LIMITING THE BURDENS OF *PRO SE* INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL

American Bar Association
Criminal Justice Section

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A Technical-Assistance Manual for Courts, Correctional Officials, and Attorneys General

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PROJECT OVERVIEW AND SUMMARY OF RECOMMENDATIONS

The goal of this project has been, and is, to provide assistance to courts, correctional officials, and Attorneys General to help limit the burdens ensuing from *pro se* prisoners' civil-rights lawsuits while at the same time ensuring that prisoners' legal rights are protected. To effectuate this goal, an assessment of what is known about the nature, amount, and effects of *pro se* prisoners' civil-rights litigation was completed. Then, steps that courts, correctional officials, and Attorneys General can take to limit the costs and burdens of that litigation were identified. The kinds of steps identified fell into two general categories: (1) steps that correctional officials and Attorneys General can take to avert litigation; and (2) steps that courts, correctional officials, and Attorneys General can take to process *pro se* prisoners' civil-rights suits more efficiently and effectively.

To help ensure the accuracy of the project's findings and the soundness of its recommendations, an extensive effort was undertaken to reach out to correctional officials, Attorneys General, court officials, prisoners' advocates, and others. After an extensive literature review, input was sought from the Attorneys General in every state and United States territory, from the Directors of the Departments of Corrections in each state and U.S. territory, from over one hundred prisoners' rights organizations, and from numerous other experts on prisoner litigation and case processing from across the country. Notices of the project were also placed in publications disseminated to prisoners and librarians, as well as in numerous newsletters and publications of the American Bar Association, prompting feedback from prisoners, prison librarians, and others.

From all of the information gathered, eighteen federal districts were identified in which courts, correctional officials, and/or Attorneys General have taken somewhat or very innovative steps to limit the burdens of *pro se* inmate litigation. During two-day visits to three sites, qualitative evaluations were then undertaken of the Constituent Services Office of the Missouri Department of Corrections discussed in Chapter 2, of the legal-assistance program for prisoners developed by the Corrections Corporation of America discussed in Chapter 3, and of the early case-evaluation hearings discussed in Chapter 5 utilized by the United States District Court for the District of Nevada. In addition, during two one-day site visits, *Spears* hearings employed by the United States District Court for the Northern District of Illinois were observed, as well as a prisoner's civil-rights trial conducted with the use of videoconferencing equipment in the United States District Court for the Central District of Illinois.

Mail surveys were also sent out to, and completed by, fifteen federal district courts to enrich the data base from which conclusions could be drawn about the steps that can be taken to mitigate the burdens of *pro se* inmate litigation while ensuring that prisoners' constitutional rights are protected. The courts surveyed are located in the District of Columbia, the Southern District of Florida, the District of Hawaii, the Central District of Illinois, the Northern District of Illinois, the Southern District of Iowa, the District of Maryland, the District of Minnesota, the Western District of Missouri, the Southern District of New York, the Eastern District of North Carolina, the Eastern District of Texas, the District of Utah, the District of Vermont, and the Eastern District of Washington.

In order to more accurately and fully assess the difficulties faced in processing prisoners' lawsuits and the steps that can be taken to surmount those difficulties, the following individuals in each court were surveyed separately: a federal district judge, a magistrate judge, a *pro se* staff attorney, a judge's "elbow clerk," a court clerk, and a United States Marshal. In addition, a lengthy general survey covering statistics on *pro se* prisoners' civil-rights cases and the tools utilized by each court to process those cases was completed by each court.

In states in which federal district courts were surveyed or assessed on site, plus two other states, a series of telephone surveys were then conducted. A person assigned by the Attorney General in each state (typically, the attorney who oversees prisoner litigation) was first surveyed about techniques employed to avoid or efficiently process *pro se* prisoners' civil-rights lawsuits. The sixteen Attorneys General (or equivalent) who were surveyed are from the District of Columbia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Minnesota, Missouri, Nevada, New York, North Carolina, Texas, Utah, Vermont, Washington, and Wisconsin.

Then, twenty-four telephone surveys of correctional officials were completed within thirteen of the states targeted for study. In all but two of these states, both an expert on the state correctional department's grievance system and legal counsel for the department were surveyed. (In the other two states, surveys could only be arranged with the grievance coordinator.) The Departments of Corrections participating in the surveys are from the states of Florida, Illinois, Louisiana, Maryland, Minnesota, Missouri, Nevada, New York, North Carolina, Texas, Vermont, Washington, and Wisconsin.

After this project was initiated, Congress enacted the Prison Litigation Reform Act, dramatically changing the procedures and rules governing the processing of *pro se* prisoners' civil-rights lawsuits. The recommendations developed during this project were developed against this backdrop and can

be implemented in conformance with the Act's requirements. In addition, during the project, some preliminary information was collected regarding implementation of some provisions of the PLRA, particularly its filing-fee provisions.

The project, however, was neither designed nor intended to study the many legal and policy implications of the Act nor the full range of implementation issues that it has raised. Nor can the effects of the PLRA -- on the number of civil-rights suits filed by prisoners, on the nature of those suits, and on the costs incurred by courts, correctional officials, and Attorneys General in processing these kinds of lawsuits -- yet be fully assessed. In future projects, research will need to be undertaken to address these many important issues raised by the Prison Litigation Reform Act.

Set forth below is a summary of the recommendations that are the product of the extensive information gathered during this project. Further information about the recommendations and the basis for them can be found in the chapters indicated.

SUMMARY OF RECOMMENDATIONS

Chapter One

1. As part of ongoing efforts to enhance data collection and reporting in the federal district courts, the feasibility of making certain additional changes to facilitate the tracking and evaluation of courts' processing of prisoners' civil-rights suits should be considered. A few examples of additional data that would contribute to a better understanding of prisoners' civil-rights lawsuits and help to identify ways in which they could be more efficiently processed include the following:

- The disposition of prisoners' civil-rights cases. These dispositions could be reported using categories that reflect the most typical ways in which these cases are disposed of. Possible disposition categories might include: *sua sponte* dismissal for frivolousness; *sua sponte* dismissal for failure to state a claim; *sua sponte* dismissal for failure to pay a partial filing fee; *sua sponte* dismissal for other reasons, such as failure to prosecute; dismissal or summary judgment upon motion of the defendant; voluntary dismissal; settlement; trial; and a catch-all category for other dispositions. This kind of specific disposition information would facilitate the identification of areas on which to target efforts to reduce the costs and increase the benefits of prisoner litigation. The information could also be used to monitor the effects and effectiveness of the measures employed to

accomplish these objectives. For example, one criterion that might be used in evaluating the effectiveness of a legal-assistance program under which attorneys draft inmates' complaints for them is whether the number and the percent of prisoners' complaints dismissed *sua sponte* for frivolousness have declined since implementation of the program.

- Attorney representation. Whether a prisoner is proceeding *pro se* could be reflected in reported statistics so that the efficacy of procedures targeted towards *pro se* prisoners can be evaluated, as well as the effects of attorneys' representation of prisoners bringing civil-rights suits. If the records kept revealed whether or not a prisoner was represented by an attorney at the time a complaint was filed, the effects of attorney-drafted complaints on the processing of prisoners' civil-rights suits could be assessed. Records could also be compiled on whether an attorney was representing a prisoner at the time of the final disposition of the civil-rights suit. This latter information could be used for a number of different evaluative purposes, including assessing the full impact of cases brought initially by prisoners proceeding *pro se* but in which attorneys later represented them.

- Median case-processing times. It would be helpful if information were regularly collected and reported on how long it takes for courts to process prisoners' civil-rights suits. The effects and effectiveness of procedures and programs adopted to facilitate the processing of prisoners' civil-rights suits could then be better assessed.

- Case outcomes. Statistics could be collected and reported on the outcomes of prisoners' civil-rights suits. Specifically, information could be gathered on who prevailed in a case and, if the prisoner-plaintiff prevailed, the relief awarded. If an injunction was entered in a class-action suit, that information might also be reported since a more accurate picture would be gained about the number of persons affected by, and benefited by, prisoners' civil-rights suits.

Information like that listed above could also be collected about nonprisoners' *pro se* cases so that decisions about the extent to which *pro se* prisoners' civil-rights suits will be processed the same or differently than nonprisoners' *pro se* suits are better informed. Other information which, if collected by the courts, would facilitate the proactive efforts of

correctional officials and Attorneys General to avert litigation is discussed in Chapter 2.

2. The federal government should establish a broad-based working group to identify priority research projects concerning prisoners' civil-rights lawsuits towards which federal funds will be targeted. This research agenda will help to ensure that policy and programmatic responses to prisoners' civil-rights litigation are better informed and that decisions in this highly politicized area are grounded in facts and methodologically sound research. Collaboration in establishing a research agenda would also be wise from a fiscal standpoint, avoiding unnecessary duplication and overlap in research endeavors.

Examples of some of the topics upon which future research might focus include the following:

- Why do *per-capita* filing rates differ so dramatically from state to state, and what factors driving those differences are the most significant?
- Why have the number of civil-rights suits filed by federal prisoners increased at such a lower rate than the number of suits filed by state prisoners?
- To what extent are there differences in filing rates between different prisons in a state, and what accounts for those differences?
- Does accreditation of a prison have an effect on litigation rates or outcomes?
- Of the prisoners' civil-rights suits processed by the federal courts that are legally frivolous, how many appear to be patently frivolous from a substantive perspective?
- How many of the court orders and consent decrees governing the operation of correctional facilities in the country began as a *pro se* lawsuit?

Additional research projects that might be undertaken or need to be undertaken are identified in subsequent chapters in this manual.

Chapter Two

1. The Department of Corrections in each state, in conjunction with the Attorney General, should develop a high-quality training program designed to teach correctional personnel about prisoners' rights. The Constituent Services Office, if one

were established in the Department of Corrections, could provide helpful input in the development and refinement of the training program since that Office will have unique insights about the problems and factors which drive prisoners' complaints, grievances, and lawsuits.

To be effective in diminishing litigation, the training program would need to include the following key components:

- Knowledgeable and skilled instructors and high-quality training materials;
- Program content that includes training about prisoners' legal rights, why it is important to protect those rights, practical issues that arise in the enforcement of those rights, and how to act professionally in the face of the challenges posed by those prisoners who are rude and unruly;
- Pre-service training;
- In-service training;
- Communication mechanisms to provide updates on the law between training sessions;
- Training of line staff as well as correctional administrators;
- Specialized training for persons, such as disciplinary hearing officers, working in areas that are frequently the subject of lawsuits; and
- Audits of the training program's efficacy.

2. To facilitate the development in each state of high-quality programs to train correctional officials about prisoners' rights, a model prisoners' rights training curriculum should be developed through a collaborative process in which input is obtained from a range of correctional professionals (including line staff and correctional administrators), prisoners' attorneys, Attorneys General, and Constituent Services Officers. This model curriculum can then be adapted to fit the needs of a particular state.

The model training program could be developed by a federal agency or by a national organization, such as the American Bar Association, the American Correctional Association, the National Association of Attorneys General, or the National Prison Project. If one of the latter organizations were to develop the model training program, grant funds might be obtained for that purpose.

Alternatively, the costs incurred in developing the program could perhaps be recouped by selling training modules to Departments of Corrections across the country.

3. Prison managers (wardens and superintendents) should institute a review of prison operations to identify sloppy and erratic practices, haphazardly enforced rules, and other problems in the prison's operations that invite litigation. A similar review process should be undertaken at the departmental level by the Director. Steps should then be taken to rectify the problems uncovered. For example, if one is not already in place, a good system should be established for controlling and accounting for inmate property, particularly when inmates are transferred. In addition, policies and practices should be adopted to ensure that good-time credits, release dates, and the amount of money inmates have in their commissary funds are computed accurately.

4. Each state's Department of Corrections should establish a Constituent Services Office and should consider patterning that Office after the Constituent Services Office within the Missouri Department of Corrections. Whether the Missouri model or some new model is utilized when establishing a Constituent Services Office, the overarching purpose of the Office would be to address, both through education and problem solving, the root causes of prisoners' legitimate complaints. To be successful, the Constituent Services Office would need to have the following key components:

- Constituent Services Officers who are accessible and visible;
- Responsiveness, in the sense of quickly following up on prisoners' concerns and those of their family members and friends;
- The full support of the Director and the authority to effect needed changes in prison operations;
- Constituent Services Officers with the personality, knowledge, and skills to accomplish the Office's purposes and bring a balanced perspective to a very difficult job;
- Communication and education mechanisms to ensure that there is a free flow of information both to and from the Constituent Services Office and key constituencies;
- High-quality training of Constituent Services Officers and other persons who play important roles in the work of the Constituent Services Office,

such as staff and inmate members of inmate councils;

- Adequate resources, including staffing, to support the work of the Constituent Services Office; and

- Regular evaluation of the operations and effects of the Constituent Services Office.

5. Constituent Services Officers from Departments of Corrections across the country should, in the future, join together to form a Constituent Services Officers Association. The purpose of this organization would be to facilitate an exchange of information between Constituent Services Officers. Constituent Services Officers could exchange information about how they face and meet the special challenges of being a Constituent Services Officer and about the steps that they have taken in furtherance of the work of their Constituent Services Office.

6. In each state, a statistics-gathering system should be put in place through which correctional officials and the Attorney General can obtain some basic information about the civil-rights suits prisoners are submitting to the courts. This information would include the number of claims falling within certain claim categories (e.g., medical care, use of force by correctional officers, lost or damaged property, and religious freedom) and the number and types of claims originating from each prison. The information gathered would need to include not only complaints that are filed in the courts and served on defendants, but also those that are screened out in the courts before filing or before service of process.

Ideally, the kinds of statistics to be gathered concerning claim categories and prisons from which the claims originated would be identified in a model data-collection system created by a governmental agency or private organization and then adopted by all of the states. A uniform data-collection system would facilitate research across courts and states concerning prisoners' civil-rights suits and the effects of the measures taken to limit the amount and costs of those lawsuits. The process through which information would be disseminated to correctional officials and the Attorney General in a particular state would, however, need to be established at the court level, after consultations between court officials, correctional officials, and the Attorney General.

7. Both correctional officials and the Attorney General within a state need to set up structures through which the statistics gathered about prisoners' civil-rights lawsuits in the state are analyzed and necessary follow-up actions based on the

results of that analysis are undertaken. Within the Department of Corrections, the Constituent Services Officer should probably be involved in the efforts of any litigation-response team. Because the Constituent Services Office serves as the clearinghouse for addressing prisoners' complaints and concerns, the Constituent Services Officer can be particularly helpful in analyzing the significance of litigation statistics and trends. In addition, the Constituent Services Office can help in identifying the core concerns that may be driving certain types of lawsuits and can help craft appropriate measures to address those concerns.

8. Departments of Corrections should review auditing procedures to determine how they can be revamped to increase the likelihood that constitutional violations and other violations of the law will be detected and remedied. At a minimum, correctional officials should consider increasing the involvement of correctional attorneys in the structuring of audits and the review of audit findings. In addition, Departments of Corrections can consider initiating some pilot projects in which attorneys participate in audits, at least at certain prisons. Finally, a structure should be put in place within each Department of Corrections to follow up on recommendations made after audits and rectify constitutional violations and other violations of the law identified during them.

9. When a prisoner's civil-rights case is closed, a close-out letter should be prepared by a correctional attorney assigned to complete this task apprising the Department of Corrections of the case's outcome and of any changes that need to be made to bring the department into compliance with the law. The letter should be sent to the Director, the Chief Legal Counsel for the Department of Corrections, and the Chief Constituent Services Officer.

10. Each Department of Corrections should review its grievance system to determine the extent to which it is perceived by prisoners to be a fair and effective alternative to litigation. Each Department of Corrections can then, where necessary, add certain features to the grievance system that may increase the likelihood that the grievance system can forestall litigation. Those features include:

- A broad range of remedies, including damages, for the full range of claims that may be the subject of lawsuits;

- Follow-up mechanisms to ensure that relief granted through the grievance process is actually awarded;

- The opportunity to have a grievance considered and resolved, at some point, by an arbiter who not only is, but appears to be, neutral and objective;

- A process that inmates have confidence in for collecting and presenting the facts bearing on a grievance;

- Written responses that clearly explain why grievances were denied;

- The review of prisoners' grievances, at some stage of the grievance process, by attorneys or paralegals working under the supervision of an attorney;

- A process in place to collect and evaluate statistics about the nature and amount of grievances being filed; and

- A process in place to evaluate the way in which the grievance system is operating in practice and to assess its effectiveness, including its effects on litigation rates.

Chapter Three

1. Each Department of Corrections should undertake a formal evaluation of its "access to the courts" program. As part of this evaluation process, an assessment should be made of the extent to which the program, as it is currently constructed, helps meet the following four policy objectives: (1) the resolution, without litigation, of problems which may otherwise culminate in litigation; (2) the winnowing out of frivolous claims before prisoners' civil-rights complaints are filed in court; (3) ensuring that those prisoners' complaints which are filed in court are drafted clearly and correctly so that correctional officials and the Attorney General can respond to them, and so that the courts can process them, more efficiently and accurately; and (4) ensuring that prisoners' meritorious claims are appropriately resolved as soon as possible during the litigation process.

2. After the completion of the above evaluation, each Department of Corrections should develop an "access to the courts" plan. One purpose of this plan would be to establish a blueprint of the steps to be taken to most cost-effectively achieve the four policy objectives set forth above. Another purpose of the plan would be to ensure that the department's legal-assistance program meets constitutional requirements.

The "access to the courts" plan should contain the answers to the following questions, among others:

- Who (whether individuals or entities) will provide legal assistance and advice to inmates in each of the prisons run by the department?
- For what kinds of legal problems will assistance and advice be available?
- Will this assistance be available to all inmates? If not, to whom will it be available?
- What training requirements must legal-services providers meet?
- What kinds of model forms, litigation manuals, federal-court handbooks, and information packets specially designed for prisoners will be available in the prisons?
- Which prisons, if any, will retain fully-stocked law libraries, and which will have "mini" law libraries?
- In those prisons, if any, that have mini law libraries, what books and other resources, at a minimum, will be in each library's collection, and who will be responsible for managing that collection?
- How will technology be used to ensure that prisoners' constitutional right to have meaningful access to the courts is protected and that the policy objectives of the legal-assistance program are met?
- What kinds of training will be offered to inmates as part of the "access to the courts" plan?
- How and how often will the quality and efficacy of the legal-services program be evaluated?

3. The federal government (or the Departments of Corrections through a pooling of their resources) should fund research to determine the relative cost-effectiveness of various approaches to providing prisoners with meaningful access to the courts. As part of this research, the range of ways in which paralegals are being used in prisons' legal-assistance programs should be determined. Several different paralegal program models, as well as other legal-assistance models, should then be evaluated to determine which model can most cost-effectively achieve the following objectives: facilitating the problem solving that can avert litigation, weeding out frivolous claims,

and ensuring that meritorious claims are efficiently and appropriately resolved.

4. In a research project or projects sponsored by the federal government and/or in pilot projects initiated by individual Departments of Corrections, a qualitative analysis should be completed of the differences between attorney-drafted complaints in prisoners' civil-rights suits and complaints drafted by prisoners and then revised after being reviewed by an attorney. The research conducted should also include an evaluation of which complaint-drafting method is the most cost-effective.

5. The American Association of Law Libraries should develop a recommended list of the basic books and materials that should, at a minimum, be included in a prison's "mini" law library.

6. The federal government should fund research to evaluate the capacity of prisoners to adequately complete discrete tasks during the litigation process, such as discovery. As part of this research, the feasibility of developing tools to facilitate the identification of prisoners in need of assistance in completing such tasks should be determined.

This research would serve, in part, as a subject-specific follow-up to the national study on prisoners' literacy levels conducted by the National Center for Education Statistics. The recommended research project, if carefully designed, could provide critically helpful feedback to correctional officials developing and refining legal-assistance programs for prisoners and to courts developing and refining the case-processing tools used to process *pro se* prisoners' civil-rights suits.

7. In a state where the Department of Corrections does not provide inmates with the legal assistance and/or advice needed after prisoners' civil-rights complaints are filed to ensure that meritorious claims are appropriately resolved and that the cases are processed efficiently, the federal district courts should put suitable case-processing tools in place, including attorney-appointment programs, to protect the efficiency and accuracy of the courts' adjudication processes. Whether a court adopts a *pro bono* model for appointing counsel in certain cases or a contract-attorney model, the court should consider whether the appointing of counsel for limited purposes, such as to interview witnesses, complete discovery, or respond to a motion for summary judgment, would facilitate the processing of *pro se* prisoners' civil-rights suits in that particular district. If so, then a process for making such appointments should be put in place.

Chapter Four

1. Congress should provide the funding for a study of the cost-effectiveness of the PLRA's filing-fee provisions. Some of the costs to be examined and assessed during this study would include the value of the time spent by various court personnel administering the provisions, the value of the time spent by correctional officials administering them, and the computer costs incurred to administer the provisions.

When assessing the effectiveness of the filing-fee provisions, the appropriate measure of effectiveness would have to be defined. If the measure were simply decreased numbers of civil-rights suits being filed by prisoners, then the study would examine the extent to which the number of such lawsuits, both in sheer numbers and on a *per-capita* basis, have declined since implementation of the filing-fee provisions. If the measure of effectiveness were instead decreases in the number of frivolous civil-rights lawsuits brought by prisoners (the purported objective of the PLRA, according to its legislative history), then a more complicated research design would have to be constructed.

When analyzing the benefits of the filing-fee provisions, the revenue generated by the provisions would also need to be included in the calculus. The combined benefits of the filing-fee provisions would then need to be compared to the costs of implementing them before making a final determination regarding their overall cost-effectiveness.

When assessing the cost-effectiveness of the PLRA's filing-fee provisions, it would also be illuminating to compare the cost-effectiveness of these provisions with the cost-effectiveness of other filing-fee mechanisms to determine what is the most cost-effective filing-fee model. There were a number of different formulas and methods employed in about half of the districts to collect partial filing fees before the PLRA's enactment. The costs, benefits, and impact on inmate litigation of some of these alternative systems for collecting filing fees from prisoners could be assessed in a comparative cost-benefit study.

2. The federal government should collect and disseminate information to courts and correctional officials about steps they can take to reduce the costs of implementing the PLRA's filing-fee provisions. In their survey responses, district courts reported some steps they have taken to resolve problems encountered in implementing the PLRA's filing-fee provisions. Some of those steps include: meetings with correctional officials to coordinate efforts to implement those provisions; the development of forms, including forms for correctional officials to certify the average monthly deposits and balance in

an inmate's account during the previous six months and forms for inmates to signify their consent to the collection of filing fees from their trust-fund accounts; the development of systems, both manual and computer, to track filing-fee payments; having correctional officials hold checks until they reach a certain amount so as to avoid checks for only a few cents being sent to the court (one court reported that before instituting such a procedure, it received checks for four cents); and issuance of a standing order by the court directing federal, state, and local correctional officials to calculate and remit the initial filing fees and subsequent payment amounts to the court in cases where prisoners have been granted *in-forma-pauperis* status.

Information about the steps that have been taken to reduce costs, however, needs to be systematically collected from all of the district courts. In addition, those steps need to be evaluated to determine which are the most effectual in reducing implementation costs. Specifically, the most efficient means of calculating and collecting the initial partial filing fee, of calculating and collecting subsequent fee payments, and of tracking subsequent fee payments need to be identified. This information then needs to be disseminated to courts and correctional officials as soon as possible to assist in the development and refinement of the procedures being put in place to calculate, collect, and track prisoners' filing-fee payments under the PLRA.

Chapter Five

1. Each federal district court should review the way it processes pro se prisoners' civil-rights suits to determine what steps it can take at each processing stage to both improve the efficiency with which these cases are processed and to ensure that meritorious claims are resolved appropriately. Some of the steps that a court can consider taking include:

- developing a set of filing instructions and notices for prisoners that include, among other information, an explanation of the court's limited jurisdiction; a brief explanation of key limitations on the relief that the court can award prisoners; a summary of certain key requirements of the Prison Litigation Reform Act; notice regarding the consequences of filing a nonmeritorious lawsuit; notice of the need to apprise the court of a change of address; identification of the court in which to file the complaint; and notice of the option of consenting to a magistrate judge's jurisdiction;

- piloting the use of claim-specific complaint forms;
- drafting filing checklists for prisoners to complete and send to the court along with their complaints;
- developing form orders and structuring and staffing the screening process to maximize the efficiency and accuracy with which *pro se* prisoners' civil-rights complaints are initially screened for technical deficiencies, failure to exhaust administrative remedies, "three strikes," frivolousness, and failure to state a claim.
- utilizing early case-evaluation hearings to, among other purposes, facilitate the amendment, streamlining, and dismissal, where appropriate, of claims and complaints and to reduce the burdens of serving process;
- developing a court-based, alternative dispute-resolution program for prisoners' civil-rights suits;
- using discovery tools that have been specially tailored for *pro se* prisoners' civil-rights suits, including limited, mandatory disclosures in response to court-drafted discovery documents, *Martinez* reports, and *Watson* questionnaires;
- expanding the kinds of matters considered and resolved during the initial scheduling and case-management conference;
- requiring defendants to send a court-prepared notice of summary-judgment requirements along with any motion for summary judgment served on a prisoner;
- piloting different ways to streamline the processing of summary-judgment motions, including adopting shorter page limits for those motions, requiring that those motions be submitted on court-prepared forms, and holding summary-judgment conferences;
- providing a clear explanation to prisoners about what will occur in preparation for and during a pretrial conference;
- drafting standard forms for the final pretrial order; and

- utilizing videoconferencing for pretrial hearings and conferences and for the testimony of some witnesses during a trial.

2. Each federal district court should, alone or together with other federal district courts in the state, organize a Pro Se Prisoner Litigation Working Group. This working group would be comprised of court officials (including one or more judges, *pro se* staff attorneys (or law clerks in districts that have no *pro se* staff attorneys), and court clerks), a representative from the U.S. Marshal's Office, one or more representatives from the Department of Corrections, one or more representatives from the Attorney General's Office, and one or more prisoners' advocates.

The purpose of this working group would be to identify steps that can be taken to facilitate the efficient and accurate processing of *pro se* prisoners' civil-rights claims. Some of the areas upon which the working group's efforts might focus include:

- the development of procedures and a form to confirm that prisoners have exhausted their administrative remedies;
- the implementation of the filing-fee provisions of the Prison Litigation Reform Act;
- adoption of procedures to reduce the burdens that attend the service of process;
- identification of the documents to be produced for early case-evaluation hearings;
- the development of standardized discovery documents; and
- the use of videoconferencing.

3. Each court of appeals should appoint a Pro Se Prisoner Litigation Committee to draft model forms, orders, and jury instructions to be used by district courts when processing pro se prisoners' civil-rights suits. The committee should, on a regular basis, review the model forms and orders and, where necessary, revise them. In addition, the committee can oversee the piloting of claim-specific complaint forms in some district courts in the circuit and develop model, claim-specific complaints based on the findings of the pilot projects.

Chapter Six

1. The federal government should fund a pilot project to facilitate the establishment of, and analyze the effects of, a DOC-based, early case-resolution review process. Since such a process is not only a litigation-related program but a correctional management program, possible funding sources might include federal agencies whose work centers on court operations and/or agencies whose work centers on or focuses in part on corrections. Applicants for a grant to establish and evaluate such a program should have to demonstrate the commitment of the Department of Corrections, the Attorney General, and the court in which the project will be piloted to the program and its purposes.

2. Each Department of Corrections should work with the Attorney General and courts within the state to identify steps that the department can take that will lead to pro se prisoners' civil-rights suits being processed more efficiently and effectively. The steps to be taken by the Department of Corrections should, at a minimum, include:

- the development of a legal-assistance program that will help siphon frivolous claims from the courts and ensure that nonfrivolous claims filed with courts are coherent and well-drafted;
- the development of a mechanism through which service of process can be conditionally accepted or waived for both current and former DOC employees at early case-evaluation hearings;
- the development of efficient mechanisms for obtaining requests for representation from past and former DOC employees sued by *pro se* prisoners;
- the appointment of a litigation coordinator at each prison and DOC headquarters;
- the development of an efficient system for retrieving documents needed to conduct early case-resolution reviews and for the litigation and court processing of a case; and
- the institution of early case-resolution reviews that will focus on solving problems that may be driving lawsuits, both to improve correctional operations and to avoid costly litigation.

3. Each Attorney General should work with the Department of Corrections and courts within the state to identify steps that the Attorney General can take that will lead to pro se prisoners' civil-rights suits being processed more efficiently and effectively. The steps to be taken by the Attorney General should, at a minimum, include:

- the development of a mechanism through which service of process can be conditionally accepted or waived for both current and former DOC employees at early case-evaluation hearings;

- the development of efficient mechanisms for obtaining requests for representation from past and former DOC employees sued by *pro se* prisoners;

- holding regular meetings with DOC litigation coordinators to identify steps that can be taken to improve the efficiency with which *pro se* prisoners' civil-rights suits are defended;

- adopting a policy under which consent is generally given to a magistrate's case-dispositive authority over all proceedings or at least all pretrial proceedings in a case;

- the review of all forms and documents utilized by the Attorney General's Office so that they are streamlined and can be and are tailored to the particular facts of a case;

- enhanced training of attorneys involved in the litigation of *pro se* prisoners' civil-rights suits;

- adequately staffing the division of the Attorney General's Office which handles prisoners' civil-rights suits;

- the utilization of a computer tickler system to ensure that deadlines for the filing of answers, case-dispositive motions, and discovery are met;

- the adoption of policies, and the monitoring of their implementation, to ensure that prisoner-plaintiffs are promptly provided relevant discovery without the need for court intervention; and

- abandoning any no-settlement policy and working with the Department of Corrections to implement an early case-resolution-review process with a problem-solving emphasis.

CHAPTER ONE

AN INTRODUCTION TO PRO SE PRISONERS' CIVIL-RIGHTS LITIGATION

I. THE AMOUNT OF STATE PRISONER CIVIL-RIGHTS LITIGATION

The Number of Civil-Rights Suits Filed in Federal Court by State Prisoners

At first glance, the rise in the number of civil-rights suits filed by state prisoners[1] over the years is not only striking, but alarming to those responsible for the efficient and effective operation of federal courts as well as to those (which would include all taxpayers) who must bear the costs of defending against such suits. Since 1966, the first year in which statistics were collected on the number of prisoners' civil-rights suits, the number of civil-rights suits filed by state prisoners in federal court has climbed from 218 to 40,569 in 1995.[2] The numbers reflect an attention-grabbing 18,510% increase in the number of state prisoners' civil-rights suits filed over a 29-year period.

Using 1966 as the benchmark year when assessing the amount of the increase in state prisoners' civil-rights suits is, however, misleading because of dramatic changes in the law which have occurred since the 1960s. In 1966, prisoners, for the most part, had no reason to file a civil-rights suit in federal court because most of the courts refused to adjudicate inmates' claims contesting the constitutionality of the conditions of their confinement. This "hands-off doctrine" was spawned in part by the courts' belief that the operation of prisons fell within the exclusive province of the executive and legislative branches of the government.

A series of events in the late sixties and early seventies, however, led courts to reexamine their assumption that the responsibility for protecting prisoners' constitutional rights could and should be entrusted solely to the executive and legislative branches. Among the catalysts which prompted the courts to abandon the hands-off doctrine was the riot at the Attica State Prison in New York in 1971 which resulted in 43 deaths.[3]

When measuring the amount of the increase in state prisoners' civil-rights suits, therefore, the year 1980 seems a more appropriate and insightful starting point. For by 1980, the Supreme Court had rendered a series of seminal decisions confirming that prisoners have rights under the first amendment,[4] a right to have access to the courts,[5] the right to be accorded due process during certain prison disciplinary proceedings,[6] the

right to be afforded equal protection of the law,[7] and the right not to be subjected to treatment or conditions of confinement rising to the level of cruel and unusual punishment.[8]

Even when using 1980 as the benchmark year from which to gauge and analyze the rise in the number of civil-rights suits filed by state prisoners, federal courts have witnessed a substantial rise in the number of state prisoner filings. Between 1980 and 1995, the number of state prisoners' civil-rights suits filed in federal court increased 227%, climbing from 12,397 in 1980 to 40,569 in 1995.[9]

Gross figures about the rise in the number of civil-rights suits filed in federal court by state prisoners, however, mask important details about inmate litigation. Some of those details, which provide a context in which to assess the burdens of *pro se* prisoner litigation, are highlighted below.

The Number of Civil-Rights Suits Filed by State Prisoners Compared to the Number of State Prisoners

Clearly, part of what has fueled the dramatic increase in the number of civil-rights suits filed by state prisoners is the simple fact that there are substantially more persons incarcerated in state prisons. Thus, while the number of civil-rights suits filed by state prisoners increased, as mentioned earlier, by 227% between 1980 and 1995, the number of state prisoners increased even more -- by 237%.[10] (Figure 1) As a result, the *per-capita* rate with which state prisoners filed civil-rights suits in federal court between 1980 and 1995 actually declined slightly -- from 40.7 suits per every 1000 state prisoners in 1980 to 39.4 suits per every 1000 state prisoners in 1995.

Data from the years 1994 and 1995 provide another illustration of the apparent link between rising state prisoner populations and the rise in the number of civil-rights suits filed in federal court by state prisoners. During those years, there was only one one-hundredth of a difference between the amount by which the state prisoner population increased (6.96%)[11] and the amount by which the number of state prisoners' civil-rights suits increased (6.97%).[12]

The increase in the size of the state prisoner population does not, however, fully explain the increase in the number of civil-rights suits filed in federal court by state prisoners, as is evident when different years are used to compare the relationship between the growth in the number of state prisoners and the growth in the number of civil-rights suits which they file. For example, while the number of civil-rights suits filed by state prisoners increased 63% between 1990 and 1995,[13] the

Figure 1

CIVIL-RIGHTS SUITS FILED BY STATE PRISONERS: suits compared to prison population - 1980-1995

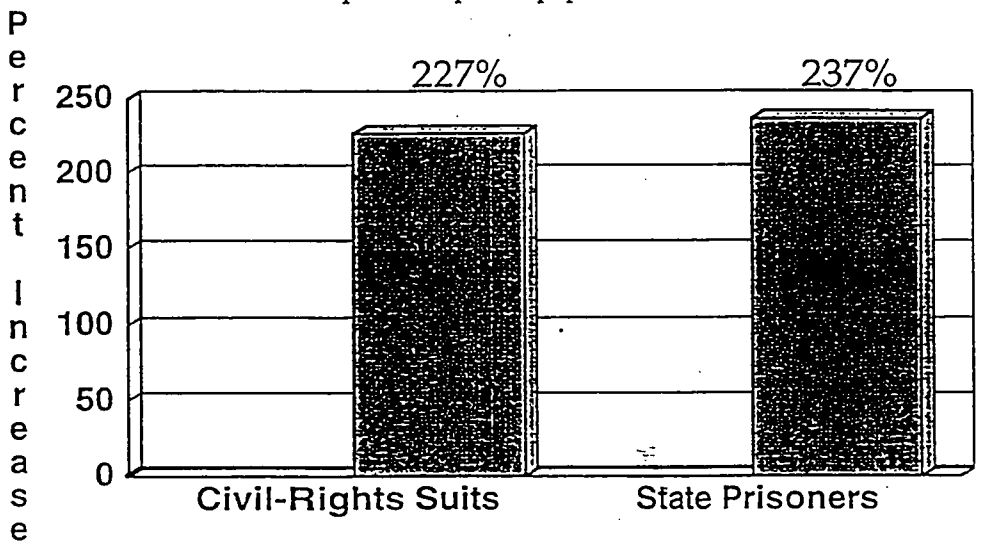
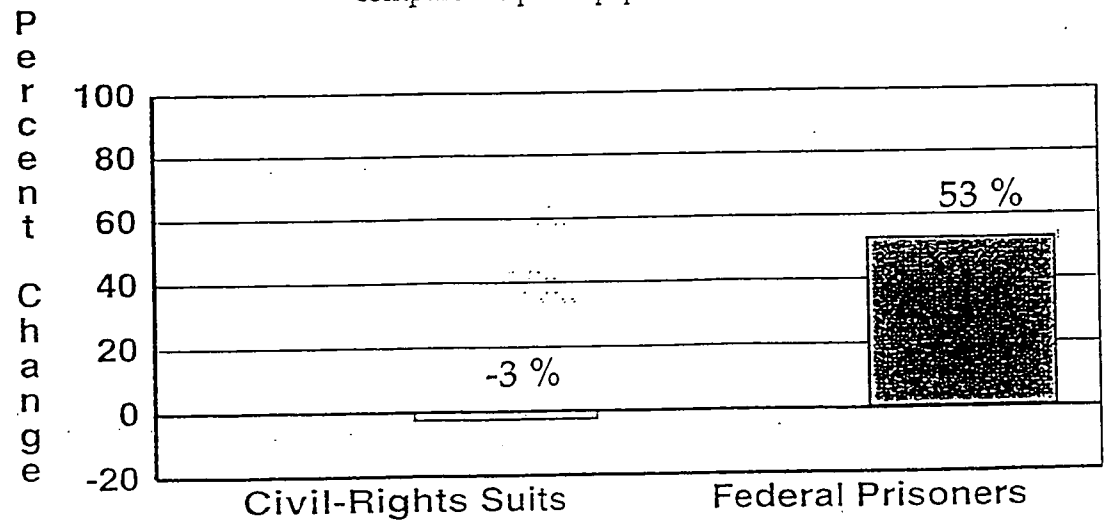


Figure 2

CIVIL-RIGHTS SUITS FILED BY FEDERAL PRISONERS: suits compared to prison population - 1990-1995



number of persons incarcerated in state prisons increased by "only" 45%.[14]

Statistics regarding the filing of civil-rights suits in federal court by federal prisoners further suggest that prisoner population size is not the sole factor (and in the case of federal prisoners, possibly not even the main factor) driving prisoner civil-rights litigation rates. Thus, while the number of federal prisoners increased 311% between 1980 and 1995,[15] the number of civil-rights suits filed by federal prisoners increased much less -- by 84%.[16] And while the size of the federal prisoner population continued to climb between 1990 and 1995, increasing 53%,[17] the number of civil-rights suits filed by federal prisoners during that time period actually dropped 3%.[18] (Figure 2)

Differences Between State Per-Capita Filing Rates

Another important point generally overlooked when discussing gross figures on prisoner litigation is that the extent to which state prisoners are filing civil-rights suits varies greatly from state to state. As Table 1 illustrates, the *per-capita* rate with which state prisoners filed civil-rights suits in 1995 ranged from a high of 145.4 suits per every 1000 prisoners in Iowa to a low of 12.7 suits per every 1000 prisoners in Massachusetts. The significance of these data is that they underscore that something more than the sheer number of state prisoners explains what is undergirding the frequency with which civil-rights suits are filed by state prisoners.

Differences Within States in State Prisoners' Civil-Rights Filings

Even within states, the rate with which prisoners file lawsuits varies dramatically from prison to prison, as Table 2 exemplifies. Table 2 sets forth data collected by the Wisconsin Legislative Audit Bureau during an audit completed in 1993 on civil lawsuits filed by Wisconsin prisoners in both state and federal courts.[19] The table shows litigation rates ranging from a high of 10.7 lawsuits filed per every 100 inmates at one prison during fiscal year 1991-92 to a low of one lawsuit per every 100 inmates at a different prison.

Researchers have found that a disproportionate share of state prisoners' civil-rights suits are generated by prisoners confined in maximum-security prisons.[20] What is not known is why prisoners in maximum-security prisons tend to file more lawsuits, although theories abound as to why this is true. Some people posit that conditions of confinement and the actions of

Table 1. State Prisoners Civil-Rights Lawsuits: Amount and Per-Capita Rate -1995.

State	Prisoner Population	Civil-Rights Suits	Suits per 1000 Prisoners
Iowa	5,906	859	145.4
Arkansas	9,401	988	105.1
Nebraska	3,113	324	104.1
Mississippi	13,008	1099	84.5
Virginia	27,710	2260	81.6
Missouri	19,139	1529	79.9
Tennessee	15,206	1131	74.4
Alabama	20,718	1458	70.4
West Virginia	2,511	169	67.3
Pennsylvania	32,410	2181	67.3
Louisiana	25,427	1701	66.9
Kentucky	12,060	802	66.5
Maine	1,447	94	65.0
Indiana	16,125	1045	64.8
Nevada	7,826	488	62.4
Arizona	21,341	1293	60.6
Utah	3,448	181	52.5
Colorado	11,063	573	51.8
Wisconsin	11,199	572	51.1
Montana	1,788	81	45.3
Delaware	4,802	217	45.2
Georgia	34,266	1524	44.5
Washington	11,608	500	43.1
Wyoming	1,405	59	42.0

Kansas	7,054	265	37.6
Illinois	37,658	1341	35.6
Maryland	21,453	729	34.0
Vermont	1,072	36	33.6
South Carolina	19,611	658	33.6
Florida	63,879	2068	32.4
Michigan	41,112	1277	31.1
Texas	127,766	3956	31.0
New Mexico	4,195	128	30.5
South Dakota	1,871	55	29.4
Oregon	7,886	230	29.2
New York	68,484	1975	28.8
North Carolina	29,374	792	27.0
New Hampshire	2,014	54	26.8
Oklahoma	18,151	480	26.4
District of Columbia	9,800	252	25.7
Connecticut	14,801	374	25.3
Idaho	3,328	80	24.0
New Jersey	27,066	642	23.7
Minnesota	4,863	114	23.4
Hawaii	3,560	81	22.8
California	135,646	2771	20.4
Rhode Island	2,902	54	18.6
Ohio	44,677	733	16.4
North Dakota	608	9	14.8
Alaska	3,505	50	14.3
Massachusetts	11,619	148	12.7
Total	1,026,882	40,480	39.4

Table 2

Inmate Litigation per 100 Inmates by Institution in Wisconsin FY1988-89 to FY1991-92

Correctional Institution	FY1988-89	FY1989-90	FY1990-91	FY1991-92
MEN				
Columbia (maximum)	n/a	18.3	17.7	10.7
Waupun (maximum)	5.9	12.5	11.2	10.3
Green Bay (maximum)	1.4	2.8	3.6	4.0
Fox Lake (medium)	2.3	1.7	1.1	2.8
Kettle Moraine (medium)	4.1	3.3	4.5	2.0
Oshkosh (medium)	2.5	1.8	3.1	1.7
Racine (medium)	n/a	n/a	n/a	1.7
Dodge (medium)	0.8	1.5	0.9	1.0
Oakhill (minimum)	1.1	2.7	1.6	2.1
WOMEN				
Taycheedah	0.5	2.1	3.5	3.0
SYSTEM	7.2	5.8	6.5	4.9

Source: Wisconsin Legislative Audit Bureau (1993).

correctional officials in maximum-security prisons more frequently transgress constitutional boundaries, as evidenced by the large number of maximum-security prisons that are operating under court order. Others suggest that while conditions and practices are no more likely to be unconstitutional in a maximum-security prison, prisoners are more disgruntled about their conditions of confinement and treatment within maximum-security prisons, where their freedom is so much more dramatically curtailed. Still other theories include that prisoners in maximum-security prisons tend to have longer sentences and are therefore more likely to file lawsuits that will come to a conclusion while they are still incarcerated; that because maximum-security prisoners are confined in their cells so much longer each day than prisoners at lower security levels, they have much more time to spend on litigation, and they pass the time by filing lawsuits; and that prisoners confined in maximum-security prisons tend to be more manipulative and bigger troublemakers than inmates confined in other prisons.

While more civil-rights lawsuits may be coming out of a particular state's maximum-security prisons, great differences may still exist between the filing rates of prisoners at different maximum-security prisons within the state. For example, the audit mentioned earlier conducted by the Wisconsin Legislative Audit Bureau revealed a range of 10.7 lawsuits filed per every 100 prisoners at one maximum-security prison during fiscal year 1991-92 to four lawsuits per every 100 prisoners confined at another maximum-security prison. (Table 2) Tracking such filing-rate differences over time between prisons should help to clarify why maximum-security prisoners tend to generate more civil-rights lawsuits. In addition, such tracking efforts can identify the prisons upon which to concentrate efforts to decrease the burdens of *pro se* inmate litigation.

II. THE PERSONS FILING STATE PRISONERS' CIVIL-RIGHTS SUITS

Pro Se Litigants

While there are many facts about prisoners' civil-rights litigation that are not yet known, one fact is clear: the overwhelming majority of civil-rights suits brought in federal court by state prisoners are filed by prisoners who are representing themselves. A study conducted by the National Center for State Courts of civil-rights cases filed in 1992 by state prisoners in sixteen federal district courts, for example, reported that 96% of the suits were brought by prisoners proceeding *pro se*.[21]

To What Extent Are State Prisoners "Frequent Filers"?

One question about *pro se* prisoners' civil-rights suits about which there has been much rhetoric but very few facts illuminating discussion of the question is the extent to which the number of prisoners' civil-rights suits are attributable to "frequent filers" who file lawsuits for "recreational purposes." A study that focused on this question in the Northern District of Illinois found that most state prisoners filing civil-rights suits *pro se* were not "frequent filers." The study found that during the six-year period from 1980 to 1986, 80% of the prisoners who filed civil-rights suits in the Northern District of Illinois filed only one lawsuit per prisoner.[22] The study mentioned earlier on *pro se* inmate litigation conducted by the National Center for State Courts additionally found that in two-thirds of the § 1983 suits studied, the state prisoners bringing lawsuits had asserted only one kind of claim in their complaints and not multiple kinds of claims.[23]

While most state prisoners who file civil-rights suits are, according to the data available, apparently "one-shot players,"[24] a small number of repeat litigators file a disproportionate number of the lawsuits. For example, a study of civil-rights filings in the United States District Court for the Northern District of Illinois between 1977 and 1986 found that 2% of the inmate filers had filed 21% of the total number of lawsuits.[25] But perhaps the most graphic example of how a small number of prisoners can account for a disproportionate amount, and occasionally even the lion's share, of the state prisoners' claims being processed by the courts was reported in Hawaii, where 76% of the claims contesting conditions of confinement filed in federal or state courts in 1994 were brought by nine prisoners.[26]

III. THE TIME SPENT PROCESSING PRO SE PRISONERS' CIVIL-RIGHTS SUITS

When assessing the burdens on courts, correctional officials, and Attorneys General stemming from *pro se* inmates' civil-rights lawsuits, certainly one important question concerns the time spent processing those lawsuits. Subsumed within that general question are several other questions, including: (1) At what stage in the litigation process are *pro se* prisoners' civil-rights suits resolved? (2) How much time does it take to process *pro se* prisoners' civil-rights suits through the court? and (3) How much time is spent by various federal court officials processing *pro se* prisoners' civil-rights suits, and on what tasks do they spend their time? These questions are addressed below.

The Stage at Which Pro Se Prisoners' Civil-Rights Suits are Resolved

The study on state prisoners' § 1983 suits conducted by the National Center for State Courts found that the vast majority of the claims upon which the study focused -- fully three-quarters of them -- were dismissed on the court's own motion.[27] In other words, these claims were dismissed without the defendants having to file a motion to dismiss or motion for summary judgment.

Some people who hear this statistic about the high rate of *sua-sponte* dismissals might leap to the conclusion that the burdens borne by correctional officials and Attorneys General in defending against *pro se* state prisoners' civil-rights suits are overstated since the cases "disappear" before there is any need for the defendants to file a motion. But several caveats are in order when assessing the significance of the reported high *sua-sponte* dismissal rate.

First, aggregate figures can mask wide variations between courts as to the stage at which and way in which cases are resolved. The responses of the federal courts surveyed during this study in fact indicated that such wide variations exist. For example, when questioned about the stage at which *pro se* prisoners' civil (nonhabeas) cases filed in the court in 1995 were disposed of, the answers for those disposed of before service of process was issued ranged from a low of 8% to a high of 75%. These data suggest that the extent to which defendants in *pro se* prisoners' civil-rights suits are relieved of the burden of responding to the suits varies a great deal from court to court.

But even if the *sua-sponte* dismissal rate were fairly even across courts, that does not necessarily mean that the burden on those defending against such suits would be the same across courts or that the burden would always be trivial. For even in districts where *sua-sponte* dismissal rates are high, the courts may employ procedures before dismissing cases on their own motion that still place burdens on the defendants and their attorneys in some cases. For example, as is discussed more fully in Chapter 5, some courts require correctional officials to conduct investigations of claims contained in prisoners' civil-rights complaints and to report the results of their investigations to the court before the court decides whether or not to *sua sponte* dismiss a complaint. Still other courts ask correctional officials and/or their attorneys to participate in hearings designed to explore in greater depth the nature of prisoners' claims before dismissal orders are entered in certain cases. So the critical point is that to gain a full and accurate understanding of the interplay between the stage at which *pro se* prisoners' civil-rights lawsuits are resolved and the burdens

associated with those lawsuits, both qualitative data about court processes and procedures and quantitative data need to be collected within each federal district court.

When comparing data between districts about *sua-sponte* dismissals, however, it is important to keep in mind that a high dismissal rate is not necessarily an indicator that a court is operating effectively. As one federal district judge observed when commenting on a study on inmate litigation conducted in the 1970s, "The study's single recitation of the percentage of cases dismissed *sua sponte* does not necessarily reflect an accurate evaluation of the quality of justice dispensed by this court."[28] A high *sua-sponte* dismissal rate could, for example, in some cases simply reflect a court's perfunctory and cursory complaint-review process and a dismissive attitude towards prisoners' complaints. On the other hand, a court that has adopted a set of procedures to ensure that prisoners' claims are fully and fairly aired within the court might still have a high *sua-sponte* dismissal rate. So once again, an accurate assessment of the import of statistics about the processing of *pro se* prisoners' civil-rights lawsuits requires a closer look at what courts, as well as correctional officials and Attorneys General, are doing to ensure that prisoners' cases are not only quickly resolved, but correctly resolved.

One fact about which there is no dispute is that very few of these cases go to trial. Studies of prisoners' civil-rights lawsuits have generally found that 3% or less of them go to trial.[29] Statistics gathered during this project revealed similarly low trial rates. Of the twelve federal district courts that were able to pull together statistics on the stages at which *pro se* prisoners' civil (nonhabeas) cases are resolved, all but two reported trial rates of 3% or less. (One court reported that approximately 5% of its cases went to trial, while another reported that approximately 10% went to trial.) A study conducted by the Federal Judicial Center on *pro se* filings in ten federal district courts, however, also found that less than 2% of the nonprisoner cases studied went to trial, almost the same as the percentage of prisoner cases that went to trial.[30]

The Time Spent By Federal Court Officials Processing Pro Se Prisoners' Civil-Rights Suits

In 1995, prisoners' civil-rights suits, both state and federal, comprised 16.8% of the total civil cases commenced in the federal district courts.[31] But the court surveys conducted during this project confirmed that court personnel across courts and within courts do not spend the same fraction of time on these types of cases. The average amount of time spent working each day on these cases varies, as one would expect, depending on the

number of *pro se* civil-rights suits filed in the court, on the way in which the tasks to be performed in processing these cases are allocated, and on the amount of time spent performing those tasks.

Seventy-one different court officials who were surveyed were able to estimate the amount of each workday that they spend on *pro se* prisoners' civil-rights suits. Feedback would have to be received from many more court officials about their workloads, and time logs would have to be kept, to get a fully accurate picture of the percentage of time that, for example, federal district judges are spending on *pro se* prisoners' civil-rights cases. But the information collected does at least provide a glimpse of the complexity and variability of the amount of time that various court personnel are spending processing *pro se* prisoners' civil-rights suits.

The survey data also indicate that, at least in some courts, behind-the-scenes personnel (*pro se* staff attorneys, law clerks, and court clerks) and sometimes magistrate judges are bearing the brunt of the burden of processing *pro se* prisoners' civil-rights suits. Of the twelve federal district judges who provided estimates of the amount of their workday devoted to processing *pro se* prisoners' civil-rights suits in 1995, ten reported spending 10% or less of each day, on average, working on these kinds of cases. (Three judges reported spending approximately 2% or less of their time on these cases; two reported spending 5% of their time on these cases; four estimated that they spent 5 to 10% of their time on these cases; and one reported spending 10% of his time on *pro se* prisoners' civil-rights suits.)

Only two judges reported spending 20% of their time on these cases. By contrast, of the twelve *pro se* staff attorneys who were able to provide time estimates, all but two reported spending at least 70% (and in many instances more) of their time working on these kinds of cases.

Case-Processing Time

Another criterion that can be examined when roughly assessing the burdens ensuing from *pro se* prisoners' civil-rights lawsuits is the time that it takes to process those lawsuits through the courts. When examining data from individual courts, however, care must be taken when drawing inferences about the significance of short or long case-processing times. Very short case-processing times may, for example, in some instances reflect intense and concentrated efforts on the part of courts to dispose of as many prisoners' civil-rights suits as possible during the front end of the litigation process. And long case-processing times in some court systems may simply reflect the fact that

these cases are languishing on the courts' dockets with no one -- not the prisoner-plaintiffs, the defendants, or the courts -- taking the steps needed to move them along. So at least in some instances, short case-processing times may reflect a greater expenditure of court and other resources on cases than long case-processing times.

Having said that, there are some fairly illuminating statistics that have been collected on the time it takes to process *pro se* prisoners' lawsuits. The previously mentioned study conducted by the National Center for State Courts determined that the median time that elapsed between the filing of state prisoners' § 1983 complaints and the final disposition of their cases was 181 days.[32] In other words, half of the prisoners' cases studied took six months or less to process, and half took six months or more.

The National Center for State Courts' study went on to examine what factors might explain why some prisoners' cases take so much longer to process through the courts than others. The study found that the more claims within a complaint, the longer it takes a court to process the case.[33] This information highlights the need to develop procedures and programs to weed out nonmeritorious claims before a complaint is even drafted and submitted to a court.

The National Center for State Courts also found that the type of claim asserted by a prisoner affected disposition time.[34] For example, claims alleging correctional officers' use of excessive force took much longer to process (an average of 661 days) than claims alleging abridgements of prisoners' right to religious freedom (an average of 503 days).[35]

Finally, the National Center study found that prisoner cases in which attorneys represented the plaintiffs took longer, on average, to process than cases where the prisoners represented themselves.[36] The study furthermore found that cases in which evidentiary hearings were held had longer case-processing times than cases where there were no evidentiary hearings.[37] The researchers who conducted the study, however, cautioned that these data do not mean that the holding of an evidentiary hearing (and presumably also the participation of an attorney) necessarily causes the increase in case-processing time.[38] Rather, cases in which attorneys are involved or in which evidentiary hearings are held may tend to be more complex cases that, because of their complexity, take longer to resolve. Such cases may generally have greater merit as well, thus requiring more substantial involvement by the courts.

The study conducted by the Federal Judicial Center of *pro se* cases, including habeas corpus cases, filed by prisoners in ten

United States district courts also found that cases in which prisoners were represented by attorneys took longer to process (a median time of 173 days from filing to disposition) during the time period of 1991 through 1994 than cases in which the prisoners were representing themselves (a median time of 141 days).[39] Interestingly, the FJC study also revealed that prisoners' *pro se* lawsuits took less time to process (a median time of 131 days) than nonprisoner *pro se* cases (a median time of 161 days).[40] And cases in which prisoners were represented by counsel took less time to process than each of the different kinds of nonprisoners' cases in which the plaintiffs were represented by counsel.[41]

Finally, the FJC study confirmed the extent to which case-processing times can vary widely from district to district. The median time that elapsed between the filing of *pro se* prisoners' civil suits and their disposition ranged from a low of 56 days in the Southern District of New York to a high of 195 days in the Eastern District of Michigan.[42]

IV. THE ACTUAL AND PERCEIVED BURDENS OF PRO SE PRISONERS' CIVIL-RIGHTS LITIGATION

Prisoners' *pro se* civil-rights suits are considered burdensome chiefly for three reasons: first, because of certain tangible costs that courts, correctional officials, and Attorneys General incur because of them; second, because of certain intangible costs which stem from them; and third, because of certain attributes of *pro se* prisoners' civil-rights lawsuits which make them more difficult to process.

Tangible Costs

The kinds of tangible costs incurred because of *pro se* prisoners' civil-rights suits are relatively easy to identify. They include the value of the time of court officials spent processing those lawsuits and the value of the time of correctional officials and the attorneys and staff from the Offices of Attorneys General spent investigating and otherwise responding to those lawsuits. Other costs include the following: the costs of providing legal assistance to certain inmates who bring civil-rights suits; a portion of the costs of prison law libraries and the personnel who staff them;[43] the costs of providing indigent inmates with some of the basic tools needed to litigate a case, such as paper, pens, envelopes, and stamps; the costs of photocopying documents that must be produced in response to prisoners' discovery requests; and transportation costs, which include not only costs incurred when correctional officials and Attorneys General travel to court, but also costs, including

security costs, incurred when prisoner-plaintiffs and prisoner-witnesses are transported out of prison for a hearing or trial.

Costs are also occasionally incurred when *pro se* inmates actually prevail in their civil-rights suits. Those costs include the costs of paying any damages awarded and the costs of complying with any court injunction. It is questionable, however, whether these costs should be considered a "cost" of the prisoners' litigation, which implies that the prisoners are responsible for the incursion of these expenses, since the costs are due to the failure to operate prisons in conformance with the requirements of the law.

While the kinds of tangible costs stemming from *pro se* prisoners' civil-rights suits can be readily identified, assigning a reliable dollar figure to those costs can be problematic. Most of the statistics that have been bantered about in the press about the costs of prisoner litigation are based on self-reported data that has not been validated. And even a cursory look at these figures reveals that they do not accurately reflect, and sometimes grossly inflate, the costs of *pro se* prisoner civil-rights litigation.

For example, the costs of defending against prisoners' civil-rights suits are often lumped together with the costs of defending against other types of prisoners' lawsuits, such as habeas corpus and other types of actions in which prisoners are contesting, not the conditions of their confinement, but the validity of their convictions or sentences. In addition, the reported costs of defending against *pro se* prisoners' civil-rights suits typically fail to differentiate between the costs of *pro se* suits and those in which the prisoners are represented by counsel. That this failure can lead to distorted figures about the costs of *pro se* inmate civil-rights litigation in individual states is evident from the results of the surveys of correctional officials and Attorneys General conducted during this project. For example, the Illinois Attorney General's Office reported that approximately 40% of the total time spent by attorneys from the Office working on prisoners' civil (nonhabeas) cases filed in federal court was spent in 1995 on cases in which prisoners were represented by an attorney.

States that have not done so already can adopt timekeeping systems as one step towards developing reliable calculations of the costs of *pro se* prisoners' civil-rights cases. The Wisconsin Department of Justice now utilizes a timekeeping system that may provide helpful guidance to other Attorneys General and correctional attorneys in the development of their own timekeeping systems.[44] A timekeeping system, if well-constructed, can yield at least two different kinds of benefits. First, it can help Attorneys General more accurately identify the costs incurred in

defending against prisoners' lawsuits. (For example, how much time is spent on different types of lawsuits? How much time is spent on civil-rights cases in which prisoners prevail as compared to those in which they do not prevail? How does the amount of time spent on prisoners' civil-rights cases, and certain stages of litigating those cases, compare to the amount of time spent on nonprisoners' cases?) And second, the timekeeping system can facilitate an assessment of whether steps taken to reduce costs have proven effective.

Intangible Costs

One of the potential intangible costs of prisoner litigation is the stress it may cause those who are defendants in prisoners' lawsuits. A few of the correctional officials and Attorneys General who provided feedback during this study stated that concerns about the stress of litigation have dissuaded persons, particularly medical professionals,[45] from entering into the corrections profession or have caused them to leave the profession. The degree of this reported adverse effect of prisoner litigation is not known. Nor has there been analysis of the extent to which other factors, such as safety concerns, working conditions, and the general unruliness of many prisoners, have contributed to decisions not to seek, accept, or continue employment in the field of corrections.

Some claims have been made that another cost of *pro se* inmate litigation is that it causes delay in the processing of nonprisoners' lawsuits. The aggregate statistics currently available, however, do not substantiate this claim and in fact, suggest that it is not true. Case-processing times have remained fairly constant over the years as the number of prisoners' civil-rights suits has increased substantially. For example, as mentioned earlier in this chapter, the number of civil-rights suits filed by prisoners increased 227% between 1980 and 1995. Yet the median time from filing to disposition for all civil cases terminated in the federal district courts in 1995 was eight months, the same amount of time that it took to dispose of cases in 1980.[46] One potential reason why case-processing times may have remained fairly constant in the face of rising numbers of prisoners' civil-rights suits is that, as the court surveys revealed during this project, behind-the-scenes personnel (*pro se* staff attorneys, law clerks, and court clerks) are doing so much of the work processing these cases.

Another cited cost of the many civil-rights suits filed by *pro se* prisoners is that they cause meritorious prisoners' claims to be lost in the case-processing shuffle. A passage from Justice Jackson's concurring opinion in a Supreme Court case dealing with habeas corpus cases capsulizes this concern: "It

must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[47]

As Justice Jackson's remarks illustrate, the concern about meritorious prisoners' lawsuits being "buried" is twofold in nature. There is first the concern that simply because of the volume of civil-rights suits being processed by the courts, it is difficult for the courts to identify and focus their attention on meritorious claims. And second, there is the concern that seeing what is perceived to be an endless stream of prisoners' civil-rights cases, most of which will not culminate in any court-ordered relief for a prisoner, breeds insensitivity towards prisoners' civil-rights suits in judges, correctional officials, and Attorneys General. This insensitivity, it is felt, can cause judges, correctional officials, and Attorneys General to view prisoners' civil-rights suits as, to use Justice Jackson's words, "worthless," making it more likely that meritorious claims will be overlooked and fall through the cracks of the judicial system.

Distinguishing Features of Pro Se Prisoner Litigation

As mentioned earlier, another principal reason why *pro se* prisoners' civil-rights suits are considered burdensome is because they have certain attributes, and the prisoners bringing them have certain attributes, which make prisoners' suits more difficult to process than nonprisoners' cases. One particularly important distinguishing feature of prisoners' cases is that the population from which they come -- prisoners -- contains a disproportionate and very high percentage of persons who lack even basic literacy skills. A 1994 report of the National Center for Education Statistics reported that seven out of every ten prisoners perform at the lowest literacy levels.[48] Because of these deficiencies in literacy skills, it was reported, the majority of prisoners would have difficulty performing tasks that require them to "integrate or synthesize information from complex or lengthy texts."[49] These statistics suggest that it is at least inordinately difficult, and perhaps impossible, for most prisoners to effectively litigate their civil-rights cases through the court system from beginning to end. For as any lawyer will attest, the ability to integrate and synthesize information from complex and lengthy texts, including court opinions and documents produced during discovery, are hallmarks of effective litigation.

The deficient literacy skills of most prisoners explains why so many complaints are heard from judges and others about the prolix and rambling statements made by so many prisoners in documents filed with a court. Indeed, during this project, a

number of judges, *pro se* staff attorneys, law clerks, court clerks, and Attorneys General complained of the difficulty they had deciphering the writings submitted by many *pro se* prisoners to the court.

The final reason why prisoners' *pro se* civil-rights suits are considered more burdensome than suits filed by their nonprisoner counterparts is that prisoners' involvement in lawsuits generates safety and security concerns. These concerns are most directly implicated when prisoners are taken out of prison for a hearing or trial as well as when court personnel go into prisons to conduct hearings or trials.

But *pro se* prisoner litigation may have other security implications as well. Inmate law clerks may, for example, exert undue influence over other inmates who are dependent on them for legal assistance. And according to anecdotal reports received during this study, prison law libraries can and have served as a place where prisoners hide and pass contraband. These and other security problems are often a function of the type of legal-assistance program afforded prisoners in a particular correctional institution, a subject which is explored in greater depth in Chapter 3.

V. COMPLETING A COST-BENEFIT ANALYSIS OF PRO SE PRISONERS' CIVIL-RIGHTS LITIGATION

As can be understood from the preceding discussion, there has not been, and could not currently be, an accurate quantification of the costs of *pro se* prisoners' civil-rights suits, particularly because the records needed for such a cost accounting are not kept. But even if an accurate number representing the costs of that litigation could be adduced, that raw figure, by itself, would, for two reasons, represent an incomplete and misleading picture of the repercussions of *pro se* prisoners' civil-rights suits. First, for the economic calculus to be complete, the extent to which any of the identified costs were unnecessarily incurred would also have to be taken into account. And second, any benefits reaped from *pro se* prisoners' civil-rights lawsuits would have to be considered. These two subjects are discussed below.

Unnecessary Costs

As mentioned above, simply to tally up the costs of *pro se* prisoners' civil-rights litigation without examining the nature of those costs and the extent to which they can be avoided or reduced skews the assessment of those costs. Misimpressions about those costs can then lead to the adoption of crude measures

to curb those costs that are not appropriately tailored to their true nature and amount.

An analogy can illustrate this point. Assume that the owner of a new American-made car never gets the oil changed in the car. After a while, a red light goes on in the car, alerting the owner of the need to change the oil, but the owner fails to get the oil changed. Eventually, the engine block cracks, and the owner incurs $5,000 in repair bills. The owner then publicly lambasts American-made cars and urges all of his friends and neighbors never to buy one.

If one were to calculate the costs to the owner of owning and operating an American-made car and included the $5,000 in repair costs in the calculus, the end result would be an inflated figure. The raw figure fails to reveal that the total costs could have been reduced by $5,000 had the owner taken basic steps to maintain his vehicle. The $5,000 charge could also have been avoided had the owner responded appropriately when he first received a sign that he was having car trouble. So the decision of the owner and others never to buy an American-made car in the future because of this particular $5,000 repair bill is, to those who know the full facts, an overreaction and foolhardy.

While the amount of unnecessary costs incurred in litigating or processing *pro se* prisoners' civil-rights suits cannot be determined with any level of specificity, the potential kinds of unnecessary costs can be identified. These potential costs fall into four categories.

First, some *pro se* prisoners' civil-rights litigation may be an outgrowth of poor conditions in some prisons and/or the failure of certain correctional officials to abide by their own rules and regulations. Certainly, the fact that over a quarter of state prisons were operating under a court order or consent decree in 1995 suggests that the possibility that legitimate concerns about prison practices, policies, and conditions have sparked or are sparking some *pro se* prisoners' civil-rights litigation is not a specious one.[50] As is discussed more fully later in this chapter, however, to say that some of the complaints spawning *pro se* prisoners' lawsuits may be legitimate does not necessarily mean that they are legally meritorious. It simply means that the taking of certain proactive measures might avert some of those lawsuits and reduce their costs, a subject which is discussed more fully in Chapter 2.

The second type of avoidable litigation costs would be those incurred because of the failure of certain correctional officials and others to listen to, and appropriately respond to, prisoners' legitimate grievances before they culminate in a lawsuit. This category of costs is related to, but somewhat different than, the

first category. While the first category relates to the taking of actions to prevent a problem from occurring in the first place (the equivalent of changing the oil in the car context), the second category concerns the taking of action to quickly respond to and redress a problem once it has occurred (the equivalent of adding oil to the car, once the warning light has gone on, before the car is driven any further). The taking of corrective measures once problems have been brought to the attention of correctional officials is discussed in both Chapter 2 and Chapter 6.

The third category of potentially avoidable litigation costs would be those incurred because of the lack of knowledge and illiteracy of many of the prisoners bringing *pro se* civil-rights complaints. These costs might be reduced through a carefully crafted legal-assistance program. Through such a program, nonmeritorious claims that would otherwise be filed by prisoners who do not understand the requirements of the law could be weeded out, and meritorious claims could be litigated more efficiently and effectively. Legal-assistance programs and questions about their cost-effectiveness are discussed in greater depth in Chapter 3.

The fourth kind of avoidable litigation costs would be those which ensue from inefficiencies in the ways in which courts process, and correctional officials and Attorneys General respond to, civil-rights suits filed by *pro se* prisoners. Eliminating these inefficiencies is the focus of Chapters 5 and 6.

Benefits of Pro Se Prisoners' Civil-Rights Litigation

As was mentioned earlier, an accurate assessment of the repercussions of *pro se* prisoners' civil-rights suits must look not only at the costs incurred because of those suits, but also at the benefits which they yield. Under a cost-benefit analysis, even if the costs of *pro se* inmate litigation were extremely high, those costs would be worth incurring if the benefits of the litigation outweighed the costs. Conversely, if the benefits of *pro se* prisoners' civil-rights suits were minimal or nonexistent, the costs would not be worth incurring, even if those costs were low.

Two assertions are frequently made when discussing the benefits of *pro se* prisoners' civil-rights suits. First, it is often said that most of these lawsuits are frivolous. And second, it is underscored that prisoners rarely prevail in these lawsuits. These two points are explored in greater depth below.

1. Frivolous Lawsuits

a. Quantitative Analysis

One question about *pro se* prisoners' civil-rights suits is: How many of them are frivolous? To answer that question, a distinction must be made between legal frivolousness and substantive frivolousness.

The Supreme Court has defined a legally frivolous complaint as one which has "no arguable basis in law or in fact."[51] In plain-English terms, what the Court is essentially saying is that a complaint is legally frivolous if the plaintiff has no chance of prevailing on his or her claim. The prisoner may have a legitimate grievance about the way in which he or she was treated by correctional officials. But the grievance is not one for which the court can provide redress.

An example can illustrate the difference between legal and substantive frivolousness. Assume that prison doctors amputate the wrong leg of a prisoner whose other leg was gangrenous. In his § 1983 suit, the prisoner seeks damages for the loss of his healthy leg, but he concedes that the prison doctors were no more than negligent in amputating the wrong leg. Since the Supreme Court has held that negligence will not suffice for the actions of prison doctors to be considered cruel and unusual punishment (what is called "deliberate indifference" is necessary),[52] the prisoner's claim will be dismissed as frivolous. Yet by no stretch of the imagination could his complaint be considered trivial in nature.

As mentioned earlier, the National Center for State Courts' study of state prisoners' § 1983 suits found that 74% of the claims were dismissed on the court's own motion, in other words, without a motion to dismiss or for summary judgment being filed by the defendant. Of these court dismissals, 19% were reportedly because the court found the inmate's claim to be frivolous.[53] Other reasons for court dismissals included: (1) the plaintiff's failure to comply with court rules, such as an order to pay a filing fee (38%); (2) the absence of any evidence of a constitutional violation (19%); (3) the raising of an issue not cognizable under § 1983, such as a claim for release from confinement, which is one that can only be asserted in a habeas corpus action (7%); (4) the defendant's immunity from liability (4%); (5) the defendant was not acting under color of state law (3%); and (6) other reasons, such as that a claim for injunctive relief was moot because the plaintiff had been released from confinement (9%).[54]

According to the National Center's study then, only 13% of the *total* number of prisoners' suits studied (the court

dismissals plus the cases disposed of through other means) were dismissed for frivolousness.[55] One cannot necessarily conclude, however, from these data that only 13% of the prisoners' civil-rights suits processed by the courts are legally frivolous.

The reason to be cautious about the significance of the 13% figure is that some of the cases studied that were dismissed by the courts purportedly for reasons other than frivolousness could probably be classified as frivolous. For example, many courts dismissing a prisoner's suit against a fellow prisoner because the defendant was not acting under the color of state law would denominate the complaint as frivolous. In other words, there is no arguable basis in the law or fact for the plaintiff's complaint because an essential element of a § 1983 action -- that the defendant acted under color of state law -- is clearly absent.

b. Qualitative Analysis

The subject of frivolous *pro se* prisoners' civil-rights litigation involves not only a quantitative question (How many of the claims being processed by the courts are legally frivolous?), but also a qualitative question (What kinds of frivolous claims are being brought by prisoners?). At first glance, the latter question might seem unimportant. Some might say, "If a complaint is legally frivolous, it does not belong in court, and we must get rid of it. End of discussion."

But on closer examination, the question of why a claim is frivolous is an important one. As is discussed subsequently, the nature of the frivolous claims being brought in court should affect the kinds of practices, policies, procedures, and programs adopted by courts, correctional officials, and Attorneys General to keep frivolous lawsuits out of the courts and to dispose of those which find their way into the court system.

In 1995, two dozen states circulated what they called their "Top Ten List of Frivolous Inmate Litigation" in order to "educate congressional leadership about the magnitude and expense of the inmate litigation problem."[56] Each list described grossly trivial civil-rights suits that had been filed by prisoners, including a suit brought by a pedophile convicted of passing AIDS to a juvenile in which the prisoner contested the warden's refusal to let him receive the newsletter of the North American Man Boy Love Association, a suit brought because prison officials would not let an inmate wear a bra, and a suit brought by an inmate convicted of escape who sued because the jail was too easy to escape from. Of the suits on these lists, the one which attracted the most media attention was the one involving the prisoner who reportedly sued because he received a jar of creamy

peanut butter, instead of the crunchy peanut butter he had ordered.

There has been some dispute over whether the facts of these cases were reported accurately.[57] But while it is, of course, an important question whether the facts of cases affecting public opinion, and in turn policy, have been accurately reported, the more critical question is this: Assuming that the facts of the claims on the "Top 10" lists were depicted accurately, do those claims represent the typical kind of legally frivolous inmate claim? For if they do, the policy response to frivolous inmate lawsuits would be more punitive in nature, with a heavy emphasis on sanctions to deter and punish flagrantly abusive use of the courts.

On the other hand, if these kinds of egregiously trivial claims represent the exception, and not the norm, policy responses would be different. If most prisoners are bringing legally frivolous claims because they do not understand the law and/or because, in their opinion, they have no other place to turn for a fair consideration of their claims, efforts would be concentrated on developing alternative relief mechanisms for prisoners and cost-effective methods to advise prisoners about the requirements of the law.

If *pro se* prisoners were filing lawsuits primarily for recreational purposes or to harass prison officials, it would seem that they would file multiple complaints. In fact, as was mentioned earlier in this chapter, research shows that prisoners are doing the opposite. The majority of those prisoners who are filing civil-rights suits are filing only one lawsuit.

One researcher who examined every § 1983 complaint filed in the United States District Court for the Northern District of Illinois between 1980 and 1986 concluded that "there is strong evidence that most suits possess substantive, if not judicial, merit."[58] Whether or not this is true is a subject upon which future research should focus. For it is important that policy measures governing the processing of *pro se* prisoners' civil-rights suits, like all policy measures, be driven by facts, not hyperbole.

2. The Infrequency with Which Prisoners Prevail

Regardless of the exact percentage of prisoners' *pro se* civil-rights complaints that are legally frivolous and regardless of details about the nature of their frivolousness, the bottom line, for some, about *pro se* prisoners' civil-rights suits is this: prisoners rarely win. So, it is argued, it is a waste of the time, energy, and resources of courts, correctional

officials, and Attorneys General when these cases are processed through the court system.

Here's what we know about the frequency with which tangible relief ensues from *pro se* prisoners' civil-rights suits. We know, first of all, that cases in which prisoners represent themselves are settled at least somewhat less frequently than cases in which prisoners are represented by an attorney.[59] This difference in settlement rates may be due to several reasons. First, the cases in which attorneys are involved are typically litigated more effectively, which may, in turn, make defendants more willing to settle them. Alternatively or in addition, the screening mechanisms that lead to attorneys' involvement in these cases, whether court-based programs for appointing counsel or the attorneys' own case-review processes, may lead to attorneys' involvement in the more meritorious lawsuits. And finally, prisoners might be more inclined to view defendants' settlement offers as reasonable if their attorneys tell them so and explain why.

We also know that prisoners' suits, whether *pro se* or represented, settle less frequently than nonprisoners' civil suits.[60] What we don't know for sure though is why settlement appears to be disproportionately impeded in prisoners' cases. Is it because prisoners themselves are less willing to accept defendants' settlement offers? Is it because defendants are reluctant to appear to be giving in to prisoners' demands? Is it because prisoners' claims are substantively weaker than nonprisoners' claims? Or is it because of some other reasons? In order to facilitate the processing of *pro se* prisoners' civil-rights suits, impediments to the settlement of these cases need to be explored in greater depth, a subject which is discussed further in Chapter 6.

The implications of the data about the extent to which prisoners prevail when their civil-rights cases go to trial are also more complicated than they might appear at first glance. The study mentioned earlier conducted by the National Center for State Courts reported that in the § 1983 cases studied, inmates prevailed on close to half of the issues that went to trial.[61] (On the other hand, a different study conducted by Dean Howard B. Eisenberg of prisoners' civil-rights cases filed in three federal district courts in 1991 revealed no cases that had gone to trial in which the prisoner had obtained relief).[62]

The numbers on inmate "wins" look very different when the instances when inmates have prevailed are compared to the total number of civil-rights claims or complaints brought by prisoners. The National Center for State Courts' study, for example, found that prisoners won some relief on only about 5% of their claims.[63] In other words, for every twenty civil-rights claims

(not cases) filed by state prisoners in federal court, a prisoner obtained relief on one of those claims.

Several qualifying points should be kept in mind, however, when considering the significance of this win/loss ratio. First, mere number-crunching -- computing the percentage of cases in which prisoners obtained some relief because of a civil-rights claim filed in court -- presents neither a complete nor an accurate picture of what is won and what is lost through the processing of prisoners' civil-rights suits. For the relevant question to be considered when crafting policy responses to *pro se* prisoner litigation is not simply how often prisoners prevail in civil-rights suits, but also how often they would prevail if the processes and procedures for the handling of their suits were changed. In other words, the focus should not just be on what benefits are being reaped under current procedures, but on what benefits are being lost because of current procedures.

In any event, the fact that prisoners do not win often when they file a civil-rights claim in federal court should not mask the fact that sometimes they not only win, but win big -- very big. As was mentioned earlier, a quarter of the state prisons in this country are currently operating under court order. Some, and perhaps many, of these court orders stem from lawsuits brought initially by prisoners who were representing themselves.[64] These court orders affect the conditions of confinement of literally thousands of prisoners, which certainly casts the picture of the number of prisoners who have received the benefits of court-ordered relief from *pro se* prisoners' civil-rights suits in a different light.

Other Benefits

It was clear from the feedback received from judges, correctional officials, Attorneys General, prisoners, and prisoners' rights organizations during this study that an accurate assessment of the benefits of *pro se* prisoners' civil-rights suits would have to go beyond computing the dollar value of the damages and injunctive relief awarded prisoners who brought civil-rights suits in which they, at least initially, represented themselves. Other unquantifiable benefits would have to be included in the economic calculus. But while these benefits may be unquantifiable, they are no less real and important. In fact, many survey respondents underscored that these benefits are of overriding importance.

The extent to which the somewhat more intangible benefits of prisoner litigation are reaped depends in large part on both how correctional officials and Attorneys General respond to these complaints and how they are processed by the courts. The intangible and interrelated benefits that can follow from soundly

constructed and well-functioning systems for processing and responding to these complaints are identified below.

Vindicating Constitutional Rights. First is the interest in, and benefits from, vindicating constitutional rights. The importance of this interest was reflected in many of the comments of the survey respondents during this project.

Government Accountability. The second related benefit that can come from prisoners' civil-rights lawsuits is government accountability. The potential for abuse of governmental authority is particularly high within prisons for two reasons: first, because prisons are closed off from the rest of the world; and second, because prisoners are such despised individuals. By having a public forum in which correctional officials can be held accountable if they violate the law, the potential for abuse is diminished.

Respect for the Law. The third potential benefit of prisoners' civil-rights suits stems from the effect that vindicating constitutional rights and holding governmental officials accountable when they misuse governmental power can have on others, particularly prisoners. Enforcing prisoners' constitutional rights can teach prisoners that the law does matter. The cynicism that can result when prisoners, who are incarcerated for violating the law, watch as some of their "keepers" violate the law with impunity can then be avoided. In short, providing inmates with redress when their rights under the law have been violated can help to inculcate a respect for the law in persons who tend to view the law as a tool of oppression.

Rehabilitation. The fourth related potential benefit of prisoners' civil-rights suits is that their fair adjudication can have rehabilitative value. The Supreme Court has repeatedly recognized the spin-off rehabilitative value of treating inmates with procedural fairness.[65] If prisoners are provided with a forum in which they can receive redress for violations of their rights, they may, at least potentially, be more amenable to rehabilitative efforts.

Safety Valve. The fifth asserted benefit of prisoners' civil-rights litigation is what can be described as its safety-valve function. Prisoners, it is said, will one way or the other react to mistreatment, whether constructively or destructively. A court action offers a peaceful way for inmates to air grievances about the alleged violation of their legal rights. Without such an avenue for redress, prisoners may, unfortunately but not surprisingly, respond to wrongdoing by doing wrong themselves -- rioting and employing other violent modes of expression. As one Department of Corrections administrator

observed when being interviewed during this study, "I would rather have an inmate pick up a pen than a sword."

VI. CONCLUSION AND RECOMMENDATIONS

Discussions about prisoners' civil-rights litigation, like so much other public discourse of important and complicated subjects, have in recent years taken the form of sound bites. Much, for example, is heard about the "flood" of prisoners' lawsuits. But little is heard about the apparent link between the rising number of civil-rights suits and the rising number of prisoners. And little is heard about the complexity of the factors underlying prisoner litigation, a complexity which is evidenced by differences in filing rates between states and between prisons within a single state.

Much is heard about "frequent filers" and "serial litigators," prisoners who repeatedly file civil-rights suits. But little is heard about the research revealing that the majority of the prisoners who have filed civil-rights suits have filed only one civil-rights complaint.

Much is heard about the waste of time and money spent processing and responding to *pro se* prisoners' civil-rights suits. But little is heard about the lawsuits that could have been avoided and those that could be more efficiently and effectively litigated if changes were made in policies, practices, and procedures that contribute to prisoners' decisions to file civil-rights suits and that affect how those suits are litigated. And still less is heard about the tangible and intangible benefits that can accrue when not only courts, but correctional officials and Attorneys General, enforce prisoners' constitutional rights.

The purpose of this chapter was to highlight some facts on a subject about which there has been much rhetoric. But from the preceding analysis, it should be apparent that there is still much to be learned about *pro se* prisoners' civil-rights litigation. Some of the areas upon which future research and statistics-gathering efforts can and should be targeted are highlighted below.

Recommendations

1. As part of ongoing efforts to enhance data collection and reporting in the federal district courts,[66] the feasibility of making certain additional changes to facilitate the tracking and evaluation of courts' processing of prisoners' civil-rights suits should be considered. A few examples of additional data

that would contribute to a better understanding of prisoners' civil-rights lawsuits and help to identify ways in which they could be more efficiently processed include the following:

- The disposition of prisoners' civil-rights cases. These dispositions could be reported using categories that reflect the most typical ways in which these cases are disposed of. Possible disposition categories might include: *sua sponte* dismissal for frivolousness; *sua sponte* dismissal for failure to state a claim; *sua sponte* dismissal for failure to pay a partial filing fee; *sua sponte* dismissal for other reasons, such as failure to prosecute; dismissal or summary judgment upon motion of the defendant; voluntary dismissal; settlement; trial; and a catch-all category for other dispositions. This kind of specific disposition information would facilitate the identification of areas on which to target efforts to reduce the costs and increase the benefits of prisoner litigation. The information could also be used to monitor the effects and effectiveness of the measures employed to accomplish these objectives. For example, one criterion that might be used in evaluating the effectiveness of a legal-assistance program under which attorneys draft inmates' complaints for them is whether the number and the percent of prisoners' complaints dismissed *sua sponte* for frivolousness have declined since implementation of the program.

- Attorney representation. Whether a prisoner is proceeding *pro se* could be reflected in reported statistics so that the efficacy of procedures targeted towards *pro se* prisoners can be evaluated, as well as the effects of attorneys' representation of prisoners bringing civil-rights suits. If the records kept revealed whether or not a prisoner was represented by an attorney at the time a complaint was filed, the effects of attorney-drafted complaints on the processing of prisoners' civil-rights suits could be assessed. Records could also be compiled on whether an attorney was representing a prisoner at the time of the final disposition of the civil-rights suit. This latter information could be used for a number of different evaluative purposes, including assessing the full impact of cases brought initially by prisoners proceeding *pro se* but in which attorneys later represented them.

- Median case-processing times. It would be helpful if information were regularly collected and reported on how long it takes for courts to process prisoners'

civil-rights suits. The effects and effectiveness of procedures and programs adopted to facilitate the processing of prisoners' civil-rights suits could then be better assessed.

- Case outcomes. Statistics could be collected and reported on the outcomes of prisoners' civil-rights suits. Specifically, information could be gathered on who prevailed in a case and, if the prisoner-plaintiff prevailed, the relief awarded. If an injunction was entered in a class-action suit, that information might also be reported since a more accurate picture would be gained about the number of persons affected by, and benefited by, prisoners' civil-rights suits.

Information like that listed above could also be collected about nonprisoners' *pro se* cases so that decisions about the extent to which *pro se* prisoners' civil-rights suits will be processed the same or differently than nonprisoners' *pro se* suits are better informed. Other information which, if collected by the courts, would facilitate the proactive efforts of correctional officials and Attorneys General to avert litigation is discussed in the next chapter.

2. The federal government should establish a broad-based working group to identify priority research projects concerning prisoners' civil-rights lawsuits towards which federal funds will be targeted. This research agenda will help to ensure that policy and programmatic responses to prisoners' civil-rights litigation are better informed and that decisions in this highly politicized area are grounded in facts and methodologically sound research. Collaboration in establishing a research agenda would also be wise from a fiscal standpoint, avoiding unnecessary duplication and overlap in research endeavors.

Examples of some of the topics upon which future research might focus include the following:

- Why do *per-capita* filing rates differ so dramatically from state to state, and what factors driving those differences are the most significant?

- Why have the number of civil-rights suits filed by federal prisoners increased at such a lower rate than the number of suits filed by state prisoners?

- To what extent are there differences in filing rates between different prisons in a state, and what accounts for those differences?

- Does accreditation of a prison have an effect on litigation rates or outcomes?

- Of the prisoners' civil-rights suits processed by the federal courts that are legally frivolous, how many appear to be patently frivolous from a substantive perspective?

- How many of the court orders and consent decrees governing the operation of correctional facilities in the country began as a *pro se* lawsuit?

Additional research projects that might be undertaken or need to be undertaken are identified in subsequent chapters in this manual.

NOTES

1. The Administrative Office of the United States Courts divides the civil-rights lawsuits filed by incarcerated individuals into two categories: "U.S. cases" and "private cases." Consequently, the number of lawsuits referred to in the manual filed by state prisoners includes lawsuits filed by nonfederal pretrial detainees and inmates confined in jails and other correctional facilities. Were the number of persons confined in jails and these other correctional facilities included when calculating *per-capita* filing rates, the *per-capita* filing rates mentioned later in this manual would be dramatically lower.

2. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR, at 145 (hereinafter AO 1995 REPORT); ADMIN. OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - 1975, at 207.

The statistics measuring the rise in the number of state prisoners' civil-rights suits are drawn from 1995 in order to gain a better understanding of the nature and amount of that increase before enactment of the Prison Litigation Reform Act in April of 1996. The number of civil-rights suits filed by state prisoners declined slightly (1.4%) from 1995 to 1996, from 40,569 to 39,996. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR, at 142 (hereinafter AO 1996 REPORT). Because of the rise in the number of state prisoners during that time period though, the reduction in *per-capita* filing rates would be even greater. Since the statistics regarding the number of state prisoners incarcerated at year-end 1996 were not yet available at the time this manual went to press, the *per-capita* filing rate

for 1996 could not be computed. But the rise in the number of state prisoners was evident from population statistics gathered in midyear 1996. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1996, at 1 (1997).

3. For a discussion of other factors and events that contributed to the abandonment, or at least erosion, of the "hands-off doctrine," see LYNN S. BRANHAM & SHELDON KRANTZ, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 282-85 (1997).

4. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974).

5. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974).

6. Wolff v. McDonnell, 418 U.S. 539 (1974).

7. Lee v. Washington, 390 U.S. 333 (1968) (per curiam).

8. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

9. AO 1995 REPORT, *supra* note 2, at 145; ADMIN. OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE UNITED STATES COURTS--1980, at 232 (hereinafter AO 1980 REPORT).

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995, at 3 (1996) (hereinafter BJS 1995 REPORT); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1981, at 2 (1982) (hereinafter BJS 1981 REPORT) (The 1980 statistics are drawn from BJS's 1981 report because the year-end data on the number of incarcerated prisoners are always preliminary and subject to revision when initially reported.)

11. BJS 1995 REPORT, *supra* note 10, at 3.

12. AO 1995 REPORT, *supra* note 2, at 145; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1994 REPORT OF THE DIRECTOR, at A-31.

13. AO 1995 report, *supra* note 2, at 145; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS--1990, at 142 (hereinafter AO 1990 REPORT).

14. BJS 1995 REPORT, *supra* note 10, at 3; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1991, at 2 (1992) (hereinafter BJS 1991 REPORT).

15. BJS 1995 REPORT, *supra* note 10, at 3; BJS 1981 REPORT, *supra* note 10, at 2.

16. AO 1995 REPORT, *supra* note 2, at 144; AO 1980 REPORT, *supra* note 9, at 232.

17. BJS 1995 REPORT, *supra* note 10, at 3; BJS 1991 REPORT, *supra* note 14, at 2.

18. AO 1995 REPORT, *supra* note 2, at 144; AO 1990 REPORT, *supra* note 13, at 141.

19. WISCONSIN LEGISLATIVE AUDIT BUREAU, AN EVALUATION OF INMATE LITIGATION, at 11 (1993).

20. An in-depth study of prisoners' civil-rights suits filed in the United States District Court for the Northern District of Illinois between 1977 and 1986, for example, found that a disproportionate number of the complaints filed by state prisoners -- 86% -- originated in the state's four maximum-security prisons, even though those prisons only housed 40 to 66% of the state's prisoners during the years in question. Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*, 15 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 52 (1989).

21. ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION, at 21-22 (Bureau of Justice Statistics 1995).

22. Thomas, *supra* note 20, at 47.

23. HANSON, *supra* note 21, at 11-12. The National Center study used what were called "issues" as the measure of analysis, rather than cases. "Issue" referred to the type of claim. For example, if a prisoner sued the warden and the prison doctor because his pain medication was not refilled, that counted as one "issue" or what is referred to in this manual as a claim. On the other hand, if the inmate sued a correctional officer for failing to protect him from an attack and sued the prison doctor for inadequately treating his injuries, that was counted as two "issues." Telephone Interview with Roger A. Hanson, Senior Staff Associate, National Center for State Courts (May 28, 1997).

24. Thomas, *supra* note 20, at 45.

25. Jim Thomas, *Inmate Litigation: Using the Courts or Abusing Them?*, CORRECTIONS TODAY 124, 126 (July 1988).

26. MICHAEL L. CARTER, PRISONER LITIGATION IN HAWAII: A REPORT TO THE ATTORNEY GENERAL OF HAWAII 3-4 (1994).

27. HANSON, *supra* note 21, at 18-19.

28. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 625 n. 84 (1979).

29. *See, e.g.*, HANSON, *supra* note 21, at 18-19 (2% of the cases studied went to trial). *See also* AO 1996 REPORT, *supra* note 2, at 160 (2.8% of the state prisoners' civil-rights cases that were terminated in 1996 reached trial).

30. David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC DIRECTIONS 5 (Federal Judicial Center, June 1996).

31. AO 1995 REPORT, *supra* note 2, at 144-45.

32. HANSON, *supra* note 21, at 22, 24. It is not clear from this study how much of the time between filing and final disposition in these kinds of cases is due to the time it takes to serve process in cases not *sua sponte* dismissed by the courts.

33. *Id.* at 25.

34. *Id.* at 30-35.

35. *Id.* at 30-31.

36. *Id.* at 32-35.

37. *Id.*

38. *Id.* at 35.

39. Rauma, *supra* note 30, at 10.

40. *Id.*

41. *Id.* at 11.

42. *Id.* at 10; David Rauma, Figure 7: Median time from filing to disposition in ten district courts, fiscal 1991-1994 (unpublished table sent to the Project Director on February 6, 1997).

43. Not all of the costs of prison law libraries and the personnel who staff them can be attributed to prisoners' civil-right suits, since many of the books and materials in the libraries and some of the time spent managing them will be related to other kinds of cases.

44. WISCONSIN DEP'T OF JUSTICE & BUREAU OF COMPUTING SERVICES, LSIS TIMEKEEPING SYSTEM: GUIDE FOR ATTORNEYS, PARALEGALS, INVESTIGATORS (1996).

45. Litigation can also have the more tangible effect on medical professionals of increasing their medical-malpractice insurance rates.

46. AO 1995 REPORT, *supra* note 2, at 168; AO 1980 REPORT, *supra* note 9, at 393.

47. Brown v. Allen, 344 U.S. 443, 536 (1953) (Jackson, J., concurring).

48. KARL O. HAIGLER ET AL., LITERACY BEHIND PRISON WALLS xviii, 17-19 (National Center for Education Statistics 1994).

49. *Id.* at xviii.

50. BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995 (publication forthcoming in 1997).

51. Neitzke v. Williams, 490 U.S. 319, 324 (1989).

52. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

53. HANSON, *supra* note 21, at 20.

54. *Id.*

55. While 74% of the claims that were studied were dismissed *sua sponte* by courts, 20% were dismissed on motion of a defendant. *Id.* at 19. According to one of the researchers who conducted the study for the National Center for State Courts, virtually all of "dismissals" in response to a defendant's motion (the entry of summary judgment on a defendant's behalf was treated as a dismissal) were for reasons other than frivolousness. Telephone Interview with Roger A. Hanson, Senior Staff Associate, National Center for State Courts (May 28, 1997).

56. Office of the Attorney General of Nevada, "Top 10 Most Frivolous Inmate Lawsuits" (August 1, 1995) (press release).

57. Upon reading media accounts of some of the cases on the "Top 10" lists, Judge Jon Newman, a judge on the Second Circuit Court of Appeals, decided to take a closer look at some of these cases since they did not reflect the types of cases that he had seen as a judge. Judge Newman later reported that, in his opinion, the facts of the sensational cases he examined had been misrepresented and that the prisoners' claims, though perhaps not legally meritorious, were not substantively frivolous. Jon O. Newman, *Fulfilling the Duty of Representation*, N.Y.L.J., at 2 (June 24, 1995).

58. Jim Thomas et al., *Issues and Misconceptions in Prisoner Litigation: A Critical View*, 24 CRIMINOLOGY 775, 792 (1986).

59. The study of *pro se* lawsuits conducted by the Federal Judicial Center found that 16% of the *pro se* prisoner cases settled as compared to 18% of those in which the prisoner was represented by an attorney. Rauma, *supra* note 29, at 12.

60. The Federal Judicial Center study reported that while 16% of the *pro se* prisoner cases settled, 25% of the nonprisoner *pro se* cases settled. And while 18% of the cases in which prisoners were represented by attorneys settled, 31% of the nonprisoners' cases settled when the plaintiff was represented by an attorney. *Id.*

61. HANSON, *supra* note 21, at 36. Telephone Interview with Roger Hanson, Senior Staff Associate, National Center for State Courts (May 28, 1997).

62. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 458 (1993).

63. HANSON, *supra* note 21, at 19, 36.

64. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978), which began as a *pro se* suit. *See* Holt v. Sarver, 309 F. Supp. 362, 364 (E.D. Ark. 1970).

65. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

66. Examples of recent efforts to expand and improve data collection regarding prisoners' civil-rights cases include: (1) the Integrated Case Management System (ICMS) has been modified to permit tracking of the number of prison condition cases filed and the identification of the proportion of those cases filed *in forma pauperis;* and (2) a mechanism has been put in place for district courts to report to the Administrative Office of the United States Courts the amount of filing fees being collected under the Prison Litigation Reform Act's filing-fee provisions. Letter from Jeffrey A. Hennemuth, Senior Counsel to the Assistant Director, Administrative Office of the United States Courts, to Lynn S. Branham, Project Director (April 29, 1997).

CHAPTER TWO

STEPS CORRECTIONAL OFFICIALS AND ATTORNEYS GENERAL CAN TAKE TO AVERT LITIGATION

In developing responses to the demands of *pro se* prisoners' civil-rights suits, the central focus in recent years has been on the courts. Two questions have dominated discussion and debate: What steps can courts take to process *pro se* prisoners' civil-rights suits more efficiently? And what obstacles can and should be placed at the courthouse door to discourage prisoners from filing lawsuits which, from a legal standpoint, are nonmeritorious?

The focus on the courts has led to litigation responses that are more back-end than front-end, reactive rather than proactive, and court-based rather than corrections-based. The responses of correctional officials, Attorneys General, and court officials surveyed during this project confirmed that this is true. For example, all but one of the Attorneys General surveyed during this project reported that the attorneys from their offices spend a tiny fraction of their time on activities designed to avert litigation filed by prisoners. In fact, in six of the Attorney General's offices, the attorneys in 1995 spent, it was estimated, only about one-half of one percent, or even less, of their time on proactive work. And in one state in which the attorneys spent approximately 25,000 hours in 1995 litigating prisoners' civil lawsuits filed in federal or state court (not including habeas corpus, state postconviction, parole review, or other cases in which prisoners challenged their convictions, sentences, or length of confinement), the attorneys in the Attorney General's office spent no time on proactive activities to avert the filing of such lawsuits.

This chapter broadens the context in which the subject of *pro se* inmate litigation is examined and discusses some of the steps that can be taken by correctional officials and Attorneys General to avert prisoners' civil-rights lawsuits. But the focus of the recommendations is not simply on what correctional officials and Attorneys General can do to keep inmate lawsuits out of court. For if that were the only concern, officials' and researchers' creative energies could all be directed towards creating as many hurdles to effective litigation as possible to discourage prisoners from filing lawsuits.

Instead, the focus of the recommendations is on the development by correctional officials and Attorneys General of a comprehensive, cost-effective, front-end response to *pro se* prisoners' litigation. With cost-effectiveness in mind, the goal becomes not just to limit the costs incurred because of *pro se* prisoners' civil-rights suits; the goal also becomes to reap,

without the necessity of litigation, the potential benefits of those lawsuits discussed previously in Chapter 1 -- the vindication of constitutional rights, government accountability, the development of respect for the law, the promotion of inmate rehabilitation, and the safeguarding of institutional security and personal safety which ensues when prisoners are afforded a forum in which to express their grievances nonviolently and seek redress for perceived wrongs.

I. RECRUITMENT, TRAINING, AND MANAGEMENT PRACTICES

The amount of prisoners' civil-rights litigation is in part a function of who is hired to work within prisons, how well those individuals are trained, and how well they and the prisons in which they work are managed. While even the best-run prison systems will have prisoners who file civil-rights suits, the number of those lawsuits can still be limited and reduced by recruitment, training, and management practices.

About 80% of the Attorneys General who were surveyed during this project reported that they provide training about prisoners' rights to correctional officials in their state. Some of these Attorneys General, however, acknowledged that the training was provided sporadically. (If a prison has a high staff-turnover rate, sporadic training is especially problematic.) Others reported that the training was confined to certain correctional personnel, such as correctional administrators.

The survey responses from Legal Counsel for Departments of Corrections were somewhat more mixed. About half reported that those correctional officials who attend the training academy receive some training about prisoners' rights. Several of the Departments of Corrections, however, reported that no correctional officials receive training about prisoners' rights, and in one state, the department's Legal Counsel had no idea whether or not correctional officials were provided with such training.

Even where training about prisoners' rights is provided to correctional officials, however, that does not necessarily mean that the training program is an effective one. Components of an effective training program include:

- high-quality instructors and training materials;
- training-program content that includes prisoners' legal rights, why it is important to protect those rights, practical issues confronted when protecting those rights (such as how to extract a

resisting prisoner from his cell without using an unconstitutionally excessive amount of force), and how to act as a professional in the face of persons who may be crude, rude, and obnoxious;

- pre-service training;
- in-service training;
- communication mechanisms to provide updates on the law between training sessions;
- training of line staff as well as correctional administrators;
- specialized training for persons, such as disciplinary hearing officers, working in areas that are frequently the subject of lawsuits; and
- audits of the training program's efficacy.

In developing and monitoring training programs for correctional officials about prisoners' rights, Attorneys General and DOC Legal Counsel can and should ensure that the training programs contain these critical components. They can also make sure that the training programs are modified when the statistics about litigation discussed later in this chapter suggest the need for such changes.

The commitment to professionalism instilled through training can and should be reinforced by management practices. Management practices, including the promotion and discipline of correctional employees, can reinforce the bedrock principle that the prison system is run by a team of professionals, from the very top to the very bottom of the organization, who are committed to excellence in their work and to treating all prisoners, even those whom they most dislike, humanely and decently.

Sound prison management can also help to avoid lawsuits in some very concrete ways. A good prison manager will, for example, identify the areas of the prison's operations (or, in the case of the Director, the areas of the prison system's operations) where practices are "sloppy" and erratic. The good prison manager will then make the changes needed to improve operating effectiveness and efficiency. For example, one Department of Corrections which provided feedback during this study suggested that one of the best practical ways to reduce the number of *pro se* prisoners' lawsuits is to adopt a good system for controlling and accounting for inmate property, particularly when inmates are transferred. Another practical step that can be taken is to adopt policies and practices to ensure accuracy in

the computation of good-time credits, prison-release dates, and commissary funds, since errors in these and other bookkeeping functions frequently provoke lawsuits.

II. CONSTITUENT SERVICES OFFICES

The Constituent Services Office of the Missouri Department of Corrections

In January of 1994, Director Dora Schriro established the Constituent Services Office within the Missouri Department of Corrections. A Constituent Services Officer oversees the work of the Constituent Services Office. As the flow chart on the next page illustrates, the Constituent Services Officer reports directly to the Director.

The Constituent Services Office had, and still has, a twofold purpose: to reduce the number of prisoners' lawsuits filed against correctional officials and to improve the service rendered by the Department of Corrections to its "customers" -- prisoners, prisoners' families, legislators, the Governor's Office, advocacy groups, and others -- by identifying and then addressing the "root causes" of prisoners' legitimate complaints.[1] The latter purpose of the Constituent Services Office is not litigation-driven. In other words, whether or not Missouri prisoners filed lawsuits against correctional officials, the Constituent Services Office would be considered, in Missouri, to be a cornerstone of good correctional management.

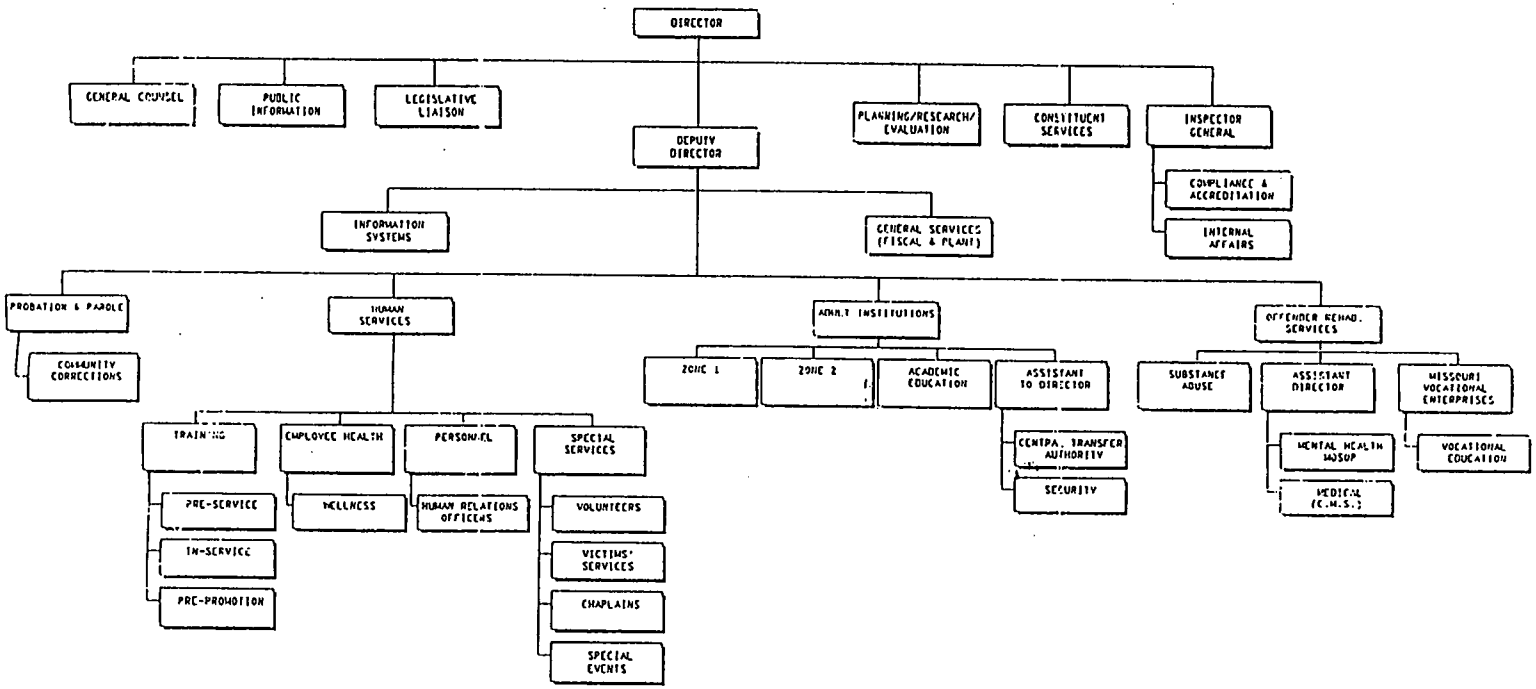
The Constituent Services Office has adopted a number of different mechanisms to further its purposes. Those mechanisms are described below.

1. Institutional Visits. On a regular basis, the Constituent Services Officer visits prisons within the state to listen to prisoners' concerns and respond to their questions. In 1996, for example, the Constituent Services Officer completed thirty-four such visits.[2] The Constituent Services Officer generally visits each prison in the state at least once a year, but she visits the three maximum-security prisons from which most prisoners' complaints, grievances, and lawsuits originate more frequently -- a total of twenty-one times in 1996.[3]

The Constituent Services Officer typically spends a half to a full day at each prison being visited. She makes separate trips to visit the segregation units at the state's maximum-security prisons where she spends about six hours listening and talking to the segregated prisoners.

During a site visit conducted as part of this project, the Constituent Services Officer was observed making the rounds through the Jefferson Correctional Center. As she walked through

MISSOURI DEPARTMENT OF CORRECTIONS



different sections of the prison, the Constituent Services Officer fielded a number of questions from prisoners and listened to their concerns. During the first twenty-five minutes of the visit, ten inmates posed questions to, or raised concerns with, the Constituent Services Officer. The exchanges with the prisoners were short, but informative -- for both the prisoners and the Constituent Services Officer. Many of the prisoners were given the information that they needed on the spot. If some additional fact-finding was needed or corrective action needed to be taken by the department, the prisoner was asked to send a note requesting information or assistance to the Constituent Services Office.

One purpose of the institutional visits is education. During the site visit, for example, many of the prisoners wanted to know when they could be transferred to a lower-security prison. The Constituent Services Officer would ask a prisoner a couple of quick questions about his disciplinary record and then tell him about the applicable departmental rules and how they affect him. The bottom line would be shared with the inmate: "You'll be here three more months." But the Constituent Services Officer would end the exchange on a positive note, reminding the prisoner that he could get the transfer that he wanted (out of the maximum-security prison) if he refrained from misconduct.

2. Correspondence and Telephone Calls. Institutional visits are not the only means through which prisoners communicate with the Constituent Services Office. Inmates also send letters and notes to the Constituent Services Office requesting information or assistance. As mentioned earlier, some of the letters are written in response to a request made by the Constituent Services Officer during an institutional visit.

Questions and problems are brought to the Constituent Service Officer's attention not only through letters from prisoners, but through letters and telephone calls from prisoners' family members and friends, legislators, the Governor's Office, advocacy groups, and other sources. In 1996, the Constituent Services Office registered a total of 5,288 "contacts," which are defined to include inquiries by telephone or in writing.[4] A third of the contacts came from prisoners, and a third came from their family members and friends. Those two groups accounted for 66% of the total contacts in 1996.[5]

Twenty percent of the contacts in that year came from legislators (1066 contacts); 10% were routed through the Governor's Office (532 contacts); 1.5% came from advocacy agencies (85 contacts); 1.5% came from other state agencies (66 contacts); and 1% came from miscellaneous sources (43 contacts).[6] Many of the contacts from these other individuals and entities involved requests for information or action prompted by

complaints received from prisoners, their family members, or their friends.

The contacts received by the Constituent Services Office cover a wide range of issues. In 1996, the largest number of contacts, as in previous years, concerned requests for transfer; 15% of the contacts concerned this subject. The second largest category of contacts concerned classification status (11.5%), and conduct violations were the focus of the third largest category of contacts (8%). Segregation assignments, harassment allegations, medical services, and visiting issues each accounted for between 6 to 8% of the contacts. Other issues raised (listed from highest to lowest frequency) concerned conditions of confinement, property, sentencing, probation and parole, legal and mail services, humanitarian requests (such as a request to attend a family member's funeral), recreation and education, use of force, mental-health care, religious issues, food service, and the sex-offender program.[7]

3. Inmate Councils. In order to obtain more formal and ongoing feedback from prisoners about departmental operations, the Director of the Missouri Department of Corrections has requested that each prison establish and operate an inmate council. The Constituent Services Officer participates in inmate council meetings as another way of hearing prisoners' concerns, communicating the reasons for departmental policies, procedures, and practices to prisoners, and identifying ways in which those policies, procedures, and practices can be improved.

Both inmates and staff participate in inmate council meetings. Inmates are rotated on and off the council on a regular basis to avoid problems with inmates becoming "power figures" who can exert a disproportionate amount of influence over other prisoners.[8] According to the Constituent Services Officer, there have thus far been no reported problems of council members using their temporary positions as council members to exert control over or manipulate other inmates.[9]

Inmate council meetings are held at prisons on at least a quarterly basis. The Constituent Services Officer attends some of these meetings and receives the minutes of all council meetings. In addition, the Director attends a council meeting at each prison once a year.

When these meetings or other sources of information reveal that the prisoners have a significant concern about some area of the prison's operation, the Constituent Services Office arranges a special council meeting or series of meetings in which those concerns can be addressed by the appropriate staff members. For example, the Director of the Division of Human Services, who serves as the department's coordinator for the Americans with Disabilities Act, met with paraplegic inmates at one prison to

discuss the Act. Changes were then made by the department to rectify problems highlighted by the prisoners. The changes included making it easier for inmates in wheelchairs to gain access to toilets and changing the length of the tubes leading into colostomy bags.

Other special council meetings have included one in which the department's Food Service Coordinator addressed prisoners' concerns about food service; one in which the Inmate Finance Officer discussed banking procedures involving inmates; and one in which the Director of the Division of Offender Rehabilitation Services discussed vocational-training opportunities for prisoners.

Because a large number of prisoners' lawsuits, grievances, and contacts with the Constituent Services Office concern medical care, the Constituent Services Office has established, at two of the state's prisons, special medical councils which meet four times a year. During a site visit, a meeting of the medical council at the Jefferson Correctional Center was observed. Twenty-one people participated in the meeting -- ten inmates, the prison superintendent (warden), the department's Chief of Medical Services, the department's Chief of Mental Health, the prison's Medical Administrator, the Director of Nursing at the prison, the Constituent Services Officer, and five persons who work for Correctional Medical Services, a private company which has contracted to provide medical services to Missouri prisoners -- the Regional Medical Director, the Regional Manager, the Regional Administrator, the Statewide Director of Nursing, and the Chief of Dental Services.

Before a medical-council meeting, the inmate representatives consult with prisoners in their unit to identify questions and concerns about the medical care provided at the prison. The inmate representatives then meet as a group to identify ten to twelve issues that should be addressed by the council at its next meeting. The meeting agenda, which is prepared by the prisoners, is then circulated to staff members on the council so that the agenda items can be researched before the council meeting.

Each inmate council at the Jefferson Correctional Center (there is one council in each of the five units) selects two inmate representatives to serve on the medical council.[10] Many of the inmates selected have special medical needs themselves, making them well-versed in how the medical-care system works and, at times, doesn't work. But the inmate representatives are reminded in a memorandum sent to them before the meeting, and verbally at the meeting's outset, that the council meeting is not the forum in which to discuss issues concerning their own medical care.

The meetings of the medical council are scheduled to last one hour. From experience, the Constituent Services Officer has learned that longer meetings tend to "go downhill," with the discussion becoming less focused and less effective in identifying and resolving problems in the medical-care system.

Officially, there is no chairperson of the council in order to reinforce the understanding that the meeting is bringing together stakeholders who are equals in terms of their shared interest in improving the delivery of health-care services within the prison. The Constituent Services Officer serves as the meeting "hostess," ensuring, for example, that appropriate introductions are made. In addition, before the meeting, the Constituent Services Officer appoints an inmate representative to serve as the "inmate coordinator" or "facilitator." One responsibility of the inmate coordinator is to keep the prisoners on track during discussions of agenda items and to keep the meeting moving along so that all agenda items can be thoroughly discussed. By using a prisoner to perform this function, the resentment that might ensue if the inmate representatives felt they were being rushed by staff members during the meeting is avoided.

The medical-council meetings serve both an educational and a problem-solving function. Many times, inmate concerns are allayed and addressed by simply educating them about health problems and medical care. For example, during the medical-council meeting observed during this project, a concern was expressed that inmates with diabetes sometimes have to wait fifteen minutes in the outpatient clinic for their scheduled insulin injections. The medical-unit administrator informed the inmate representatives that there is a one-hour time frame during which it is acceptable to administer the insulin -- thirty minutes before or after the scheduled injection. The medical-unit administrator also explained to the inmates that sometimes the need to attend to an emergency patient causes a short delay in the administration of the insulin.

An example of the problem solving that occurs during a medical-council meeting could be seen in the discussion of first-aid boxes at the observed council meeting. One of the prisoners reported that the first-aid boxes were not being properly stocked and maintained. Another reported that the first-aid box was missing in one unit of the prison. The Constituent Services Officer responded by assuring the inmate that the missing first-aid box would be replaced that very day.

In addition, decisions were made at the meeting to prevent similar problems from recurring. An updated list of medical supplies would be put in each first-aid box, and housing staff would be instructed to return the boxes to the medical department when they needed restocking. As an additional check, the fire

and safety staff would regularly inspect the boxes in the future to make sure that they were fully stocked. And finally, the inmates were given the name of the staff person to apprise if problems with the stocking of the first-aid boxes persisted.

A medical-council meeting, by design, always ends on a positive note. The Constituent Services Officer asks each inmate representative to share one positive observation about the medical-care system. The ostensible purpose of this practice is to let the medical staff know what they're doing well so that those practices are not changed. But another purpose of this tradition, according to the Constituent Services Officer, is to maintain staff morale in the face of the negative, though generally constructive, comments heard about the medical-care system during the council meeting.

After a medical-council meeting, minutes are prepared by Correctional Medical Systems. The minutes are then circulated to the inmate representatives, the DOC contract monitor, and the Constituent Services Officer for comments. After appropriate revisions have been made, the minutes, which recount the information shared at the meeting and the steps that will be taken to address the inmates' concerns about medical care, are posted on all inmate bulletin boards. In addition, the prison's Medical Administrator reviews the minutes with all medical staff who work in the prison.

4. Special Projects. The input received by the Constituent Services Office from institutional visits, inmate council meetings, telephone calls, and letters leads to special projects designed to rectify problems uncovered in the department's policies, procedures, and practices. For example, when the Constituent Services Office first began operating, the Constituent Services Officer noted a large number of complaints coming from prisoners, their family members, and their friends about visiting procedures. As a result, the Constituent Services Officer assembled a department-wide Inmate Visiting Task Force to review the department's visiting procedures.

The task force's investigation revealed two main problems with the visiting procedures. First, many of the prisoners and their visitors were unaware of the rules governing visitation, such as the dress code for visitors and limitations on the infant and medical supplies that could be brought into the visiting room.

Second, the visitation procedures varied dramatically from prison to prison, with no sound reason for those variations. These variations led to confusion amongst prisoners and their prospective visitors and fueled resentment and complaints because of perceived erratic treatment by correctional officials. For example, one prisoner, whose mother had traveled two hundred

miles to visit her son, was turned away from a visit because her dress was two inches above her knee. At the prison where her son had previously been incarcerated, however, females with dresses of that length were permitted to visit with prisoners.

The Inmate Visiting Task Force, which was chaired by the Constituent Services Officer, initiated several changes to redress the problems found in the department's visiting procedures. Visiting policies were changed to make them uniform in prisons across the state. In addition, a handbook was prepared to apprise prisoners' visitors of the rules governing visitation. The handbook also contains the answers to questions that family members and friends frequently have about other prison rules, programs, and operations.

The way in which the changes in departmental operations were effectuated in response to the problems concerning visiting procedures uncovered through feedback received by the Constituent Services Office is noteworthy. The department's visiting policies and procedures were only changed after all of the prisons had been surveyed about their policies and procedures and after draft policies and procedures were reviewed by prison superintendents and inmate councils for comments and proposed revisions. A similar outreach effort was undertaken when the handbook for family members and friends was drafted; extensive feedback was obtained from inmate councils, family members, and correctional staff about the information that needed to be included in the handbook.

Program Advantages

Interviews with the Director of the Missouri Department of Corrections, the superintendent at the Jefferson Correctional Center, the Constituent Services Officer, other DOC staff, prisoners, and staff from the Governor's Office, as well as other information collected before, during, and after the site visit, revealed many benefits that have accrued to the Missouri Department of Corrections from the establishment of the Constituent Services Office. Some of those benefits are set forth below.

1. Improved Departmental Operations. Although, as is discussed below, a Constituent Services Office may decrease the number of civil-rights lawsuits filed by prisoners, a more fundamental reason for establishing a Constituent Services Office within a Department of Corrections, and the reason why the Office was established within the Missouri Department of Corrections, is to improve the operations of the department. For the purpose of a Constituent Services Office is not simply to respond to the individual complaints of prisoners, their families, and their friends. The larger purpose of the Constituent Services Office

is to identify the root causes of those complaints and the areas where remedial action needs to be taken by the department.

In describing the function of the Constituent Services Office, the Director observed: "What we are looking for is whether there is a legitimate basis for concern, even in a bogus complaint." In doing so, the Constituent Services Office fills in a gap that prison grievance procedures and court litigation leave open. If, for example, the prisoner mentioned earlier filed a grievance because his mother, who had traveled two hundred miles to visit him, was refused entry into the prison because her dress was too short, the grievance would be denied because prison rules forbade her entry. And if the prisoner filed a lawsuit because of the denied visit, the court would summarily dismiss the complaint because, from a legal perspective, it is frivolous. Neither the prison grievance mechanism nor the legal system would address the prisoner's legitimate concerns and the underlying problems with the department's operations. So problems with, and complaints about, visiting policies and procedures would continue.

2. Averted Lawsuits. The Assistant Director for Medical Services within the Missouri Department of Corrections observed during an interview that one advantage of the Constituent Services Office is that "it deals with issues while they are still issues." The Assistant Director noted that the problems addressed by the Constituent Services Office would have to be dealt with at some time -- either sooner or later. And to this administrator, as well as everyone else with whom the Constituent Services Office was discussed during the site visit, it was basic common sense to address these problems head on and early on rather than waiting for them to wind their way through time-consuming and expensive grievance and litigation processes which still might not lead to the problems being adequately addressed.

Since the institution of the Constituent Services Office, the number of civil-rights lawsuits filed by Missouri prisoners has decreased, even though the size of the prison population has increased substantially. Between 1993 (the year before the Constituent Services Office was established) and 1996, the number of state prisoners' civil-rights suits filed in the federal courts in Missouri decreased 39%.[11] Yet during this same time period, the number of Missouri prisoners increased 33%.[12]

When looking at the statistics from 1993 to 1995 (in order to guard against any potential effects of the Prison Litigation Reform Act, which went into effect on April 26, 1996), the same pattern emerges. The number of civil-rights suits filed by state prisoners in federal court declined during a time when the number of state prisoners increased significantly. During that time period, the number of civil-rights lawsuits filed by state

prisoners in federal court in Missouri decreased over 7%,[13] while the prison population increased 18%.[14]

Because a number of variables can affect litigation rates, however, the decline in the number of civil-rights lawsuits filed by Missouri prisoners cannot be definitively attributed to the work of the Constituent Services Office. Other changes have occurred within the Missouri Department of Corrections in recent years that may have contributed to the decline in lawsuits. For example, in 1992, the department's grievance procedures were certified under the Civil Rights of Institutionalized Persons Act. And in the same year, the medical-care system, which had spawned many inmate lawsuits, was privatized, leading to improvements, according to department administrators, in the quality of the medical services provided to the inmates.

3. Efficiency. One of the marked and frequently mentioned benefits of the Constituent Services Office is the increased efficiency in the handling of questions and concerns of prisoners, their family members, and friends. As the Director observed during an interview, prisoners often take a "buckshot approach" when they have a complaint. They will contact the Governor's Office, several legislators, and numerous officials within the Department of Corrections. Before the Constituent Services Office was established, each one of the individuals whom a prisoner contacted for help spent a lot of time trying to track down information so that the prisoner's complaint could be responded to. And often, the responses received by the prisoner were inconsistent, with one person saying prison officials would do one thing in response to the prisoner's complaint and another person saying the department would do something else.

Now, the Governor's Office, legislators, and others funnel complaints they receive from prisoners, their family members, and friends to the Constituent Services Office. The Constituent Services Office responds in writing to the prisoner, after any necessary investigation, and sends a copy of the response to the Governor's Office, the legislator, or whomever brought the prisoner's complaint to the Constituent Services Office's attention. The end result of this clearinghouse function performed by the Constituent Services Office is, in the Director's words, "terrific efficiency." The duplication and miscommunication that previously occurred when responding to prisoners' complaints and those of prisoners' family members and friends have been eliminated.

4. Legislative Support and Support of the Governor's Office. According to top administrators within the Missouri Department of Corrections, the Constituent Services Office has given the department added credibility with legislators and the Governor's Office, helping the department to get the support needed to make other changes in the correctional system. That

support is, in part, a byproduct of having repeatedly observed the demonstrated responsiveness of the Constituent Services Office and, in turn, the Department of Corrections, on a whole range of issues. From that responsiveness and the commitment to problem solving evidenced by the work of the Constituent Services Officer, a relationship of trust has developed between the Director and both the legislature and the Governor. When the Director goes to the legislature with recommendations, that foundation of trust facilitates legislative support of those recommendations.

Another way in which the Constituent Services Office has helped to solidify the support of the legislature and the Governor's Office for departmental initiatives is through educational outreach efforts. The biannual reports of the Constituent Services Office are sent to the Governor's Office, and now, to all legislators. In addition, the Constituent Services Office arranges for members of the Governor's staff and legislators to tour the prisons so that they can gain a better understanding of the problems faced by the department.

Finally, the Constituent Services Office helps the Department of Corrections garner support from the Governor's Office and legislators simply by making their jobs easier. For example, 15 to 20% of the correspondence and calls received by the Governor's Office come from prisoners' family members and friends, as well as from prisoners themselves. These calls and correspondence can now simply be sent over to the Constituent Services Office for a response.

5. Institutional Security. Several correctional officials interviewed during the site visit stated that the Constituent Services Office has safety and security benefits. Once again, it would be difficult to validate this claim empirically because of the number of other factors, such as prisoners' profiles, the degree of crowding, the training and professionalism of the staff, and management practices, that can affect the amount of violence within a prison.

There are at least three ways in which a Constituent Services Office can yield safety and security benefits. First, as mentioned earlier, a Constituent Services Office can lead to a better-run prison system. And a better-run prison system is a safer system because its prisoners are less tense, less frustrated, and less angry.

Second, a Constituent Services Office provides prisoners with an outlet in which they can obtain meaningful review of their complaints without resorting to violence. In short, the Constituent Services Office offers prisoners a place where they can constructively "let off steam."

And third, the Constituent Services Office provides prisoners with a model for dispute resolution, performing a function which the Director of the Missouri Department of Corrections considers particularly important. In discussing the role of the Constituent Services Officer, one inmate observed during the site visit, "She's there for us if it's a legitimate problem." A staff member from the Governor's Office noted, "She'll go to bat for inmates if they have been unfairly treated." And the Constituent Services Officer underscored, "If I think staff has done wrong, I'll pursue it to my dead-dog days."[15] By observing the work and commitment of the Constituent Services Office, prisoners can see the value of, and the benefits reaped by, expressing their complaints nonantagonistically.

6. Humanitarian. One of the benefits of the Constituent Services Office is that it brings a humanitarian focus to the Department of Corrections. As the Constituent Services Officer observed, "The Constituent Services Office shows that the department can be human." The Office also shows that the department can be humane, instead of coldly bureaucratic.

One of the underpinnings of the Constituent Services Office is its commitment to providing high-quality "customer service" to the family members and friends of prisoners. Undergirding this commitment is a sensitivity towards the plight and suffering of family members and friends, who often tend to be the forgotten victims of offenders' crimes. This sensitivity is reflected in the Director's charge to the Constituent Services Office to "respond to complaints or concerns raised by family members, inmates, inmate councils, advisory agencies, legislators, the governor's constituent staff, and any individual with an interest in the Department's operations. ANYONE NO ONE ELSE WANTED TO TALK TO." Many of the family members of prisoners who have called the Constituent Services Office for information or assistance have expressed relief at, and gratitude for, having found someone who would, in their words, "really listen" to them.

Key Ingredients of a Successful Constituent Services Office

Certain requirements must be met in order for the above benefits of a Constituent Services Office to be realized. The key ingredients to a successful Constituent Services Office, which were identified through interviews with prisoners, departmental staff, and staff from the Governor's Office and observations made during the site visit, are set forth below.

1. Accessibility and Visibility. In order for a Constituent Services Office to perform its problem-solving function, a Constituent Services Officer needs to be readily accessible, not only to prisoners, but to others who turn to the Constituent Services Office for information or assistance. But more than just accessibility is needed; the Constituent Services

Officer must also be visible to, and frequently seen by, prisoners and staff within the prisons. Through the face-to-face contact that comes during institutional visits and attendance at inmate council meetings, inmates come to know the Constituent Services Officer, to understand her commitment to accuracy and fairness, and to trust her.

2. Responsiveness. The fact that staff of a Constituent Services Office are accessible and visible achieves little unless the Constituent Services Office is also responsive. Being responsive does not necessarily mean giving a prisoner what he or she wants. In fact, the Constituent Services Officer in Missouri reported that she has to say "no" to the majority of prisoners' requests. But being responsive means promptly and accurately responding to requests for information or help, explaining the reasons why what an inmate or someone else wants done sometimes cannot be done, and taking remedial action when something can be done to redress a problem.

The willingness to take remedial action where warranted is a hallmark of a successful Constituent Services Office. As the Constituent Services Officer in Missouri observed, "If we lose a prisoner's property and fail to compensate the prisoner for that loss, we lose credibility with that inmate."

Often, the appropriate remedial action will not take the form of direct compensation to the aggrieved prisoner, family member, or friend. In the case of the prisoner whose mother traveled two hundred miles to see him only to be turned away at the prison gate, for example, the Department of Corrections, it was felt, could not reimburse the mother for her transportation expenses since she was denied entry in accordance with prison rules. But the department could and did, through the Constituent Services Office, apologize and take steps to change departmental policies and procedures to avoid future misunderstandings about visiting rules.

Procedures need to be put in place in a Constituent Services Office to ensure that the follow-up so necessary to the effective functioning of the Constituent Services Office occurs. The Constituent Services Officer in the Missouri Department of Corrections responds to every letter she receives from prisoners and others, and she uses a constituent log and a tickler file to ensure that those responses are made and are timely.

3. Authority/Full Support of the Director. In order to accomplish its objectives, a Constituent Services Office must have the power to effect change and have the full support of the Director. In Missouri, the fact that the Constituent Services Officer reports directly to the Director has, in the words of one top administrator, given her "a mantle of authority. If you hear from her, it means something." Another prison administrator who

was interviewed during the site visit noted that the Constituent Services Officer has had a positive effect on the inmates since they know that she reports to the Director. And still another staff member, who supervises a drug-treatment unit within one of the prisons, confirmed that the Constituent Services Officer "has the power to take care of problems."

A superintendent interviewed during the site visit observed that because of the Constituent Services Office, there is now more pressure on superintendents to address, rather than ignore, problems within their institutions. The Constituent Services Officer in Missouri, however, works very hard with staff to resolve problems and rarely has to exercise her prerogative to go directly to the Director to deal with a recalcitrant staff member. She also, as a matter of course, always goes to a staff member against whom a complaint has been lodged to get his or her response so that the Constituent Services Office's handling of the matter actually is, and is perceived to be, balanced and fair.

4. Personality, Knowledge, and Skills. It was evident from observations made, and feedback received, during the site visit to the Missouri Department of Corrections that the personality, knowledge, and skills of Constituent Services Officers are critical to the success of a Constituent Services Office. Listed below are attributes of a Constituent Services Officer considered essential to a successful program:

- Listening skills
- Communication skills
- Honesty and integrity
- An in-depth knowledge and understanding of departmental policies and procedures
- Open-minded
- Patience
- Perseverance
- Handles stress well
- Can work well with persons with all types of personalities
- Polite
- Down to earth

- Has versatile computer skills and the know-how to readily access DOC databases

One question concerning the credentials of the Constituent Services Officer is whether it is best for a Constituent Services Officer to come from within or outside the Department of Corrections. The consensus of those with whom this question was discussed during the site visit was that it is best for the Constituent Services Officer to be recruited from within the department. One superintendent, for example, observed that the staff would have been very resistant to the work of the Constituent Services Officer had she come from outside the system. And the Constituent Services Officer noted the need to know the corrections system "inside and out" in order to appropriately respond to questions and concerns and to effect changes within the department.

While the Constituent Services Officer must be thoroughly conversant with departmental policies and procedures to be effective, the Constituent Services Officer must not, in the words of one staff member, be "hardened" to those policies and procedures. In other words, the Constituent Services Officer must be the type of person who can see problems that others may have become acclimated to and be the type of person who is able and willing to find solutions to those problems.

5. Communication and Education Mechanisms. To cost-effectively avert and respond to prisoners' concerns, a Constituent Services Office must have access to a variety of communication and education mechanisms. For example, the Constituent Services Office in Missouri uses a newsletter sent to prisoners by the department's Public Information Office to address questions that have been raised frequently by prisoners and to respond to rumors that are causing unrest within the prison population. Other communication tools include the videocable station in some prisons and the inmate council meeting minutes that are posted on inmate bulletin boards.

A structure also needs to be in place to ensure that information flows both to and from the Constituent Services Office and other key constituencies. Those key constituencies include the Director, correctional staff, the Governor's Office, and the legislature. This information flow serves multiple purposes: ensuring that the Constituent Services Office is kept apprised of problems and events within the department that are likely to spawn inmate complaints; ensuring that departmental staff understand the functions and benefits of the Constituent Services Office; and ensuring that key constituencies support the work of the Constituent Services Office.

6. Training. Training of Constituent Services Officers is essential if they are to succeed in the difficult and delicate

task of serving as an effective advocate for both the Department of Corrections and prisoners. Other persons who play important roles in the work of a Constituent Services Office, however, also need to receive some formal training.

As was mentioned earlier, during the site visit an inmate medical council meeting was observed at the Jefferson Correctional Center. The meeting was extraordinarily productive and impressive in terms of the level of communication between the staff and the prisoners, the education of prisoners and staff that occurred during the meeting, and the problem solving which took place.

Another inmate council meeting observed at another prison, however, was disappointing by comparison. One staff member seemed indifferent to the prisoners, and the prisoners did not seem fully prepared to bring other prisoners' concerns to the attention of the council. Through the training of staff and inmate council members, an inmate council will be more likely to serve its educational and problem-solving functions.

7. Resources. An effective Constituent Services Office, like any other effective correctional program, needs adequate resources to support its work. The Missouri Department of Corrections budgeted $58,356 for the Constituent Services Office for fiscal year 1997. This sum includes the salaries of both the Constituent Services Officer and a clerk typist.

The number of staff needed to effectively run a Constituent Services Office will, of course, vary. The size of the state's prison population will, for example, affect staffing needs. In a state with a very small prisoner population, such as North Dakota, which had 640 prisoners in mid-1996,[16] the staff member who serves as the Constituent Services Officer might perform other duties as well.

In a state with a larger prison population, however, staffing needs will be greater. While the Missouri Department of Corrections had a prisoner population of over 22,000 inmates as of February 1997, however, it has only one Constituent Services Officer. Top administrators and the Governor's staff recognize though that the resources devoted to the Office are stretched too thin. Adding additional Constituent Services Officers could facilitate collaborative problem solving, help to avoid the burnout that can otherwise occur in such a highly stressful job, and free up the Chief Constituent Services Officer to do more training and to address problems in prison "hot spots."

Operating a larger Constituent Services Office does not necessarily mean that a state needs to have a Constituent Services Officer in every prison in order for the Office to work effectively. In fact, having a Constituent Services Officer in

every prison might arguably impede the work of the Constituent Services Office if prisoners came to view the Constituent Services Officer, not as the Director's surrogate, but as a part of an entrenched prison bureaucracy.

A regional approach, under which Constituent Services Officers are assigned to different regions in the state, could, if constructed properly, probably work well in some of the states with larger prison populations and be cost-effective. The number of Constituent Services Officers needed would depend on the size of the state and the number and types of prisons within the state. But great care would have to be taken when expanding the size of a Constituent Services Office to ensure that the Chief Constituent Services Officer does not become isolated from prisoners and that he or she continues to regularly visit the prisons and attend inmate council meetings.

8. Evaluation and Statistics Gathering. In order to ensure that the Constituent Services Office is meeting its objectives and operating effectively, its operations and its effects need to be evaluated regularly, at least on an annual basis. Part of this evaluation should include an assessment of the effects of the Constituent Services Office on the types of inmate concerns that are prompting the most grievances and lawsuits and the effects on the number of grievances and lawsuits being filed by inmates confined in the prisons from which grievances and lawsuits most frequently originate. The Constituent Services Office can then target identified areas and prisons for additional outreach by the Constituent Services Office.

The Challenges Faced in Incorporating a Constituent Services Office into a Department of Corrections

Because of the many benefits of a Constituent Services Office and the fact that its purposes of solving problems and educating inmates seem to make such basic common sense, the question arises as to why a Constituent Services Office isn't already an integral component of every Department of Corrections. When asked this question, the Director of the Missouri Department of Corrections described the attitude which prevails in many Departments of Corrections: "We're doing a good job, and we have formal mechanisms in place (grievance procedures). If you don't think so, sue me."

The Director of Nursing, in a separate interview, observed that many correctional officials have the mind-set that "you can't learn from inmates." To the contrary, she noted, inmates can be, and often are, truthful and informative.

Getting a Constituent Services Office up and running therefore presents special challenges because part of what it is doing, as described by the Director, is "culture busting" or

"culture creating." That these challenges can be faced successfully though is evident from the experience of the Missouri Department of Corrections. According to the Governor's staff, the Governor is so impressed with the work of the Constituent Services Office in the Missouri Department of Corrections that he would like to establish a Constituent Services Office in all other state agencies and departments.

Another obstacle to the establishment of a Constituent Services Office may come from misperceptions about the role and functions of the Office. First, some correctional officials might be concerned that the Constituent Services Office will handle problems that should be handled and resolved by administrators and staff at a particular prison. One of the premises underlying this concern is a sound one -- that prison administrators and line staff should be actively involved in solving problems that impede the effective, safe, and efficient operations of a prison and that can culminate in litigation. The establishment of a Constituent Services Office does not negate the need for good correctional management at the local level.

Part of what a Constituent Services Office brings, however, to a Department of Corrections is a different level and type of problem solving. Because of its channeling function, the Constituent Services Office will see core areas of concern that have implications department-wide. These areas of concern, such as the visiting policies and procedures of the Missouri Department of Corrections discussed earlier, can often only be addressed effectively through changes in policies and procedures at the departmental level. It is important to reiterate though that the Constituent Services Office in the Missouri Department of Corrections works extensively with prison administrators when developing ways in which to address these core concerns about prison operations.

Some correctional officials might also be concerned that a Constituent Services Office will somehow inappropriately undermine the functioning of the grievance system. That has not been the case in Missouri, according to the Director of the Department of Corrections. For one, the Constituent Services Office generally funnels site-specific complaints, such as an inmate's complaint about lost property, back to the appropriate prison official and then works with that official to ensure that the problem, if one exists, is resolved. In this way, the work of the Constituent Services Office is consistent with the informal dispute resolution that can occur during the beginning stages of many grievance proceedings.[17]

As to the interrelationship between a Constituent Services Office and formal grievance proceedings, the Director of the Missouri Department of Corrections reported that the Constituent Services Office, in two ways, fills in gaps in those proceedings.

First, problems will at times not come to the attention of correctional authorities through the grievance process because of the technical requirements of that process. An inmate may, for example, not be able to file a grievance because the time period for filing the grievance has passed. Yet the problem about which the inmate has a complaint may be one of which correctional authorities should be made aware and attempt to remedy.

Second, the Director emphasized that grievance systems are not designed to identify and analyze the issues underlying prisoners' specific grievances, nor to remediate the underlying causes of those grievances. The way in which the Constituent Services Office responded to the large numbers of complaints regarding medical care that were being processed by the Office provides a contrasting example of how the Constituent Services Office performs these functions. The Office analyzed correspondence and initiated focus groups to determine what factors were driving these complaints about medical care. What the Office found was that many of the complaints were not due to anything medical personnel were actually doing wrong, but to the perception of the inmates that medical personnel were mishandling their care. For example, it was determined that inmates felt that every death of an inmate while incarcerated in prison was avoidable and was due to poor medical care.

In response to these findings, the Constituent Services Office initiated a number of remedial measures, including educational outreach to prisoners about health care. In addition, the Department of Corrections instituted a Peer Mortality Review Board to evaluate each death of a prisoner and, where necessary, make recommendations, The result of these and other remedial measures has been a drop in the rate with which prisoners in Missouri are filing formal grievances about medical care -- from 4.1 per every 100 inmates in 1993 to 2.9 per every 100 inmates in 1996.[18] In addition, the number of contacts to the Constituent Services Office about medical care dropped 15% between 1995 and 1996.[19]

The final potential objection that might be raised against establishing a Constituent Services Office within a Department of Corrections is cost. Some correctional officials might question why money should be spent establishing what they perceive to be a new bureaucracy at a time when they are being forced, due to budgetary considerations, to reduce costs.

The response of the Director of the Missouri Department of Corrections to a question about this concern was that a Constituent Services Office actually helps to streamline departmental operations and thereby saves money. Whether or not there is a Constituent Services Office in a Department of Corrections, human capital will be expended as the department processes complaints from prisoners, their families and friends,

legislators, and others. But without a Constituent Services Office, there will often be costly duplication of effort in the handling of these complaints and sometimes inconsistent responses coming from the department. In addition, without the problem-solving initiatives undertaken by the Constituent Services Office in response to insights gained through its clearinghouse function, the underlying causes of those complaints will often go unaddressed. The costs of processing the complaints, and the grievances and lawsuits that stem from them, will then continue to be incurred.

III. STATISTICS GATHERING AND EVALUATION

In order to avert civil-rights lawsuits, correctional officials and Attorneys General need to collect and evaluate some basic information about the lawsuits actually being filed. In particular, statistics need to be gathered each year on the types of claims filed by the prisoners (e.g., medical care, use of force by correctional officers, lost or damaged property, and religious freedom) and the prisons from which those claims originated.

By reviewing tables prepared each year, correctional officials and Attorneys General can then quickly identify litigation "hot spots" -- the prisons from which most lawsuits are originating and the most common types of complaints of the prisoners in each prison. Comparing statistics from the different prisons and trend information by prison and by category of complaint over time can provide additional insights about the prisons and types of prison operations upon which proactive measures to avert litigation should be directed. For example, a significant increase in the number of claims regarding medical care coming out of a particular prison may point to the need to make changes in that prison's system for delivering medical care.

The surveys of correctional officials and Attorneys General conducted during this project revealed that many states are not collecting the basic statistics needed to effectively target prisons for proactive measures designed to avert litigation. More than half of the Attorneys General and DOC Legal Counsel who were surveyed reported that their offices neither collect nor receive information each year regarding the number of prisoners' civil (nonhabeas) suits filed in federal court which originated from each state prison nor similar information for lawsuits filed in state court. And slightly less than half of those surveyed reported that the Department of Corrections and Attorney General's Office do not collect or receive a breakdown of prisoners' civil suits filed in federal court by type of claim; slightly more than half reported that they do not receive this information for civil suits filed in state court.

Even examining statistics drawn only from cases in which the defendants were served with process will, it should be noted, provide an incomplete picture of prisoners' civil-rights lawsuits and trends involving those lawsuits. As mentioned earlier in Chapter 1, many prisoners' civil-rights complaints are never filed or, if filed, are never served on the defendants because courts have determined that they are frivolous. In addition, under the Prison Litigation Reform Act, courts can now *sua sponte* dismiss complaints before or after they are docketed that fail to state a claim for which relief can be granted.[20]

But just because a complaint is nonmeritorious from a legal perspective does not mean that the complaint is irrelevant to those attempting to assess, from litigation statistics, whether there are areas of a prison's operations that need to be changed and improved. And by making these changes, future lawsuits may be avoided. Courts, as well as correctional officials and Attorneys General, will benefit from lawsuits avoided through proactive measures taken by correctional officials and Attorneys General. Therefore, it would be advisable for court officials, correctional officials, and the Attorney General in a state to meet to discuss data collection that can reduce the costs of *pro se* inmate litigation. Those discussions can include the collection and dissemination of data about all prisoners' civil-rights complaints lodged with the court, whether or not they are filed or served on the defendants.

The system put in place to obtain the data to facilitate proactive measures to avert litigation need not be elaborate. The court, correctional officials, and the Attorney General, for example, might decide that the most cost-effective means of implementing this data-collection effort is to have the court send the Attorney General or the Department of Corrections a copy of prisoners' civil-rights complaints that are dismissed, or at least those that are dismissed before service of process. From these complaints and their own records of other complaints, the Attorney General or the Department of Corrections could then compile the statistics needed to target proactive measures so that they curb litigation effectively.

It should be emphasized that Departments of Corrections and Attorneys General would need to do more than set up mechanisms to collect and compile the data highlighted above. They would also need to evaluate and use the data to identify steps that can be taken to avoid litigation in the future. Collecting the data without the necessary evaluation and follow-up would be, in short, useless.

IV. REVIEW OF POLICIES, PRACTICES, AND PROCEDURES FOR CONSTITUTIONAL COMPLIANCE

Another means by which correctional officials and Attorneys General can avert lawsuits is by reviewing correctional policies, at both the departmental and institutional level, to ensure that they meet legal requirements. In addition, correctional attorneys can help to draft policies that will help to ensure that prisoners' constitutional and other rights are protected.

Just because policies are devised, however, to meet and implement the requirements of the law does not mean that those requirements are actually being met. Only through thorough and well-constructed audits can it be determined whether prisons' conditions and operations meet the requirements of the law.

Currently, neither attorneys from within or outside most Departments of Corrections in the states surveyed during this project are conducting audits, not prompted by a pending lawsuit, of prisons to determine whether conditions, practices, and procedures in the prisons meet constitutional and other legal requirements. Almost 90% of the Attorneys General surveyed said that they did not conduct such audits or inspections. In addition, about 70% of the Departments of Corrections said that no attorneys from within or outside the department conduct constitutional-compliance audits of state prisons.

Such direct involvement of attorneys in the auditing process may or may not be necessary to adequately ensure that conditions and operations at each prison comply with constitutional requirements.[21] Departments of Corrections already typically have correctional professionals who are not attorneys conduct periodic audits at prisons in their state. These auditing processes might be refined to increase the involvement of attorneys in the structuring of those audits and the review of audit findings. The purpose of these changes would be to help ensure that constitutional and other violations of the law are detected and remedied.

Departments of Corrections might want to also consider instituting pilot projects to determine which of several different auditing mechanisms are most effective in uncovering and remedying violations of the law. One possible pilot project would examine the effects of including an attorney from the Department of Corrections or the Attorney General's Office on the audit team at those prisons generating the largest number of lawsuits.

Another potential pilot project would examine the effects of periodically utilizing, at certain prisons, a specialized audit team comprised of lawyers with expertise in correctional law. Preferably, this audit team would be drawn from both within and

outside the Department of Corrections. One team member could be a staff attorney who works for the Department of Corrections. Another could come from the Attorney General's Office since the Attorney General will often bear a large part of the burden of defending against civil-rights lawsuits that might have been averted through a rigorous auditing process. To ensure that the problems that may spark litigation are not overlooked during the constitutional-compliance assessment, the third audit team member could be an expert in correctional law from a law school, university, or college, a prisoners' rights advocate, or some other qualified and independent lawyer who will contribute to the objectivity of the assessment process.

Constitutional-compliance audits and audits that have a constitutional-compliance component will themselves be of little value unless there is appropriate follow-up to audit recommendations. Part of that follow-up process might include formal monitoring by a DOC staff attorney or the Attorney General of the steps taken to rectify constitutional violations unearthed during the audit.

V. POST-LITIGATION FEEDBACK

In order to forestall future lawsuits, the Wisconsin Attorney General has adopted the commendable practice of sending a close-out letter prepared by the attorney who handled the case to the Department of Corrections when a prisoner's civil-rights case is closed.[22] The letter apprises the Department of Corrections of the case's outcome and advises the department whether any changes are needed in departmental operations in order to comply with the law.

It would probably be advisable to send a copy of such a close-out letter to the Director, the Chief Legal Counsel for the Department of Corrections, and the Chief Constituent Services Officer. Because of the clearinghouse function served by the Constituent Services Office, the Constituent Services Officer may be in the best position to assess whether operational changes need to be made in light of claims in complaints that were not legally meritorious but which, when considered in conjunction with complaints received from other sources, point to problems in departmental operations.

VI. GRIEVANCE PROCEDURES

As was mentioned earlier in this chapter, running a well-managed correctional facility with a professional and well-trained staff committed to solving, rather than ignoring, problems is the first and most fundamental step that correctional officials can take to avert the filing of civil-rights suits by

prisoners. A Constituent Services Office is a backstop, though an important one, which, if functioning properly, will resolve problems that go undetected or unresolved by staff, particularly systemic problems uncovered through the Office's clearinghouse function.

Another backstop is the correctional department's grievance system. The important role that the grievance system can play in resolving problems that may otherwise culminate in the filing of lawsuits was underscored by a magistrate judge, who wrote in a survey response: "I believe the single most effective step [that correctional administrators can take to decrease the burdens of *pro se* inmate litigation] would be for correctional administrators to develop meaningful grievance procedures, conducted by individuals who are as independent as possible, and are compassionate and creative." This view about the value of an effective grievance mechanism in averting litigation was echoed by a number of other court personnel, Attorneys General, prisoners' advocates, and prisoners from whom feedback was received during this study.

To gain insights about how grievance mechanisms might be constructed to reduce litigation, the correctional officials with expertise regarding their Departments of Corrections' grievance processes and the Attorneys General who were surveyed during this project were asked to identify up to five features of a prison's grievance process that can help it to best serve as an effective alternative to *pro se* prisoner litigation. From the responses to this and other survey questions, some of the features that may be particularly helpful, or perhaps critical, to a grievance system's success in stemming the filing of *pro se* prisoners' civil-rights suits were identified. In addition, some limited information was collected about the extent to which, in the states surveyed, grievance processes have some of these seemingly important features.

Set forth below are some of the features of a prison's grievance system that may enhance its likelihood of forestalling litigation. Before reviewing these features though, two points bear noting.

First, as was recognized by some of the survey respondents during this study, in order for a grievance process to serve as an effective alternative to *pro se* prisoner litigation, the grievance system must not only be fair, but be perceived by prisoners as fair. In other words, no matter how objective and accurate the findings of the persons who adjudicate inmates' grievances, the grievance system will only delay, and not curtail, the filing of lawsuits if the prisoners consider the grievance system to be, as two prisoners' advocates described the grievance process in their state, "a total farce." Nor will the grievance system curb litigation if the prisoners share the view

of the inmate who, in a letter to the Project Director, analogized participation in the grievance process in his state to "being brushed off like a fly by a horse's tail." Therefore, some of the components of a grievance system identified below may or may not be necessary to the fair and correct adjudication of prisoners' grievances. But those components may be extremely important to the success, or lack thereof, of the grievance system in curbing *pro se* prisoners' civil-rights suits.

The second caveat about the grievance-system features highlighted below is that their utility, in terms of diminishing the *per-capita* number of *pro se* prisoners' civil-rights suits, was not evaluated during this study. In-depth analyses of grievance systems with these and other features would need to be undertaken before definitive conclusions could be reached about how to devise a model grievance system to curb inmate litigation.

Features of a Prison Grievance System that May Avert Lawsuits

Some of the features of a prison's grievance system that may forestall litigation include:

1. A Broad Range of Remedies, Including Damages, for the Full Range of Claims that may be the Subject of Lawsuits. The Departments of Corrections that were surveyed during this project were asked to describe their policies regarding prisoners' recovery of damages through the grievance process. All of the thirteen departments that provided such descriptions reported that they only compensated inmates, whether through the grievance process or a parallel claims procedure, for lost or damaged property and, in a few states, for miscalculated state pay or commissary charges.

There will be times though, such as when a prisoner has suffered irreparable harm because of grossly inadequate medical care, when monetary relief is needed in order to adequately remedy the harm about which a prisoner has a legitimate complaint. And if prisoners cannot obtain appropriate relief through the grievance process, then many of them will inevitably turn to the courts for redress.

If correctional officials want to avoid litigation then, they would have to structure the grievance process so that monetary relief can be awarded in appropriate cases. Now that is not to say that Departments of Corrections would need to start handing out money willy-nilly to prisoners whenever they ask for damages in the grievance process. In fact, a grievance process should be structured to include a wide range of remedies so that grievance officials have the flexibility to devise appropriate, and sometimes creative, nonmonetary remedies in response to prisoners' legitimate grievances. But monetary relief would need

to be included in the grievance system's arsenal of remedies if certain types of claims are realistically to be kept out of court.

2. Enforcement of Relief. A grievance system will have little effect on litigation rates if decisions granting inmates relief are ignored. A system therefore needs to be in place to ensure that the necessary follow-up to effectuate the relief occurs.

The Division of Correction of the Maryland Department of Public Safety and Correctional Services has adopted a policy to help ensure that this follow-up occurs. Under this policy, a warden must ensure that staff charged with the responsibility of providing the relief granted an inmate actually do so and that they document that this relief has been provided.[23] To facilitate this compliance monitoring, a grievance coordinator at each prison maintains the documentation submitted by staff that the relief has been provided.[24] In addition, the grievance coordinator maintains a tickler file and notifies the warden when staff have not provided relief within the required time frame.[25]

3. Arbiter Who Not Only is, but Appears to be, Neutral and Objective. If grievance processes are to serve as an effective alternative to litigation, prisoners must have confidence in those processes. Thus, even if the persons resolving prisoners' grievances are objective and committed to accurately adjudicating those grievances, the grievance process will simply serve as a pit stop on the way to court if prisoners believe that the grievance adjudicators are biased against them.

One feature of a grievance mechanism that can create an appearance of bias is to have only personnel employed by the Department of Corrections involved in the adjudication of inmates' grievances. Yet of the thirteen Departments of Corrections surveyed about their grievance procedures, only two, Maryland's and North Carolina's, reported that prisoners have the option, other than going to court, of having grievances resolved, at some point, by persons who are not on the staff of the Department of Corrections.[26]

In Maryland, prisoners have two grievance processes from which to choose. They can invoke the "Administrative Remedy Procedure" of the Division of Correction, or they can file a grievance with the Inmate Grievance Office. This Inmate Grievance Office is, by statute, an independent state agency.[27]

By contrast, in North Carolina a prisoner can appeal the denial of a grievance to an Inmate Grievance Board. The Governor appoints the five members of that Board, three of whom are attorneys selected from a list of ten attorneys provided by a state bar committee and two of whom must have knowledge and

experience in corrections.[28] The Board is also staffed by attorneys.[29]

Although the Secretary of Correction can modify the Inmate Grievance Board's findings and order some kind of alternative relief, the Board's decision is considered final unless modified by the Secretary.[30] According to the Executive Director of the Inmate Grievance Board, the Secretary modifies the Board's decisions in 5% or less of the cases reviewed by the Board.[31]

There are a number of other different ways that a grievance process could be structured so that a prisoner would not have to file a lawsuit in order to have a grievance reviewed by a non-DOC official. Which structure would have the greatest impact on *per-capita* litigation rates has yet to be determined. In addition, the comparative impact on litigation rates of using non-DOC personnel to make recommendations regarding the disposition of grievances, but not to make those decisions, has yet to be assessed. It should be remembered though that when making a comparative assessment of the effects of different grievance structures on litigation rates, features other than the availability of an independent decisionmaker, such as those discussed earlier and below, will also influence litigation rates.

4. Process That Inmates Have Confidence in for Collecting and Presenting Facts Bearing on Grievances. Even if prisoners could appeal the denial of grievances to a person whom they consider unbiased and not beholden to the Department of Corrections, prisoners still might not have the requisite confidence in the grievance system needed for that system to have an impact on litigation rates. This would be particularly true if prisoners believe that this neutral arbiter has not been presented with accurate facts or the full facts bearing on a grievance.

When structuring grievance systems, correctional departments might take several different steps to assuage this concern. One step would be to utilize not only a neutral arbiter somewhere in the grievance process, but to also provide inmates with the option, at least at some point, of having the grievance investigated by a person not employed by the Department of Corrections.

In Wisconsin, inmates have this option. Inmates whose grievances are denied at the prison level can appeal their grievances to the Department of Justice. (This is the agency, incidentally, which will have to defend against any prisoners' claims that are later filed in court.) A Corrections Complaint Examiner within the Department of Justice reviews the complaint and the investigation conducted by DOC personnel. The Examiner then often conducts an independent investigation of the facts

underlying the grievance, including face-to-face interviews with witnesses. The Corrections Complaint Examiner then makes a recommendation to the Secretary of the Department of Corrections regarding the disposition of the grievance.

Another step that correctional departments could take to provide prisoners with a measure of confidence that the grievance adjudication was based on the full and accurate facts would be to include certain procedural safeguards in the grievance process, safeguards that would leave inmates with the sense that they have had a full and fair opportunity to "tell their side of the story" to the person or persons adjudicating their grievances. It is not clear, at this point, what mix of procedural safeguards would provide inmates with this assurance. But some of the comments received from survey respondents during this study suggest that it would be particularly fruitful for future research efforts to focus on the effect that two procedural safeguards have on prisoners' confidence in grievance systems and on their reliance on those systems in lieu of litigation -- the right to appear, whether in person or through videoconferencing, before the grievance arbiter and the right to call witnesses to substantiate the prisoner's grievance.

5. Written Responses Clearly Explaining the Reasons for Denying Grievances. Oftentimes, there are legitimate reasons why prisoners' grievances must be denied -- why, for example, a policy they are challenging must remain in effect or a correctional practice must persist. If prisoners are not, however, provided with these reasons or the reasons are not adequately explained, some of the prisoners will automatically turn to the courts for redress. To avert litigation then, prisoners whose grievances are denied need to be provided with written responses that clearly explain, in language which they can understand, the basis for the denial.

In a 1995 report of a Ninth Circuit Task Force on Prisoner Remedy Procedures, the grievance system employed in the state of Washington was described as successful in diverting a significant number of prisoners' claims away from federal courts and resolving them in a way which appeared to satisfy most inmates.[32] The impact of this and other grievance systems on litigation rates was not separately evaluated during this study. Yet it is noteworthy that one premise of Washington's grievance process, which reportedly has had some success in deflecting lawsuits, is that "many inmates will readily accept a 'NO' in response as long as the respondent gives a clear, <u>honest</u> reason why a condition or rule will not or can not be changed."[33]

6. Review of Prisoners' Grievances by Attorneys or Paralegals at Some Stage of the Grievance Process. Three of the thirteen Departments of Corrections that were surveyed during

this project reported that responses to grievances at the institutional level and/or on appeal are reviewed by attorneys or paralegals.[34] Three of the departments reported that such review occurs only with regard to certain types of claims, such as grievances involving issues under the Americans with Disabilities Act. And six of the Departments of Corrections reported that neither attorneys nor paralegals review prisoners' grievances at any stage in the grievance process.

Logic would suggest that having an attorney or a qualified paralegal who is working under the supervision of an attorney review prisoners' grievances at some point in the grievance process would avert the filing of certain prisoners' civil-rights suits. Because of their legal expertise, these trained professionals should be able to identify claims with colorable legal merit that it would be more appropriate and cost-effective to resolve without litigation. And without this input from legal experts in the resolution of grievances, some grievances may be denied because of procedures or practices that are, unbeknownst to correctional officials and others involved in the processing of inmates' grievances, illegal.

7. Audits, Evaluations, and Statistics Gathering. There are at least two ways in which evaluations of prison grievance processes can potentially reduce the number of civil-rights suits filed by *pro se* prisoners. First, as is required by a directive of the Maryland Division of Correction, the grievance process can be used "as a management tool to help identify problems with specific services and programs in specific institutions, or deficiencies in division policies or procedures that indicate a need for reevaluation, change, or staff training."[35] In other words, by monitoring the number and the nature of grievances that are being filed by prisoners, problems that adversely affect correctional operations, including those that may culminate in litigation, can be identified and resolved.

To facilitate this problem-solving function of the grievance process, certain statistics would need to be gathered about the grievances being filed. These statistics would permit the ready identification of those prisons, staff members, and areas of operation within each prison (e.g., medical care, food service, and religious services) that are spawning the most number of grievances. The statistics would preferably be collected on a monthly basis to prevent small problems from escalating into large, widespread problems that are more difficult to resolve. By monitoring these statistics and changes in these statistics over time, correctional officials can then identify potential target areas for changes and improvements in correctional operations. These changes and improvements might, in turn, stave off certain lawsuits, as well as grievances, that would otherwise be filed in the future.

Another kind of evaluation of a prison's grievance system can also potentially have an impact on litigation rates. The purpose of this second kind of evaluation is to examine the way in which the grievance process is operating in practice and to assess its effectiveness, including its effects on litigation rates. Through well-constructed audits of a prison's grievance process, it can be determined, for example, whether grievance findings are supported by adequate documentation, whether deadlines for the processing of grievances are being met, whether the reasons for denying grievances are being explained adequately to prisoners, whether remedial relief granted through the grievance process is being implemented, and whether the grievance process is perceived by inmates as an adequate and effective alternative to litigation.

During this study, the Missouri Department of Corrections provided an example of a very thorough and detailed report -- fourteen pages long -- of an audit of a prison's grievance process, the kind of candid and in-depth audit report that can be utilized to improve the functioning of a prison's grievance process. In Missouri, these audits take one to two days to complete, depending on the size of the prison.[36] Some of the standard forms used in Missouri when collecting and recording information during such audits are included in the Appendix.

The last step in this evaluation of the functioning of the grievance system would be to examine the effects of the grievance system on the nature and amount of civil-rights suits being filed by prisoners. Based on the feedback received and data collected during this study, this is a step which many Departments of Corrections are apparently not taking. But as the coordinator of the grievance system in one state's Department of Corrections commented during a survey, it would be helpful if the officials involved in processing grievances received more information about the nature and number of lawsuits being filed by prisoners so that the officials can craft "more meaningful resolutions" at the grievance stage that may avert similar lawsuits in the future.

It should be noted that the features of grievance processes described above that are most likely to have an impact on litigation rates are not the only components of a well-functioning grievance system. A well-functioning grievance system, for example, will be adequately staffed so that grievances can be processed efficiently and accurately, so that processing deadlines are met, and so that the problems spawning certain grievances can be resolved as soon as possible. To the extent that these and other components of the grievance process contribute to the efficiency and effectiveness of that process, prisoners are more likely to consider that process, not as an obstacle that must be surmounted on the way to court, but as an effective alternative to going to court.

VII. CONCLUSION AND RECOMMENDATIONS

When discussing the subject of *pro se* prisoner litigation, the brunt of the focus, in the past, has been on the courts. What, it is asked, can courts do to process these cases more efficiently and effectively? And what can be done to make inmates think twice before filing a lawsuit? Lost in this discussion are two key sets of actors who can play a significant role in limiting the burdens of inmate litigation while helping to ensure that the potential benefits of that litigation are still realized -- correctional officials and Attorneys General.

During this study, certain steps were identified that correctional officials and Attorneys General can take to potentially ward off much inmate litigation. In order to have a significant impact on litigation rates, however, the proactive measures adopted by correctional officials and Attorneys General would have to be focused on more than just those potential claims that are legally meritorious. To quote the credo of the Missouri Department of Corrections, correctional officials would have to identify and eradicate the "root causes" of prisoners' legitimate complaints.

If correctional officials, as well as Attorneys General, were to fail to take such proactive measures, they and the courts would probably continue to see a stream of prisoners' *pro se* civil-rights suits flowing into the courts. And should this stream be cut off by measures designed to discourage or deny prisoners court access, it is possible that prisoners might, through more destructive means, express their frustration about these festering problems that correctional officials and Attorneys General neglected to address.

Some of the steps that correctional officials and Attorneys General can take to avert prisoners' civil-rights lawsuits are briefly summarized below.

Recommendations

1. The Department of Corrections in each state, in conjunction with the Attorney General, should develop a high-quality training program designed to teach correctional personnel about prisoners' rights. The Constituent Services Office, if one were established in the Department of Corrections, could provide helpful input in the development and refinement of the training program since that Office will have unique insights about the problems and factors which drive prisoners' complaints, grievances, and lawsuits.

To be effective in diminishing litigation, the training program would need to include the following key components:

- Knowledgeable and skilled instructors and high-quality training materials;
- Program content that includes training about prisoners' legal rights, why it is important to protect those rights, practical issues that arise in the enforcement of those rights, and how to act professionally in the face of the challenges posed by those prisoners who are rude and unruly;
- Pre-service training;
- In-service training;
- Communication mechanisms to provide updates on the law between training sessions;
- Training of line staff as well as correctional administrators;
- Specialized training for persons, such as disciplinary hearing officers, working in areas that are frequently the subject of lawsuits; and
- Audits of the training program's efficacy.

2. To facilitate the development in each state of high-quality programs to train correctional officials about prisoners' rights, a model prisoners' rights training curriculum should be developed through a collaborative process in which input is obtained from a range of correctional professionals (including line staff and correctional administrators), prisoners' attorneys, Attorneys General, and Constituent Services Officers. This model curriculum can then be adapted to fit the needs of a particular state.

The model training program could be developed by a federal agency or by a national organization, such as the American Bar Association, the American Correctional Association, the National Association of Attorneys General, or the National Prison Project. If one of the latter organizations were to develop the model training program, grant funds might be obtained for that purpose. Alternatively, the costs incurred in developing the program could perhaps be recouped by selling training modules to Departments of Corrections across the country.

3. Prison managers (wardens and superintendents) should institute a review of prison operations to identify sloppy and erratic practices, haphazardly enforced rules, and other problems in the prison's operations that invite litigation. A similar review process should be undertaken at the departmental level by the Director. Steps should then be taken to rectify the problems

uncovered. For example, if one is not already in place, a good system should be established for controlling and accounting for inmate property, particularly when inmates are transferred. In addition, policies and practices should be adopted to ensure that good-time credits, release dates, and the amount of money inmates have in their commissary funds are computed accurately.

4. Each state's Department of Corrections should establish a Constituent Services Office and should consider patterning that Office after the Constituent Services Office within the Missouri Department of Corrections. Whether the Missouri model or some new model is utilized when establishing a Constituent Services Office, the overarching purpose of the Office would be to address, both through education and problem solving, the root causes of prisoners' legitimate complaints. To be successful, the Constituent Services Office would need to have the following key components:

- Constituent Services Officers who are accessible and visible;
- Responsiveness, in the sense of quickly following up on prisoners' concerns and those of their family members and friends;
- The full support of the Director and the authority to effect needed changes in prison operations;
- Constituent Services Officers with the personality, knowledge, and skills to accomplish the Office's purposes and bring a balanced perspective to a very difficult job;
- Communication and education mechanisms to ensure that there is a free flow of information both to and from the Constituent Services Office and key constituencies;
- High-quality training of Constituent Services Officers and other persons who play important roles in the work of the Constituent Services Office, such as staff and inmate members of inmate councils;
- Adequate resources, including staffing, to support the work of the Constituent Services Office; and
- Regular evaluation of the operations and effects of the Constituent Services Office.

5. Constituent Services Officers from Departments of Corrections across the country should, in the future, join together to form a Constituent Services Officers Association. The purpose of this organization would be to facilitate an exchange of information between Constituent Services Officers. Constituent Services Officers could exchange information about how they face and meet the special challenges of being a Constituent Services Officer and about the steps that they have taken in furtherance of the work of their Constituent Services Office.

6. In each state, a statistics-gathering system should be put in place through which correctional officials and the Attorney General can obtain some basic information about the civil-rights suits prisoners are submitting to the courts. This information would include the number of claims falling within certain claim categories (e.g., medical care, use of force by correctional officers, lost or damaged property, and religious freedom) and the number and types of claims originating from each prison. The information gathered would need to include not only complaints that are filed in the courts and served on defendants, but also those that are screened out by the courts before filing or before service of process.

Ideally, the kinds of statistics to be gathered concerning claim categories and prisons from which the claims originated would be identified in a model data-collection system created by a governmental agency or private organization and then adopted by all of the states. A uniform data-collection system would facilitate research across courts and states concerning prisoners' civil-rights suits and the effects of the measures taken to limit the amount and costs of those lawsuits. The process through which information would be disseminated to correctional officials and the Attorney General in a particular state would, however, need to be established at the court level, after consultations between court officials, correctional officials, and the Attorney General.

7. Both correctional officials and the Attorney General within a state need to set up structures through which the statistics gathered about prisoners' civil-rights lawsuits in the state are analyzed and necessary follow-up actions based on the results of that analysis are undertaken. Within the Department of Corrections, the Constituent Services Officer should probably be involved in the efforts of any litigation-response team. Because the Constituent Services Office serves as the clearinghouse for addressing prisoners' complaints and concerns, the Constituent Services Officer can be particularly helpful in analyzing the significance of litigation statistics and trends. In addition, the Constituent Services Office can help in identifying the core concerns that may be driving certain types

of lawsuits and can help craft appropriate measures to address those concerns.

8. Departments of Corrections should review auditing procedures to determine how they can be revamped to increase the likelihood that constitutional violations and other violations of the law will be detected and remedied. At a minimum, correctional officials should consider increasing the involvement of correctional attorneys in the structuring of audits and the review of audit findings. In addition, Departments of Corrections can consider initiating some pilot projects in which attorneys participate in audits, at least at certain prisons. Finally, a structure should be put in place within each Department of Corrections to follow up on recommendations made after audits and rectify constitutional violations and other violations of the law identified during them.

9. When a prisoner's civil-rights case is closed, a close-out letter should be prepared by a correctional attorney assigned to complete this task apprising the Department of Corrections of the case's outcome and of any changes that need to be made to bring the department into compliance with the law. The letter should be sent to the Director, the Chief Legal Counsel for the Department of Corrections, and the Chief Constituent Services Officer.

10. Each Department of Corrections should review its grievance system to determine the extent to which it is perceived by prisoners to be a fair and effective alternative to litigation. Each Department of Corrections can then, where necessary, add certain features to the grievance system that may increase the likelihood that the grievance system can forestall litigation. Those features include:

- A broad range of remedies, including damages, for the full range of claims that may be the subject of lawsuits;
- Follow-up mechanisms to ensure that relief granted through the grievance process is actually awarded;
- The opportunity to have a grievance considered and resolved, at some point, by an arbiter who not only is, but appears to be, neutral and objective;
- A process that inmates have confidence in for collecting and presenting the facts bearing on a grievance;
- Written responses that clearly explain why grievances were denied;

- The review of prisoners' grievances, at some stage of the grievance process, by attorneys or paralegals working under the supervision of an attorney;

- A process in place to collect and evaluate statistics about the nature and amount of grievances being filed; and

- A process in place to evaluate the way in which the grievance system is operating in practice and to assess its effectiveness, including its effects on litigation rates.

NOTES

1. CONSTITUENT SERVICES OFFICE, MISSOURI DEP'T OF CORRECTIONS, 1996 ANNUAL REPORT, at 1.

2. Constituent Services Officer Institutional Site Visits for 1996 (list on file with the Project Director). In 1995, the Constituent Services Officer conducted fifty-nine institutional visits. CONSTITUENT SERVICES OFFICE, MISSOURI DEP'T OF CORRECTIONS, 1995 ANNUAL REPORT, at 2.

3. Constituent Services Officer Institutional Site Visits for 1996 (list on file with the Project Director).

4. CONSTITUENT SERVICES OFFICE, MISSOURI DEP'T OF CORRECTIONS, 1996 ANNUAL REPORT, at 1.

5. *Id.* at 2.

6. *Id.* at 2, 5-6.

7. *Id.* at 2, 8-9.

8. For example, prisoners who serve on the medical council at the Jefferson Correctional Center attend two council meetings before new prisoners are rotated onto the council in their place.

9. During this project, feedback was received from the Office of the Attorney General of Washington that the use of inmate councils in that state had been ineffective in resolving conflict between staff and inmates. Letter from Michael T. Mitchell, Senior Assistant Attorney General, Office of the Attorney General of Washington, to Lynn S. Branham, Project Director (May 9, 1997). The success of inmate councils as a problem-solving mechanism and a correctional management tool could hinge on a number of different factors, such as the process used to select council members, the training council members receive regarding

their functions and responsibilities, the way in which council meetings are run, and the extent to which there is follow-through in resolving problems identified during council meetings. A fruitful area for future research would closely examine the use of inmate councils in different states and identify the variables which contribute to the success or failure of those councils.

10. According to the Constituent Services Officer, if an inmate who is likely to disrupt the meeting or will not represent the interests of other inmates is selected by an inmate council to serve on the medical council, the Constituent Services Officer will ask the inmate council to select another inmate representative. In addition, if an inmate does disrupt a council meeting, the inmate is removed from the council.

11. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR, at 144; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1993 REPORT OF THE DIRECTOR, at A1-63.

12. Letter from Lisa Jones, Constituent Services Officer, Missouri Department of Corrections, to Lynn S. Branham, Project Director (May 20, 1997).

13. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR, at 168; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1993 REPORT OF THE DIRECTOR, at A1-63.

14. Letter from Lisa Jones, Constituent Services Officer, Missouri Department of Corrections, to Lynn S. Branham, Project Director (May 20, 1997).

15. The Constituent Services Officer, however, repeatedly emphasized the importance of maintaining objectivity when investigating inmates' complaints. She also emphasized the importance of reaching out to, and working with, staff and prison administrators to ensure that prisoners' legitimate complaints are fairly and effectively resolved. The Director of the Missouri Department of Corrections reported that the Constituent Services Officer has a reputation with the line staff of being "fair, not pro-inmate."

16. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1996 3 (1997).

17. *See, e.g.*, 28 C.F.R. § 542.13 (1996) (A prisoner "shall" first submit a concern to staff for informal resolution before filing a formal grievance).

18. MISSOURI DEPARTMENT OF CORRECTIONS CONSTITUENT SERVICES PROGRAM, at 3 (1996).

19. CONSTITUENT SERVICES OFFICE, MISSOURI DEP'T OF CORRECTIONS, 1996 ANNUAL REPORT, at 2. Between January 1, 1994 and January 1, 1996, the number of pending lawsuits involving medical care also dropped 39%. Attorney General of Missouri, Litigation Division, Total Inmate Cases by Case Type (01/01/96); Attorney General of Missouri, Litigation Division, Total Inmate Cases by Case Type (01/01/94). Because the number of pending lawsuits can be affected dramatically by changes in the way the Attorney General or the courts process cases, these statistics have more limited significance than would statistics, were they available, regarding changes in the number of medical claims filed in or sent to the courts.

20. 28 U.S.C. § 1915A(a),(b)(1); 42 U.S.C. § 1997e(c).

21. An audit cannot always guarantee that constitutional violations will be detected and remedied, because there may be substantial uncertainty and differences of opinion about certain requirements of the law. A well-constructed audit can, however, identify those prison conditions or operations about whose legality there is some doubt. The need to make changes in those conditions or operations to avert litigation and, more importantly, to ensure that correctional officials are abiding by the requirements of the law can then be considered.

22. WISCONSIN LEGISLATIVE AUDIT BUREAU, AN EVALUATION OF INMATE LITIGATION, at 18-19 (1993).

23. Maryland Division of Correction Directive #185-208 (1993).

24. *Id.*

25. *Id.*

26. If prisoners in Missouri, however, appeal a grievance to the Director, then a Citizens Advisory Board will review the grievance. The Citizens Advisory Board will not resolve the grievance but will make a recommendation to the Director as to how it should be resolved. Missouri Department of Corrections and Human Resources, Institutional Services, Policy and Procedure Manual, Procedure No. IS8-2.1, § M.(1992).

27. MD. CODE ANN. Art. 41, § 4-102.1(a). Under this statute, the Inmate Grievance Office is a "separate agency" within the Maryland Department of Public Safety and Correctional Services.

28. North Carolina Department of Correction, Division of Prisons, Policies - Procedures, § .0313(a).

29. Memorandum from Finesse G. Couch, Executive Director, North Carolina Inmate Grievance Resolution Board, to Lynn S. Branham, Project Director (March 14, 1997).

30. North Carolina Department of Correction, Division of Prisons, Policies - Procedures, § .0310(c)(5).

31. Telephone Interview with Finesse G. Couch, Executive Director, North Carolina Inmate Grievance Resolution Board (May 22, 1997).

32. TASK FORCE ON PRISONER REMEDY PROCEDURES, EFFECTIVE PRISONER REMEDY PROCEDURES: REPORT TO THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, at 11, 21 (1995).

33. HISTORY OF THE OFFENDER GRIEVANCE PROGRAM AT THE WASHINGTON STATE PENITENTIARY 1980-1991, at 3 (1992) (emphasis in the original).

34. The Departments of Corrections that reported that attorneys or paralegals regularly review the responses to the grievances at the institutional level or on appeal are located in Maryland, Missouri, and North Carolina.

35. Maryland Division of Correction Directive #185-300 (1993).

36. Telephone Interview with Janet Wolfrum, Grievance Coordinator, Missouri Department of Corrections (May 27, 1997).

CHAPTER THREE

THE USE OF LEGAL-ASSISTANCE PROGRAMS TO PROCESS PRISONERS' CIVIL-RIGHTS SUITS MORE EFFICIENTLY AND EFFECTIVELY

Prisoners, according to the Supreme Court, have the constitutional right to have "meaningful access" to the courts.[1] In 1977, the Supreme Court held in *Bounds v. Smith* that as part of this right, prisoners must either be afforded access to an "adequate" law library or be provided with "adequate assistance" from someone "trained in the law."[2]

The vast majority of the states responded to this Supreme Court edict by putting law libraries into the prisons. Only a handful of states -- Maryland, North Carolina, and Utah -- adopted legal-assistance programs in lieu of law libraries in an attempt to meet the requirements of *Bounds*.[3]

In 1996, the Supreme Court threw an unexpected wrench in the states' plans for providing inmates with access to the courts. In *Lewis v. Casey*, the Court rebuffed the argument of Arizona correctional officials that providing illiterate and non-English-speaking inmates with physical access to well-stocked law libraries satisfies the requirements of the Constitution.[4] The Court noted that an inmate's ability to turn pages in a book in a law library is not the measure of constitutional compliance.[5] In other words, providing inmates with access to law books that they cannot read or understand does not satisfy constitutional requirements. To meet those requirements, correctional officials must instead ensure that inmates have "a reasonably adequate opportunity to file nonfrivolous claims" contesting their convictions, sentences, or conditions of confinement.[6]

While the Supreme Court made it clear in *Lewis* that providing access to a law library will not protect all inmates' right of access to the courts, the Court did not prescribe any particular program or procedures that correctional officials should adopt to ensure that the right is protected. Instead, the Court underscored that in *Bounds* it had encouraged "local experimentation" as correctional officials take steps to protect prisoners' constitutional right of access to the courts.[7] In a potentially telling aside, however, the Court noted that one possible experiment "might replace libraries with some minimal access to legal advice and a system of court-provided forms . . . forms that asked the inmates to provide only the facts and not to attempt any legal analysis."[8]

In one sense, the Supreme Court in *Lewis* more expansively interpreted the scope of the right of access to the courts than it had been interpreted previously. Correctional

officials cannot, as many thought they could, satisfy their constitutional obligations by simply installing a law library in a prison. Instead, they must do something more or different to ensure that those inmates who cannot effectively utilize a law library have a "reasonably adequate opportunity" to present certain nonfrivolous claims to a court.

In another sense though, the Supreme Court narrowly construed the scope of the right of access to the courts when compared to the way in which some correctional officials had previously understood the scope of that right. The Court identified two significant limitations on the scope of the right of access.[9] First, the Court noted that the constitutional right is confined to what is needed to give a prisoner the capability to present a grievance to a court. The Court said that correctional officials need not, at least as far as the Constitution is concerned, do anything to help inmates "discover grievances" or to "litigate effectively" once they are in court.[10]

Second, the Supreme Court observed that the Constitution does not require correctional officials to take steps to facilitate the bringing of all types of legal claims by prisoners. The Court stated: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."[11] Instead, according to the Court, the affirmative assistance that must be provided to prisoners as part of the right of access to the courts is confined to what is needed for them to challenge their convictions or sentences, whether directly on appeal or collaterally, and to challenge the conditions of their confinement.[12]

Most Departments of Corrections from whom input was received during this project appear to have adopted a "wait-and-see" attitude since the Supreme Court's decision in *Lewis v. Casey*. Many correctional officials want to wait and see how other correctional departments respond to the decision before making any changes in their own "access to the courts" programs. And many officials want to see how the lower courts flesh out what is needed to provide prisoners with a "reasonably adequate opportunity" to litigate certain nonfrivolous claims.

The purpose of this chapter is not to resolve this constitutional question, one with which courts will wrestle for years to come. The focus of the chapter is instead on a broader policy question: How can legal-assistance programs be developed and used to process prisoners' civil-rights suits more efficiently and effectively? In other words, what kinds of legal-assistance programs would most cost-effectively achieve the dual objectives of weeding out frivolous claims and ensuring that meritorious claims are resolved appropriately?

One of the legal-assistance programs from which insights can be gained as correctional officials and Attorneys General address this policy question and grapple with the constitutional implications of *Lewis v. Casey* is that employed by the Corrections Corporation of America (CCA). That legal-assistance program is discussed below.

I. THE LIMITED USE OF CONTRACT ATTORNEYS BY THE CORRECTIONS CORPORATION OF AMERICA

The Corrections Corporation of America utilizes contract attorneys to provide limited advice and legal assistance to prisoners at many CCA correctional facilities.[13] The inner workings of this legal-assistance program were observed and evaluated during a site visit to the Metro-Davidson County Detention Facility in Nashville, Tennessee in March of 1997.

CCA has a contract with the county to operate this medium-security facility. The name of the facility is a bit misleading because, with few exceptions, it holds state prisoners, both male and female, whom the county has contracted with the state to incarcerate.[14] The facility is, all but in name, a prison.

During the site visit, the following individuals were interviewed: the contract attorney who provides legal assistance to inmates at the Metro facility, two assistant wardens, CCA's vice president of legal affairs, the director of legal affairs, the chairman and chief executive officer of CCA, and the contract monitor who, on behalf of the county, oversees CCA's implementation of its contract with the county. In addition, the Project Director observed meetings of the contract attorney with fourteen different prisoners. Finally, the Project Director interviewed ten different inmates whose names she had selected at random from a list of prisoners with whom the contract attorney had met over the previous six months.

Description of the Legal-Assistance Program at the Metro-Davidson County Detention Facility

CCA has contracted with a local attorney to provide legal services to the approximately 1100 inmates confined at the Metro facility. This attorney has been practicing law for twenty years. He was a prosecutor for ten years and has been in private practice, handling both criminal and civil cases, for the remainder of the time.

CCA's contract with the attorney provides that he will be paid by the hour. The contract does, however, include a guaranteed minimum number of hours for which he will be paid each

month. The guaranteed minimum is $850 -- ten hours of work at the hourly rate of $85.[15]

The number of hours that the contract attorney spends each month providing legal assistance to the inmates confined at the Metro facility, however, typically exceeds ten hours. The contract attorney reported that he generally spends a minimum of four hours and a maximum of eight hours each week providing legal services to Metro inmates. In 1996, CCA paid the contract attorney approximately $21,000 for his work at the Metro facility.

CCA uses a standard contract when contracting with attorneys to provide legal services to inmates confined in CCA facilities. The contract, a copy of which is included in the Appendix, specifies the services for which CCA will reimburse the attorney. Those services include:

a. Consultation and assistance with post-conviction and habeas corpus issues involving the inmate's custodial situation and institutional claims personally involving the inmate;

b. Personal interviews with inmates seeking assistance with the above referenced issues to include motions to proceed in forma pauperis and for appointment of counsel and the preparation of pleadings;

c. Consultation and assistance in fact gathering and legal research;

d. Consultation and assistance in referring inmates to:

   i. legal organizations that provide specialized services;

   ii. social service agencies; and

   iii. Facility staff;

e. Consultation and assistance in the preparation of inmate grievances pursuant to Facility policy.

The contract attorney at the Metro facility, however, reported that he does not assist inmates in the preparation of grievances. In addition, since the Supreme Court's decision in

Lewis v. Casey and the ensuing revision by CCA of its contract with its contract attorneys, he no longer helps inmates with divorces. He does, however, assist inmates with any kind of potential legal claim that they might have against CCA or CCA employees, whether it is constitutionally based or an ordinary civil claim. Thus, for example, if an inmate has a potential medical-malpractice claim against a prison doctor and CCA, the contract attorney will provide assistance in resolving and, if need be, bringing this claim, whether or not the inmate was treated with the deliberate indifference needed to state a constitutional violation.[16]

An inmate at the Metro facility can initiate a meeting with the contract attorney through one of two different ways. The inmate can fill out a "Request for Attorney Conference," put it in an envelope, and seal it. CCA will then mail the request form to the attorney at no cost to the inmate.

Alternatively, the inmate can fill out a generic request form which is used not only when contacting the contract attorney, but when contacting an array of CCA officials and employees. This generic request form is placed in the contract attorney's mailbox.

The form entitled "Request for Attorney Conference" provides inmates with some information, set forth below, about the role and function of the contract attorney:

> Please note that the attorney is retained and his/her fee is paid by Corrections Corporation of America. This in no way alters the attorney's duty to advise or represent you. Even though the attorney is employed by CCA, the attorney is bound by the disciplinary rules of the Supreme Court of this state to represent the client-inmate/resident and to preserve the confidence of the client-inmate/resident. However, the attorney will attempt to resolve any dispute with CCA informally before instituting more formal procedures.
>
> The attorney's representation at CCA's expense shall include personal interviews with the inmate/resident, fact gathering, legal research, follow-up interviews, referrals of inmate/resident to other resources, negotiation on the inmate/resident's behalf and assistance with the preparation of <u>initial</u> pleadings including motions to proceed *in forma pauperis* and motions for appointment of counsel but not to include typing of such pleadings and/or motions. The attorney's representation at CCA's expense shall not extend to making entry of appearance or appearing on behalf of the inmate/resident at hearings.

This information is not included on the generic request forms since, as mentioned above, they are used to contact not only the contract attorney, but a number of other individuals as well.

The contract attorney reported that he typically sees an inmate who has requested a meeting within seven days of that request. Each interview, he said, lasts anywhere from five to thirty minutes. His time estimates comported with observations made during the site visit; it took about three hours one afternoon during the site visit for the attorney to interview fourteen inmates.

The contract attorney estimated that about half of his meetings with inmates concern their sentences. Thirty to 35% concern conditions of confinement, and the remainder concern miscellaneous civil matters. During the site visit, seven of the fourteen inmate interviews involved sentencing issues, and three involved conditions of confinement. The rest fell in the miscellaneous category.

In a sense, what was observed during the attorney/inmate interviews at the CCA facility was not remarkable. What occurred was what would typically occur when any competent attorney meets with a client for the first time -- identification of the client's problem, obtaining some key facts about that problem, laying out options for the client's consideration, identification of potential pitfalls or difficulties in pursuing certain options, and responding to questions about the law and court procedures.

Based on discussions with the contract attorney, the CCA attorneys, and the two assistant wardens at the Metro facility, as well as what was observed during two of the three inmate meetings concerning conditions of confinement at the CCA facility, it appears as though there is an emphasis on problem solving in the contract attorney's work for and with inmates. If an inmate has a complaint about his or her conditions of confinement or treatment by correctional officials, the contract attorney reported that he will typically ask the inmate if he or she would like the contract attorney to speak with someone at the facility about the problem. When inmates are told that they have two options -- either try to get the problem resolved or file suit, their general reaction, according to the contract attorney, is: "Let's see if we can solve the problem." The contract attorney will not talk to correctional authorities or medical personnel about an inmate's complaint about the institution, however, without the inmate's permission.

If an inmate wishes to pursue a lawsuit against CCA or CCA employees and is literate, the contract attorney asks the inmate to first attempt to write the complaint. The contract attorney informs the inmate that he will then help the inmate "clean up"

the rough draft of the complaint, ensuring that the inmate has sued the right people, included the requisite facts, and otherwise met legal and procedural requirements. The contract attorney himself does not normally make the changes but tells the inmate what changes need to be made.

Before an inmate puts pen to paper, however, the attorney talks to the inmate about his or her potential claim. In the one attorney/inmate interview observed in which the inmate appeared to plan to file a lawsuit, the attorney explained that two of the individuals the inmate wanted to sue -- the president and the chief executive officer of CCA -- could not be sued because there were no facts that suggested that these individuals were personally involved in the alleged violation of the inmate's constitutional right.

The inmate also wanted, as relief, to get the warden fired. The contract attorney informed the inmate that this was not the kind of relief that could be obtained from the court, but then told the inmate about the kinds of relief that he could properly seek in his complaint.

If an inmate is illiterate, the contract attorney will draft the complaint. The contract attorney makes the literacy determination by first asking inmates whether they think they can write a first draft of the complaint. If they say that they can't, he drafts it for them. In addition, he sometimes drafts a pleading (generally a petition for postconviction relief) on the spot if the limitations period is about to lapse.

The contract attorney does not represent inmates in court. The attorney does, however, answer legal questions that inmates have as they litigate their own cases, such as questions about motions for summary judgment or discovery. In addition, the contract attorney will provide copies of cases to inmates upon request.[17]

One rather unusual feature of CCA's legal-assistance program at the Metro facility is the ready access that the contract attorney is given to prisoners' institutional files. During the observed inmate interviews, the attorney went to the file room several times and pulled an inmate's file to examine records bearing on the legal problem about which the inmate had contacted the attorney. When CCA's vice president of legal affairs was asked about the ease with which the attorney could obtain access to the inmate's file, she responded that she encouraged CCA to be open with its contract attorneys and that she felt that the contract attorney generally should be able to flip through the file of an inmate who has consulted him for assistance. "If we've done a good job, we should reveal it," she explained. "If not, it will come out anyway."

At the end of an interview, the contract attorney fills out a response section on the form the inmate used to request a meeting. In that section, the contract attorney summarizes steps he has discussed during the meeting that he or the inmate needs to take.

Interviews with CCA Officials, Inmates, and Others Regarding CCA's Legal-Assistance Program at the Metro Facility

During the site visit, the Project Director spoke with CCA officials, inmates, and others about CCA's legal-assistance program. The comments of these individuals are capsulized below.

1. Assistant Wardens. Both assistant wardens at the CCA Metro facility have extensive correctional experience. One worked for seventeen years in the Texas prison system -- in three 2500-bed or larger, maximum-security prisons for males, one maximum-security prison for females, and a minimum-security prison. At the time of the site visit, this assistant warden had been working at the Metro facility for sixteen months.

The other assistant warden began working for CCA in 1984. Before then, the assistant warden had been a deputy sheriff and had worked for four years at a penal farm run by the county.

Both assistant wardens had worked in correctional facilities that follow the traditional model in providing inmates with access to the courts. In these facilities, inmates were provided with access to law libraries; any assistance they received in preparing their complaints or litigating their cases came from inmate law clerks employed by the institution or "jailhouse lawyers," prisoners who do legal work for other prisoners but are not employed by the institution.

Both assistant wardens considered the type of legal-assistance program utilized by CCA to be far superior to that generally utilized in prisons in the public sector. Some of the advantages of the CCA legal-assistance program mentioned by the assistant wardens are described below.

a. Proactive problem solving. One of the assistant wardens described the legal-assistance program as "proactive." He noted that the contract attorney will tell CCA administrators about a problem that has been brought to his attention by an inmate, after receiving the inmate's permission to talk to the authorities about the problem. The CCA administrators can then attempt to get the problem remedied.

The other assistant warden concurred that the contract attorney facilitates problem solving. He noted that the contract attorney is "another set of eyes and ears" that can detect and avert problems within the facility.

b. Cost-effective. Both assistant wardens considered the use of contract attorneys to be a money-saver for a correctional facility. One of the assistant wardens noted that when he had worked in the public sector and an inmate said that he ought to sue correctional officials, they would respond, "Fine. Go ahead and sue." The assistant warden said that by contrast, at CCA "we watch everything we do" because of the need to be cost-effective. "Litigation is costly," the assistant warden commented. "The last thing we want to say to an inmate is go ahead and sue." The assistant wardens agreed that the work of the contract attorney helps to avert costly litigation through the problem solving mentioned earlier.

Both assistant wardens also felt that the use of contract attorneys saves money because the costs of law libraries can be avoided. Some of the costs of law libraries that were mentioned by the assistant wardens included: the costs of the law books; the costs of paying the personnel, both librarians and correctional officers, needed to staff the library; and the costs of replacing the books damaged, destroyed, or stolen by inmates.

c. Security benefits. One assistant warden mentioned that the elimination of law libraries has security benefits. He stated that law libraries can serve as a locus where inmates pass contraband and gang members meet and plan illegal and disruptive activities.

Both assistant wardens underscored another security benefit reaped by the use of contract attorneys to provide inmates with legal advice and assistance -- the elimination of the security problems caused by jailhouse lawyers and inmate law clerks.[18] Both assistant wardens agreed that jailhouse lawyers give inmates "so much power" that they become more bold in confronting staff. The assistant wardens also asserted that jailhouse lawyers foment discontent amongst inmates, making inmates more disgruntled about their treatment in prison than they would otherwise be. And finally, one of the assistant wardens mentioned the problem with jailhouse lawyers extorting fees for their services from other inmates.

d. Higher-quality legal advice and assistance. Both assistant wardens noted that the use of a contract attorney leads to inmates receiving higher-quality legal advice and assistance. This higher-quality service, in their opinion, also yields benefits for correctional officials. One of the assistant wardens rather colorfully explained, "Jailhouse lawyers use the cloak of law to get back at correctional staff. They are on your butt every week with a frivolous lawsuit." By contrast, the contract attorney, in his opinion, is not pro-litigation, but pro-problem solving. The contract attorney, unlike inmate legal assistants, is also able to cut through the bureaucracy to solve inmates' problems.

The assistant warden who had been working at the Metro facility for a little over a year said that he had not heard one complaint from an inmate about the contract attorney. (The contract attorney has also never been sued by an inmate.) The other assistant warden said that some inmates have said that the contract attorney is "CCA's attorney." He said that when he hears these kinds of comments, he explains that while paid by CCA, the contract attorney represents the inmates. Neither assistant warden reported receiving any complaints from line staff about the contract attorney.

The two assistant wardens were asked why, if the use of contract attorneys has so many advantages, they are not the prevalent means of providing inmates with legal assistance. The assistant wardens responded with three reasons: first, correctional officials, like many other people, are resistant to change. Second, correctional officials view attorneys as "ambulance chasers." Until correctional officials work with a contract attorney, they do not realize that the attorney does not want to sue; the attorney wants to solve the inmates' problems. And third, wardens do not want someone else telling them what to do or "snooping around" their prisons.

Both assistant wardens said that a legal-assistance program that utilizes contract attorneys to provide legal assistance to prisoners can work in a state prison, not just a facility run by CCA. Their advice to state correctional officials was: "Try it. If you don't like it, you can always end the contract."

2. Contract Monitor. The contract monitor employed by the county to monitor CCA's operation of the county-owned facility was also favorably impressed with CCA's legal-assistance program. Describing the program as a "very useful tool," the contract monitor, who had himself worked in a county jail for eighteen years, said that it is cost-effective to use a contract attorney to provide legal assistance to inmates since the contract attorney tells inmates when their claims are nonmeritorious, thereby leading to fewer lawsuits being filed against correctional officials. In the contract monitor's opinion, the reason why legal-assistance programs utilizing contract attorneys are not more widespread is because of resistance to change.

3. Officials from CCA's Corporate Office. During interviews with CCA's chief executive officer, the vice president of legal affairs, and the director of legal affairs, the same benefits of CCA's legal-assistance program that had been recounted by the assistant wardens were mentioned -- proactive problem solving, cost-effectiveness, security benefits, and higher-quality legal assistance for inmates. As these officials from CCA's corporate office elaborated on these benefits, they made the following additional points.

With regard to the cost-effectiveness of using contract attorneys, it was first noted that CCA avoids the $70,000 that CCA officials have calculated it would cost to install a law library in a prison. (CCA also saves the costs of maintaining and updating an extensive collection of law books.) While CCA includes a small number of law books in its general library collection, the cost of these books does not nearly approach the cost of a typical prison law library.

The CCA vice president of legal affairs furthermore noted that correctional officials, at some point, generally have to pay for an attorney if an inmate has a legal problem involving his or her conditions of confinement or treatment within the prison. She said that correctional officials have a choice: either pay for an attorney up front to attempt to solve that problem or pay a lot more money for an attorney to defend correctional officials when the inmate later files a lawsuit against them. And she added that even when the contract attorney is on occasion unsuccessful in solving an inmate's complaint without litigation, it is far easier for CCA's attorneys to address and resolve a well-written complaint drafted with input from the contract attorney.

And finally, the vice president of legal affairs stated that not only does CCA "save big bucks" by using contract attorneys, but the courts, in her opinion, reap savings as well. The contract attorney helps to resolve the problems underlying potential legal claims and also winnows out many frivolous claims that might otherwise end up in court. As a result, the courts save the time and money that would otherwise be spent processing these claims.

CCA's chief executive officer, however, explained that CCA did not initiate the use of contract attorneys simply to avoid litigation costs. He said that the practice of using contract attorneys was also instituted to help reduce tension in prisoners (that can, in turn, lead to management problems) and to serve as a quality-control mechanism.

CCA's vice president of legal affairs also pointed to the security benefits of contract attorneys. In her opinion, the CCA facilities where contract attorneys are utilized are calmer and have fewer problems because the inmates have an outside person to whom they can turn to air concerns and get problems resolved. She stated that even if law libraries were, over the long run, less costly from a financial standpoint than contract attorneys, contract attorneys are still, in her opinion, more cost-effective because of these intangible benefits.

4. Contract Attorney. During an interview, the contract attorney who assists inmates at CCA's Metro facility emphasized, "I'm paid by CCA, but I don't work for CCA." Noting that he had

an ethical duty to do what was in his inmate-clients' best interests, he analogized his role to that of an insurance defense lawyer. The insurance defense lawyer, he noted, is ethically bound to represent the insured, not the insurance company who pays the lawyer's fee.

The contract attorney observed that by contrast, jailhouse lawyers and inmate law clerks have no such enforceable ethical duty to their so-called clients. The contract attorney added that in any event, inmate law clerks, even trained ones, and jailhouse lawyers lack the competence to provide inmates with sound legal advice and assistance and, in particular, to adequately distinguish between frivolous and nonfrivolous claims.

5. Inmates. While the comments of CCA officials, the contract monitor, and the contract attorney about CCA's legal-assistance program at the Metro facility were quite positive, the reactions of the ten inmates interviewed about the program were much more mixed. Three of the inmates said that they were satisfied or very satisfied with the contract attorney's services, but six inmates said that they were unsatisfied or very unsatisfied with the quality of the service they received from the contract attorney. The tenth inmate couldn't or wouldn't say whether he was very satisfied, satisfied, unsatisfied, or very unsatisfied with the assistance he received from the contract attorney. He simply described the quality of the service as "okay."

Some of the positive comments made by the inmates about the use of a contract attorney to provide legal assistance to inmates included: (1) the contract attorney provides more accurate information than a jailhouse lawyer or inmate law clerk; (2) inmate legal assistants require inmates to give some form of payment in return for the legal services they receive, while a contract attorney does not; (3) the contract attorney is competent and was able to answer their legal questions; (4) the contract attorney was able to cut through the bureaucracy to provide the inmates with answers or information; and (5) the contract attorney discussed the law in plain terms that they could understand.

Some of the negative comments about the use of a contract attorney to render legal services to inmates conflicted with the positive comments received from other inmates. Those conflicting negative comments included: (1) inmates could not understand why they could not get the relief they wanted (typically an adjustment to their sentence), either because the attorney did not provide them with a full explanation of the law or because he spoke to them in legalese; (2) according to an inmate who had been a jailhouse lawyer in state prisons, the contract attorney did not have adequate knowledge about one area of prisoners' rights; and 3) there was a delay in getting information from the

contract attorney when quick answers could have been obtained from a law library if one were in place in the institution.

The inmates dissatisfied with CCA's legal-assistance program at the Metro facility expressed, between them, four other reasons for their dissatisfaction. First, a dominant concern of several inmates was that the Metro facility had no law library. Two inmates, for example, stated that they could understand law books better than an attorney, apparently in part because they could take whatever time was needed to read the books until they comprehended the requirements of the law. Another inmate, the one who had been a jailhouse lawyer in state prisons, was particularly frustrated by the lack of access to a law library. He reported that the contract attorney had told him, "I'm the law library. I'll get you what you need." "But how," the inmate asked, "am I supposed to know what cases I need? I don't know all of the court cases."

Second, one inmate was unhappy with the contract attorney because he would not help her get a divorce. She was not aware that CCA now bars the attorneys with whom it contracts from providing that kind of legal assistance.

Third, three of the inmates complained that the meeting with the contract attorney was not confidential. They had met with the contract attorney either in the staff dining room or the chapel while other inmates who wanted to meet with the contract attorney were present. Two other inmates also said that other inmates could overhear their conversations with the contract attorney, although these inmates seemed unconcerned about the lack of confidentiality.

Finally, two of the inmates questioned whether the contract attorney works on inmates' behalf. During the interview, one of them complained about conditions at the Metro facility. He said, however, that he had not shared his concerns with the contract attorney because he is "hired to keep lawsuits off CCA."

The second inmate, the former jailhouse lawyer referred to earlier, charged that the contract attorney does what is in his best interests, not the inmates'. He noted that the attorney, who is paid by CCA, is "not going to bite the hand which feeds him." The former jailhouse lawyer insisted that inmates can get more help from other inmates since they "want justice done." "Jailhouse lawyers," the inmate observed, "will help you get the most litigation you can."

Recommendations to be Considered When Structuring a Legal-Assistance Program that Utilizes Contract Attorneys

Based on the observations made and information collected during the site visit to the Metro-Davidson County Detention

Facility run by CCA, some limited recommendations can be made to correctional officials who decide to use contract attorneys to provide limited legal assistance to prisoners. Those recommendations are set forth below.

1. Specification of the Attorney's Role and Functions. All inmates in the prison need to be informed clearly and specifically, both in writing and verbally, of the role and functions of the contract attorney. The kind of specific information contained in the "Request for Attorney Conference" utilized by CCA should be shared with each inmate. In particular, each inmate should be told that the attorney is bound by disciplinary rules to represent the inmate-client (not the correctional officials) and to preserve the inmate-client's confidences. In addition, each inmate should be apprised about what the contract attorney can and cannot do on the inmate's behalf in order to avoid misunderstandings about the scope of legal assistance that the contract attorney can provide.

This specific notification of the role and functions of the contract attorney should be given to inmates verbally during the orientation process at the prison and should be included in the inmate handbook. In addition, the notification should be included on any form used by an inmate when requesting a meeting with the contract attorney and on the form, discussed below, which capsulizes the advice that the attorney has given to the inmate and the steps that the attorney will take on the inmate's behalf.

Finally, and perhaps most importantly, the contract attorney should begin each meeting with an inmate by reminding the inmate that while the attorney's fee is paid by the corrections department, he or she is duty-bound to represent the inmate. In addition, the contract attorney should reiterate that he or she cannot discuss anything that the inmate says during the meeting without the inmate's consent. Perhaps this specific affirmation by the contract attorney of his or her professional and ethical obligations to the inmate will help to limit the kinds of misperceptions about the role and loyalty of the contract attorney that were heard from some inmates during the site-visit interviews.

2. Contract Attorney's Qualifications. It goes without saying that the contract attorney needs to be qualified for the job. The question is: What does that mean?

The persons with whom this question was discussed during the site visit had a lot of advice about the personal traits and qualifications that correctional officials should be looking for when hiring a contract attorney. The assistant wardens said that the contract attorney needs to have common sense, be open-minded

and willing to understand corrections, be observant, have good communication skills, not be dogmatic, and be experienced.

The contract attorney himself said that the attorney needs to be a "jack of all trades" because of the range of questions brought to the attorney by inmates. But he also said that it is particularly important for the attorney to have had criminal-justice experience; to understand the state's sentencing system, postconviction law and procedures, and summary judgment; and to have tried a case. The contract attorney also highlighted the need to have good communication skills and, in his words, an "ability to cut through the b.s." The contract attorney should not, he cautioned, be so naive as to always believe either inmates or correctional officials.

CCA's vice president of legal affairs added to this list of credentials. She too emphasized the need for the attorney to have broad knowledge of the law in general as well as postconviction and civil law in particular. She noted, in addition, that the contract attorney must not be afraid to work with, or dislike working with, inmates. (One of CCA's contract attorneys quit because he didn't like working with this kind of clientele.) And finally, the CCA vice president advised that a contract attorney should have a desire to help people and should be a problem solver.

3. Warden's Qualifications. One of the assistant wardens at the Metro facility commented that even if a contract attorney had all of the knowledge and personal traits needed to do the job well, the legal-assistance program would not be effectual with "a bad warden." For a legal-assistance program that utilizes a contract attorney to meet one of its objectives -- the avoidance of litigation -- the warden would need to have good communication skills, be a problem solver, and not be obdurate.

4. Private Meeting Place. If a prison utilizes a contract attorney to provide legal services to inmates, a room must be made available where the contract attorney can meet with an inmate in private. Disclosures made to the attorney in the presence, for example, of other inmates will not be protected by the attorney-client privilege. In addition, as the comments made by inmates during the site visit indicated, some inmates, understandably, have less confidence in a legal-assistance program in which their discussions with the contract attorney are not confidential.

5. Clarity in Communications with Inmates; Attorney Response Forms. During the meetings between inmates and the contract attorney observed during the site visit to the Metro facility, the attorney demonstrated an impressive breadth of knowledge about the law. In addition, the attorney clearly explained the law to the inmates. Nonetheless, when interviewed

about the contract-attorney program, a few inmates complained that they did not understand why they could not obtain the relief about which they had consulted the attorney, such as the correction of a perceived error in the calculation of sentencing credits.

To avoid or at least limit such confusion, the contract attorney must always be mindful of the need to explain the requirements of the law in language that an uneducated and unknowledgeable person can understand. In addition, at the end of the meeting, the contract attorney should ensure that the inmate has no questions about what has been discussed during the meeting.

Finally, the attorney should briefly summarize in writing any steps that the attorney has advised the inmate to take regarding the legal problem about which the inmate consulted the attorney. If there are any deadlines that the attorney has told the inmate that the inmate needs to meet, then those deadlines should be identified on the form. In addition, the contract attorney should identify the steps that he or she will be taking on the inmate's behalf and the date by when these steps will be completed.

II. KEY DECISIONS TO BE MADE BY CORRECTIONAL OFFICIALS REGARDING LEGAL-SERVICES PROVIDERS; AREAS FOR FUTURE RESEARCH

As was discussed at the beginning of this chapter, the Supreme Court made it clear in *Lewis v. Casey* that correctional officials cannot simply open a law library, even an excellent one, and thereby satisfy their constitutional obligation to provide inmates with access to the courts. For certain inmates, such as those who are illiterate or who do not speak or read English, correctional officials must take some different or additional steps to ensure that the inmates' access to the courts is, as the Constitution requires, "meaningful."[19]

What kinds of steps should be taken, as a policy matter, is the more difficult question. It is a question that cannot be definitively answered without further research. It is a question that, in any event, could not be answered in this manual because of the limited focus of this project -- on prisoners' civil-rights lawsuits and not the other types of claims, such as habeas corpus claims, to which the obligation to provide limited assistance extends.

Yet from this project, some limited information has been gathered and insights gained that may provide helpful guidance to correctional officials faced with the task of making key decisions about how they should respond to the Supreme Court's

decision in *Lewis v. Casey*. In addition, areas have been identified where further research is needed before the most cost-effective means of limiting the burdens of *pro se* inmate litigation through legal-assistance programs can be determined. Some of the key decisions confronting correctional officials about legal-assistance programs, information bearing on those decisions, and some questions upon which future research can focus are set forth below.

Inmate Law Clerks in Lieu of Attorneys?

As was mentioned earlier, inmates in most correctional facilities must currently turn to other inmates for legal assistance and advice.[20] Yet there are a number of drawbacks to, and potential problems with, a legal-assistance program that primarily relies upon inmates to meet other inmates' legal-assistance needs. Some of the chief drawbacks and potential problems are capsulized below.

- Inmates do not have the leverage, the knowledge, and the access to correctional administrators needed to engage in the problem solving with correctional authorities that can avert litigation.
- Inmates do not have the capacity and the contacts to cut through a bureaucracy to resolve, without litigation, other inmates' legal problems, such as errors in the calculation of their sentence credits.
- Inmates, even trained ones, generally lack the knowledge to identify and discourage the filing of frivolous claims.
- Inmate legal assistants lack the objectivity to identify and discourage the filing of frivolous claims.
- Inmates lack the knowledge to adequately identify meritorious claims and the skills to assist other inmates in effectively presenting those claims to a court in cases in which litigation cannot be avoided.
- Inmates have no legal or ethical duty to act in another inmate's best interests.
- Inmates are not bound by the attorney/client privilege.
- There can be a lack of continuity in the provision of legal services as inmate assistants are transferred out of, or released from, a correctional facility.

- Inmate legal assistants may refuse to provide quality legal services (assuming they had the capacity and training to provide quality services), or even any services, to certain inmates.

- Inmate legal assistants may extort contraband, exhorbitant fees, or sexual favors in return for the assistance they provide.

- Inmate legal assistants may become "power figures" and exert a disproportionate amount of influence over other inmates.

- At least some inmate legal assistants may provoke litigation in order to increase their status amongst other prisoners, to harass correctional authorities, or for other reasons.

With all of the downsides that come or can come from using inmate legal assistants, it would seem ill-advised to construct a legal-assistance program that primarily utilizes inmates to meet the legal-assistance needs of other inmates. Yet the repercussions of using inmate legal assistants and the ways in which they might effectively be used for limited purposes, under the supervision of an attorney, need to be more closely studied and better documented so that correctional officials can make informed decisions when establishing or revamping legal-assistance programs in prisons. One particularly illuminating piece of research would compare, in a methodologically sound study, the extent to which, if at all, inmate law clerks curb the filing of frivolous civil-rights claims compared to other legal-assistance providers, such as contract attorneys. Another research project might examine the extent to which inmate law clerks succeed in getting errors in sentencing computations rectified compared to other legal-services providers. The project could then evaluate and compare the monetary savings reaped by correctional officials because of those corrections.

The Role of Paralegals

In devising a legal-assistance program to curb the filing of frivolous civil-rights claims by inmates, facilitate the problem solving that can avert litigation, and ensure that meritorious claims are resolved appropriately, one question that correctional officials will confront is: What role, if any, should paralegals play in that program? The question is an important one because paralegals do not cost as much as attorneys.

Yet if paralegals are not qualified to perform the legal tasks with which they are charged, the savings reaped through the use of paralegals will be ephemeral. Potentially greater costs

will be incurred as claims that should not have ended up in court wind their way through the legal system. In addition, even if the paralegals are qualified to perform their assigned tasks, but are not perceived by inmates to be qualified to perform them, then the costs of *pro se* inmate litigation will not be curtailed and the benefits of the legal-assistance program will be reduced as prisoners "go it alone" and pursue their claims in court.

There is some evidence which suggests that paralegals can, at least in some circumstances, be incorporated into a prison's legal-assistance program to decrease its costs without compromising its effectiveness. The paralegal program that used to be in place at the medium-security prison in Fox Lake, Wisconsin, for example, was reportedly successful in expanding the level of legal services available to inmates, providing quality services with which the inmates were satisfied, and providing vocational training to the two inmate paralegals employed at the prison.[21] (The paralegal program was discontinued after these inmates were paroled because of difficulties experienced finding long-term prisoners with both the judgment and ability to serve as paralegals.[22])

Yet there were some qualifying features of this program that warrant emphasizing. First, the paralegals had to successfully complete a two-year associate of arts program in paralegal studies before they were eligible to work as a paralegal in the prison.[23] Second, their duties and authority were carefully circumscribed. Much of what they did entailed the gathering of facts during interviews with inmates and from public records and transcripts.[24] The paralegals were strictly prohibited from providing legal advice without a supervising attorney's prior approval.[25]

Third, the work of each paralegal was closely supervised by an attorney.[26] For example, any legal documents prepared by a paralegal had to be reviewed by the supervising attorney.[27]

Fourth, inmates at the prison had the option of meeting with a law student, who was also working under the supervision of an attorney, instead of an inmate paralegal.[28] It is possible that giving the prisoners this option made the program more credible in their eyes.

And finally, and quite significantly, this particular program did not provide assistance to inmates bringing claims about their conditions of confinement.[29] The program was primarily designed to help inmates with postconviction petitions, family-law problems, such as divorces, and questions involving sentence credits.[30]

The successful incorporation of paralegals into a prison's legal-assistance program would seem to hinge on a number of

different factors. Some of those factors include: the amount, quality, and content of the training the paralegals receive; the type of tasks they perform; the amount and quality of supervision they receive; and who is supervising their work.

It is important to note the potential effects that this latter factor may have on a legal-assistance program's efficacy in curbing the filing of frivolous claims. In the report of the in-house evaluation of the Fox Lake paralegal program, a supervising attorney underscored that it is imperative that the supervising attorney not be under the control of, or supervised by, officials at the prison.[31] Otherwise, the program will not have credibility with the inmates,[32] and inmates will resort to the kinds of self-help that lead to the filing of legal claims that could and should have been avoided.

It would provide particularly helpful guidance to correctional officials if a research project were undertaken in the near future to assess the use of paralegals in prisons' legal-assistance programs. Correctional departments across the country could be canvassed to determine the range of ways in which paralegals are currently being utilized in such programs. Then, independent evaluations of several different paralegal program models could be undertaken in an attempt to determine which model can most cost-effectively achieve the objectives of a legal-assistance program mentioned earlier -- facilitating the problem solving that can avert litigation, weeding out frivolous claims, and ensuring that meritorious claims are resolved appropriately.

Attorney-Drafted v. Attorney-Edited Complaints

Typically, when a person is going to file a lawsuit and turns to an attorney for assistance, the attorney drafts the complaint, unless the claim which the client wants to bring is a frivolous one. CCA, as discussed earlier, provides more limited assistance to inmates through its legal-assistance program at the Metro facility. The contract attorney will not draft a complaint for an inmate unless the inmate is unable to draft the complaint himself or herself. The attorney will, however, advise an inmate, before the complaint is drafted, about what claims can and cannot be included in the complaint. In addition, the attorney will review the complaint once it is drafted and tell the inmate what changes should be made in the complaint.

The question is: Which method is the most cost-effective means of deflecting frivolous claims from the court and of ensuring that meritorious claims that could not be resolved without litigation are correctly adjudicated by the court. At this point, this question cannot be answered without further research. Part of this research would include a qualitative

analysis of the differences between attorney-drafted complaints and those revised after being reviewed by an attorney. But it seems self-evident that the degree of those differences will depend on the intensity and thoroughness of the editing process and on whether the inmate or the attorney makes the necessary changes in the complaint.

The answer to the question about which complaint-drafting method is the most cost-effective may also depend on what costs are included in the calculus. To be fully accurate, a cost assessment would include the following costs: differences in the amount of time that it takes the attorney to draft complaints for inmates as opposed to the time it takes to edit them; differences in the time it takes a court to process attorney-drafted as opposed to attorney-edited complaints; and differences in the amount of time it takes for the attorneys representing the defendants sued by inmates in civil-rights actions to resolve and/or respond to attorney-drafted claims versus attorney-edited claims.

The Comparative Cost-Effectiveness of Different Approaches to Affording Prisoners Meaningful Access to the Courts

In this chapter, observations made during a site visit to a prison that uses a contract attorney to provide limited legal assistance to prisoners were highlighted. There are, however, other approaches that can be taken in an attempt to ensure that prisoners are afforded meaningful access to the courts and that certain policy objectives are met.

Just one example of the many alternative approaches is the "Eastern District Prisoner Representation Plan" established by the Clerk of the United States District Court for the Eastern District of North Carolina, North Carolina Prisoner Legal Services (NCPLS), the North Carolina Department of Correction, and the Attorney General of North Carolina. Under that plan, a prisoner's civil-rights lawsuit that has survived a frivolity review is referred to NCPLS for an investigation of the complaint's factual and legal basis. Within ninety days of the referral, NCPLS must then submit a report to the court. In that report, NCPLS must state one of four things: (1) that it will represent the prisoner; (2) that in the opinion of an NCPLS attorney, there is no need to appoint an attorney to represent the prisoner; (3) that the prisoner does not want to be represented by NCPLS; or (4) that NCPLS could not complete the investigation because the prisoner refused to cooperate.

Research needs to be undertaken to determine the relative cost-effectiveness of these various approaches to providing prisoners with meaningful access to the courts. This research should, in particular, examine the extent to which these different approaches meet the policy objectives of solving

problems without the need for litigation, discouraging prisoners from filing frivolous claims, and helping to ensure that meritorious claims are justly resolved.

III. THE DEVELOPMENT OF AN "ACCESS TO THE COURTS" PLAN

The Supreme Court's decision in *Lewis v. Casey* has sparked a need for each Department of Corrections to review the steps it is taking to facilitate inmates' access to the courts in order to ensure that constitutional requirements are met. This review process will also provide each Department of Corrections with the opportunity to determine how its legal-assistance program can best and most cost-effectively be constructed and used to limit the burdens of *pro se* prisoners' civil-rights suits and to ensure that inmates' meritorious claims are resolved appropriately.

The end result of this review process can be a written "access to the courts" plan. This plan would help to ensure that constitutional requirements and the policy objectives of the legal-assistance program are met. Some key features of the plan would cover the following topics.

1. Service Providers. The plan would first identify what kinds of individuals or entities will provide legal assistance and advice to inmates in the correctional facilities operated by the department. Some potential options to consider include: the use of contract attorneys; the use of well-trained paralegals working under the close supervision of, and in conjunction with, an attorney or attorneys; the use of law students working under the close supervision of, and in conjunction with, an attorney or attorneys as part of a law school's clinical program; and the use of organizations which specialize in providing legal services to inmates. (As was mentioned earlier, relying on inmate law clerks as the primary means of providing legal advice or assistance seems ill-advised from a policy perspective.)

During the review process, correctional officials may determine that they should not or cannot adopt a "one-size-fits-all" approach for providing legal assistance at each of the prisons operated by the Department of Corrections. For example, they may decide that it would be most cost-effective at one prison to provide legal services through a clinical program operated by a nearby law school. At another prison not located near a law school, using a contract attorney or contracting with an organization that specializes in providing legal services to prisoners might appear to be the most viable and cost-effective option. And correctional officials might decide that it would be best if a contract attorney worked in tandem with trained paralegals at a third prison, a maximum-security prison where there are more potential legal claims to attempt to resolve

administratively and to "clean up" if the claims are filed in court.

When deciding who will serve as the legal-services providers in prisons in the state, a Department of Corrections might want to consider two features of the legal-services program utilized by the Minnesota Department of Corrections that would expand its service-provider options: "circuit-riding" legal-services providers and the use of interactive television as a means for service providers to communicate with prisoners at some prisons. The Minnesota Department of Corrections has contracted with the State Law Library to run a program called Law Library Service to Prisoners (LLSP). This program utilizes two circuit-riding law librarians who visit prisons in the state on a weekly or biweekly basis.[33] And at one prison, interactive television technology is used so that the librarians can still meet "face-to-face" with inmates and yet save the time and money that would otherwise be spent traveling over two hundred miles round-trip to the prison.[34]

The primary function of LLSP is to provide inmates with legal-reference assistance and to teach them how to conduct their own legal research. Since the librarians are not attorneys, they are precluded from giving inmates legal advice or helping them write legal documents.[35] But the practices of circuit-riding and using interactive television to meet with an inmate might also be used effectively, at least in some circumstances, by legal-services providers who provide more extensive legal assistance and advice.

In addition to identifying what kinds of individuals or entities will be involved in providing legal services to inmates, the "access to the courts" plan would identify any restrictions on the types of legal services that can be provided. (For example, will assistance be provided for ordinary civil cases, such as divorces?) The plan would also identify any restrictions on the types of inmates who can receive certain services. (For example, will assistance only be available for certain prisoners, such as those who are illiterate or those mentally incapable of drafting a coherent complaint or otherwise meeting the requirements that must be met when filing or litigating a claim? And if so, how will the assessment regarding literacy and mental capacity be made?)

Many of these issues to be resolved, though extremely important, go beyond the scope of this study. When, however, the restrictions applicable to prisoners' civil-rights cases are considered, the principal question confronting correctional officials will not be, "What can we get by with under *Lewis v. Casey*?" While it will be imperative that the "access to the courts plan" meet constitutional requirements, the more challenging and, over the long run, more important question to be

resolved will be the policy question, "What legal-assistance mechanism will most cost-effectively achieve the goals of solving problems that may otherwise culminate in litigation, discourage the filing of frivolous claims, and ensure that meritorious claims are resolved appropriately?"

2. Forms, "How-to" Manuals, Federal-Court Handbooks, and Information Packets. Well-drafted model forms, litigation manuals, federal-court handbooks, and information packets written especially for prisoners can be useful tools to limit the kinds of mistakes and ineptly drafted legal documents that can bog down the processing of, and increase the costs of processing, *pro se* prisoners' civil-rights suits. Some of the model forms may, as is suggested in Chapter 5, be drafted by the courts, while others are drafted by or for the Department of Corrections. If forms are generated by the department, however, it would be advisable to obtain feedback about the kinds of forms that should be made available and about their content from attorneys who are prisoners' advocates. This feedback will help to ensure that the forms, in conjunction with the other components of the legal-services program, meet constitutional requirements, as well as the policy objectives of the program.

As this technical-assistance manual was going to press, the Vermont Department of Corrections was in the midst of compiling a form bank for prisoners and an inmate litigation manual as one part of a plan to provide inmates with access to the courts.[36] In Maryland, another state surveyed during this project, Correctional Education Libraries operates a program called Library Assistance to State Institutions (LASI). As one part of this program, twenty-one Legal Information Packets have been developed on an array of criminal-law and postconviction-law topics.[37] As part of its "access to the courts" plan and program, a Department of Corrections could consider developing such information packets to assist *pro se* inmates in the filing and litigation of civil-rights suits.

The efforts of these two states can provide a potentially helpful starting point for Departments of Corrections in other states developing forms, litigation manuals, and information packets under their "access to the courts" plans. Several examples of litigation manuals and federal-court handbooks that may also serve as helpful resources include:

> Prisoners' Legal Manual for Selected Problems (publication funded by the Southern Poverty Law Center located in Montgomery, Alabama);[38]
>
> Federal Court Prison Litigation Project: Revised Handbook (publication funded by the

United States District Court for the Northern District of Illinois);[39]

Prison and Jail Cases Handbook (publication funded by the United States Court of Appeals for the Seventh Circuit);[40]

A Manual for *Pro Se* Litigants Appearing Beforethe United States District Court for the Southern District of New York (published by the United States District Court for the Southern District of New York);[41]

A Manual for Inmate Litigants Filing Civil Actions *Pro Se* in the United States District Court for the Western District of New York (published by Prisoners' Legal Services of New York);[42] and

Prisoners' Self-Help Litigation Manual (published by Oceana Publications, Inc.).[43]

3. Law Books. The "access to the courts" plan developed by the Department of Corrections can identify which prisons, if any, will retain the kind of fully stocked law library developed in response to the Supreme Court's decision in *Bounds v. Smith* and which will utilize scaled-down "mini law libraries." If mini libraries are going to be used in some or all prisons, the books and materials which, at a minimum, will be included in each collection need to be clearly specified, as the Vermont Department of Corrections has done in an appendix to its "access to the courts" plan. Care must be taken, however, to ensure that the most current editions of the books are included on the list and that this list is continually updated so that obsolete materials are neither purchased for, nor retained in, the mini libraries.

The "access to the courts" coordinator in Vermont has also prepared a list of about 250 cases. Twenty-five copies of each case on this list will be included in "case banks" in the eleven law libraries in prisons in the state.[44] If other Departments of Corrections utilize case banks as part of their "access to the courts" programs, a structure would need to be put in place to ensure that important new cases are promptly added to the case bank and overruled or reversed cases are promptly removed.

4. Technology. The "access to the courts" plan developed by a Department of Corrections can explain how, if at all, technology will be used to ensure both that inmates' constitutional right to have meaningful access to the courts is protected and that the policy objectives of the legal-assistance program are met. Examples of states where technology has been or

is being incorporated into the legal-assistance program for prisoners include: Maryland, where inmates can search selected CD-ROM data bases;[45] and Minnesota, where, as mentioned earlier, interactive television is utilized for communications between librarians and prisoners at a distant prison. In addition, in Vermont, an "access to the courts" plan submitted to the federal district court in 1996 envisioned having civilian paralegals access cases, statutes, and other primary-source, legal materials through a CD-ROM/internet/dial-up system. The plan to use civilian paralegals to provide legal assistance to prisoners has now, however, been abandoned.[46]

5. Training. The "access to the courts" plan can identify what, if any, training will be offered to inmates as part of the "access to the courts" plan. In Maryland, for example, as part of the LASI program, a seminar providing an introduction to legal research is offered to inmates.[47] In addition, videotapes on how to conduct legal research are available in the prison libraries.[48] Finally, inmates can receive training, both individually and in groups, on how to use the prison library's CD-ROM products.[49]

The "access to the courts" plan can also discuss the training of the individuals who will provide legal assistance to prisoners. For example, if paralegals are used as part of the legal-assistance program, the plan can specify the kinds and amount of training the paralegals must receive. The plan can also identify the steps that will be taken to ensure that the paralegals are regularly updated about critical developments in the law.

6. Evaluation. To ensure that the "access to the courts" program is meeting its objectives, the "access to the courts" plan would define a process through which the quality and efficacy of the program are regularly evaluated.

IV. COURT-BASED, LEGAL-ASSISTANCE PROGRAMS

The preceding discussion focused on the development of cost-effective, legal-assistance programs by correctional officials to avert litigation and facilitate the efficient and accurate processing of *pro se* prisoners' civil-rights suits. As was discussed, there are a number of routes that correctional officials may take to reach these policy objectives.

But let us assume, for purposes of discussion, that each Department of Corrections recognizes the cost-effectiveness of establishing a high-quality, though limited, legal-assistance program through which problems are solved without the need for litigation, frivolous claims are winnowed from complaints before filing, and claims that are filed are clear, well-written, and

easier for correctional officials to respond to and courts to process. And let us furthermore assume that each Department of Corrections puts such a program in place. The question which remains is this: Can and should legal-assistance programs be developed and utilized to cost-effectively increase the efficiency and accuracy with which *pro se* prisoners' civil-rights complaints are processed after they are filed?

It is clear that courts do not have to establish such post-filing, legal-assistance programs. Nor, it appears, do correctional officials have a constitutional obligation to establish such programs. As was mentioned earlier in this chapter, the Supreme Court in *Lewis v. Casey* concluded that states need not, as a constitutional matter, take any steps to ensure that prisoners can "litigate effectively" once they are in court.[50]

The question whether courts should adopt such programs as a case-processing tool is, however, a different question. The answer to that question depends in part on the nature, scope, and quality of the legal-assistance program developed by correctional officials in a particular district. There will be no need for a court-based program, for example, if the legal-assistance program developed by correctional officials extends to all phases of the litigation process, including trial.

But what if it does not? To what extent is there then a need for a court-based program to ensure that prisoners' civil-rights suits are resolved efficiently and accurately?

During this project, some limited information was gathered which bears on this question. In the fifteen courts in which surveys were conducted, a district judge and a magistrate judge were each asked these two questions: "What percent of *pro se* prisoners whose complaints survive defendants' motions to dismiss and/or for summary judgment are, in your opinion, unable to adequately conduct and complete discovery?" and "What percent of *pro se* prisoners whose complaints survive defendants' motions to dismiss and/or for summary judgment are, in your opinion, unable to adequately represent themselves at trial?"

Of the twenty judges who were able to quantify the percentage of prisoners unable to adequately conduct and complete discovery, twelve said that 50% or more of the prisoners whose complaints survive motions to dismiss and/or for summary judgment cannot adequately process their lawsuits through the discovery stage of the litigation process. In addition, four of the eight judges who quantified their responses and indicated that a majority of prisoners can handle the demands of discovery added significant qualifications to their responses. Two of the judges said that the prisoners can do so in their district because they receive assistance from counsel at this litigation stage; the two

others said that this litigation stage poses no or few special problems for prisoners because discovery in the district is effected through mandatory disclosures.

Nineteen of the district and magistrate judges who were surveyed were able to quantify the percentage of *pro se* prisoners who cannot adequately represent themselves at trial. Fourteen of the judges said that 50% or more of *pro se* prisoners are incapable of adequately representing themselves at trial. In fact, seven of the judges (more than a third of those who gave a numerical estimate) said that 90% or more of *pro se* prisoners cannot adequately represent themselves at trial.

Without additional research, the percentage of *pro se* prisoners who actually cannot adequately conduct discovery or represent themselves at trial cannot be determined with any level of precision. Yet the feedback received from the judges surveyed during this project suggests that there are a potentially large number of prisoners who cannot litigate, with any realistic chance of success, even meritorious claims through certain complex stages of the litigation process, unless they receive at least limited assistance.

The number of prisoners (and nonprisoners) for whom assistance is needed in order to effectively and accurately process their claims through a particular district court and the litigation stages at which assistance is needed are important to determine because these factors may affect the nature and scope of any post-filing, legal-assistance program adopted as a case-processing tool. It is important to underscore, however, that the assistance provided at a particular litigation stage may not necessarily need to come from an attorney. As several courts indicated in their survey responses, for example, the need for assistance from an attorney or some other qualified person trained in the law to maneuver a case through the discovery process may often be obviated through the use of mandatory disclosures in *pro se* prisoners' civil-rights suits.

In addition to other case-processing tools, however, courts have found that programs through which attorneys are appointed to assist prisoners who have brought *pro se* civil-rights suits can be a useful means of increasing the efficiency and accuracy with which those suits are processed. Two different attorney-appointment programs are briefly highlighted below, followed by a discussion of the appointment of counsel for limited purposes in *pro se* prisoners' civil-rights suits.

Volunteer Lawyers' Project for the Southern District of Florida[51]

The Volunteer Lawyers' Project for the Southern District of Florida is administered by a full-time Project Coordinator. The Project Coordinator screens all civil, nonhabeas cases filed by *pro se* litigants, both prisoners and nonprisoners, in which process has been served on the defendants. The court facilitates this screening by providing the Project Coordinator with current docket information through on-line computer access to the court's Integrated Case Management System.

During the initial screening process, the Project Coordinator determines whether a claim is facially meritorious and whether the plaintiff has a chance of succeeding on the merits. In making this determination, the Project Coordinator will take the kinds of steps typically taken by attorneys when deciding whether to represent a prospective client on a contingent-fee basis. The Project Coordinator reviews documents filed with the court and may, in addition, write to, or talk with, the plaintiff, request and review other relevant records, and talk to witnesses.

If the Project Coordinator determines that a claim is facially meritorious and that the plaintiff has a chance of succeeding on the claim, the Project Coordinator then turns to the next stage of the screening process -- determining whether the case should be referred to a volunteer attorney. In making this determination, the Project Coordinator considers a number of factors, including the following:

- How substantial is the alleged injury?
- Is immediate relief needed to avoid further injury?
- How limited is the inmate's access to legal research and writing tools?
- Does the case involve complex legal issues?
- Is there a likelihood of success on the merits if counsel is assigned to the case?
- Is the plaintiff physically, mentally, and linguistically capable of adequately presenting the case?
- Does the case, for the most part, consist of conflicting testimony that requires skilled presentation and cross-examination?

- Would others besides the plaintiff benefit if the plaintiff prevails in the case?

The Volunteer Lawyers' Project has taken a number of steps to diminish the burdens on counsel who agree to represent *pro se* litigants. Those steps, according to the Project Coordinator, have contributed to the success and ease with which the Project has been able to recruit volunteer attorneys. The steps include:

- For those attorneys whose professional-liability insurance policies do not cover *pro bono* work up to a minimum of $200,000, the Project will, at no charge, provide insurance coverage in that amount.

- The Project will provide volunteer attorneys with a computer disk containing form pleadings, motions, notices, discovery requests, and other documents.

- The Project offers training seminars on the substantive law, procedural issues, and the practical aspects of representing *pro se* litigants, including prisoners.

- The Project recruits experienced trial lawyers to serve as mentors to inexperienced lawyers with *pro bono* assignments.

- The Project provides an attorney who has agreed to take a case with a copy of the complaint, other essential court orders and documents filed with the court, a summary of key legal and factual issues in the case, the docket sheet, and any additional information about the case gathered by the Project Coordinator.

- The Project administers a Revolving Litigation Loan Fund through which attorneys can be reimbursed for out-of-pocket expenses incurred in a *pro bono* case. If a case is later settled or the court awards attorney's fees and costs, the money loaned to the attorney for out-of-pocket expenses must be repaid. If the plaintiff does not prevail in the case, however, the money need not be repaid.

The start-up money for the Volunteer Lawyers' Project came from $80,000 of a civil-contempt penalty allocated to the Project by the court. The ongoing expenses of the Project, including the Project Coordinator's salary, are paid from funds received primarily from two sources. First, the court assesses $25 in annual dues from each member of the court's general and trial bars. These dues are paid directly to the Volunteer Lawyers' Project.

Second, if a court awards attorney's fees and costs in a case or a settlement offer includes attorney's fees and costs, the attorney keeps 75% of the fee award remaining after the Revolving Litigation Loan Fund has been reimbursed for any money provided to the attorney to cover out-of-pocket expenses. The remaining 25% of the fee award goes to the Volunteer Lawyers' Project to help pay its operating expenses.

The Project costs about $75,000 a year to run. A bank's donation of the space in which the Project is housed and the coverage of overhead costs by a local law firm help to keep the costs of the Project down.

The Use of Contract Attorneys by the Northern and Southern Districts of Iowa[52]

For years, the Northern and Southern Districts of Iowa struggled to find a workable system for appointing counsel to facilitate the efficient and effective processing of *pro se* prisoners' civil-rights suits. The Iowa courts found that the system of requesting attorneys to represent inmates *pro bono* was, in the words of the Chief Magistrate Judge from the Southern District, a "dismal failure," even when the attorneys' out-of-pocket expenses incurred on the cases were covered by the Attorney Admission Fee Fund. The process of finding a lawyer who would take such a case was labor-intensive for the courts, with three to five requests having to be made by the courts in almost every case. Attorneys professed a lack of competence to handle these kinds of cases. In addition, the distance between the attorneys and their prospective clients -- seven hours round-trip from the prison where most claims originate in Iowa and the cities where most of the attorneys are located -- presented a logistical complication. The distance also led to a financial burden on the attorneys, because of the lost time spent traveling to and from the prison, that further discouraged attorneys from accepting the courts' appointments.

For a while, the two district courts used what they considered their inherent power to appoint counsel in *pro se* prisoners' civil-rights suits. These mandatory appointments led to so much tension with the bar and so many calls from attorneys who claimed a lack of ability to provide competent representation in these cases that the practice of making inherent-power appointments was discontinued.

The courts in the Northern and Southern Districts of Iowa now contract with attorneys to represent certain *pro se* prisoners who have brought civil-rights suits. Counsel was provided in about 150 cases in the contract period from July 1, 1995 through June 30, 1996 -- between a third and 40% of the cases which survived the initial screening process. Attorneys in two law

firms in the state represent the prisoners in the vast majority of these cases.

The contract attorneys are paid from the Attorney Admission Fee Fund. In addition, their out-of-pocket expenses are paid from this fund. The combined out-of-pocket expenses of the contract attorneys generally total about $25,000. In addition, the two law firms will be paid a total of $85,000, in monthly installments, under their 1996-97 contract with the courts. In return, the firms have agreed to accept eighty-five prisoners' civil-rights cases assigned by the courts.

The money in the Attorney Admission Fee Fund comes primarily from three sources: (1) a $30 fee paid for admission to the court *pro hac vice*; (2) a $20 fee paid every other year by attorneys to register their CLE credits; and (3) a $50 fee paid every other year by attorneys who do not want to be assigned a prisoner's § 1983 case. Legal Services Corporation Attorneys and government attorneys -- those from the U.S. Attorney's Office, the Iowa Attorney General's Office, and the City of Des Moines Attorney's Office, as well as county attorneys and other agency counsel -- are exempted from paying the $50 "buy-out fee."[53]

If they do not pay the $50 fee, however, the government attorneys must provide five hours of *pro bono* services to the court over a two-year period. Examples of projects on which government attorneys have worked include: developing a model set of jury instructions for § 1983 suits; editing a handbook on § 1983 case law in the Eighth Circuit; developing one-page outlines of § 1983 issues that can be used by attorneys and court staff attorneys when responding to requests for advice from prisoners; and serving as mediators in § 1983 cases.

Appointment of Counsel for Limited Purposes

In *Billman v. Indiana Department of Corrections*, the Seventh Circuit Court of Appeals acknowledged that it is difficult, and sometimes impossible, for prisoners to conduct the investigation needed to establish or verify their claims.[54] In that case, the prisoner-plaintiff did not know the name of the correctional official who had placed the plaintiff in a cell where he was allegedly raped by an HIV-positive cellmate whom correctional officials allegedly knew had a history of sexually assaulting prisoners. The district court dismissed the complaint because it lacked any facts which suggested that the correctional officials who had been sued had acted with the requisite deliberate indifference.

On appeal, the court of appeals reversed. "We do not think that the children's game of pin the tail on the donkey is a proper model for constitutional tort law," the court said.[55] The court of appeals then held that the district court had a duty to

help the prisoner-plaintiff "within reason" to conduct the "necessary investigation."[56] The court mentioned several ways in which the district court might discharge this duty, one of which is particularly noteworthy here. The court of appeals suggested that the district court could, under 28 U.S.C. § 1915(d) (now § 1915(e)(1)), ask an attorney to represent the plaintiff for the limited purpose of determining whether the complaint could be amended to name a defendant whom there was reason to believe had violated the plaintiff's constitutional rights.[57]

During this project, feedback was received about other instances in which counsel is appointed for a limited purpose in a *pro se* prisoner's civil-rights suit. The Chief Magistrate Judge from the Southern District of Iowa reported that counsel is appointed in that district just to handle discovery in some cases. In the United States District Court for the Northern District of New York, an attorney is sometimes appointed just to represent a prisoner at trial or to serve as standby counsel. And, as mentioned earlier in this chapter, under the "Eastern District Prisoner Representation Plan," North Carolina Prisoner Legal Services is appointed to investigate prisoners' civil-rights suits that survive the court's frivolity review.

There are other potential ways in which attorneys might be used, in limited ways, to facilitate the processing of *pro se* prisoners' civil-rights suits. For example, it is possible that a mechanism could be put in place through which designated attorneys answer prisoners' specific questions about certain procedural aspects of their cases, such as how to respond to a motion for summary judgment. As was discussed earlier in this chapter, the contract attorney at the Metro-Davidson County Detention Facility operated by CCA already serves this kind of post-filing, advisory role in a corrections-based, legal-assistance program. And such back-up assistance and advice is already provided to *pro bono* attorneys in certain court-based, legal-assistance programs. It is therefore at least possible that this program concept could be extended in such a way that advice is given directly to *pro se* litigants. Whether such an extension would be advisable though is a different question, one which could not and should not be answered without further study.

V. CONCLUSION AND RECOMMENDATIONS

For years, correctional officials have primarily relied on law libraries, combined with assistance from jailhouse lawyers or inmate law clerks, to provide inmates with access to the courts. In *Lewis v. Casey*, the Supreme Court essentially said to correctional officials in one critical paragraph of its opinion: "You need to take another look at your legal-assistance programs. You need to make sure that they truly provide prisoners with meaningful access to the courts."[58] More specifically, the Court

indicated that providing inmates with access to books and other materials that they cannot read or understand does not provide them with the meaningful access to the courts to which they are constitutionally entitled.

One of the benefits of the Supreme Court's decision in *Lewis* is that while correctional officials are already reviewing their legal-assistance programs to ensure that they meet constitutional requirements, they can also review them to determine how, from a policy perspective, they might need to be changed. Set forth below are some recommendations that will help correctional officials make these determinations over both the short and the long run.

Recommendations

1. Each Department of Corrections should undertake a formal evaluation of its "access to the courts" program. As part of this evaluation process, an assessment should be made of the extent to which the program, as it is currently constructed, helps meet the following four policy objectives: (1) the resolution, without litigation, of problems which may otherwise culminate in litigation; (2) the winnowing out of frivolous claims before prisoners' civil-rights complaints are filed in court; (3) ensuring that those prisoners' complaints which are filed in court are drafted clearly and correctly so that correctional officials and the Attorney General can respond to them, and so that the courts can process them, more efficiently and accurately; and (4) ensuring that prisoners' meritorious claims are appropriately resolved as soon as possible during the litigation process.

2. After the completion of the above evaluation, each Department of Corrections should develop an "access to the courts" plan. One purpose of this plan would be to establish a blueprint of the steps to be taken to most cost-effectively achieve the four policy objectives set forth above. Another purpose of the plan would be to ensure that the department's legal-assistance program meets constitutional requirements.

The "access to the courts" plan should contain the answers to the following questions, among others:

- Who (whether individuals or entities) will provide legal assistance and advice to inmates in each of the prisons run by the department?

- For what kinds of legal problems will assistance and advice be available?

- Will this assistance be available to all inmates? If not, to whom will it be available?
- What training requirements must legal-services providers meet?
- What kinds of model forms, litigation manuals, federal-court handbooks, and information packets specially designed for prisoners will be available in the prisons?
- Which prisons, if any, will retain fully-stocked law libraries, and which will have "mini" law libraries?
- In those prisons, if any, that have mini law libraries, what books and other resources, at a minimum, will be in each library's collection, and who will be responsible for managing that collection?
- How will technology be used to ensure that prisoners' constitutional right to have meaningful access to the courts is protected and that the policy objectives of the legal-assistance program are met?
- What kinds of training will be offered to inmates as part of the "access to the courts" plan?
- How and how often will the quality and efficacy of the legal-services program be evaluated?

3. The federal government (or the Departments of Corrections through a pooling of their resources) should fund research to determine the relative cost-effectiveness of various approaches to providing prisoners with meaningful access to the courts. As part of this research, the range of ways in which paralegals are being used in prisons' legal-assistance programs should be determined. Several different paralegal program models, as well as other legal-assistance models, should then be evaluated to determine which model can most cost-effectively achieve the following objectives: facilitating the problem solving that can avert litigation, weeding out frivolous claims, and ensuring that meritorious claims are efficiently and appropriately resolved.

4. In a research project or projects sponsored by the federal government and/or in pilot projects initiated by individual Departments of Corrections, a qualitative analysis should be completed of the differences between attorney-drafted complaints in prisoners' civil-rights suits and complaints drafted by prisoners and then revised after being reviewed by an attorney. The research conducted should also include an

evaluation of which complaint-drafting method is the most cost-effective.

5. The American Association of Law Libraries should develop a recommended list of the basic books and materials that should, at a minimum, be included in a prison's "mini" law library.

6. The federal government should fund research to evaluate the capacity of prisoners to adequately complete discrete tasks during the litigation process, such as discovery. As part of this research, the feasibility of developing tools to facilitate the identification of prisoners in need of assistance in completing such tasks should be determined.

This research would serve, in part, as a subject-specific follow-up to the national study on prisoners' literacy levels conducted by the National Center for Education Statistics.[59] The recommended research project, if carefully designed, could provide critically helpful feedback to correctional officials developing and refining legal-assistance programs for prisoners and to courts developing and refining the case-processing tools used to process *pro se* prisoners' civil-rights suits.

7. In a state where the Department of Corrections does not provide inmates with the legal assistance and/or advice needed after prisoners' civil-rights complaints are filed to ensure that meritorious claims are appropriately resolved and that the cases are processed efficiently, the federal district courts should put suitable case-processing tools in place, including attorney-appointment programs, to protect the efficiency and accuracy of the courts' adjudication processes.[60] Whether a court adopts a *pro bono* model for appointing counsel in certain cases or a contract-attorney model, the court should consider whether the appointing of counsel for limited purposes, such as to interview witnesses, complete discovery, or respond to a motion for summary judgment, would facilitate the processing of *pro se* prisoners' civil-rights suits in that particular district. If so, then a process for making such appointments should be put in place.

NOTES

1. Lewis v. Casey, 116 S.Ct. 2174, 2180 (1997)(quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)).

2. 430 U.S. 817, 828 (1977).

3. Telephone Interview with Brenda Vogel, Library Coordinator, Maryland Correctional Educational Libraries (May 30, 1997).

4. 116 S.Ct. 2174, 2182 (1996).

5. *Id.*

6. *Id.*

7. *Id.* at 2180 (quoting Bounds v. Smith, 430 U.S. 817, 832 (1977)).

8. 116 S.Ct. at 2180.

9. The Supreme Court also discussed the requirements of the constitutional doctrine of standing. The Court held that prisoners have no standing to seek redress from the courts for an alleged violation of their right of access to the courts unless they can prove that they suffered an "actual injury" from the violation. *Id.* at 2179. An example of such actual injury, according to the Court, is when a complaint is dismissed because it failed to meet a "technical requirement" that the prisoner could not, because of deficiencies in the legal assistance available to him, have been aware of. *Id.* at 2180.

10. *Id.* at 2181.

11. *Id.* at 2182.

12. *Id.*

13. As of April 1997, CCA was operating forty-five correctional facilities. Contract attorneys are used at twenty-five of these facilities. Letter from Sherril Gautreaux, Director, Legal Affairs, Corrections Corporation of America (April 30, 1997).

14. According to an assistant warden at the Metro facility, the prisoners confined there are, for the most part, convicted offenders serving sentences of one to six years. By contrast, a detention facility or jail typically holds mostly pretrial detainees and some convicted offenders serving short sentences.

15. CCA now pays the contract attorney $110 an hour, but the contract, under which he was originally paid $85, has not been changed.

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

17. The contract attorney did, however, say that he will only provide a "reasonable" number of copies to an inmate. When inmates have asked him for hundreds of copies of cases, he has helped winnow down their requests. He has, however, delivered copies of fifty to sixty cases to some inmates.

18. Inmates will be disciplined at the Metro facility if they provide legal services in return for money, contraband, or some other form of compensation. In any event, according to the vice

president of legal affairs, jailhouse lawyers have not posed a problem in CCA facilities since prisoners prefer to obtain services from the contract attorney instead of a jailhouse lawyer.

19. Lewis v. Casey, 116 S.Ct. 2174, 2180 (1997) (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)).

20. BRENDA VOGEL, DOWN FOR THE COUNT: A PRISON LIBRARY HANDBOOK 89 (1995).

21. Ben Kempinen, *Prisoner Access to Justice and Paralegals: The Fox Lake Paralegal Program*, NEW ENG. J. ON CRIM & CIV. CONFINEMENT 67, 83-89 (1988).

22. Telephone Interview with Ben Kempinen, Clinical Associate Professor, University of Wisconsin Law School (May 14, 1997).

23. Kempinen, *supra* note 21, at 76.

24. *Id.* at 74.

25. *Id.* at 71.

26. *Id.* at 71, 79-83.

27. *Id.* at 83.

28. *Id.* at 81 n. 39.

29. *Id.* at 69.

30. *Id.*

31. *Id.* at 80.

32. *Id.*

33. Letter from Ron Hauser, Outreach Librarian, Law Library Service to Prisoners, Minnesota State Law Library, to Lynn S. Branham, Project Director (August 2, 1996).

34. LAW LIBRARY SERVICE TO PRISONERS, 1995 ANNUAL REPORT 1 (1995). The librarians use the state's videoconferencing system in the city in which the librarians work to confer with inmates at this distant prison. Telephone Interview with Ron Hauser, Outreach Librarian, Law Library Service to Prisoners, Minnesota State Law Library (May 23, 1997).

35. LAW LIBRARY SERVICE TO PRISONERS 2 (brochure distributed to Minnesota prisoners).

36. The plan initially called for assigning civilian paralegals to three different areas in the state. Vermont Department of Corrections' Plan for Inmate Access to the Courts, at 2-4 (filed March 11, 1996), Halpin v. Patrissi (No. 5: 89-359). A paralegal assigned to an area would have been responsible for providing legal services at the prisons in that area. The paralegals were to be supervised by an attorney, although that attorney is an employee of the Department of Corrections, serving as its director of legal education and coordinator of its "access to the courts" program. Telephone Interview with Carol A. Callea, Director Legal Education, Inmate Access to Court, Vermont Department of Corrections (July 9, 1996).

It appears as though the Vermont Department of Corrections will now be using trained inmate assistants, instead of civilian paralegals, as the legal-services providers. Telephone Interview with Carol A. Callea, Director Legal Education, Inmate Access to Court, Vermont Department of Corrections (May 1, 1997). Other components of the "access to the courts" plan, however, remain unchanged. Some of these components include form banks, an inmate litigation manual that will be provided to each inmate upon entry into the prison system, and a case bank, which will include twenty-five copies of each of about 250 of the cases most pertinent to civil-rights and habeas-corpus litigation. *Id.*

37. Brenda Vogel, *An Innovative Approach: Advances in Technology and Strategic Thinking*, CORRECTIONS TODAY 120 (July 1996).

38. NANCY E. ORTEGA & JOEL R. WELLS, PRISONERS' LEGAL MANUAL FOR SELECTED PROBLEMS (1993).

39. LEGAL ASSISTANCE FOUNDATION OF CHICAGO, FEDERAL COURT PRISON LITIGATION PROJECT: REVISED HANDBOOK (July 1994 & Case Law Supp. Nov. 1995).

40. LEGAL ASSISTANCE FOUNDATION OF CHICAGO, PRISON AND JAIL CASES HANDBOOK (July 1994 & Supp. Nov. 1995).

41. ELIZABETH ANN ETKIND & LOIS BLOOM, A MANUAL FOR *PRO SE* LITIGANTS APPEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (1993).

42. MICHAEL W. McCARTHY & MARY ELLEN GIANTURCO, A MANUAL FOR INMATE LITIGANTS FILING CIVIL ACTIONS PRO SE IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK (1995).

43. JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (3d ed. 1995).

44. Telephone Interview with Carol A. Callea, Director Legal Education, Inmate Access to Court, Vermont Department of Corrections (May 1, 1997).

45. Vogel, *supra* note 37, at 44.

46. Telephone Interview, *supra* note 44.

47. Vogel, *supra* note 37, at 122.

48. *Id.*

49. *Id.*

50. 116 S.Ct. 2174, 2181 (1996).

51. The description of the Volunteer Lawyers' Project is drawn from two sources: a telephone interview with David Weintraub, the Project Coordinator, conducted on May 1, 1997 and a "working paper" describing the Project. This working paper is appended as Exhibit 5 to a manual describing the *Pro Se* Division of the United State District Court for the Southern District of Florida.

52. The description of the use of contract attorneys by the Northern and Southern Districts of Iowa is drawn from the "Plan for Representation of Indigent Plaintiffs in Civil Rights Cases;" a written description of the program prepared by Magistrate Judge Celeste F. Bremer entitled, "Provision of Counsel in Prisoner § 1983 Cases: The Iowa Experience;" and a telephone interview with Kay Bartolo, Staff Attorney, United States District Court for the Southern District of Iowa, conducted on May 15, 1997.

53. Because the number of *pro se* cases has decreased since enactment of the Prison Litigation Reform Act, this fee will be reduced from $50 to $20. In addition, under the 1997-98 contract, the two law firms will be paid $60,000 to handle fifty cases. They will then be paid $1200 for any additional case they handle.

54. 56 F.3d 785 (7th Cir. 1995). The court of appeals observed: "[T]his is not an ordinary case. Billman is a prison inmate. His opportunities for conducting a precomplaint inquiry are, we assume, virtually nil. The state's attorney smiled when we asked him at argument whether Billman would be given the run of the prison to investigate the culpability of prison employees for the rape." *Id.* at 789. Elsewhere in its opinion, the court added: [I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit." *Id.* at 790.

55. *Id.*

56. *Id.* at 790.

57. *Id.*

58. The Supreme Court discussed a number of issues in *Lewis*, including the doctrine of standing and equitable limitations on courts' remedial powers. The critical paragraph in which the Court indicated that law libraries will not provide all inmates with the requisite "meaningful access" to the courts can be found at 116 S.Ct. at 2182.

59. KARL O. HAIGLER ET AL., LITERACY BEHIND PRISON WALLS (National Center for Education Statistics 1994).

60. While the focus of this study was not on *pro se* litigants who are nonprisoners, it would be equally important for the courts to take the steps necessary to protect the efficiency and accuracy with which cases brought by those litigants are adjudicated.

CHAPTER FOUR

THE IMPLEMENTATION OF THE FILING-FEE PROVISIONS OF THE PRISON LITIGATION REFORM ACT: SOME PRELIMINARY OBSERVATIONS

I. PRE-PLRA FILING-FREE PROVISIONS

Before enactment of the Prison Litigation Reform Act in 1996, about half of the federal districts had formal or informal policies in place for assessing partial filing fees in prisoners' civil-rights cases.[1] The courts employed a wide range of formulas and approaches in imposing those fees. Looking at the formulas used by just three of the district courts from which feedback was received during this study gives some sense of the degree of variation in the courts' imposition of partial filing fees.

In the Central District of Illinois, the fee was calculated using a percentage-of-income approach. The prisoner-plaintiff could be charged no more than 50% of the average monthly income reflected in his or her prison trust-fund account over the preceding six months.[2] After the collection of this fee, the court did not collect additional payments from the prisoner.[3]

Before enactment of the PLRA, the United States District Court for the District of Nevada also required one single payment up front. But unlike the district court in the Central District of Illinois, the Nevada court did not require all prisoners to pay the same percentage of their average monthly net deposits over the preceding six-month period (or of their current balance, if that figure was higher). Instead, the court employed a progressive fee schedule under which prisoners with more money paid a higher percentage of their funds towards the filing fee. The table used to calculate this fee is set forth below:[4]

Amount($)	Fee($)	Amount($)	Fee($)
0 - 4	0	95 - 109	30
5 - 9	1	110 -124	35
10 - 19	2	125 -149	45
20 - 29	5	150 -174	60
30 - 39	8	175 -199	75
40 - 50	12	200 -224	90
51 - 64	15	225 -249	105
65 - 79	20	250+	120
80 - 94	25		

In the Eastern District of Texas, the district court also used to use a sliding scale to determine the amount of the initial partial filing fee. One of the most significant distinctions between this scale and the one once used in Nevada

is that under the sliding scale used by the court in Texas, inmates whose trust-fund account balance over the past six months was less than $50 were exempted from prepaying any money at all towards the full filing fee. The table once used in the Eastern District of Texas as a guideline when calculating the partial filing fee is set forth below:[5]

Applicant's Inmate Account Balance over Last Six Months	Clerk's Fee Requirement
Under $50.00	Full Costs Waived
Over $50.00	Obtain printout or other statement of average monthly income
Applicant's Average Monthly Income over Last Twelve Months	
$50.00-59.99	$5.00; other costs waived until further order
$60.00-69.99	$10.00; "
$70.00-79.99	$20.00; "
$80.00-89.99	$30.00; "
$90.00-99.99	$40.00; "
$100.00-109.99	$50.00; "
$110.00-119.99	$60.00; "
$120.00-129.99	$70.00; "
$130.00-139.99	$80.00; "
$140.00-149.99	$90.00; "
$150.00-159.99	$100.00; "
$160.00-169.99	$110.00; "
$170.00-179.99	$120.00; "
$180.00-	Full fee; nothing waived

II. THE FILING-FEE PROVISIONS OF THE PRISON LITIGATION REFORM ACT

Under 28 U.S.C. § 1915(b)(1), which was enacted into law as part of the Prison Litigation Reform Act, all prisoners who bring a civil action or appeal "shall be required to pay the full filing fee." They must either prepay the full filing fee, or, if they don't have the funds to fully pay in advance, they must pay the full fee over time. The current fee to file a complaint is $150, while the filing fee on appeal is $105.

If prisoners do not have the funds to fully prepay the filing fee, they must seek leave to proceed *in forma pauperis*.[6] When seeking *in-forma-pauperis* status, they must submit an affidavit listing their assets and a certified copy of their prison trust-fund-account statement for the preceding six months.[7]

If the court determines that the prisoner cannot prepay the full filing fee, the court must assess an initial partial filing fee. The amount assessed is 20% of the greater of: (1) the average monthly balance in the trust-fund account during the previous six months; or (2) the average monthly deposits in the trust-fund account.[8] But if a prisoner does not have the resources to pay even the initial partial filing fee, he or she can still file a civil-rights lawsuit.[9] The prisoner will, however, have to pay the full filing fee in the future.

The PLRA also requires prisoners to make subsequent installment payments until the full filing fee is paid. Since the statutory section which requires these installment payments (28 U.S.C. § 1915(b)(2)), is subject to varying interpretations, it is quoted, in full, below:

> After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

III. IMPLEMENTATION OF THE PLRA'S FILING-FEE PROVISIONS

At the time the federal district courts were surveyed during this project, the PLRA had only been in effect eight months, not enough time for the effects of its filing-fee provisions to be accurately assessed. (One court reported that at the time of the survey, it did not even have a system yet in place to collect the

partial fees.) Yet from these courts, feedback was obtained about problems that courts have encountered in implementing the PLRA's filing-fee provisions, about the steps some courts have taken to resolve at least some of those problems, and about some questions and concerns that some court personnel have about the filing-fee provisions. In addition, the feedback received revealed some significant variations in the ways in which courts are interpreting and applying the terms of the Act.

This preliminary and limited feedback may prove helpful to courts still developing and refining the mechanisms for enforcing the PLRA's filing-fee provisions. The feedback may also be helpful because the courts have identified some unresolved questions concerning the filing-fee provisions which will, in time, have to be answered, whether through court directives, case law, or statutory amendments. And finally, the feedback may prove helpful to researchers crafting future research projects to assess the effects of the PLRA's filing-fee provisions. Therefore, set forth below is a summary of the feedback received during this project about the PLRA's filing-fee provisions.

Implementation Variations

The court surveys revealed some significant variations in the ways in which federal district courts are implementing the PLRA's filing-fee provisions. Some of the implementation differences have substantial implications for court administration, while others have substantial practical effects on prisoners because of the varying ways in which the fee provisions are being interpreted and applied. Some of the more significant implementation differences unearthed during this study are briefly described below.

1. Who calculates the initial partial filing fee when a complaint is filed? The district courts vary as to who has been assigned or has assumed the responsibility of calculating the initial partial filing fee when a complaint is filed. The district courts which were surveyed reported using the following different persons to calculate the initial fee: the *pro se* staff attorney; a court clerk; correctional officials; correctional officials in conjunction with the *pro se* staff attorney; the *pro se* staff attorney and a court clerk; and the magistrate judge and that judge's "elbow clerk." One court reported that it did not yet have a system in place to calculate partial filing fees because correctional officials were developing computer software to enable such calculations to be made.

2. Who calculates the initial partial filing fee when a prisoner takes an appeal? The courts have also adopted different practices in calculating the initial partial filing fee to be paid when a prisoner takes an appeal in a civil-rights case. In the courts in which procedures have been devised to make these

calculations, about half reported that staff from the court of appeals computed the fee. The other half of the district courts reported that the fee was calculated in the district court, whether by a court clerk, a *pro se* staff attorney, or the *pro se* staff attorney working together with the court clerk. Two district courts reported that the decision about who would calculate the initial fee to be paid when taking an appeal had not been made at the time the survey was conducted in January of 1997.

3. How is the "average monthly balance" computed? As mentioned earlier, a prisoner must pay, as an initial partial filing fee, a sum which equals 20% of the greater of the average monthly deposits to the prisoner's trust-fund account or the average monthly balance in the account for the preceding six months. Title 28 U.S.C. § 1915(b)(1)(B) does not specify how the average monthly balance is to be computed, and federal district courts have adopted a number of different formulas to make this calculation. Some of the formulas that have been adopted by courts, as they were reported by the courts during the survey, include:

1. Start with the "current balance" reflected in the trust-fund-account statement. Add the balance on the date thirty days previously, thirty days before that, and so on, going back five months. Divide by six.

2. Start with the balance in the inmate's account on the date closest to the day the complaint was submitted to the court. Add the balance on the same or the closest corresponding day over the previous five months. Divide by six.

3. Add up the balance in the inmate's account on the first day of the month over the past six months. Divide by six.

4. Add up the balance in the inmate's account on the last day of the month over the past six months. Divide by six.

5. Add up the money in the inmate's account at the end of the day for each day of the month. Divide by the number of days in the month. Compute this figure for the preceding six months, and add the six figures together. Divide by six.

6. Add up every balance entry during the preceding six months. Divide by the total number of entries during that six-month period.

Some of the district courts reported that they never or rarely compute the average monthly balance because the figure for average monthly deposits is almost invariably higher.

4. Should a prisoner be assessed a partial filing fee before or after a court screens the complaint under 28 U.S.C § 1915A? Section 1915A directs courts to dismiss prisoners' claims which are frivolous, malicious, fail to state a claim for which relief can be granted, or seek damages from defendants who are immune from paying monetary relief. It became evident during this study that courts are interpreting the relationship between the filing-fee provisions and the screening provisions of the Prison Litigation Reform Act differently. In some districts, such as the Northern District of Illinois and the District of Columbia, the screening of a prisoner's civil-rights complaint precedes the assessment of a partial filing fee. Only if a complaint states a colorable claim for relief is a partial filing fee assessed and collected.

By contrast, in other districts, such as the District of Hawaii, courts direct prisoners who have submitted a civil-rights complaint to the court to first pay a partial filing fee. (These prisoners must also ultimately pay the full filing fee.) Only then, do these courts screen prisoners' complaints to determine whether they should be dismissed for frivolousness or for one of the other reasons set forth in § 1915A.

5. When are fee payments forwarded from the Department of Corrections to the court clerk? Title 28 U.S.C. § 1915(b)(2) says that the agency which has custody of a prisoner "shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid." Applying this statutory provision literally can lead to payments in *de minimis* amounts being regularly forwarded to, and processed by, the courts. One court, for example, reported having just processed a check for 70 cents at the time of the survey.

Because so many courts and Departments of Corrections were still working out arrangements for the forwarding of fee payments at the time the surveys were conducted, information was not systematically collected about the mechanisms in place for forwarding these payments. It is apparent, however, that the courts, in conjunction with Departments of Corrections, are crafting mechanisms to reduce the administrative costs attending implementation of the filing-fee provisions.

A few examples of the mechanisms that have been developed to decrease the costs of processing fee payments include the following: In the Eastern District of Texas, funds deducted from an inmate's account to pay the filing fee are sent to the court on a quarterly or semi-annual basis. In the Southern District of

New York, the Department of Correctional Services holds the monthly fee deducted from an inmate's account until the full fee has been accumulated. A check covering the full fee is then sent to the court. In the Eastern District of North Carolina, fee payments are aggregated until they reach $50, and then this sum is sent to the court. And in the District of Nevada, inmates' monthly fee payments are lumped together in one check, which is then sent to the court. Along with the check, the Nevada Department of Prisons sends a statement listing which inmates have made payments reflected in the check and in what amount. But no check is sent to the court until at least $25 in filing-fee payments have been collected from prisoners' accounts.

Problems Encountered by Survey Respondents in Implementing the Filing-Fee Provisions of the Prison Litigation Reform Act

In the court surveys distributed to fifteen district courts during this project, five different court personnel in each district who might play some role in enforcing the PLRA's filing-fee provisions -- a district judge, a magistrate judge, a *pro se* staff attorney, a law clerk, and a court clerk -- were each asked about the problems, if any, which they have encountered stemming from the partial-filing-fee requirements of the Act. Some specific problems identified by the survey respondents are set forth below:

1. Correctional institutions send checks without providing the case numbers to which the payments are to be credited.

2. Correctional institutions are not providing accurate information on prisoners' six-month financial statements.

3. Correctional institutions are not providing complete information on prisoners' six-month financial statements.

4. The six-month financial statements are "regularly" not certified.

5. Prisoners complain that they cannot get the six-month statements from the prison officials or that these statements are not being produced in a timely fashion.

6. Between the time the certified copy of the trust-fund-account statement is prepared and the time the court assesses the initial partial filing fee, the amount in the account has changed, and the prisoner is unable to pay the fee which he or she owes.

7. Inmates incarcerated in several different correctional facilities during the preceding six months have had difficulty getting the trust-fund account information from institutions where they were previously confined.

8. Keeping track of which plaintiffs have paid which amounts in cases with multiple plaintiffs has been, in the words of one respondent, a "nightmare."

9. Cases that should have been brought as habeas-corpus actions are brought under 42 U.S.C. § 1983, thereby requiring the inmate-plaintiffs to pay a $150 fee instead of the $5 fee payable in habeas-corpus actions.

10. Prison officials make errors when collecting fees from prisoners' accounts, prompting multiple motions by *pro se* plaintiffs.

When discussing procedures adopted in one state's Department of Corrections in response to the Prison Litigation Reform Act, a correctional attorney mentioned another problem that some other Departments of Corrections may also be encountering. This attorney noted that the department's development of an automated system to implement those provisions was difficult because the PLRA's requirements were different from the partial-filing-fee requirements that apply, under state law, to prisoners' lawsuits filed in state court.

Questions and Concerns Raised by Survey Respondents About the Filing-Fee Provisions of the PLRA

In addition to the specific problems that survey respondents mentioned encountering as they have implemented the filing-fee provisions of the PLRA, the survey respondents raised several questions and expressed several concerns about the implementation of those provisions. The questions included:

1. Does the money deposited in an inmate's account each month that will then be automatically deducted to pay restitution, fines, medical copayments, and garnishments count as "income," 20% of which the inmate must pay towards the full filing fee?

2. How is the money that has been deducted from the trust-fund account of a prisoner who has filed several civil-rights suits or appeals to be allocated?

3. How should filing-fee debts accrued in suits filed by inmates when they were incarcerated be collected after their release from prison or jail?

4. How long should the courts maintain records of uncollected debts accrued under the PLRA's filing-fee provisions?[10]

It should be noted that the above questions do not reflect all of the questions that court personnel have raised about the filing-fee provisions, questions which the Administrative Office of the United States Courts and the Federal Judicial Center have fielded and attempted to provide answers to since enactment of the PLRA.[11] Instead, what is set forth above are just a few questions raised by court personnel surveyed during this study. These questions are being shared so that courts, court administrators, policymakers, and researchers can give some thought as to how these questions should be answered.

The survey respondents also expressed some general concerns about the filing-fee provisions. The concerns expressed include: first, that the filing-fee requirements can discourage prisoners from agreeing to a small monetary or nonmonetary settlement of their claims; second, that the filing-fee provisions may (or in one respondent's opinion, will) deter inmates from filing meritorious claims; and third, that the administrative costs of implementing the filing-fee provisions far outweigh the *de minimis* sums being collected from prisoners.

The latter concern was clearly the one expressed most frequently by survey respondents. Some of the comments about the administrative costs made by court personnel from ten different districts follow:

Magistrate Judge: "The effort to administer and enforce the requirement seems vastly out of proportion to the benefit."

Magistrate Judge: "My personal view is that the costs associated with the collection and bookkeeping of the filing fees exceed the desired end goals envisioned by Congress."

Pro Se Staff Attorney: "The administrative burden of the partial filing system has been significant. In states where inmates earn little or no money in the form of work pay or idle pay, the impact of the partial filing fee system on reducing prisoner lawsuits probably would not be worth the cost of administering it. Even in states where inmates do receive pay, the cost of administering the partial filing fee system may outweigh the reduction in inmate litigation."

Court Clerk: "We believe from a Clerk's perspective that this is a lot of fuss over very small amounts of money. What it costs the Clerk's office in time to process these payments far outweighs what we collect."

Court Clerk: "There is a lot more time being used to assess and collect these minimal fees than what is being recovered."

Pro Se Staff Attorney: "The bookkeeping [for follow-up payments] is a nightmare."

District Judge: "Whether the benefit to the court in (presumably) discouraging frivolous litigation will outweigh the administrative costs to the State institutions and the court is not clear."

District Judge: "I think the partial filing system legislated by Congress places a heavy burden on state prison administrators."

Magistrate Judge: "Collecting, monitoring and accounting for initial partial filing fees, and increments of the balance, will likely cost more in time and expense than the revenue generated. Hence, the value of the filing fee provisions of [the] PLRA lies in whether filings decrease."

Pro Se Staff Attorney: "It requires a tremendous amount of work for us to keep track of fees paid, and fees to be paid, which results in delays in processing cases."

Court Clerk: "The PLRA set up an overly complex system for addressing the issues of prisoner litigation. Prior to the legislation, this district had adopted several procedures for handling prisoner litigation which were successful. They include a one time partial payment for prisoners with some resources, generally up to $60.00 or so. Once the fee was paid, the case was processed without the cumbersome monthly collection process and resultant administrative costs in receipting and accounting for the sum received. (There is actually a case in this district wherein a $120 filing fee is being paid off by a three cent a month payment.)"

Pro Se Staff Attorney: "It is a bureaucratic disaster. Many inmates are assessed $1 or $2, and it may take five or more years for the filing fee to be paid."

IV. CONCLUSION AND RECOMMENDATIONS

Despite the negative comments made by many survey respondents during this study about the administrative costs incurred in implementing the PLRA's filing-fee provisions, it cannot be said, at this point, that those provisions are not a cost-effective means of diminishing the number of frivolous civil-rights lawsuits filed by prisoners. In order to make that determination, further research is needed.

Recommendations

1. Congress should provide the funding for a study of the cost-effectiveness of the PLRA's filing-fee provisions. Some of the costs to be examined and assessed during this study would include the value of the time spent by various court personnel administering the provisions, the value of the time spent by correctional officials administering them, and the computer costs incurred to administer the provisions.

When assessing the effectiveness of the filing-fee provisions, the appropriate measure of effectiveness would have to be defined. If the measure were simply decreased numbers of civil-rights suits being filed by prisoners, then the study would examine the extent to which the number of such lawsuits, both in sheer numbers and on a *per-capita* basis, have declined since implementation of the filing-fee provisions. If the measure of effectiveness were instead decreases in the number of frivolous civil-rights lawsuits brought by prisoners (the purported objective of the PLRA, according to its legislative history[12]), then a more complicated research design would have to be constructed.

When analyzing the benefits of the filing-fee provisions, the revenue generated by the provisions would also need to be included in the calculus. The combined benefits of the filing-fee provisions would then need to be compared to the costs of implementing them before making a final determination regarding their overall cost-effectiveness.

When assessing the cost-effectiveness of the PLRA's filing-fee provisions, it would also be illuminating to compare the cost-effectiveness of these provisions with the cost-effectiveness of other filing-fee mechanisms to determine what is the most cost-effective filing-fee model. As was mentioned at the beginning of this chapter, there were a number of different formulas and methods employed in about half of the districts to collect partial filing fees before the PLRA's enactment. The costs, benefits, and impact on inmate litigation of some of these alternative systems for collecting filing fees from prisoners could be assessed in a comparative cost-benefit study.

2. The federal government should collect and disseminate information to courts and correctional officials about steps they can take to reduce the costs of implementing the PLRA's filing-fee provisions. In their survey responses, district courts reported some steps they have taken to resolve problems encountered in implementing the PLRA's filing-fee provisions. Some of those steps include: meetings with correctional officials to coordinate efforts to implement those provisions; the development of forms, including forms for correctional officials to certify the average monthly deposits and balance in an inmate's account during the previous six months and forms for inmates to signify their consent to the collection of filing fees from their trust-fund accounts; the development of systems, both manual and computer, to track filing-fee payments; having correctional officials hold checks until they reach a certain amount so as to avoid checks for only a few cents being sent to the court (one court reported that before instituting such a procedure, it received checks for four cents); and issuance of a standing order by the court directing federal, state, and local correctional officials to calculate and remit the initial filing fees and subsequent payment amounts to the court in cases where prisoners have been granted *in-forma-pauperis* status.[13]

Information about the steps that have been taken to reduce costs, however, needs to be systematically collected from all of the district courts. In addition, those steps need to be evaluated to determine which are the most effectual in reducing implementation costs. Specifically, the most efficient means of calculating and collecting the initial partial filing fee, of calculating and collecting subsequent fee payments, and of tracking subsequent fee payments need to be identified. This information then needs to be disseminated to courts and correctional officials as soon as possible to assist in the development and refinement of the procedures being put in place to calculate, collect, and track prisoners' filing-fee payments under the PLRA.

NOTES

1. Marie Cordisco, *Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases*, 9 FJC DIRECTIONS 25 (Federal Judicial Center, June 1996) (hereinafter Filing-Fee Study); Telephone Interview with Marie Leary, Research Associate, Federal Judicial Center (May 29, 1997).

2. Filing-Fee Study, *supra* note 1, at 30.

3. Telephone Interview with Michael Meyer, *Pro Se* Staff Attorney, United States District Court, Central District of Illinois (May 29, 1997).

4. The table was included on the "Financial Certificate" that inmates submitted when seeking leave to proceed *in forma pauperis*. Before the adoption of this multi-tiered fee schedule, the district had two fee levels. If an inmate's average account balance or monthly net deposits over the preceding six months was between $25 and $250, the partial filing fee was $5; if the highest of the two sums was between $251 and $500, the fee was $10. Under this system, only about 20% of the prisoners applying for *in-forma-pauperis* status had to pay a partial filing fee. REPORT OF THE SPECIAL STUDY COMMITTEE ON *PRO SE* PRISONER LITIGATION, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA 12 (1995).

5. In the Matter of Applications to Proceed In Forma Pauperis Submitted By or On Behalf of Prisoners, General Order No. 88-19 (E.D. Texas April 1, 1988).

6. The United States District Court for the District of Columbia reported during this study that even when prisoners can fully prepay the filing fee, they will seek and be granted leave to proceed *in forma pauperis* so that the court can handle service of process on the defendants. 28 U.S.C. § 1915(d).

7. 28 U.S.C. § 1915(a)(1),(2).

8. *Id.* § 1915(b)(1). While § 1915(b)(1)(A) does not set a limit on the time period over which average monthly deposits are to be calculated, § 1915(a)(2) only requires prisoners to produce records from their trust-fund accounts for the six months preceding the filing of the complaint or appeal. The courts surveyed during this study also reported that they are only examining a prisoner's financial status over this six-month period.

9. *Id.* § 1915(b)(4).

10. The Sixth Circuit Court of Appeals has already addressed this question. The court concluded that since Congress has not enacted a statute of limitations for the collection of prisoners' filing-fee obligations, district court clerks may have to keep hundreds of accounts open for decades, even if no payments towards certain prisoners' debts are being transmitted by prison authorities to the courts. In re Prison Litigation Reform Act, 105 F.3d 1131, 1139 (6th Cir. 1997).

11. *See, e.g.*. Administrative Office of the United States Courts, Prison Litigation Reform Act Questions and Answers (July 19, 1996); Federal Judicial Center, *Habeas & Prison Litigation Case Law Update* (available via Internet at http: //www.fjc.gov).

12. *See, e.g.*, 141 CONG. REC. S7498-01, *S7524 (May 25, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners

tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

13. Some of the courts that have developed mechanisms to avoid having to process checks for trivial amounts of money were identified earlier. A few examples of courts where some other measures have been taken that were described by the courts as "very effective" or "effective" in limiting the problems encountered processing *pro se* prisoners' civil cases include:

1. Meetings with correctional officials: Eastern District of Texas; District of Utah.

2. Forms: Central District of Illinois; District of Utah (A two-page form developed in the District of Utah that contains an application to proceed *in forma pauperis*, a "Certificate of Correctional Official as to Status of Applicant's Trust Account," a "Consent to Collection of Fees from Trust Account," and a place where correctional officials can certify that the prisoner has exhausted administrative remedies can be found in the Appendix.)

3. Systems to track fee payments: Eastern District of North Carolina (manual); District of Nevada (computer).

4. Standing order: Southern District of New York.

CHAPTER 5

STEPS COURTS CAN TAKE TO PROCESS PRO SE PRISONERS' CIVIL-RIGHTS SUITS MORE EFFICIENTLY AND EFFECTIVELY

Crafting recommendations to assist courts in the processing of *pro se* prisoners' civil-rights suits is not an easy endeavor. For one thing, any current recommendations must be made against the backdrop of the Prison Litigation Reform Act, many of whose provisions the courts are still struggling to interpret and some of whose provisions have been stricken down as unconstitutional by some courts.[1]

Another complicating factor is the uncertainty about the meaning of, and how correctional officials will respond to, the Supreme Court's decision in *Lewis v. Casey*.[2] How broadly or narrowly correctional officials construe their obligation to ensure that prisoners have, both in the legal and the practical sense, "meaningful access" to the courts[3] will affect the case-processing measures that courts must adopt in order to both efficiently and effectively process *pro se* prisoners' civil-rights suits.

The third reason why the development of recommendations for the processing of *pro se* prisoners' civil-rights suits is so challenging is reflected in Rule 1 of the Federal Rules of Civil Procedure. Rule 1 directs courts to administer the rules in a way that will secure "the *just*, speedy, and inexpensive determination of every action."[4] Were the Rule's charge, and the purpose of the federal courts, simply to speedily and inexpensively resolve civil actions, the task of developing recommendations for the processing of prisoners' *pro se* civil-rights suits would be much easier. But the purpose of the federal rules, and the courts' raison d'être, are not only to ensure that cases are efficiently processed, but that they are justly resolved.

The obligation of those developing recommendations to process prisoners' civil-rights suits more efficiently (as well as of those adopting procedures, rules, and legislation which will affect the processing of such lawsuits) is therefore to include safeguards that will help to ensure that the "wheat" (meritorious claims) is not thrown out with the "chaff" (nonmeritorious claims) as prisoners' lawsuits are more efficiently processed through the court system. As stated in the *Report of the Civil Justice Reform Act Advisory Committee for the United States District Court Central District of Illinois*, "As with all civil cases, the goal of the court should not be the elimination of as many inmate civil rights cases as possible, but the elimination of the nonmeritorious cases from the system as

soon as possible, making the system more accessible and more efficient for the meritorious claims."[5]

The fourth and final factor making the task of developing recommendations to assist courts in the processing of *pro se* prisoners' civil-rights suits more difficult is the dearth of formal mechanisms in place to evaluate the effects of case-management tools adopted by courts to aid in the processing of *pro se* prisoners' civil-rights suits. In very few courts have statistics been collected or analyses been done on the effects of case-management tools, programs, or technology adopted by the courts to facilitate the processing of *pro se* prisoners' civil-rights suits. And even in those handful of courts that have pulled together some rough data on the quantitative effects of the measures which they have adopted, there has not been -- understandably, because of research limitations -- an assessment of the qualitative effects of the measures adopted, including an assessment of the extent to which the measures are permitting or preventing meritorious claims from "falling through the cracks" of the judicial system.

Mindful of the complexities faced in developing recommendations to facilitate the processing of *pro se* prisoners' lawsuits, an extensive outreach effort was undertaken during this project to identify procedures, programs, and technology that appear potentially promising in terms of both improving the efficiency with which courts process these suits and their effectiveness in winnowing out legally nonmeritorious claims. Steps that courts, correctional officials, and Attorneys General can take to process *pro se* prisoners' lawsuits more efficiently and effectively were identified. Set forth below is a discussion of the steps that courts can consider taking towards that end, if they have not taken them already. The next chapter then discusses the steps that can be taken by correctional officials and Attorneys General.

I. FILING INSTRUCTIONS, COMPLAINT FORMS, FILING CHECKLISTS, AND FEDERAL-COURT HANDBOOKS

In order to facilitate the processing of *pro se* prisoners' civil-rights suits, courts can ensure that prisoners have access to certain basic informational materials and standard forms. These informational materials and forms include a set of instructions regarding the filing of civil-rights complaints, standard forms needed to bring a civil-rights case in federal court, a filing checklist, and a federal-court handbook like one of those listed in Chapter 3.

These informational materials and forms would be devised with two purposes in mind: first, to dissuade prisoners from filing legally frivolous lawsuits; and second, to help ensure

that the essential facts of a prisoner's claim are clear, complete, and understandable, both so that any frivolous claims that prisoners do bring can be sifted out quickly by the courts and so that potentially meritorious claims are not overlooked by the courts. To achieve these purposes, the written materials would need to meet two critical requirements: clarity and availability.

Clarity. The written materials prepared to guide prisoners in their decision whether or not to file a lawsuit and in their presentation of any claims they file with the court would need to be extremely clear and understandable. All instructions, handbooks, and forms would need to be prepared based on the assumption that prisoners know absolutely nothing about the law and court processes. While there are some experienced prisoner litigators for whom this assumption will not hold true, these prisoners represent the exception, rather than the norm.

All instructions, handbooks, and forms would therefore need to be written in plain, simple English. Generally, they should not contain any legalese. Complaint forms should not, for example, ask a prisoner, as some currently do, to recount the facts which demonstrate that a defendant was acting "under color of state law" at the time he or she allegedly violated the prisoner's constitutional rights. The phrase, "under color of state law," is a legal term of art with which persons unschooled in the law would be unfamiliar.

All instructions, handbooks, and forms to be used by prisoners would need to be field-tested to ensure that they are at the appropriate reading level. If they are not, large numbers of prisoners will not be able to understand them. A study conducted by the National Institute of Justice in 1984 revealed that the average prisoner in a sample of 1000 inmates surveyed had left school after the tenth grade, but tested at the 6.7-grade level.[6] And fully 42% of the inmates were functionally illiterate, reading at or below the fifth-grade level.[7] The more recent study on prisoners' literacy levels discussed in Chapter 1 similarly found that the majority of prisoners are performing at the lowest literacy levels.[8]

Availability. In order for the instructional materials, handbooks, and forms to meet their purposes, they would have to be readily available to prisoners. The current practice in many federal districts is for prisoners who are contemplating filing a civil-rights suit to send a letter to the court clerk, who then sends out an informational package to the prisoner. While this is certainly one way of getting the necessary written materials into the hands of a prisoner, it can be time-consuming and expensive for the court. For example, the United States District Court for the Eastern District of Texas reported in a survey sending 11,785 pre-filing "mail-outs" in 1996 to prisoners. Of

these mail-outs, 6,780 were § 1983 forms. It would be far easier and cheaper, it would seem, if the courts were to make arrangements with correctional officials so that prisoners, if they want, could obtain the information packets right at the prison -- whether from the library or a legal-assistance program in place at the prison.

Filing Instructions and Notices

Rather than providing prisoners who are considering filing a civil-rights suit with a form complaint and then leaving them to their own devices, courts can provide prisoners with a set of filing instructions and notices. These instructions and notices would serve several purposes. They would help to eliminate common misimpressions about the kinds of problems that federal courts can help prisoners with, would help to guard against poorly drafted complaints and forms that are incompletely filled out, and would apprise prisoners of the consequences that may follow from the filing of a lawsuit. The set of instructions and notices would be appended to the front of the complaint form to help ensure that they are read and reviewed by prisoners before they make the decision whether or not to file a lawsuit.

The filing instructions and notices should include, among other information, the following:

1. An Explanation of the Court's Limited Jurisdiction. In very plain and clear terms, the instructions should apprise prisoners contemplating bringing a civil-rights suit of the very limited instances when federal courts can provide them with redress -- when their constitutional rights or their rights under a federal statute, such as the Americans with Disabilities Act, have been violated. While some of the instructions currently utilized by some courts do contain a cryptic reference to the federal courts' limited jurisdiction, the instructions should go further because many prisoners obviously do not understand what the jurisdictional limitations mean. For example, during a *Spears* hearing[9] observed during this study, one prisoner repeatedly insisted that he was entitled to relief because the way in which prison officials had strip-searched him had violated their own regulations. While the magistrate judge apprised the prisoner during the hearing that a violation of a prison regulation is not automatically tantamount to a constitutional violation, it would be best if this basic information were shared with prisoners before, rather than after, they file complaints.

Prisoners need to be told in straightforward and practical terms what the court's limited jurisdiction means. It means, they must be told, that just because correctional officials may have acted rudely, may have acted unprofessionally, may have acted wrongfully, and may even have violated their own rules, regulations, or state laws, does not mean that a prisoner can

obtain relief from the federal court.[10] The federal court has the power to consider a civil-rights suit only if the officials violated the prisoner's constitutional rights or rights under a federal statute.

2. A Brief Explanation of Key Limitations on the Relief that the Court can Award Prisoners. The instructions need to make it clear to prisoners that even if their constitutional rights were violated by correctional officials or others, that does not necessarily mean that they will be able to obtain relief from the federal court. Courts can advise prisoners in the filing instructions and notices of several key limitations on the relief that they can be awarded in civil-rights suits.

a. No immediate or early release from confinement. The prisoners can be informed that if they are seeking an immediate or earlier release from confinement, they must file a petition for a writ of habeas corpus rather than a § 1983 complaint. The prisoners can be given the following specific example of a commonly misfiled claim to make sure that they understand this directive: If they are state prisoners seeking the restoration of good-time credits that they claim were illegally revoked during disciplinary proceedings, they must assert their claim in a habeas-corpus action brought under 28 U.S.C. § 2254 after they have exhausted available state-court remedies. This warning, designed to avert the misfiling of habeas-corpus claims in § 1983 suits, is particularly important and needed because the study on prisoner litigation conducted by the National Center for State Courts that was discussed in Chapter 1 found that over 10% of the § 1983 claims should have been asserted in habeas-corpus cases.[11]

b. Immunity from damages liability. The prisoners contemplating the filing of a lawsuit need to be aware that even if prison officials violated their constitutional rights, they will not have to pay a prisoner any money damages unless the rights were "clearly established" at the time of the violation and a reasonable person would have been aware of those rights.[12] And if the court determines at the outset of the lawsuit that the defendant is immune from damages liability, any claim for damages will be dismissed immediately.[13]

c. No damages for mental or emotional injuries. The Prison Litigation Reform Act prohibits prisoners from recovering damages for mental or emotional injuries which they suffered while incarcerated unless they can also show that they suffered a "physical injury."[14] As this manual was going to press, courts were just beginning to consider challenges to the constitutionality of this PLRA provision.[15] If its constitutionality is upheld by the courts, however, it would be advisable to apprise prisoners of this significant limitation on the damages they can recover in a civil action filed in federal court.

3. A Summary of Key PLRA Requirements. A separate section of the set of instructions and notices would apprise prisoners of certain key requirements of the Prison Litigation Reform Act. Three, in particular, would, it would seem, need to be highlighted.

First, prisoners can be told that they cannot file suit under § 1983 or any other "federal law" unless they have exhausted all available administrative remedies.[16] Second, they can be told about the effects of the filing-fee provisions of the PLRA.[17] It should be made clear to the prisoners that if they file a civil suit in federal court, they will, at some point, end up paying a $150 filing fee. If they take an appeal, they will have to pay an additional $105. The prisoners also need to understand that the money to pay the filing fees will be extracted from their prison trust-fund accounts even if their complaint or appeal ends up being dismissed by the court.[18]

Finally, the court should warn prisoners about the PLRA's "three-strikes" provision,[19] if the court finds this provision to be constitutional. (One district court has held that the three-strikes provision violates the equal-protection component of the fifth amendment's due-process clause.[20]) The prisoners can be told that if they file a civil suit or an appeal that is then dismissed because it is frivolous, malicious, or fails to state a claim for which relief can be granted, their suit or appeal will be counted as "one strike." If they accrue three "strikes," they will then be barred from bringing suit *in forma pauperis* unless they are facing an "imminent danger" of "serious physical injury." In other words, unless this exception applies, they will not be able to file a civil suit in federal court unless and until they pay the $150 filing fee. And they won't be able to file a civil appeal unless and until they prepay $105.

4. Notice of the Consequences of Filing a Nonmeritorious Lawsuit. Prisoners need to be aware that if they lose their lawsuit, they may have to pay money above and beyond what they pay for the filing fee. They need to be told that the defendants' costs may be assessed against them and that if they are, the money to pay those costs will be taken from their prison trust-fund accounts in the same way as the money to pay the filing fee.[21] Since the word "costs" is vague, prisoners should be specifically told of the types of costs for which they may be held responsible under 28 U.S.C. § 1920 -- clerk and marshal fees, court-reporter fees, printing and witness fees, photocopying fees, docket fees, and compensation for interpreters and court-appointed experts.

Prisoners also need to be informed that there may be additional monetary outlays and sanctions imposed if they file a frivolous lawsuit with the court. At a minimum, prisoners need to be told of the kinds of representations to the court that can

lead to the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure. And they need to know that nonmonetary as well as monetary sanctions may be imposed for violating Rule 11.[22]

5. Notice of the Need to Apprise the Court of a Change of Address. The filing instructions should tell *pro se* prisoners of the need to immediately apprise the court if their address changes. Prisoners can furthermore be informed, as is already the practice in some courts,[23] that the failure to notify the court of an address change may lead to the dismissal of a complaint. This kind of warning is particularly important because of the frequency with which prisoners are transferred to other prisons and the delay that ensues when court orders subsequently fail to reach a transferred prisoner.

6. Identification of the Court in Which to File the Complaint. To prevent complaints from being filed in the wrong district court, the instructions can tell the prisoner to file the complaint in the district and division in which the prison where the claim arose is located.[24] The instruction form should list what prisons are in each division within a district and provide the name and address of the court in which claims involving a particular prison are to be filed.

7. The Option of Consenting, in Whole or in Part, to a Magistrate Judge's Jurisdiction. In many district courts, magistrate judges are heavily involved in the processing of *pro se* prisoners' civil-rights cases, often much more than the district judges. Under 28 U.S.C. § 636(b)(1), magistrate judges have the authority to perform an array of functions in prisoners' civil-rights cases, whether or not the parties consent to a magistrate's involvement in the case. Magistrate judges can, for example, resolve discovery disputes and enter scheduling orders. They can also draft reports and make recommendations to district judges as to whether or not to grant a party's motion for summary judgment or involuntarily dismiss a prisoner's complaint because it is frivolous or fails to state a claim for which relief can be granted.

Unless the parties have consented, however, magistrate judges cannot enter what is often called a "dispositive order" -- an order, other than one embodying a voluntary dismissal, which finally disposes of a plaintiff's claim.[25] A magistrate judge cannot, for example, actually dismiss a claim because it is frivolous or fails to state a claim and cannot grant a motion for summary judgment. Unless the parties have consented, the magistrate judge must draft a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Beyond the restrictions on magistrates judges' authority set forth in 28 U.S.C. § 636(b)(1), it is up to each district court

as to how involved magistrate judges will be in the handling of prisoners' *pro se* civil-rights suits.[26] If a court authorizes magistrate judges to handle dispositive matters in prisoners' civil-rights cases, the court clerk is supposed to notify the parties "at the time the action is filed" that they have the option of consenting to the magistrate judges's jurisdiction.[27]

It would improve the efficiency with which prisoners' *pro se* civil-rights cases can be processed and maximize the case-processing options available to courts if prisoners were apprised of, and given the option of, consenting to the exercise of a magistrate judge's jurisdiction over a case before a complaint was submitted to the court. If such consent were obtained at the outset, magistrate judges could then themselves *sua sponte* dismiss prisoners' frivolous claims and those which fail to state a claim for which relief can be granted, instead of preparing a report and recommendation for a district judge. The place where prisoners signify whether they are consenting to a magistrate judge's jurisdiction over their case could either be on the complaint form itself or on a consent form attached to the complaint.

Many prisoners do not understand that even if they refuse to consent to a magistrate judge's jurisdiction, a magistrate judge may, under 28 U.S.C. s 636(b), be heavily involved in processing their cases. Many of the prisoners who refused to sign a consent form then object if a magistrate judge is later involved in handling their cases. To limit the time expended by the court responding to these objections and to help ensure that a prisoner's decision whether to consent to a magistrate judge's jurisdiction is an informed one, the written materials can explain to prisoners that whether or not they consent to a magistrate judge's jurisdiction, a magistrate judge may handle certain aspects of their cases. The ways in which a magistrate judge may be involved in processing a case in that court would then need to be identified.

The current practice in most courts when obtaining a party's consent to a magistrate judge's jurisdiction is to obtain consent to have a magistrate judge "conduct any and all proceedings in the case, including trial, and order the entry of a final judgment."[28] Procuring consent to the magistrate judge's jurisdiction over the entire case can, as mentioned above, maximize the efficiency with which that case is processed through the court.

If, however, in a particular district, prisoners or the correctional officials whom they are suing are refusing to consent to a magistrate judge's jurisdiction, the court can consider modifying the consent form to eliminate one potential impediment to consent. The consent provision or form could clearly inform prisoners that if they consent to a magistrate

judge's jurisdiction at this point, their consent will be limited in scope. They will still continue to have the right, if their cases progress that far, to have their cases tried before a district judge, unless they later consent to trial before a magistrate judge.[29] By fully explaining the significance of consenting, in a limited fashion, to the magistrate judge's jurisdiction, the filing instructions could help to ensure that prisoners do not withhold consent to a magistrate judge's jurisdiction simply because they want their case, if it goes to trial, to be tried before a district judge.

There is precedent for obtaining limited consent to a magistrate judge's jurisdiction. In the United States District Court for the Northern District of Illinois, a prisoner can consent to have a magistrate judge "conduct any and all further proceedings in the case, including the entry of judgment, as to plaintiff's motion for leave to file in forma pauperis." The form entitled, "Limited Consent to Exercise of Jurisdiction by a United States Magistrate Judge," furthermore apprises the prisoner: "The district judge will continue to retain jurisdiction over that part of the case not reached, resolved, dismissed, or otherwise ruled upon or disposed of by the magistrate judge's disposition of plaintiff's in forma pauperis motion."

Standard Complaint Forms

Many federal district courts, including those that were studied during this project, use standard complaint forms for state prisoners bringing § 1983 actions. These forms are designed to ensure that prisoners include certain basic information in their complaints, including:

- the prisoner-plaintiff's name, address, telephone number, and prisoner identification number;
- the names, positions, and addresses of the defendants;
- the types of lawsuits in which the prisoner-plaintiff has been previously involved and the outcome of those lawsuits;
- whether the plaintiff has exhausted his or her administrative remedies;
- a statement of the plaintiff's claim or claims;

- the relief the plaintiff is requesting; and
- whether the plaintiff is requesting a jury trial.

It appears from the input received and the observations made during this project, however, that these complaint forms, as presently drafted, are failing to fully achieve their basic objective of ensuring that complaints contain the information needed by courts to both efficiently and correctly process prisoners' claims. Typically, a complaint form asks a prisoner to state the facts that support his or her claim. The complaint form does not, however, identify which facts are important for the prisoner to bring to the court's attention.

Because most prisoners don't know the requirements that must be met to state a legal claim, several adverse consequences can follow from these nonspecific complaint forms. First, prisoners may set forth all kinds of facts related to their claim but omit critical facts which show that they are entitled to relief. As a result, a court may unwittingly dismiss a potentially meritorious claim.

Alternatively, the court may recognize that more facts are needed to determine whether the prisoner's claim is frivolous or fails to state a claim for which relief can be granted. The court may then ask the prisoner to file an amended complaint, or the court may hold a hearing where the prisoner is afforded the opportunity to elaborate in greater detail the facts underlying the claim. But this processing of supplementary documents or the holding of a hearing consumes the time and resources of the court. A court hearing, for example, often requires the involvement of a district or magistrate judge, a *pro se* clerk or the judge's law clerk, a court clerk, and possibly other court personnel, such as a court reporter.

Another negative repercussion of the current general complaint forms is that they do nothing to steer prisoners away from filing nonmeritorious claims. More specific complaint forms, which outline certain requirements that have to be met to state a claim for which the federal court can grant relief, may reveal to at least some prisoners that they do not have a legally cognizable claim and that pursuing the claim would not be worth the filing fee they will be required to pay and the other costs they would incur if they bring suit.

It is possible, however, that more specific complaint forms may have some unexpected pitfalls. Consequently, it would be best if model complaint forms tailored to the type of claim a prisoner is asserting were created and refined during pilot projects initiated in the courts.

Complaint forms could be created for the types of claims that prisoners most frequently assert, such as claims involving medical care, the use of force by correctional officers, the failure to protect a prisoner from an assault by another prisoner, the alleged denial of due process (such as during disciplinary hearings), first-amendment rights, and access to the courts. A generic complaint form could then be used for the remaining types of claims.

Each complaint form would be designed to avert common mistakes that prisoners make when filing a complaint. And they would include information that will make it more readily apparent to prisoners whether they have a legally cognizable claim.

Before drafting the complaint forms, the most common mistakes made by prisoners when writing complaints should first be identified. Examples of such mistakes include: suing a party that cannot be sued under § 1983 (for example, the state in a § 1983 action[30] and a federal agency in a *Bivens* action[31]); failing to explain how a defendant was personally involved in the alleged violation of the prisoner's constitutional rights;[32] suing for medical maltreatment that, at most, involved only negligence;[33] protesting, on due-process grounds, the procedures employed during disciplinary proceedings that did not result in any deprivation of a liberty interest protected by the due-process clause;[34] and failing to explain what "actual injury" a prisoner suffered because of impediments to his or her access to the courts.[35]

Then, questions or directions should be added to the claim-specific complaint forms to help prevent these mistakes from occurring. For example, on the "Access-to-Courts Complaint Form," the following direction and notation could be added, followed by several lines for the inmate's response:

> Explain how the problem described above hurt your own efforts to pursue a legal claim. (NOTE: A prisoner must have personally suffered an "actual injury" to state a claim for denial of the constitutional right of access to the courts. *Lewis v. Casey*, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)).

This directive would alert prisoners who suffered no actual injury not to bother filing a complaint. At the same time, it would help to ensure that inmates who were actually injured by interferences with their access to the courts reveal this necessary information in their complaints. And finally, the case citation would help to reinforce both purposes of the directive and would point prisoners to a place to which they can turn for more information about the actual-injury requirement.

Some judges might initially express reservations about using complaint forms that in effect tell inmates "what the law is." But it needs to be remembered that the complaint forms would be case-processing tools designed to give courts some very basic facts needed for a court to determine whether a complaint can and should be *sua sponte* dismissed. The complaint forms would not cover most of the complexities of correctional law, and they would not, and should not, supplant the legal-assistance mechanisms described in Chapter 3.

In any event, the reality is that courts are already instructing prisoners about legal requirements and will continue to do so in the future -- whether through orders directing prisoners to file amended complaints, through explanations given, or statements made, during court hearings, or through some other means. And it is far preferable that some basic information about a few points of law about which there is presently much confusion amongst prisoners -- about some of the basic facts which must exist to state a claim for relief -- be communicated to prisoners before they file a lawsuit rather than afterwards. In addition, because judges can *sua sponte* dismiss complaints, both because they are frivolous and because they fail to state a claim for which relief can be granted, it is particularly important that the courts take additional precautions to ensure that the essential facts of a prisoner's claim needed by the court to rule on the claim efficiently and accurately are included, at the outset, in a complaint.

Filing Checklist

Many survey respondents, particularly court clerks and marshals, reported during this study that prisoners often fail to send in all of the forms and documents (such as trust-fund-account statements) needed for the courts to process their cases. In addition, the forms and documents which they do send in are often incompletely filled out. Prisoners sometimes, for example, forget to sign their complaints, as well as other documents submitted to the court, and they often do not completely fill out the forms needed to serve process on a defendant.

As was discussed in Chapter 3, a legal-assistance program can be used to obviate these kinds of problems. But because of expected variations in the scope and quality of legal-assistance programs and the inmates considered eligible to participate in them, the information package provided by courts to prisoners can include a checklist which lists the steps that a prisoner must take, and the documents and information that he or she must provide to the court, to initiate a lawsuit. The checklist would be filled out and signed by the prisoner and sent along with the other documents submitted to the court when filing a lawsuit. The exact contents of the checklist used by a court will vary and will depend on the procedures employed by the court.

II. INITIAL SCREENING OF COMPLAINTS

All of the courts surveyed during this project reported that complaints submitted to the court by *pro se* prisoners go through an initial screening process. How this screening process is conducted and who conducts which steps of the screening process, however, vary greatly from court to court. These differences are due in part to the personnel assigned to the court (Is there, for example, a *pro se* staff attorney who works for the court?), the preferences of the judges as to the extent of their own role in dismissing frivolous claims (Will draft orders to dismiss frivolous claims be funneled directly to the district judge or instead be routed by a magistrate judge?), and whether the court dismisses frivolous complaints before or after the payment of the initial partial filing fee.

Whatever the exact details of the screening mechanism adopted by the court, some steps can be taken to maximize the efficiency and effectiveness of the screening process. Some of those steps are highlighted below. While the steps are described in the order in which they would normally occur to maximize the efficiency of the screening process, some of the steps may occur in one sitting. For example, after a *pro se* staff attorney determines that the prisoner has exhausted available administrative remedies and does not have a "three-strikes" problem, the staff attorney may immediately proceed to screen the complaint for frivolousness and failure to state a claim.

Screening for Technical Deficiencies

As a first step in the screening process, a court clerk, preferably a specially trained *pro se* writ clerk, would review the documents submitted by prisoners bringing civil-rights suits for technical deficiencies, such as a missing signature or missing documents. As mentioned earlier, the number of such technical deficiencies can be reduced through well-drafted filing instructions, complaint forms, and filing checklists. For any technical deficiencies which nonetheless occur, a form letter or order[36] directing the prisoner to correct the deficiency within a defined period of time can be prepared by the *pro se* writ clerk. The time needed to prepare a deficiency letter or order should be minimal since standard letters and orders can be stored on the computer, with only a few blanks to be filled out by the clerk.

Screening for Failure to Exhaust and "Three Strikes"

The next step in the screening process is to determine whether the prisoner has exhausted available administrative remedies and whether the prisoner has the "three strikes" which will generally preclude the prisoner from filing the complaint *in forma pauperis*. It is most efficient if these determinations are made at the outset of the screening process because if the

prisoner has failed to exhaust administrative remedies, further processing of the complaint is unnecessary.[37] This also holds true if the prisoner has "three strikes," unless the prisoner is either facing an "imminent danger" of "serious physical injury" or pays, in advance, the full filing fee.[38]

The form order dismissing a complaint or directing the clerk not to file a complaint because of a prisoner's failure to exhaust administrative remedies or because of a three-strikes problem should be prepared by, or at least reviewed by, the *pro se* staff attorney or judge's law clerk. Questions concerning both a prisoner's need to exhaust administrative remedies and whether a prisoner faces an imminent threat of serious physical harm are questions that have substantive and legal implications. A *pro se* staff attorney or law clerk should therefore review these questions to determine whether there are any legal complications of which the judge should be made aware before a form order is sent to the judge to sign.

The court clerk's office can, however, facilitate the three-strikes review. Currently, there are a hodgepodge of methods being employed by the courts to determine whether a prisoner has "three strikes." Some courts are primarily relying on the self-reports of the prisoners about prior civil-rights lawsuits that they have filed. Others are expecting the attorneys representing the defendants to bring it to the court's attention if a prisoner has three strikes. (This method of keeping track of strikes will miss some prisoners with three strikes, because correctional attorneys will often be unaware of strikes that a prisoner accrued when a court *sua sponte* dismissed the prisoner's complaints before service of process.) Still others are relying on the collective memory of court personnel to identify those prisoners who are "repeat filers" and whose files from prior cases can then be checked to ascertain if they have accrued three strikes. And other courts are beginning to keep track of strikes either manually or with computers.

The courts vary in other ways in how they are implementing the three-strikes provision. Many courts confine their inquiry about prior strikes to those reported by the prisoners themselves and those of which the court is aware that were accrued within the district in which the court is located. The vast majority of the courts that were surveyed during this project (15 of the 17), for example, reported that they did not collect information from other federal district or appellate courts when determining whether a prisoner has three strikes.[39] In some states, such as Texas, however, there is an attempt to exchange information between district courts within the state about prisoners with three strikes.[40]

As was mentioned earlier in this chapter, questions have been raised about the constitutionality of the three-strikes

provision, and one court has held that it violates indigent prisoners' right to the equal protection of the law.[41] Concerns have also been expressed, on policy grounds, about the wisdom and fairness of closing the courthouse doors to those indigent prisoners, ignorant of the law, who on three prior occasions filed lawsuits or appeals because they believed in good faith, but erroneously, that their constitutional rights had been violated.

If the three-strikes provision remains the law, however, and its constitutionality is upheld by the courts, the courts will be obliged to enforce it. And if it is enforced, few would disagree that it should be enforced efficiently and equitably.

This efficiency and equity will be unattainable, however, unless there is coordination or sharing of information between federal courts. Because of the frequency with which prisoners are currently transferred to other prisons, some prisoners file lawsuits in several different districts. Prisoners, like nonprisoners, may also end up filing one or more unsuccessful appeals. If there is no coordination or sharing of information between the federal courts in reporting strikes that have accrued under the PLRA, disparity in the treatment of prisoners who wish to bring suit *in forma pauperis* will inevitably ensue. A prisoner, for example, with three strikes of which the court happens to be aware may be foreclosed from bringing suit *in forma pauperis* while at the same time, another prisoner who, unbeknownst to the court, has accrued ten strikes in other district and appellate courts is granted leave to file suit without prepaying the full filing fee.

The Administrative Office of the United States Courts currently has plans to establish a national data base that may facilitate courts' efforts to identify strikes that a prisoner-plaintiff has accrued in another court.[42] This "United States Party/Case Index" will list cases, both closed and pending, by name of party and by nature of the suit. From this index, a court will reportedly be able to determine if there have been other civil-rights cases filed by a prisoner-plaintiff, or at least by a person who has the same name as the prisoner-plaintiff.

The party/case index, as currently conceived, will not indicate the disposition of a case or whether a prisoner accrued a strike when the case was disposed.[43] The index should be helpful though in helping courts to determine whether a prisoner has filed other lawsuits and where. When it appears that a prisoner has filed three other civil-rights cases that are now closed, court staff can then contact the other courts in which those lawsuits were filed to determine whether the prisoner-plaintiff has accrued three strikes.[44]

In Forma Pauperis Review and Screening for Frivolousness and Failure to State a Claim

Once complaints have been reviewed for technical deficiencies, exhaustion of administrative remedies, and three-strikes problems, the complaints should be screened to weed out those complaints that are frivolous or obviously fail to state a claim for which relief can be granted.[45] Even before enactment of the Prison Litigation Reform Act in 1996, federal courts had mechanisms in place to screen out frivolous complaints early on in the litigation process. Amongst the courts participating in the project survey, estimates of the percentage of cases filed in 1995 that were dismissed before process was even served ranged from 8% to 75%.

Some Attorneys General interviewed during this study reported that, in the words of one Assistant Attorney General, the federal courts are doing a "good job" of weeding out frivolous cases. A few others complained that frivolous claims are not being adequately screened out by some courts in their states.[46]

The reality is that conclusive determinations regarding the efficacy of the screening mechanisms employed by courts cannot be made without a qualitative analysis of the cases filed. But wide disparities in *sua-sponte* dismissal rates may suggest one of several possibilities: that in courts with very high dismissal rates, potentially meritorious claims may be getting erroneously dismissed; that in courts with low dismissal rates, frivolous claims are not being identified during the screening process; or that variations in dismissal rates are due to other factors, such as the availability of legal assistance in prisons in some districts that leads to fewer numbers of frivolous claims being submitted to the court.

Several steps can be, and often already are, taken by courts to enhance the efficiency and accuracy of the screening process. First, a *pro se* staff attorney (or the judge's "elbow law clerk" if there is no *pro se* staff attorney assigned to the court) can conduct the initial screening of the complaints for frivolousness or failure to state a claim.

In district courts with several *pro se* staff attorneys and judges involved in the processing of *pro se* prisoners' civil-rights suits, consideration might be given to adopting, in full or modified form, some of the screening procedures employed by the United States District Court for the Southern District of New York. In that district, *pro se* staff attorneys meet in groups of three to screen prisoners' civil-rights complaints, as well as habeas-corpus petitions. (A group screens about twenty complaints and petitions every other day.) The theory behind this group-screening process, according to the Senior *Pro Se* Staff Attorney,

is that "three heads are better than one." The group screening, it is felt, makes it less likely that meritorious claims will go undetected and fall through the cracks of the court system or that frivolous claims will escape notice. The group-screening process also has value in helping to ensure that cases are processed consistently.

The New York district court also uses other safeguards to improve the accuracy and consistency of the screening process. The Senior *Pro Se* Staff Attorney reviews all but routine orders, such as venue-transfer orders, to ensure that the *pro se* staff attorneys are taking a uniform approach to the law. In addition, draft orders involving novel legal issues are discussed with, and screened by, the Senior Staff Attorney before being forwarded to a judge.

A second step that can be taken to expedite the screening process is to use form orders that cover the reasons prisoners' civil-rights complaints are dismissed most frequently by the courts. Some district courts, such as those in the Southern District of Florida, the District of Nevada, and the Eastern District of North Carolina, have already put together extensive form-order banks.

To facilitate the drafting of these form orders, each circuit should consider appointing a circuitwide *Pro Se* Prisoner Litigation Committee. To avoid unnecessary and costly duplication in the creation and modification of form orders by individual district courts, one of the responsibilities of this committee would be to develop model form orders for use in prisoners' civil-rights actions.[47] Each district court could use all of these model forms in their entirety or could revise them where it was considered needed or appropriate.

On a regular basis, the committee would need to review and, where necessary, revise the form orders, and the modified forms would then be disseminated to the district courts in the circuit. Great care would need to be taken when developing these orders to ensure that in particular orders, such as summary-judgment orders, the relevant facts of a case can be incorporated into the order.

Several of the courts visited and surveyed during this project reported using a triage process when screening prisoners' civil-rights complaints.[48] These courts reported dividing complaints into three categories -- those which should be immediately dismissed because they are obviously without legal merit, those which should be permitted to go forward because they are nonfrivolous and appear to state a claim for which relief can be granted, and those about which there is some doubt and for which some clarifying facts are needed from the prisoner before a final decision can be made whether to dismiss the complaint.

For reasons that will be discussed subsequently in this chapter, in some districts it may be best, at this stage of the litigation, to divide the prisoners' *pro se* civil-rights complaints into two categories -- those which should be immediately dismissed because of their patent lack of merit and those which instead should be scheduled for a short court hearing. In other districts, the preferred route may be to divide the cases into three categories -- those which should be immediately dismissed, those which should immediately be processed through the court's alternative dispute-resolution program, and those which should be scheduled for an early case-evaluation hearing.

If a complaint asserts only one claim, which is either frivolous or obviously fails to state a cognizable claim, it is most efficient for the court to dismiss it during the initial screening process. But if the complaint contains multiple claims, not all of which it is apparent should be dismissed, it will usually be most efficient to have all of the claims considered at once at the early case-evaluation hearing discussed below. (At the hearing, the court can quickly dismiss any frivolous claims or claims that fail to state a claim for which relief can be granted.) Then, only one order will have to be written at this litigation stage.

III. EARLY CASE-EVALUATION HEARINGS

As mentioned above, those prisoners' civil-rights cases that are not dismissed because they are frivolous or obviously fail to state a claim for which relief can be granted or are not referred to a court-based, alternative dispute-resolution program can be set for a court hearing. These hearings can be conducted telephonically, through videoconferencing, or in special courtrooms in the prisons.

What transpires during the hearings will depend in part on the quality and completeness of the complaints, which in turn will largely be a function of the quality of the legal assistance provided to prisoners when drafting complaints. What can be accomplished during these hearings will also depend on other factors, including the resources available to a court for alternative dispute-resolution programs specially tailored for prisoners' lawsuits and the commitment of correctional officials and the Attorney General in the state to resolve, without the need for further litigation, problems about which prisoners have legitimate concerns that prompted the filing of a portion of the lawsuits before the court.

While the purposes served by the early case-evaluation hearings will vary greatly depending on the factors listed above, a model describing what the hearings can realistically accomplish

is described below. This model is a distillation of lessons learned from the observation of early case-evaluation hearings in the United States District Court for the District of Nevada, *Spears* hearings conducted in the United States District Court for the Northern District of Illinois, and the operations of the Constituent Services Office in the Missouri Department of Corrections; feedback obtained regarding the use of a Federal Judicial Mediator to mediate disputes in prisoners' *pro se* civil-rights cases in the United States District Court for the Eastern District of Washington; and other feedback obtained from courts, correctional officials, and Attorneys General during this project.

Amendment, Streamlining, and Dismissal of Claims and Complaints

As is discussed in the next chapter, correctional officials in a state, in conjunction with the Attorney General, can put mechanisms in place that will facilitate, where appropriate, the settlement of a prisoner's civil-rights case before a scheduled early case-evaluation hearing is held. Such a settlement would obviate the need to hold the hearing.

If the case is not settled, however, one of the first steps to be taken by the magistrate judge or district judge at the hearing is to review the prisoner's claims with the prisoner. If the district judge is conducting the hearing or the prisoner has consented to the magistrate judge's jurisdiction over the case, any frivolous claims or claims which obviously fail to state a claim for which relief can be granted can be quickly dismissed by the judge after providing the prisoner with a brief, but very clear explanation as to why dismissal is required.

If a magistrate judge is conducting the hearing and the prisoner has not consented to the magistrate judges's jurisdiction, the magistrate can explain to the prisoner why a claim is legally deficient and must be dismissed. The magistrate judge can then encourage the prisoner to voluntarily dismiss the claim. It has been the experience of the Nevada court that prisoners are generally willing to voluntarily dismiss frivolous claims when a judge takes the time to explain why they are not legally cognizable. If a prisoner still refuses, after this explanation, to voluntarily dismiss a frivolous claim, the magistrate judge can then, as is done in the Nevada court, inform the prisoner of the sanctions that can be imposed under Rule 11 of the Federal Rules of Civil Procedure for persisting in the litigation of a claim which the prisoner now knows is frivolous. Usually, relating this information will prompt the prisoner to voluntarily dismiss the claim.

If a prisoner has not received adequate legal assistance in drafting a complaint, a court may have trouble deciphering a prisoner's claim. Or the court may understand the claim as

written, recognize that it is legally deficient on its face, but not know whether there exist facts which, if added in an amended complaint, would cure the legal deficiency and state a claim for which relief can be granted.

During the early case-evaluation hearing, the judge can obtain from the prisoner clarifying information about the facts underlying the prisoner's claim to determine if the complaint could be amended to state a claim for relief.[49] For example, if a complaint contains no facts which demonstrate that a defendant was personally involved in the alleged violation of a prisoner's constitutional right, the judge can determine whether there are facts not mentioned in the complaint that reveal the requisite personal involvement needed for legal liability. If these facts do not exist, then the claim against the defendant can be dismissed, either voluntarily or by the court. If they do exist, then the complaint can either be amended on the spot, depending on the nature of the deficiency, or the judge can direct the prisoner to file an amended complaint within the time prescribed by the court.[50]

The value of early case-evaluation hearings in streamlining and clarifying prisoners' complaints has been confirmed in the United States District Court for the District of Nevada in Reno. That court first began to use early case-evaluation hearings in March of 1994. During the first nine months of their use, over sixty early case-evaluation hearings were held.[51] Of the 166 claims that were processed during these hearings, 69 remained at the hearings' end. And of the 279 original defendants, 131 remained after the hearings. Thus, during the hearings, almost 60% of the original counts were weeded out or resolved, and more than 50% of the original defendants were eliminated from the cases. In other words, as a result of the early case-evaluation hearings, the size of the prisoners' civil-rights cases, in terms of the number of counts and defendants, was reduced roughly by half, permitting the streamlined cases to be processed more efficiently through the court system.

Acceptance or Waiver of Service of Process

One of the little-recognized burdens of processing *pro se* prisoners' civil-rights cases is the difficulty of effectuating service of process in such cases. The vast majority of the marshals who were surveyed during this project, as well as many court clerks and other court personnel, reported encountering many difficulties as they attempt to take the steps necessary for a copy of the complaint and a summons to be served on persons named as defendants in prisoners' civil-rights suits. Some of the reported difficulties include being provided with incomplete names of defendants; missing, incomplete, or wrong addresses; and an inadequate number of copies of the complaints to be served in cases with multiple defendants.

Early case-evaluation hearings can be, and in the federal district court in Reno have been, used to avoid many of these problems. During early case-evaluation hearings in the Nevada Court, the judge typically asks the Deputy Attorney General participating in the hearing whether he or she will accept service of process on behalf of the defendants against whom the case will be going forward. At the time of the site visit, the Deputy Attorney General generally accepted service on behalf of any person who was currently employed by the Nevada Department of Prisons. The Deputy Attorney General, however, lacks the authority to accept service of process for persons employed by other state agencies or for former employees of the Nevada Department of Prisons.[52]

As is discussed in the next chapter, there are other steps that can be taken by correctional officials and Attorneys General to mitigate the burdens of serving process in prisoners' civil-rights cases. But even this one step taken in Nevada by the Attorney General's Office, working in conjunction with correctional officials and the court, has proven very effective in diminishing these burdens. During a six-month period in 1993, for example, before institution of the early case-evaluation hearings, the United States Marshal in Reno had to serve 700 summonses for prisoners' civil-rights cases.[53] By contrast, during the same six-month period the next year, after early case-evaluation hearings began to be utilized, the U.S. Marshal only had to serve 274 summonses for that kind of case.[54]

Limited Discovery

Before an early case evaluation hearing, the prisoner-plaintiff should be provided with copies of certain already existing documents bearing on his or her claim. In order to avoid placing an undue administrative burden on correctional officials and the Attorney General in these cases in which process has not been served, the exact documents to be generally provided to prisoners before early case-evaluation hearings would best be decided after consultations between court officials, correctional officials, and the Attorney General. Examples of the documents that could, depending on the nature of the claim, be particularly helpful in ensuring that the purposes of the hearing are met (particularly the accurate determination by the court whether a colorable claim exists) include: disciplinary tickets, disciplinary-committee reports, grievance records, medical records, and "incident reports" describing, for example, a correctional officer's use of force against an inmate or an attack by one inmate of another inmate. The retrieval of these documents should not normally be overly cumbersome for correctional officials because most of these documents will either be in the prisoner's institutional file or medical file.

The limited production of certain documents early in the litigation process will yield several benefits in terms of streamlining prisoners' *pro se* civil-rights suits. First, the documents will be useful in clarifying ambiguities and rectifying omissions in prisoners' original complaints. For example, prisoners often do not know the full name of the defendants whom they are suing. Consequently, they very often just identify a defendant by his or her last name or in even more general terms, such as "the sergeant who works the night shift on the third tier of cellblock A." Through the documents produced in preparation for early case-evaluation hearings, the names of these defendants can very often be determined. Then, the complaints can be amended on the spot, eliminating both the delay that would otherwise ensue while waiting for an amended complaint to be prepared and the costs that would be incurred as that amended complaint is then processed by the court.

A second potential benefit of limited document production before an early case-evaluation hearing is that the information disclosed in those documents can sometimes, and perhaps many times, facilitate a resolution of the problem that prompted the filing of a lawsuit, leading to the voluntary dismissal of the suit. Currently, in many states, the attorneys who represent defendants in prisoners' civil-rights cases know little or nothing about the facts underlying a prisoner's claim until many weeks or even months after a complaint is filed. This lack of knowledge about even the basic facts of a case can make it difficult for the attorney to assess whether the case can and should be resolved administratively. By providing basic documentary information to both the prisoner and the correctional attorneys before the hearing, the possibility of a resolution of the claim before or at the hearing will be enhanced. In addition, the documents produced for the hearing may help to facilitate the resolution of the case if the case is routed by the court through an alternative dispute-resolution program.

Finally, providing basic documentary information to the prisoner at the outset of a case can obviate the need for the prisoner to later request those documents in discovery documents that correctional officials often find difficult to interpret and respond to.

Settlement

One of the touted benefits of early case-evaluation hearings is that they can lead to the settlement of cases that do not, and should not, have to go through the litigation process -- cases where it is obvious that correctional officials can take steps to address legitimate concerns raised in a prisoner's complaint. An example of such a case would be one where the prisoner has sued because his prescription for blood-pressure medication is not being filled.

The reality is that the objective of using early case-evaluation hearings to settle cases is not, at least in some courts, being realized, or at least not very often. The hearings observed in Nevada, for example, were primarily used for three purposes: to dismiss claims that were frivolous or obviously failed to state a claim for which relief could be granted; to identify areas of complaints where clarifying information was needed before the case could go forward; and to effectuate service of process through the Deputy Attorney General participating in the hearing. Both court officials and the Deputy Attorney General acknowledged that the hearings had moved away from one of their original purposes -- to facilitate the informal resolution of prisoners' complaints. And regret was expressed that this ostensible purpose of the hearings was receiving relatively short shrift.

It may be, however, that the court hearing itself is not the best forum for this informal resolution of prisoners' complaints. Instead, it may be that the hearing can best serve as a catalyst for the resolution of a complaint either before the hearing or after, when the case is processed through an alternative dispute-resolution mechanism.

If, however, a court decides that a central purpose of early case-evaluation hearings should be dispute resolution at the hearings themselves, then procedures would need to be put in place that will make it more likely that this purpose will be achieved. As a first step, this purpose would need to be clearly defined and articulated to all persons who will be participating in the hearing. In this way, everyone would come into the hearing prepared to talk about settlement options and not be taken aback when the subject of settlement is broached by the judge.

In addition, notice of the hearings would need to be provided far enough in advance to permit correctional officials and the Attorney General to acquire whatever information is needed about a case to assess how, if at all, it could be informally resolved. At the time of the site visit, the Attorney General's Office in Nevada was notified seven to ten days before an early case-evaluation hearing. The Senior Deputy Attorney General reported that attorneys from the Attorney General's Office often did not have enough time to collect pertinent documents bearing on a prisoner's claim or to attempt an informal resolution of the dispute before the hearing. Advance notice four weeks before a hearing would probably suffice in most districts. The minimal amount of time that should elapse between the notice and the holding of the hearing would need, however, to be decided district by district, after consultations between court officials, the Department of Corrections, and the Attorney General's Office.

ADR Screening and Referral

At the early case-evaluation hearing, the judge can decide whether to refer the case through the court's alternative dispute-resolution program specially designed for prisoners' civil-rights cases. In some districts, particularly those in which complaints are well-drafted because of the legal assistance available during the complaint-drafting process, the referral decision might be made during the initial screening process. Judges, with the assistance of their *pro se* staff attorneys and/or law clerks, could decide what cases not dismissed for frivolousness or failure to state a claim should be processed through an ADR program. The advantage of directly routing a case into an ADR program is that if the case is resolved, further court proceedings will be unnecessary.

On the other hand, courts may find through experience that the ADR process works more effectively if the ADR referral is made by the judge, and discussed by the judge, in the parties' presence. Many prisoners have a great distrust of corrections-run grievance processes.[55] Yet if a court places its imprimatur on a court-affiliated ADR program by discussing, and making a referral to, that program during the early case-evaluation hearing, it may make it more likely that prisoners, as well as correctional officials, will cooperate during that kind of ADR process and seek a way in which to resolve the dispute.

Scheduling Orders and Assignment to Litigation Tracks

If a case is not held in abeyance pending submission by the prisoner of an amended complaint or processing of the case through a court-based ADR program, then the early case-evaluation hearing can conclude with the entry of a scheduling order. The scheduling order should, at a minimum, identify the date by when the defendant or defendants should file an answer with the court and the date shortly thereafter when a scheduling and case-management conference will be held under Rule 16 of the Federal Rules of Civil Procedure. For reasons discussed subsequently in this chapter, a court should also consider including a provision in a scheduling order that bars the parties from filing any motions with the court until the answer has been filed and the Rule 16 conference has been held.

Steps to Take in Conducting Early Case-Evaluation Hearings

There are some basic steps that need to be taken in order for early case-evaluation hearings to achieve their purposes and run smoothly. Some of the more critical steps are identified and discussed below:

1. Bench Memorandum. In advance of the hearing, a *pro se* staff attorney (or judge's law clerk in those districts that do

not have *pro se* staff attorneys) should prepare and provide a bench memorandum to the judge who will conduct the hearing. The bench memorandum should be very succinct, generally no longer than two to four pages, and should include the following information:

- The total number of counts in the complaint and total number of defendants. (This information is not only helpful to the judge, but can be useful when statistically tracking the effects of early case-evaluation hearings within the district.)

- A brief summary of the facts. (In Nevada, the district court has found that a short, three-or-four-sentence paragraph will generally suffice.)

- A discussion of any problems that apply to all counts of the complaint. For example, if the prisoner has sued the state, the memorandum can simply mention that a state is not a "person" who can be sued under § 1983 and cite to *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

- A summary of any problems with, or questions involving, individual counts -- for example, claims that need to be dismissed because they are frivolous or fail to state a claim or additional information that must be obtained by the court to make the determination regarding frivolousness and failure to state a claim.

- A recommendation as to whether the case is appropriate for referral to a court-based ADR program and the reasons why or why not.

- A conclusion outlining recommended actions to be taken at the hearing, depending on the facts elicited during that hearing.

If the settlement of cases at early case-evaluation hearings is one of the main purposes of those hearings in a particular district, a court can also experiment a bit with the content of bench memoranda to determine whether a brief discussion in the bench memorandum of possible settlement options is at all helpful to the court.

2. Notice of the Hearing. As mentioned earlier, the Department of Corrections and the Attorney General's Office need

to be apprised of an early case-evaluation hearing far enough in advance of the hearing to collect relevant documents and to attempt to informally resolve the case. The prisoner should also be apprised of the date of the hearing and its purposes well in advance of the hearing. In addition, the prisoner needs to be directed to bring all documents that bear on the case and are in his or her possession to the hearing. During the hearings observed in Nevada and Illinois, several prisoners mentioned that they had not known or understood why the hearing was being held. Consequently, they did not bring certain documents they needed to answer the judge's questions to the hearing.

3. Limited Document Production in Advance of the Hearing. It is the practice in some courts that hold *Spears* hearings for correctional officials or the Attorney General to make certain relevant documents available at the hearing. If the documents are to have the greatest practical utility in terms of assisting the inmate to answer the judge's questions and enabling the court to accurately screen the complaint, the documents need to be provided to the inmate and the court at least several days before the hearing.

4. Participants in the Hearing. The Nevada and Illinois courts varied greatly in terms of who participated and how in the hearings that, in both courts, precede service of process. In Nevada, the judge and the prisoner did the brunt of the talking during the hearing, which was conducted via teleconferencing. The Deputy Attorney General was there to observe what happened on the case, to answer any questions the judge might have (such as whether she could help to identify a "John Doe defendant"), and to accept service of process on behalf of current employees of the Nevada Department of Prisons.

When the early case-evaluation hearings were first initiated in Nevada, it was envisioned that a Correctional Casework Specialist from the Nevada Department of Prisons would also play an important role in the hearing. The Casework Specialist, it was thought, would conduct a preliminary investigation of the facts underlying the prisoner's claim, attempt to informally resolve those claims that could and should be settled, and answer questions the judge might have during the hearing.

It was evident, however, from the comments of hearing participants and observations made during the site visit that the role of correctional officials in the early case-evaluation hearings has not evolved as originally intended. During the hearings that were observed, a correctional officer was in the same room as the prisoner, but apparently only for security reasons.

Two other persons participated in the hearings in Nevada. A court clerk was present to record the hearing, and the *pro se*

staff attorney who had prepared the bench memorandum was there to, when needed, provide the judge with information.

The hearings in Illinois were, by contrast, much more labor-intensive. The differences were due in part to the fact that two different magistrate judges were conducting hearings in a special courtroom at the prison throughout the day. But the differences were also due to the greater role played by correctional officials in the hearings. Attorneys and paralegals from the Legal Division of the Illinois Department of Corrections participated in the hearings in assorted ways -- running the videoconferencing equipment during several hearings involving prisoners who had been transferred to other prisons, taking copious notes, and occasionally answering questions raised by the judge. (By contrast, an Assistant Attorney General, there as an observer, read a book in a corner of the courtroom throughout most of the day.) Other persons participating in the hearing included, of course, the prisoner, as well as the correctional officer who sat next to the prisoner for security purposes, the *pro se* staff attorney, one magistrate judge's law clerk, and the court reporter.

The respective roles of the Attorney General and the Department of Corrections during early case-evaluation hearings will vary state by state, depending on the way in which litigation responsibilities in *pro se* prisoners' civil-rights suits are allocated. But it does seem preferable and advisable to have a representative from the Department of Corrections who is knowledgeable about the facts of the case and has the authority to informally resolve the dispute present during the hearing.

As far as the number of representatives from the Department of Corrections and Attorney General's Office that should be present during hearings, it does make sense to put whatever resources are needed towards the front end of the litigation process, since so many claims and cases have the potential to be resolved shortly before, during, or after an early case-evaluation hearing. To maximize the cost-effectiveness of early case-evaluation hearings though, a Department of Corrections and the Attorney General should examine the case-assignment system so that nonessential personnel are not present during the hearings.

5. Length of the Hearing. As a general rule of thumb, the hearings can and should generally last no longer than fifteen minutes. If settlement of cases at the hearings themselves is a primary purpose of the hearings, however, the hearings will generally take longer.

6. Summarizing and Recording the Results of the Hearing. It is critically important that the prisoner understand the

decisions made at the hearing. Otherwise, some or many of the purposes of the hearing will be defeated.

For example, an inmate interviewed in Nevada the day after an early case-evaluation hearing observed during the site visit was asked to explain what had happened during the hearing the preceding day. The prisoner was able to recount only about half of the decisions made concerning the multiple counts and multiple defendants in his complaint. And in some instances, his recollection and understanding of what had transpired was flat-out wrong. For example, the prisoner reported that the judge had directed him to remove his eighth-amendment claim from one count and state it as a due-process claim when just the opposite had occurred. The judge had in fact ordered the prisoner to restate the claim under the eighth amendment, removing any reference to due process.

Well-drafted minute orders can play an important role in memorializing key decisions made during early case-evaluation hearings. These minute orders can help ensure that a prisoner understands the decisions made during a hearing and what he or she is now supposed to do.

If amendments are made on the spot to complaints during the hearings, the minute orders can also be used to record these amendments and inform defendants about them. The appropriate steps must then be taken, however, to ensure that the minute orders get to the prisoner and the defendants in a timely fashion.

It was reported during one of the site visits that the minute orders entered after early case-evaluation hearings in that court have varied greatly in terms of their quality and completeness. It is therefore important to ensure that the court personnel responsible for preparing these minute orders, typically the court clerks, receive training about the special purposes served by the minute orders and about how to prepare them. And to avoid misunderstandings that can lead to deficiencies in complaints not being cured in amended complaints, it may be helpful for the *pro se* staff attorney to review a minute order for accuracy and completeness before it is sent off to the parties.

To facilitate the preparation of minute orders and to avoid the kinds of misunderstandings discussed above, the judge can also, at the conclusion of the hearing, summarize the key decisions made during the hearing that should be reflected in the minute order. In addition, correctional officials can make sure that the prisoner is provided with a pen and paper for use during the hearing so that the prisoner can take notes about what the judge tells him or her to do.

7. Teleconferences versus Videoconferences versus In-Person Hearings. The Prison Litigation Reform Act directs that "to the extent practicable," pretrial proceedings in prisoners' civil-rights suits are to be conducted without removing the prisoner from the correctional facility.[56] During this project, three very different ways of holding early case-evaluation hearings in conformance with this mandate were observed -- through teleconferencing, through videoconferencing, and through hearings held in a special courtroom within a prison.

Each hearing method has its advantages and disadvantages. Using telephones usually is the cheapest way to conduct the hearings, and the Nevada court employed teleconferencing very effectively. Some hearing participants, however, including some judges, dislike the impersonality of teleconferences.

Videoconferencing, on the other hand, makes it possible for there to be face-to-face contact between the judge, the prisoner, and other hearing participants.[57] Videoconferencing is, however, much more expensive than teleconferencing.

Holding hearings at prisons is also generally more expensive than teleconferences because of the sometimes extensive amount of time that it takes for court personnel and the Deputy or Assistant Attorney General to travel to the prison. Extra costs may also be incurred to construct the special courtroom, although the costs might be incurred in any event if trials are held at the prison or for parole hearings.

Another disadvantage of holding the early case-evaluation hearings at the prison itself is the danger posed to the judge and other hearing participants. During the hearings in Illinois, the risks are reduced by manacling the ankles and wrists of prisoners appearing before the court, but the risk of harm, though diminished, still remains.

On the upside though, it is somewhat easier to provide the judge with copies of documents during an in-person hearing than during a hearing held by telephone or videoconference. A videoconferencing system can, however, come equipped with a document camera, which permits a document to be read at the other end of the transmission. (The videoconferencing system used in the Central District of Illinois has this feature.) In addition, FAX machines can be used during both teleconferences and videoconferences to transmit documents to and from the court.

IV. ALTERNATIVE DISPUTE RESOLUTION

One way to potentially conserve the court's resources is to refer appropriate *pro se* prisoners' civil-rights suits to a

court-based, alternative dispute-resolution program. In devising an ADR program for these kinds of lawsuits, courts can draw on the experience of the United States District Court for the Eastern District of Washington. Since April 1995, that court has used a Federal Judicial Mediator to resolve certain prisoners' claims without the need for prolonged litigation.

In the Eastern District of Washington, the *pro se* staff attorney first screens a complaint for frivolousness. If the complaint is not frivolous, then the staff attorney will prepare an "Order of Reference to Federal Judicial Mediator" for cases considered appropriate for referral to the mediation program.

According to the Federal Judicial Mediator, medical claims are particularly conducive to settlement through the mediation program, since they can often be resolved after getting a second opinion from a doctor. Some claims though, in his opinion, are "almost impossible" to mediate: claims involving the alleged excessive use of force (unless the evidence is "overwhelming") and claims in which prisoners are seeking changes in prison regulations. In addition, the Federal Judicial Mediator reported a lack of success in mediating cases involving prisoners who are "professional litigators."

During the first year the mediation program was in existence, one quarter of the cases referred to the program were settled (15 of 69).[58] Others were dismissed by the court (12%); withdrawn before mediation (8.6%); involved an inmate who was transferred outside the district before mediation could occur (19%);[59] or had counsel appointed or obtained to represent the prisoner (12%).[60] About a third of the cases remained active in the mediation program at the end of the year.

The Federal Judicial Mediator reported that the biggest challenge in resolving *pro se* prisoners' civil-rights suits through mediation is finding settlement terms to which the defendants will agree, since they know that if they litigate the case, they will most likely, from a legal perspective, win. The Federal Judicial Mediator therefore underscored the need for mediators to be creative when crafting suggestions designed to resolve a case without litigation.

In the Eastern District of Washington, the mediation process typically takes about sixty days to complete, and the order of reference is for a 60-day period. (Judges will, however, readily extend the period for mediation if the Federal Judicial Mediator reports that further mediation efforts have a good chance of succeeding.) During that 60-day period, all other activity in the case is stayed, and the court directs that all communications regarding the case be made through the Federal Judicial Mediator.

V. DISCOVERY

There are two key questions concerning discovery in *pro se* prisoners' civil-rights suits. The first question concerns the timing for the use of discovery mechanisms. And the second question is what kinds of discovery mechanisms are most appropriate for these kinds of cases?

The Timing of Initial Discovery

As was mentioned earlier, it would be advisable for a court, either at the early case-evaluation hearing or after a case has moved through an alternative dispute-resolution program, to direct defendants to file an answer before filing a dispositive motion in a *pro se* prisoner's civil-rights case. There are at least three reasons for managing the progression of a *pro se* prisoner's civil-rights suit in this way. First, early case-evaluation hearings should, if properly conducted, generally obviate the need for most defendants to file motions to dismiss, since at least most claims that fail to state a claim for which relief can be granted will have been dismissed at the first hearing or a second hearing held after the filing of an amended complaint.

Second, under the Prison Litigation Reform Act, a prisoner cannot obtain relief in a civil-rights suit unless "a reply" has been filed by the defendant.[61] So by requiring the filing of an answer, the court is laying the groundwork necessary to grant relief if, for example, the plaintiff files a meritorious motion for summary judgment.[62]

Finally, the filing of an answer brings a case to the point where formal discovery can proceed. And it will generally be best for certain, though limited, discovery to occur before a defendant files a motion for summary judgment. This limited discovery should enable the prisoner to respond more effectively to the motion and make it more likely that the court accurately rules on the motion. In addition, providing the information to prisoners up front, before the filing of motions for summary judgment, will generally obviate the need for prisoners (if they even understand how to do this) to file affidavits under Rule 56(f) seeking permission to conduct discovery that will enable them to respond to the motion for summary judgment.

Specially Tailored Discovery Tools for Pro Se Prisoners' Civil-Rights Actions

According to reports received from many judges during this study, traditional discovery practices are ill-suited to *pro se* prisoners' civil-rights suits. Trying to conduct discovery through traditional means in *pro se* prisoners' civil-rights suits can be frustrating and burdensome for both prisoners and

defendants alike. Prisoners may not know what facts they need to prove a claim, and if they do, they often won't know how to craft a discovery request. Defendants often have trouble deciphering prisoners' sometimes incomprehensible discovery demands and responding to those demands. Ultimately, courts are often drawn into discovery disputes involving the often crudely drafted and overly broad discovery requests of prisoners. In addition, as is discussed in the next chapter, some courts reported during this project that correctional officials and Attorneys General often resist what the courts consider proper discovery requests.

To avoid these problems, some courts employ special discovery tools in *pro se* prisoners' civil-rights cases. These tools include: (1) automatic discovery under Rule 26(a)(1) of the Federal Rules of Civil Procedure; (2) mandatory disclosure in response to court-drafted interrogatories and requests for production of documents; (3) *Martinez* reports;[63] and (4) *Watson* questionnaires.[64] Each one of these discovery devices is discussed below.

1. Automatic Discovery under Rule 26(a)(1). The United States District Court for the Western District of Missouri is one court that utilizes Rule 26(a)(1) to effectuate discovery in *pro se* prisoners' civil-rights suits. Through a pretrial scheduling order, the court orders that disclosures be made under Rule 26(a)(1). At the time of the court surveys conducted during this project, an even more specific scheduling order, a copy of which is included in the Appendix, was used by some judges in the district in requiring disclosures under Rule 26(a).[65] The order specifically required defendants to provide the names and places of employment of persons who were present at, witnessed, or investigated the events giving rise to the plaintiff's claim.[66] Because of security reasons, the defendants did not have to provide these persons' addresses.

In addition, the pretrial scheduling order directed the defendants to produce documents prepared by any employee of the Department of Corrections in connection with the events that led to the plaintiff's claims. The order contained a nonexhaustive list of the kinds of documents that might have to be produced: conduct violation reports, intradepartmental memoranda, use of force reports, informal resolution reports, witness statements, medical services requests, and medical treatment records (if release of those latter records had been authorized). The order authorized defendants to redact documents to protect the identity of confidential informants. The defendants had to, however, provide unredacted copies of those documents to the court upon request.

2. Mandatory Disclosure in Response to Court-Drafted Discovery Documents. The United States District Court for the Southern District of New York has adopted a broader form of

mandatory disclosure. The court has prepared two sets of standard interrogatories and requests for production of documents for use in three types of frequently filed *pro se* prisoners' lawsuits: those involving a correctional officer's alleged use of excessive force against an inmate, those involving the assault of one inmate by another inmate, and those involving alleged deprivations of due process in disciplinary cases that resulted in prisoners' confinement in segregation for more than thirty days.

The "Plaintiff's First Set of Interrogatories and Requests for Production of Documents" and "Plaintiff's Second Set of Interrogatories and Requests for Production of Documents" must be served with the summons and complaint. The defendant must then provide the information and documents described in the first discovery request within ninety days after service of the complaint or thirty days after the denial in whole or part of a motion to dismiss. The defendant must then produce the information and documents outlined in the second discovery request within 150 days after service of the complaint or thirty days after a motion to dismiss or motion for summary judgment has been denied in whole or part. The response to the second set of discovery requests does not, however, have to be returned until after the first case-management conference. During that conference, the second set of discovery requests can be discussed and, where appropriate, modified, or responses to them can be postponed. No other discovery can occur during the 150-day period when the responses to the first and second discovery requests are prepared.

Copies of the two sets of interrogatories and requests for production of documents are included in the Appendix. The types of information elicited in the first discovery request include: the identities of persons who were present, witnessed, or investigated the incident about which the lawsuit was filed; documents bearing on the case, such as incident reports, intradepartmental memoranda, and misbehavior reports; documents regarding any charges against a defendant for filing a false report, for using force against an inmate (This information is only required in cases involving the alleged use of force.), and for violating the same regulation or right at issue in a lawsuit involving the alleged failure to provide due process during a disciplinary proceeding; any statements of the plaintiff or defendant made during an investigation of the incident; medical-treatment records connected to any physical injury of which the plaintiff complains in his or her complaint or that the defendant claims to have suffered during the incident; any photographs of these injuries; and any videotape recording of the incident (to be produced to the court but not to the plaintiff).

The information and documents sought in the "Second Set of Interrogatories and Requests for Production of Documents" are

much more far-ranging. Just a few examples of the information required in the second discovery set include: records of "corrective interviews" with a defendant regarding the alleged use of excessive force or the preparation or filing of a false report; any documents concerning prior instances when the prisoner-plaintiff was disciplined; documents related to the incident upon which the lawsuit is based that are in the file of any other inmate disciplined during that incident; and the disciplinary records of any prisoner who will testify at the trial in the case.

Copies of the responses made to the first and second discovery requests must be provided not only to the plaintiff, but to the court's *Pro Se* Office. The information produced is then available for the court's use when considering a prisoner's request for the appointment of counsel. The information can also then be reviewed by an attorney deciding whether or not to accept such an appointment.

To avoid the kind of foot-dragging during discovery that the New York court has reportedly experienced with defendants in the past,[67] the court cautions defendants in the *Guide to the Southern District of New York Civil Justice Expense and Delay Reduction Plan* that the discovery requests were formulated with prisoners' basic discovery needs, security and privacy concerns, and the time and money that it would cost defendants to comply with the discovery requests in mind. Defendants are told that objections should therefore be made on these grounds only in "extraordinary circumstances."[68]

When the mandatory-disclosure system was put in place in 1992 in the New York court as part of its Civil Justice Delay and Expense Reduction Plan, some of the touted benefits[69] included:

- eliminating overbroad and improper discovery requests by prisoners;
- decreasing the number of letters sent to the court by prisoners seeking help with discovery;
- making discovery predictable as a result of which correctional attorneys can develop routinized document-collection systems and procedures for responding to interrogatories;
- developing a factual record that can facilitate the settlement of cases;
- developing a factual record that can help to ensure that the court rules properly on dispositive motions;

- making information about the case available that can facilitate the judge's decision whether to appoint counsel;

- making information about the case available that will enable counsel to decide whether or not to represent the prisoner;

- decreasing the time that *pro bono* counsel has to spend on the case because of the information and documents bearing on the case already produced; and

- preserving evidence for use at trial.

The mandatory-disclosure system has not, however, had its intended effects, in part because defendants have not, for the most part, reportedly complied with its requirements. A review in 1995 of 194 *pro se* prisoners' civil-rights cases filed in the district revealed that the defendants had complied with the local discovery rule in only twenty-seven of those cases.[70]

It is interesting to consider whether the compliance rate would have been higher if the district court had adopted other recommendations of the Civil Justice Advisory Group concerning discovery in *pro se* prisoners' civil-rights suits. The Advisory Group had recommended that when defendants object to a discovery request, they not be allowed to file an objection and wait for the prisoner to file a motion to compel discovery, since the prisoner will often not know how to file such a motion. Instead, the Advisory Group suggested placing the onus on the defendant to file a motion for a protective order if the defendant wished to avoid responding to one of the standard discovery requests.[71] And the Advisory Group recommended that misuse of these "narrow motions" should lead to the imposition of Rule 11 sanctions.[72]

3. Martinez Reports. Some federal district courts utilize what are called *Martinez* reports as a means of providing the court and the plaintiff with certain basic facts about the case. The preparation of a *Martinez* report is typically initiated by a court order directing the defendants to investigate, and report to the court about, the allegations of the prisoner's complaint. Courts vary as to whether the reports must be filed before, after, or with the filing of the answer. In Texas, where *Martinez* reports are used extensively, the Attorney General reported that they have been "very effective" in reducing the burdens of *pro se* prisoners' litigation.

4. Watson Questionnaires. A *Watson* questionnaire is the name given to a set of court-drafted interrogatories to be

answered by a prisoner-plaintiff. A sample set of interrogatories can be found in the Appendix.

One of the primary purposes of the questionnaire is to provide the court with information about some of the basic facts surrounding the plaintiff's claim. Very often, the questionnaire is used, like an early case-evaluation hearing, to assist a court in determining whether a prisoner's complaint states a claim for which relief can be granted.

The questionnaire can, however, be used for other purposes and at other stages of the litigation. The questionnaire can, for example, be used as a court-generated discovery device, much like the interrogatories and requests for production of documents that are propounded to defendants in *pro se* prisoners' civil-rights suits in the United States District Court for the Southern District of New York. The potential value of these standard discovery documents disseminated by the court is that they can, if properly drawn, help to limit the burdens of conducting and, for courts, overseeing discovery in *pro se* prisoners' cases, while helping to ensure that the facts needed to properly process, litigate, and adjudicate the cases are unearthed.

A Discovery Model Upon Which Courts Can Build

Having seen that there are an array of ways in which to conduct and obtain discovery in *pro se* prisoners' civil-rights suits, the question arises as to what is "the best" way. The answer to that question will vary from court to court. One of the most critical variables that will affect which discovery devices work best will be the willingness of the defendants to cooperate during the discovery process. If correctional officials in a particular state, for example, prepare less than candid or complete *Martinez* reports, those reports would be of limited utility to the court or prisoner-plaintiffs. Other mechanisms would have to be utilized by the court to ensure that the basic facts needed to litigate and adjudicate a case are brought to the forefront.

The following model can provide a base from which court officials can at least start when structuring the discovery process to be used in their own court in *pro se* prisoners' civil-rights suits. Whatever discovery process is ultimately adopted in a court, it should be designed to achieve two basic objectives: first and most importantly, making sure that the essential facts are unveiled that are needed for the parties to litigate the case and the court to fully and fairly adjudicate the case; and second, making sure that these facts are obtained in the most cost-effective way possible.

It should be noted that the discovery process will be most likely to achieve these objectives if it is crafted after the

court receives input from correctional officials, the Attorney General, and attorneys who represent prisoners in civil-rights suits. After obtaining this input, a court would be better able to determine what facts are particularly important to the accurate adjudication of a particular kind of civil-rights case and at what juncture of the case those facts would need to be produced. In addition, the court would be better informed about the nature and amount of the administrative burdens on correctional officials and the Attorney General that would ensue from various disclosure requirements.[73]

Having said that, courts may find that it is most efficient if they first require defendants to disclose certain basic information bearing on the case at the time they file their answer. A few documents will, as suggested earlier, probably already have been provided to the court and the prisoner-plaintiff at an early case-evaluation hearing. When filing the answer, the defendants will now provide certain additional and essential information, such as the names of witnesses who observed what happened or investigated what happened during the incident which culminated in the filing of the lawsuit.

Whatever information and/or documents a court ultimately decides should be automatically disclosed with the filing of an answer, it would probably be best for the court to specifically describe the kinds of information and documents to be produced. The pretrial scheduling order that was used at the time of the court survey in the Western District of Missouri and the interrogatories and requests for production of documents employed in the United States District Court for the Southern District of New York, both of which are included in the Appendix, are very different examples of court documents that provide specific feedback to defendants about what their discovery obligations are.

One value of these kinds of specific discovery documents is that they go beyond the generic language of Rule 26(a)(1) and clearly specify what documents need to be produced by the defendant, such as medical-treatment reports. This clarification can help to avoid the withholding of relevant documents by defendants which, as is discussed in the next chapter, has reportedly been a problem in some courts. Discovery disputes over these withheld documents, disputes which protract and prolong the litigation, can then be avoided.

To streamline the litigation process, the court can also require a prisoner-plaintiff to provide certain basic information about the case to the defendants and the court by the date on which the answer is due. At a minimum, the prisoner might be required to disclose the information described in Rule 26(a)(1)(A) and (B) -- the names of witnesses and relevant documents or information about those documents. It may be ill-

advised to require the prisoner to provide a computation of damages under Rule 26(a)(1)(C) because prisoners will so often not know how to conduct reliable computations.

The prisoner should probably be required to provide the information on court-prepared forms, both to ensure that the required information is provided and to limit the possibility that the prisoner will digress into tangential points when the information is disclosed. The information that the plaintiff must disclose would need to be described in very clear and plain terms, since a prisoner might not understand the legalistic terms used in Rule 26.

In addition to requiring prisoners to disclose certain information under Rule 26(a), a court may decide that requiring a prisoner to submit a completed *Watson* questionnaire, at least in some types of cases, on the same date that the answer is due is the most cost-effective way of improving both the accuracy and the efficiency with which *pro se* prisoners' civil-rights suits are processed. For example, a *Watson* questionnaire like that found in the Appendix could be utilized to elicit certain specific and core facts bearing on a plaintiff's medical-treatment claim. With the information set forth in the questionnaire, plus the information produced by the plaintiff under Rule 26(a)(1) and the information the defendant produces at the time the answer is filed, the court can then make an informed assessment regarding what other discovery, if any, is needed in the case.

If the court decides, after a discussion of discovery at the first scheduling and case-management conference, that additional facts regarding the case still need to be adduced, the court can employ one or more of several discovery devices specially designed for *pro se* prisoners' civil-rights cases to ensure that those facts are collected and disclosed to the other party and the court. The court can require the defendants, or the defendants and the prisoner, to produce information described in other standardized discovery documents. The "Plaintiff's Second Set of Interrogatories and Requests for Production of Documents" used by the United States District Court for the Southern District of New York is an example of such a document. After receiving the input discussed earlier when drafting standardized discovery documents, other courts, however, might very well decide to reduce the number and change the kinds of discovery obligations contained in their own "second round" of standardized discovery documents.

Another option for the court at this point is to require the defendants to prepare a *Martinez* report. A third option, one discussed in Chapter 3, is for the court to appoint counsel to represent the prisoner for the duration of the case or for the limited purpose of completing discovery. As discussed in that

chapter, this option may be particularly appropriate if it appears to the court that there are additional facts that the court would need to know to fairly adjudicate the claim and the prisoner would have difficulty obtaining these facts without the assistance of counsel. In addition, the assistance of counsel may be needed when defendants are uncooperative during the discovery process.

VI. SCHEDULING AND CASE-MANAGEMENT CONFERENCES AND DOCKET REVIEW

Federal courts are finding that *pro se* prisoners' civil-rights suits need hands-on supervision by a court. Without such active supervision by the court, cases can languish, even for years, on a court's docket. In addition, obstacles to a fair and expeditious resolution of a case may go unrecognized by the court.

It was recommended earlier in this manual that courts set a date for a scheduling and case-management conference. This conference would normally be held shortly after the defendant has filed an answer and both the prisoner and the defendant have made initial discovery disclosures in conformance with the court's mandate.

Courts have found that holding a scheduling and case-management conference very early in a case can avert the filing of unnecessary or even spurious motions by prisoners, thereby avoiding the burdens of responding to and processing such motions. In addition, the scheduling and case-management conference, in conjunction with subsequent case-management conferences, can help to combat or avert problems that some federal courts have reported experiencing with defendants delaying the processing of *pro se* prisoners' civil-rights suits. These pretrial conferences are also useful case-processing tools because illiterate and uneducated prisoners can generally communicate better with a court verbally than they can through the prolix and obtuse writings they sometimes submit to the court.

Typically, a scheduling conference is primarily used by a court to set deadlines for the filing of dispositive motions and the completion of discovery. But the scheduling conference can be used for many other purposes as well, which is why it might be more appropriate to refer to it as a scheduling and case-management conference (or just a case-management conference). Set forth below are some matters that generally should, and others that may, be covered during scheduling and case-management conferences.

1. Referral to ADR. Once the parties have responded to the court's mandatory-disclosure requirements, it may become evident to the court from the materials submitted or statements made during the case-management conference that the case, previously thought unsuitable for an ADR referral, should be run through the court's alternative dispute-resolution program.

2. Settlement. The scheduling and case-management conference can be used not only to determine how the case should proceed, but whether it needs to proceed at all. Defendants may be reluctant to broach the subject of settlement at the conference for fear of appearing to capitulate to the prisoner's demands or of compromising their negotiating position. If one purpose of the conference is to informally resolve cases for which further litigation would be a waste of time and resources, then the court can take the initiative to determine whether an informal resolution of the dispute underlying the complaint is a viable option.

3. Appointment of Counsel. The judge can make a decision at the scheduling and case-management conference whether the appointment of counsel for either limited purposes or to represent the *pro se* prisoner throughout the duration of the litigation is warranted. Making the decision at this stage of the litigation, and sometimes earlier, can avoid the need for prisoners to file, and the court to process (i.e., the clerk to file, the *pro se* staff attorney or law clerk to review and write a draft order, and the judge to rule on) the motions for appointment of counsel so often filed by prisoners. Having the court take the initiative on the issue of appointment of counsel can also facilitate the scheduling decisions that must be made at the scheduling and case-management conference and help to ensure that the further processing of the case through the court system runs smoothly.

4. Consolidation of Claims. If the court has not done so already, it may, at the scheduling conference, consolidate the prisoner's case with cases raising similar issues.[74] Ordering consolidation no later than this stage of the litigation will help to ensure that appropriate deadlines are included in the scheduling order issued at the end of the conference. In addition, if the plaintiff's case is consolidated with another case or other cases, the court can explain to the prisoner what consolidation means and how consolidation will affect the litigation and processing of his or her case.

5. Screening for Dismissal. Well before the scheduling and case-management conference, the court will have screened a prisoner's complaint to determine whether it should be dismissed because it is frivolous, malicious, fails to state a claim for which relief can be granted, or seeks damages from a defendant who is immune from monetary liability. A defendant's views about

the dismissal issue, however, will generally not have been obtained during the initial screening process or during the nonadversarial early case-evaluation hearing.

At the scheduling and case-management conference, the court can determine from the defendants whether there are any grounds for dismissing a claim or claims of the plaintiff that the court has not recognized. This inquiry will help to ensure that the court has not overlooked any grounds for dismissal. It will also obviate the need for defendants to file, and the courts to process, many written motions to dismiss.

6. Discovery. At the scheduling and case-management conference, the court can determine what, if any, additional discovery the parties need in order for the case to be fairly and correctly adjudicated. This information is needed by the court to set deadlines for the filing of motions and the completion of discovery.

7. Deadlines. At the end of the scheduling and case-management conference, the court can set some clear deadlines. If discovery in the case will continue, the court can specify the dates by when certain discovery steps shall be completed. In addition, the date by when dispositive motions are due can be identified.

Finally, the court can set the case for a summary-judgment conference (a conference that is discussed subsequently), a final pretrial conference, or a status conference. Setting a status conference (which would more accurately be called a second scheduling and case-management conference) may be appropriate in cases where the case is being referred to an alternative dispute-resolution program. A status conference can also be useful when discovery in the case will continue and problems in discovery are anticipated. In that situation, discovery disputes can be resolved without the need for either party to file a motion with the court.

The scheduling and case-management conference, as well as other pretrial conferences used when processing *pro se* prisoners' civil-rights cases through the courts, can be conducted by teleconference or videoconference. To ensure that the conference runs most efficiently and to assist in the making of scheduling decisions, the *pro se* staff attorney or the judge's law clerk can prepare a very short bench memorandum to assist the judge at the conference. The bench memorandum, which would generally be no longer than one or two pages, would briefly discuss whether the case now appears appropriate for a referral to an ADR program and if so, why; whether the plaintiff's claims should be consolidated with any other claims; whether the case appears appropriate for referral to an attorney or whether the court needs any additional facts before making that decision; whether it now appears that

the case should be *sua sponte* dismissed; and whether the case should be set for a summary-judgment conference, a final pretrial conference, or a status conference.

In addition to scheduling and case-management conferences and other types of pretrial conferences, there are other measures that can be employed by a court after the filing of the defendant's answer to expedite and facilitate the movement of *pro se* prisoners' civil-rights suits through the court. One important step is to install a computer tickler system that can apprise court staff when certain steps need to be taken to keep a case moving. Some courts, such as the United States District Court for the Eastern District of North Carolina, have set goals for the disposition of pending motions in *pro se* prisoners' civil-rights cases. (In North Carolina, no motion is supposed to be in the court more than sixty days without a ruling.) The tickler system can be used to let the judge, as well as his or her support staff, know when that deadline is approaching so that the deadline is then met.

VII. SUMMARY JUDGMENT

It is at the summary-judgment stage of *pro se* prisoners' civil-rights suits that the processing of those suits can tend to get bogged down. About a third of the federal courts from whom feedback was received during this study reported that correctional attorneys file long, boilerplate, summary-judgment motions that the courts find difficult and time-consuming to rule on. Prisoners often have trouble responding to these motions, as they must under Rule 56(e) of the Federal Rules of Civil Procedure. And some correctional attorneys surveyed during this project reported that there are at least a few judges who "sit" on these motions for long periods of time.[75] One Assistant Attorney General, for example, complained about the delay in processing a summary-judgment motion that had been awaiting a ruling from the judge for one year.

Judges may choose to handle the summary-judgment stage of the litigation much the same way as it has been handled in the past -- requiring a written motion by one party, a written response from the other party when needed to confirm the existence of a genuine issue of material fact, and a written ruling by the court. But even under this traditional approach to summary judgment, steps can be taken to streamline the processing of summary-judgment motions in *pro se* prisoners' cases without compromising the quality of the review process.

For one, as mentioned earlier, courts can adopt deadlines by when the court should rule on a motion for summary judgment. Second, the notice to the prisoner about the need to respond, under Rule 56(e), to a defendant's motion for summary judgment

can be sent to the prisoner by the defendant along with the motion. This practice, enforced by a local court rule, has been adopted, for example, in the United States District Court for the District of Hawaii.[76] Requiring the defendant to send this court-prepared notice avoids the need for the court to send the notice in a separate mailing. The defendant can then confirm that the notice has been sent in the certificate of service filed with the court.

Finally, the court can, at a minimum, set special page limits for summary-judgment motions in *pro se* prisoners' civil-rights suits, or the court can go further and require that the motions be prepared on court-prepared forms. The page limits or use of forms will make it more likely that parties get to the crux of their argument as to why the entry of summary judgment is appropriate. The use of forms, if properly drafted, can also help to avoid another problem mentioned by some courts -- the failure of defendants in some cases to append to their motions the affidavits and documents needed for courts to grant them. And finally, a streamlined motion will be less likely to confuse a prisoner. In particular, a form can be drafted in a way that highlights for the prisoner why a defendant contends that he or she is entitled to judgment as a matter of law, making it easier for the prisoner to respond to the motion.

A standard form for summary-judgment motions might, for example, ask the defendant, a medical-care provider in a prison, why he is entitled to summary judgment. (He might check off or write in an answer space that there is no evidence that he acted with "deliberate indifference.") The form might then ask the defendant to identify the facts which demonstrate that he is entitled to judgment as a matter of law. (The defendant might then list the nine different times during a two-month period when he provided care for the prisoner's medical ailment, the dates when that care was provided, and what the care entailed.) Finally, the defendant can be asked to identify which affidavits or exhibits confirm the existence of each of these facts.

Whether this kind of form would work well or some other form would work better in the processing of defendants' motions for summary judgment in *pro se* prisoners' civil-rights cases would have to be determined through experimentation by the courts. The same would hold true if a court employs special page limits for summary-judgment motions, instead of forms, to make more manageable the processing of those motions in *pro se* prisoners' civil-rights suits.

Because of the importance of the summary-judgment stage of litigation and the challenges faced in not only efficiently, but correctly, ruling on motions for summary judgment in *pro se* prisoners' civil-rights suits, pilot tests could be conducted in selected courts to determine the feasibility of employing other

nontraditional mechanisms to move these cases through this litigation stage. One possible option would be to treat the materials filed in response to the court's mandatory-disclosure requirements, at a party's request, as a motion for summary judgment. There is already some precedent for this kind of case-processing mechanism. Some courts, such as the United States District Court for the District of Utah, sometimes treat *Martinez* reports prepared by defendants as though they are motions for summary judgment and then decide, on the basis of those reports, whether they should enter summary judgment on behalf of a defendant.

The summary-judgment question might be resolved, or at a minimum discussed, at the initial scheduling and case-management conference, particularly if there will be no more discovery in the case. That would certainly seem preferable from the standpoint of streamlining the processing of *pro se* prisoners' cases. At the conference, the prisoner might admit that he or she can point to no facts which refute the defendant's entitlement to summary judgment. The court's entry of summary judgment on behalf of the defendant would then be appropriate.

On the other hand, the prisoner-plaintiff might point out facts in the pleadings or in the materials produced in response to the court's mandatory-disclosure requirements that confirm that entry of summary judgment on behalf of the defendant would be inappropriate. The court can then summarily deny the defendant's motion and, if discovery is now closed, set the case for a final pretrial conference.

Or finally, a plaintiff or defendants may indicate that they must collect additional materials, such as an affidavit of a witness, to either support or effectively resist a motion for summary judgment. If the court determines that these materials would have a bearing on the summary-judgment issue, then the court can set the case for a summary-judgment conference at which the issue of a party's entitlement to summary judgment will be resolved after these materials are obtained.

One advantage of discussing the subject of a party's entitlement to summary judgment at the first scheduling and case-management conference is that roadblocks that impede the *pro se* prisoner's ability to respond effectively to a motion for summary judgment can be more readily identified. For example, if the prisoner identifies a witness with personal knowledge of facts that would demonstrate that the defendant is not entitled to summary judgment, but the prisoner cannot obtain, or is having trouble obtaining, the person's affidavit because he or she is not employed at, or incarcerated at, the prison where the plaintiff is incarcerated, then the court can discuss with the defendants during the conference how the logistical difficulties the plaintiff is encountering can be overcome. Alternatively,

the court can appoint counsel for the limited purpose of assisting the prisoner-plaintiff in responding to the defendant's motion for summary judgment.

VIII. FINAL PRETRIAL CONFERENCES

If a *pro se* prisoner's civil-rights suit is not disposed of through summary judgment, then, and generally only then, should the case be set for a final pretrial conference and trial. As was discussed in Chapter 1, the vast majority of prisoners' civil-rights suits are either dismissed or resolved through summary judgment. By deferring the setting of a trial date until the summary-judgment phase of the litigation is completed, the parties can avoid undertaking what may prove to be unnecessary preparations for trial.

It was fairly clear from the feedback received during this study that *pro se* prisoners should not be charged with the task of drafting a final pretrial order, a task that most of them would find daunting. It was not, however, clear what mechanism works best in completing the final order. Some courts place the responsibility for drafting the final pretrial order on the defendants. If this is the mechanism chosen, the defendant's attorney should not sign the order until after it has been sent to, and signed by, the prisoner-plaintiff, since prisoners sometimes make changes to the defendant's proposed final pretrial order.

Three tools can be used by a court to facilitate the processing of a *pro se* prisoner's civil-rights suit through a final pretrial conference. First, the rules governing final pretrial conferences in *pro se* prisoners' cases can be clearly set forth by the court, probably in a local court rule.[77] For example, if the court will not, under any circumstances, consider case-dispositive motions at this stage of the litigation, this point needs to be made clear to the parties. In addition, what will occur in preparation for, and during, the pretrial conference needs to be fully explained to the prisoner, both in writing (in a handbook or other documents explaining court procedures provided to the prisoner) and during the preceding pretrial conference, whether a summary-judgment conference, status conference, or scheduling and case-management conference.

Second, the court can utilize standard forms for the final pretrial order. If the draft order prepared by the defendant's attorney and sent to the prisoner is on a court-prepared form or a court form is completed during the final pretrial conference, that may allay somewhat what one magistrate judge observed was the distrust many prisoners have of documents generated by the defendants.

Finally, courts that have adopted the technology for videoconferencing have found it to be a very effective tool for use during final pretrial conferences. The general practice in most courts has been to conduct the final pretrial conference either through a teleconference or in person. Those courts which have begun to employ videoconferencing in lieu of teleconferencing have reported that the face-to-face contact made possible through videoconferencing can foster communications between the parties and the court.

In addition, as was mentioned earlier, the Prison Litigation Reform Act requires that pretrial conferences now be conducted "to the extent practicable" without removing prisoners from their place of confinement.[78] Conducting final pretrial conferences in person can result in substantial burdens for correctional officials and the court. Typically, when a prisoner is brought to court, two correctional officers must accompany the prisoner, which places a drain on the prison's staffing resources. In addition, the prisoner's presence at the final pretrial conference raises security concerns. Whenever prisoners are transported outside of a prison, there is always the risk that they will escape. There is also the risk that they will harm someone in the nonsecure court setting.

Through videoconferencing, the incursion of costs to transport a prisoner to court and the security risks caused by a prisoner's removal from the prison can be avoided. In addition, the drain on staff resources can be reduced, although not totally eliminated, since at least one correctional officer must generally be present in the room with a prisoner during a videoconference.

Some prisons now have special courtrooms in which pretrial conferences can be held. But holding pretrial conferences in a prison can be quite costly because of the time it takes court staff to travel to a prison. In addition, as was discussed earlier in this manual, the presence of a federal judge, as well as other court staff, within a prison poses risks to their personal safety that videoconferencing can eliminate.

Conducting final pretrial conferences by videoconference can have other advantages as well. If the videoconference is a three-way conference, with the judge at one site, the prisoner at a second site, and the defense attorney at a third site, the videoconference can save lawyers from the Attorney General's Office or the Department of Corrections a potentially enormous amount of traveling time, time that could be better spent on the proactive work described in Chapter 2 or the litigation work described in Chapter 6. In addition, if the pretrial conference is held by videoconference, no one from the United States Marshal's Office needs to be present for court-security purposes.

During a final pretrial conference involving a *pro se* prisoner, at least three matters may be discussed that would not normally be discussed in final pretrial conferences in other types of cases. First, the witnesses for whom the court must issue writs of *habeas corpus ad testificandum* or "video writs" must be identified. Second, it would probably be advisable if the judge reviews the trial process with the *pro se* prisoner. This overview can familiarize the prisoner with what happens during a trial, help to ensure that the prisoner is both fully prepared for the trial and follows court procedures, and provide the prisoner with the opportunity, in advance of the trial, to ask any questions he or she might have about court procedures or the rules of evidence.

Since participating in a trial can be a bewildering, confusing, and frustrating experience for a *pro se* prisoner, the court can also provide the prisoner with a set of written instructions about the trial process. These instructions may be in a handbook previously sent to the prisoner and/ or included in a separate memorandum, but the court needs to ensure that the prisoner has read and understands the instructions. An example of a set of instructions used by the United States District for the Eastern District of North Carolina can be found in the Appendix.

The third matter that courts might want to discuss at the final pretrial conference instead of at trial, as is often the customary practice in other types of cases, is the subject of jury instructions. If *pro se* prisoners first see proposed jury instructions at the time of trial, they will generally not have a meaningful opportunity to comment on them since they are unlearned in the law. By previewing proposed instructions at the final pretrial conference, the prisoner will, at least theoretically, have the chance to research the law and identify deficiencies in the instructions before trial.

The reality though is that even with advance notice of the content of proposed jury instructions, many prisoners will not have the foggiest idea whether those instructions accurately reflect the law, and they will not have the ability to gather the information needed to make that determination. Using standard court-prepared instructions adopted for general use by the court, after input has been received from prisoners' advocates and defense counsel, can also, and probably more meaningfully, reduce the risk that faulty instructions are tendered in a *pro se* prisoner's civil-rights suit.[79]

IX. TRIALS

A number of questions will arise when a court is deciding what procedures to adopt to both minimize the problems in the

trials of civil-rights cases brought by prisoners who are representing themselves and to maximize the chances that the prisoners' claims are resolved fairly and correctly. Two particularly important questions to be addressed are: one, whether a prisoner will be provided legal assistance during the trial; and two, whether some or all witnesses will testify via videoconference.

The former question was discussed in Chapter 3 of this manual. As to the second question, set forth below are some observations made during, and recommendations drawn in part from, a jury trial observed in March of 1997 in the United States District Court for the Central District of Illinois in which several witnesses testified by videoconference.

Observations of the Use of Videoconferencing during a Pro Se Prisoner's Civil-Rights Lawsuit

The trial that was observed involved a claim of excessive force. At the time the *pro se* plaintiff brought the claim, he was incarcerated at the Pontiac Correctional Center, but by the time of the trial, he had been released from prison. Three of the four defendants were correctional officers at the Pontiac prison at the time of the incident which gave rise to the lawsuit, and one was a sergeant. Two of the defendants had since been transferred to work at other prisons.

The plaintiff, who was representing himself at trial, the four defendants, and the two Assistant Attorneys General who were representing the defendants were in the courtroom for the jury trial. The plaintiff and all four defendants testified. In addition, three witnesses testified by videoconference -- two inmate-witnesses for the plaintiff, and a nurse employed by the Department of Corrections who had examined the plaintiff after the incident in which he claimed the defendants had slammed his head into a wall.

The videoconferencing system used during the trial has, as mentioned earlier, two monitors. The witness appears on the monitor on the left. The monitor on the right displays the courtroom.

The court clerk can adjust the view seen on either monitor by moving a specially designed pen across an electronic tablet that controls the software and hardware of the videoconferencing system. For example, the pen can be moved to one of six preset positions so that the witness can see the judge when the judge is speaking. Before the plaintiff begins questioning a witness, the clerk can then touch a different preset position with the pen, bringing a view of the plaintiff onto the monitor. In addition, the electronic tablet can be used to close in on a witness's face or to view some or all of the witness's body.

Two technical difficulties, which the court has not had problems with in the past, occurred during the videoconferenced portion of the observed trial. During the testimony of the inmate-witnesses, there was a discernible echo whenever someone in the courtroom said something to the witness. A juror later mentioned in a posttrial interview that this was distracting, although he hastened to add that he could still hear the witness's testimony adequately. The problem was, and in the future can be, easily corrected by adjusting the sound level on the microphone at the site where the witness is located.

The other technical problem was much more serious although, once again, some quick thinking resolved the problem. The problem occurred right before the first witness was scheduled to testify. The video linkup could not be established with the Joliet Correctional Center from where the two inmate-witnesses were to testify. Attempts to complete the linkup over the next hour were unsuccessful. In addition, technical experts from the Department of Corrections were unable to identify the source of the problem.[80] Finally, the two inmate-witnesses were transported to a nearby prison five minutes away, where the video linkup was established.

During the site visit, the following participants in the trial were interviewed about their perceptions of videoconferencing: the seven jurors, the district judge, the plaintiff, and the two Assistant Attorneys General. Their comments are summarized below.

Jurors. The jurors unanimously supported the use of videoconferencing for the testimony of nonparty witnesses. None of the jurors felt that testifying by video in any way diminished the seriousness of the court proceeding. Six of the seven jurors responded "yes" to a question on the court's questionnaire whether they could consider a witness's video testimony "substantially to the same degree" as if the witness were testifying in court. The seventh juror seemed to at least essentially, if not totally, concur with this view. The juror wrote on the questionnaire that the video testimony was "not the same as live but close."

On the written questionnaires, jurors ranked the quality of the visual image as either "excellent" (six jurors) or "okay" (one juror). None ranked the quality as "bad." During discussions with the judge, however, one juror asked what caused a witness's hand movements to appear jerky. (The problem is apparently due to a delay in the transmission signal.) The juror said that the jerky movements were distracting, and another juror said that sometimes she would be watching these jerky movements instead of the witness's face.

Another juror mentioned that it would be helpful if the camera were focused more closely on the witness's face. But other jurors mentioned how important it was to see a witness's hands to see if he or she was nervous or fidgeting.

In contrast to their views about the quality of the visual image, only one of the seven jurors ranked the quality of the audio signal as "excellent." The other six jurors considered the quality of the signal to be "okay," but none of the jurors gave the audio signal a "bad" ranking.

Interestingly, while the jurors were generally supportive of having nonparty witnesses testify by videoconference, they were, with one exception, adamantly opposed to having a party testify and participate in a trial by videoconference. One juror emphatically insisted, "We need that much here!", and another noted that having the parties at a distant location would be "too far removed." The jurors had three specific concerns: First, several jurors said that they need to see the parties' reactions to other witnesses' testimony to be able to make a full credibility assessment. Second, one juror mentioned that the parties also need to see the jury in person because the "body language" of the jury or a juror may affect trial strategy.

Third, some jurors stated that it would be unfair to the plaintiff and defendants to have to participate in a trial by videoconference. The concern of at least some jurors about unfairness stemmed from their belief that defendants and plaintiffs should be able to meet their accusers. (In this case, the plaintiff was, in a sense, being accused, since the defendants claimed that he was combative, thereby requiring the application of force to strip search him.) One juror also mentioned that the *pro se* plaintiff had done such a poor job of representing himself that if he had been participating in the trial via videoconference, the jurors would have thought that there was something wrong with the transmission.

Plaintiff. The plaintiff said that he was totally satisfied with having witnesses testify by video. He observed that it was "just like they were there." The plaintiff did not believe that the physical absence of his witnesses from the courtroom made it any more difficult for the jury to assess whether they were telling the truth.

Assistant Attorneys General. The two Assistant Attorneys General endorsed the use of videoconferencing for nonparty witnesses during trials. They furthermore stated that they believe that videoconferencing is cost-effective, even if it is not used for the testimony and participation of parties during a trial.

One of the Assistant Attorneys General did note two drawbacks, from the defendants' perspective, of videoconferencing. First, because witnesses testifying by videoconference are scheduled to, and often have to, testify at certain times because the videoconferencing equipment at the prison site is scheduled for other uses before and after that time, witnesses sometimes have to testify out of order during a trial. For example, during a previous trial in the Central District of Illinois, the plaintiff was in the middle of his testimony when the testimony was halted so that a witness could testify, as scheduled, by videoconference. The Assistant Attorney General was concerned that the plaintiff in that kind of situation can gain a tactical advantage, modifying his testimony based on the testimony of the witness that he has, in the opinion of the Assistant Attorney General, heard prematurely.

In the jury trial observed during the site visit, all four defendants ended up testifying before the plaintiff's two witnesses because of the delay caused by the inability to effect a video linkup. The Assistant Attorney General expressed a concern about the defense "tipping their hand" in a way that could modify, to the defendants' disadvantage, the way in which the plaintiff questioned his witnesses. (In this case, it should be noted, it did not seem that the change in the order in which witnesses testified in any way harmed the defendants' case. The plaintiff did not cross-examine the defendants and inartfully, at best, questioned his own witnesses. The jury, in fact, returned a verdict for the defendants in less than ten minutes.)

The other way in which the Assistant Attorney General felt that defendants might be disadvantaged by the videoconferenced testimony of nonparty witnesses is that juries might find inmate-witnesses to be less threatening if they didn't testify in person. He was concerned that juries might more readily understand the dangers that correctional officers confront in the prison, dangers that they should take into account when assessing the constitutionality of defendants' actions, if the jurors could see in person the type of persons whom defendants must supervise and control in prison.

When this Assistant Attorney General was asked about expanding the use of videoconferencing so that the plaintiff and defendants could remain off site, he expressed strong opposition to this use of videoconferencing in a jury trial. He explained that he needed to be sitting next to his clients at all times during a trial because very often he and his clients would be exchanging information, through notes, as a witness was testifying. This information exchange would affect, for example, what questions the Assistant Attorney General would then ask during cross-examination.

When asked whether this problem could be resolved by having him sit with his clients in the videoconferencing room at the prison where his clients were employed (assuming that they were still employed at the same prison), he responded that, for two reasons, he needed to be in the courtroom during a jury trial. First, the Assistant Attorney General felt that he needs to see prospective jurors in person in order to meaningfully participate in *voir dire*. And second, he said that during a trial, he continually gauges the reactions of the jury to the testimony they are hearing and sometimes makes adjustments in the presentation of his clients' defense based on his assessments of their response.

The Assistant Attorney General did express at least a willingness to experiment with having the parties participate by videoconference in a bench trial. He did, however, note that even in a bench trial, he monitors the reaction of the judge to certain evidence, and he commented that videoconferencing might impede his ability to make these assessments.

Judge. The federal district judge who presided during the jury trial said before the trial began that his experience with videoconferencing thus far had been a positive one. The judge said that it was still too early to draw final conclusions about the advisability of using videoconferenced testimony during trials since this was only the third trial in the court in which the technology had been used for this purpose.

In the judge's opinion, the ultimate issue raised by videoconferencing is how, if at all, it affects the factfinder's credibility determinations. He noted that thus far, jurors in his court had seen no real difference between videoconferenced testimony and in-person testimony. He also stated that during a bench trial held earlier that week, he was able to adequately assess the credibility of witnesses who testified by videoconference, including the testimony of a witness whose testimony he considered "very important" in the case.

The judge noted that his "core concern" was ensuring that the parties were afforded due process during the trial. He wanted to ensure that both the plaintiff and defendants felt at the end of a trial that they had had their "fair day in court," regardless of the case's outcome.

Towards that end, the judge had adopted a policy under which the plaintiff and the defendants were to have "a level playing field," at least where videoconferencing was concerned. Thus, if the defendants or their attorneys were going to be in the courtroom during the trial, then a prisoner-plaintiff would be brought to the courtroom as well.

The judge noted that thus far, videoconferencing had not been used very much for inmate-witnesses. Instead, the primary use of, and advantage of, videoconferencing to date was for correctional officials, who could testify and then get right back to work. The judge did note that the two inmate-witnesses who testified during the observed trial, both of whom were serving life sentences and were classified as moderate escape risks, were exactly the kinds of persons whom correctional officials had real and legitimate concerns about transporting out of prison and into a courtroom.

The judge disagreed that having witnesses testify out of order to accommodate the videoconferencing schedule was a problem. He noted that fairly frequently, at least in his courtroom, witnesses who appear in court to testify will testify out of order because they must be someplace else at the time when they would normally testify. The judge said that modifying somewhat the order in which witnesses testify is a normal and expected part of the trial process.

Recommendations Regarding the Use of Videoconferencing by Courts to Process Pro Se Prisoners' Civil-Rights Suits

As the technology for videoconferencing improves and the costs go down, the use of videoconferencing to process *pro se* prisoners' civil-rights cases will, most likely, spread to many other courts across the country. The Judicial Conference has already endorsed the use of videoconferencing for pretrial proceedings.[81]

Several recommendations, which are the outgrowth of observations made and information collected during the site visit to the United States District Court for the Central District of Illinois, are set forth below regarding the use of videoconferencing to process *pro se* prisoners' civil-rights suits.

1. Priority in Access to the Videoconferencing System. Videoconferencing is now beginning to be used by corrections departments for many purposes. In Illinois, for example, videoconferencing is currently used for parole hearings, immigration hearings, pretrial proceedings, and trials. Videoconferencing could also be used to hear appeals of prisoners' grievances. And the use of videoconferencing will, most likely, expand into other areas as well.

With so many potential competing uses for the videoconferencing equipment in a prison, questions will have to be resolved in each state about who has priority of access to the videoconferencing equipment. The way in which this question is resolved may affect the willingness of courts to adopt video-

conferencing, the purposes for which they use videoconferencing, and the financing of the costs of videoconferencing.

As mentioned earlier, during the jury trial observed in the United States District Court for the Central District of Illinois, technical problems occurred which led to two prisoners being transported to a nearby prison to testify via videoconference. At that time, the Prisoner Review Board was conducting parole hearings by videoconference at the other prison, but the board adjusted it schedule so that the jury trial could proceed. The potential conflict that could have occurred in the midst of a trial, however, highlighted the need to develop clear policies regarding who gets priority in the use of videoconferencing equipment and when.

Courts may insist, as a condition of installing the equipment in their courtrooms or at least as a condition of utilizing the equipment for trials, that they be able to trump all other users of videoconferencing systems at prisons when the courts have already scheduled to use the systems during a jury trial. The courts will not likely want jurors to have to wait for perhaps hours in a jury room while some other user finishes using the equipment. On the other hand, courts may be more flexible regarding priority access to videoconferencing equipment during a bench trial and even more so during pretrial conferences.

Even if a court has priority access to the videoconferencing equipment when the court has scheduled to use the equipment during a jury trial, there could still, on occasion, be competing demands to use the equipment. If two courts in the state have scheduled to use the equipment the same day, a problem might occur, such as a problem with the videoconferencing equipment, that causes one of the courts to get off schedule. The end result would be two courts that want to use the equipment at the same time. To avoid these and other kinds of scheduling conflicts, the Illinois Department of Corrections has advised that courts anticipate, as far in advance as possible, their need to use the videoconferencing equipment and "generously schedule" the equipment to avoid conflicts in its use.[82]

When resolving questions concerning priority in access to videoconferencing equipment, it should be kept in mind that the less a court is given priority in access to the equipment, the less likely it is that the court will contribute much, if anything, to the costs of using videoconferencing. In some states though, this will not impede the availability of videoconferencing for use during the processing of *pro se* prisoners' civil-rights suits where the Department of Corrections pays all or, as in Illinois, the brunt of the costs anyway.

2. Scheduling. The scheduling that must be done to reserve videoconferencing equipment for use by a court can be quite complicated because of the competing uses for that equipment. Even if it were determined that courts are to have priority access to videoconferencing equipment for at least some kinds of court proceedings, that would not resolve the question of who gets access to the equipment when two courts want to access the videoconferencing system in a prison at the same time. To handle and resolve these scheduling questions (what the court clerk who does the scheduling in the Central District of Illinois described as a "real headache"), the Department of Corrections should consider appointing a coordinator to handle all scheduling involving the use of videoconferencing within a prison.

When making the scheduling arrangements, however, correctional officials may sometimes decide that it would be more cost-effective to bring an inmate to, or have a witness testify in, court. This kind of situation might arise, for example, when the videoconferencing equipment has been scheduled to be used for a statewide training session on the date the court wants to schedule a trial.

3. Training. It is important that court staff be well-trained in the use of videoconferencing equipment. In Illinois, the Department of Corrections has provided training in the use of the equipment to some court staff in the federal court in the Central District of Illinois, and those staff now train other court staff.

A manual can also be prepared that can be used to answer basic questions that arise during the use of the equipment. In addition, the Illinois Department of Corrections has adopted the commendable practice, one that other states should consider following, of establishing a technical-services hotline that court staff can use whenever the court is experiencing any problems with, or has any questions about, the equipment.

To maximize court flexibility in the use of the videoconferencing equipment, several different members of the court's staff need to be trained in the use of the equipment. The same thing holds true at the other end of the videoconferencing system -- at the prison. When the correctional nurse testified during the jury trial observed in Illinois, there was no person qualified to run the equipment in the room from where she was testifying. (The one staff person at the prison who had been trained in the use of the equipment was sick.) While the visual and audio signal from the prison can be, and generally is, controlled from within the courtroom, a person qualified to make adjustments in the equipment at the prison site needs to be present, particularly during a trial, should some emergency arise that requires that such adjustments be made.

4. Larger Monitors. Thirty-two-inch monitors were used during the jury trial observed in the Central District of Illinois. These monitors are certainly adequate in size for use during pretrial conferences.

If a court, however, uses videoconferencing during a trial, larger monitors would be preferable. During a discussion with jurors after the trial observed in Illinois, one of the jurors remarked that it would have been better to see a close-up of the witness's face, a view shared by the author. Yet if the camera had closed in on a witness's face, the jury would not have been able to see the hand gestures of a witness that can be critical to a credibility assessment. A way to accommodate the need to see a witness's face clearly enough to assess credibility and to see the witness's hand gestures would be to use a larger monitor.

5. Cooperation between the Court, the Department of Corrections, and the Attorney General's Office in the Planning and Implementation of Videoconferencing. As several court personnel observed during the site visit to the federal court in the Central District of Illinois, there will inevitably be "bugs" in a system and problems that have to be ironed out whenever new technology is adopted by a court. Yet the number of these "bugs" and problems can be reduced and those that occur can be handled more smoothly when, from the outset, there is collaboration between the court, the Department of Corrections, and the Attorney General's Office in the development and use of a videoconferencing system to process *pro se* prisoners' civil-rights suits. One reason why the implementation of videoconferencing in the Central District of Illinois has progressed so well thus far is because the persons and entities involved have demonstrated a commitment to working together to develop videoconferencing as a viable case-processing tool.

X. CONCLUSION AND RECOMMENDATIONS

In this chapter, a number of different steps that federal courts have taken or could take to facilitate the processing of *pro se* prisoners' civil-rights suits have been discussed. When deciding which of these steps to adopt in their own court, court officials can consider which steps will best help the court realize two objectives: one, the winnowing out as soon as possible of legally frivolous claims and those that fail to state a claim for relief; and two, the just and efficient resolution of meritorious claims.

The steps that need to be taken to improve the efficiency, while ensuring the accuracy, with which *pro se* prisoners' civil-rights cases are processed will vary from court to court. The required steps will depend on a number of different factors, including the number of *pro se* prisoners' civil-rights suits

processed by the court, whether correctional officials have implemented a legal-assistance program that effectively winnows out most frivolous claims, the availability of funding for videoconferencing equipment, and the extent to which correctional officials and the Attorney General have taken the steps discussed in Chapter 6 to process prisoners' civil-rights suits more efficiently and effectively. The recommendations set forth below were written with an awareness of the need for flexibility when crafting procedures for the processing of *pro se* prisoners' civil-rights suits in a particular court.

Recommendations

1. Each federal district court should review the way it processes pro se prisoners' civil-rights suits to determine what steps it can take at each processing stage to both improve the efficiency with which these cases are processed and to ensure that meritorious claims are resolved appropriately. Some of the steps that a court can consider taking include:

- developing a set of filing instructions and notices for prisoners that include, among other information, an explanation of the court's limited jurisdiction; a brief explanation of key limitations on the relief that the court can award prisoners; a summary of certain key requirements of the Prison Litigation Reform Act; notice regarding the consequences of filing a nonmeritorious lawsuit; notice of the need to apprise the court of a change of address; identification of the court in which to file the complaint; and notice of the option of consenting to a magistrate judge's jurisdiction;

- piloting the use of claim-specific complaint forms;

- drafting filing checklists for prisoners to complete and send to the court along with their complaints;

- developing form orders and structuring and staffing the screening process to maximize the efficiency and accuracy with which *pro se* prisoners' civil-rights complaints are initially screened for technical deficiencies, failure to exhaust administrative remedies, "three strikes," frivolousness, and failure to state a claim.

- utilizing early case-evaluation hearings to, among other purposes, facilitate the amendment, stream-

lining, and dismissal, where appropriate, of claims and complaints and to reduce the burdens of serving process;

- developing a court-based, alternative dispute-resolution program for prisoners' civil-rights suits;
- using discovery tools that have been specially tailored for *pro se* prisoners' civil-rights suits, including limited, mandatory disclosures in response to court-drafted discovery documents, *Martinez* reports, and *Watson* questionnaires;
- expanding the kinds of matters considered and resolved during the initial scheduling and case-management conference;
- requiring defendants to send a court-prepared notice of summary-judgment requirements along with any motion for summary judgment served on a prisoner;
- piloting different ways to streamline the processing of summary-judgment motions, including adopting shorter page limits for those motions, requiring that those motions be submitted on court-prepared forms, and holding summary-judgment conferences;
- providing a clear explanation to prisoners about what will occur in preparation for and during a pretrial conference;
- drafting standard forms for the final pretrial order; and
- utilizing videoconferencing for pretrial hearings and conferences and for the testimony of some witnesses during a trial.

2. Each federal district court should, alone or together with other federal district courts in the state,[83] organize a Pro Se Prisoner Litigation Working Group. This working group would be comprised of court officials (including one or more judges, *pro se* staff attorneys (or law clerks in districts that have no *pro se* staff attorneys), and court clerks), a representative from the U.S. Marshal's Office, one or more representatives from the Department of Corrections, one or more representatives from the Attorney General's Office, and one or more prisoners' advocates.

The purpose of this working group would be to identify steps that can be taken to facilitate the efficient and accurate processing of *pro se* prisoners' civil-rights claims.[84] Some of the areas upon which the working group's efforts might focus include:

- the development of procedures and a form to confirm that prisoners have exhausted their administrative remedies;
- the implementation of the filing-fee provisions of the Prison Litigation Reform Act;
- adoption of procedures to reduce the burdens that attend the service of process;
- identification of the documents to be produced for early case-evaluation hearings;
- the development of standardized discovery documents; and
- the use of videoconferencing.

3. Each court of appeals should appoint a Pro Se Prisoner Litigation Committee to draft model forms, orders, and jury instructions to be used by district courts when processing pro se prisoners' civil-rights suits.[85] The committee should, on a regular basis, review the model forms and orders and, where necessary, revise them. In addition, the committee can oversee the piloting of claim-specific complaint forms in some district courts in the circuit and develop model, claim-specific complaints based on the findings of the pilot projects.

NOTES

1. *See, e.g.*, Lyon v. Vande Krol 940 F. Supp. 1433 (S. D. Iowa 1996) (PLRA's "three-strikes" provision, 28 U.S.C. § 1915(g), violates the equal-protection component of the fifth amendment's due-process clause).

2. 116 S. Ct. 2174 (1996).

3. *Id.* at 2180 (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)).

4. FED. R. CIV. P. 1 (emphasis added).

5. REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE FOR THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS, at 56 (1993).

6. Raymond Bell et al., *The Findings and Recommendations of the National Study on Learning Deficiencies in Adult Inmates*, 35 J. CORRECTIONAL EDUC. 129, 133 (1984).

7. *Id.*

8. KARL O. HAIGLER ET AL., LITERACY BEHIND PRISON WALLS (National Center for Education Statistics 1994).

9. *Spears* hearings got their name from the decision of the Fifth Circuit Court of Appeals in Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). These hearings can have multiple purposes, one of which is to determine whether a prisoner's complaint could be amended to state a colorable claim.

10. The instructions would need to be drafted carefully to ensure that prisoners understand that even when they cannot obtain relief in federal court, they may, in some instances, be able to seek relief from a state court.

11. ROGER A. HANSON & HENRY W. K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 17-18 (Bureau of Justice Statistics 1995).

12. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

13. 28 U.S.C. § 1915(e)(2)(B)(iii); 29 U.S.C. § 1915A(b)(2).

14. 42 U.S.C. § 1997e(e).

15. In Zehner v. Trigg, 952 F. Supp. 1318 (S.D. Ind. 1997), the United States District Court for the Southern District of Indiana upheld the constitutionality of 42 U.S.C. § 1997e(e).

16. 42 U.S.C. § 1997e(a).

17. 28 U.S.C. § 1915(a),(b).

18. 28 U.S.C. § 1915(e)(2). This notice might need to be somewhat modified in those courts that are, as discussed in Chapter 4, screening out frivolous complaints before complaints are filed and a partial filing fee is assessed.

19. 28 U.S.C. § 1915(g).

20. Lyon v. Vande Krol, 940 F. Supp. 1433 (S.D. Iowa 1996).

21. 28 U.S.C. § 1915(f)(2)(B).

22. FED. R. CIV. P. 11(c)(2).

23. *See, e.g.*, United States District Court, Central District of Illinois, Instructions for Filing a Civil Rights Complaint Under 42 U.S.C. § 1983 (rev. 6/96). The requirement about which prisoners are apprised in these instructions to inform the court of any change of address can be found in Local Rule 16.3(B)(10) of the United States District Court for the Central District of Illinois.

24. *See, e.g., id.* at (A)(8).

25. 28 U.S.C. § 636(b)(1)(A).

26. 28 U.S.C. § 636(c)(1).

27. 28 U.S.C. § 636(c)(2). This statutory provision does not seem to preclude the court from apprising prisoners in filing instructions of the option of consenting to a magistrate judge's jurisdiction. As mentioned subsequently in the text, the advantage of obtaining this consent at the same time that a complaint is sent to the court is that the magistrate judge then has the authority to *sua sponte* dismiss claims that are, for example, frivolous or fail to state a claim for which relief can be granted.

28. FED. R. CIV. P. app., Form 34.

29. Title 28 U.S.C. § 636(c)(1) seems to permit such limited consent to a magistrate judge's jurisdiction. The section says that when the parties consent, a magistrate judge may conduct "*any or all* proceedings in a jury or nonjury civil matter" (emphasis added). The section also authorizes the district court to define the scope of the magistrate judge's jurisdiction.

30. Will v. Michigan Department of State Police, 491 U.S. 58 (1989).

31. Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994).

32. *See, e.g.*, Moore v. State of Indiana, 999 F.2d 1125, 1129 (7th Cir. 1993).

33. Estelle v. Gamble, 429 U.S. 97 (1976).

34. Sandin v. Conner, 515 U.S. 472 (1995).

35. Lewis v. Casey, 116 S. Ct. 2174 (1996).

36. Under Rule 5(e) of the Federal Rules of Civil Procedure, a court clerk cannot refuse to file a document, such as a prisoner's complaint, solely because it is not in "proper form." If the documents sent to the court by a prisoner are not filed

for this reason, then a judge would need to sign a deficiency order, instead of having the clerk send out a deficiency letter. The court clerk can, however, still prepare this order for the judge's signature.

37. 42 U.S.C. § 1997e(a).

38. 28 U.S.C. § 1915(g).

39. While two of the surveyed district courts -- from the Eastern District of Texas and the Eastern District of Washington -- reported that they collect information from other federal courts when determining whether a prisoner has three strikes, the Washington court reported that it only did so "occasionally" -- when complaints have been sent to the court by "perceived vexatious *pro se* prisoner litigants."

40. Each month, a list is circulated amongst the district courts in Texas. That list identifies prisoners who have accrued strikes or otherwise been sanctioned by a court for filing frivolous lawsuits. Telephone Interview with Kimberly Miller, Staff Attorney, United States District Court for the Eastern District of Texas (May 20, 1997).

41. Lyon v. Vande Krol, 940 F. Supp. 1433 (S.D. Iowa 1996).

42. Telephone Interview with Jeffrey A. Hennemuth, Senior Counsel to the Administrative Director, Administrative Office of the United States Courts (May 20, 1997). The AO is currently field-testing the data base. Depending on the results of those field tests, the data base may be implemented nationwide in the fall or winter of 1997.

43. Even if the data base were modified to include this information, it would be important to ensure that administrators do not perform the judicial function of identifying what is and is not a strike. To be encoded as a strike on the data base, a judge would need to specify that the prisoner has accrued a strike as a result of the court's dismissal order.

44. To track the disposition of lawsuits filed by prisoners who currently use or have used aliases, the complaint form can ask a prisoner whether he or she has ever used an alias. Court staff can then check the index to determine whether any cases have previously been filed under the prisoner's real name or an alias.

45. Under the Prison Litigation Reform Act, the court can also *sua sponte* dismiss claims that seek monetary relief from a defendant who has immunity from that type of relief. 28 U.S.C. § 1915(e)(2)(B)(iii); 28 U.S.C. § 1915A(b)(2); 42 U.S.C. § 1997e(c). In some or perhaps many cases, courts may find that they cannot say that they are "satisfied," within the meaning of

42 U.S.C. § 1997e(c) that the defendant has immunity until they have heard arguments from the parties on that issue.

46. Three of the sixteen Attorneys General surveyed cited inadequate screening by the courts as a reason for unnecessary delay in the processing of *pro se* prisoners' civil-rights suits. One of those three mentioned, not the failure to screen out frivolous claims, but the failure to dismiss on immunity grounds, thereby requiring trials in certain cases.

47. This particular committee might be comprised largely of district court judges and staff. Since some of the documents processed by the district courts, however, relate to the taking of appeals by *pro se* prisoners, the working group would need to obtain input from the court of appeals regarding appeals-related forms. In addition, correctional officials and Attorneys General could provide helpful feedback regarding certain forms, such as any special forms designed to confirm that a prisoner has exhausted available administrative remedies and forms developed and revised to implement the filing-fee provisions of the PLRA.

48. The United States District Court for the District of Nevada is an example of one court which uses this triage process.

49. The Sixth Circuit Court of Appeals has issued an administrative order which states that the district courts do not have the discretion to permit a plaintiff to amend a complaint to avoid a *sua-sponte* dismissal. In re Prison Litigation Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997). The courts in which early case-evaluation and *Spears* hearings were observed during this project are, however, not construing the PLRA as having abrogated Rule 15(a) in prisoners' civil-rights suits. (Rule 15(a) says that a "party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.") Apparently, these courts have concluded that if it appears that a prisoner may be able to amend a complaint to cure a legal deficiency (for example, to add facts that show the defendant's personal involvement in the alleged constitutional violation), they cannot say that they are "satisfied" that the claim is frivolous or fails to state a claim for which relief can be granted, as required by 42 U.S.C. § 1997e(c).

50. The two courts in which pretrial hearings were observed during this project follow very different procedures when prisoners need to amend their complaints. In the Nevada court, only changes that can be made quickly, such as amending a complaint to state a defendant's full name, are made on the spot. By contrast, the practice of the United States District Court for the Northern District of Illinois is to put a prisoner under oath and rectify defects in the complaint at the hearing.

Having observed both types of approaches, it appears that there are some potential downsides to the latter approach. They include: more time-consuming hearings; the fact that an inmate may need time to identify the facts that would cure the legal deficiency; the difficulty of answering a complaint amended in this fashion; and the need for a court reporter to be at the hearing. It should be noted that these and other difficult and burdensome complications that may ensue when a prisoner's complaint needs to be amended could be avoided through a limited legal-assistance program that provides prisoners with assistance in drafting complaints.

51. The data concerning the early case-evaluation hearings in Nevada are drawn from pages 19-20 of the REPORT OF THE SPECIAL STUDY COMMITTEE ON PRO SE PRISONER LITIGATION, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, which was published in 1995.

52. Nevada Department of Prisons, DOP Information Bulletin #93-69, V.B.1.c., B.2.b.

53. REPORT OF THE SPECIAL STUDY COMMITTEE ON PRO SE PRISONER LITIGATION, UNITED STATES COURT FOR THE DISTRICT OF NEVADA, at 20 (1995).

54. *Id.*

55. *See* Celeste F. Bremer et al., *"Fair and Effective" Prisoner Grievance Systems: Some Practical Suggestions,* 14 ST. LOUIS U. PUB. L. REV. 41, 44 (1994) ("In examining institutional grievance procedures, the key to developing any productive system is the measure of trust that has been developed between the parties. In a prison grievance system, the trust between prisoners and the administration is at best minimal, and at worst, nonexistent.").

56. 42 U.S.C. § 1997e(f).

57. The videoconferencing equipment used by the district court in Peoria, Illinois has two monitors. The right monitor always displays the judge or whomever else in the courtroom the camera is focused on. The left monitor typically displays the prisoner or whomever else the camera is focused on at the prison. During three-way conferences, where an Assistant Attorney General is participating from a third site (generally the state's capital), a voice-activation feature of the equipment switches the left monitor to the Assistant Attorney General whenever he or she is talking. There are plans in place to add a split-screen to the left monitor later in 1997 so that the Assistant Attorney General and the prisoner can be viewed simultaneously. JEFFREY A. GUSTAFSON, PHASE ONE PROJECT REPORT: IMPLEMENTATION OF VIDEOCONFERENCING PRISONER CIVIL RIGHTS MATTERS IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS, at 25 (1997).

58. Letter from Wm. Fremming Nielson, Chief United States District Judge, Eastern District of Washington, to Noel J. Augustyn, Assistant Director Court Programs, Administrative Office of the United States Courts 4 (June 19, 1996).

59. Correctional officials have now agreed not to transfer a prisoner out of the district until after the mediation process is completed.

60. It would seem though that the representation of a prisoner by an attorney does not necessarily mean that the case is inappropriate for mediation.

61. 42 U.S.C. § 1997e(g)(1).

62. During this study, court officials reported that after a complaint survives screening by the court under 28 U.S.C. § 1915A, the plaintiff has, in their opinion, the "reasonable opportunity" of prevailing on the merits needed for the court to require a defendant to respond to a prisoner's civil-rights complaint. 42 U.S.C. § 1997e(g)(2).

63. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).

64. Watson v. Ault, 525 F.2d 886 (5th Cir. 1976).

65. After the survey was conducted, a decision was made to use the same general scheduling order throughout the district. According to the Senior *Pro Se* Staff Attorney for the Western District of Missouri, the decision to use this order was not due though to any objections received about the pretrial order that more specifically described the disclosures required under Rule 26(a). In fact, she was aware of only one instance when an attorney had complained about the disclosure requirements under that order.

66. It is not entirely clear whether the order imposed similar disclosure requirements on the prisoner-plaintiff. The order did say that "the parties shall make the initial disclosures mandated by Fed. R. Civ. P. 26(a)(1)." On the other hand, all of the specific disclosure requirements referred to information and documents the defendants must produce.

67. REPORT AND RECOMMENDATIONS OF THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE ADVISORY GROUP, at 91 (1991) (hereinafter ADVISORY GROUP REPORT).

68. GUIDE TO THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, at 13 (1993). The actual requirement for automatic disclosures in certain kinds of *pro se* prisoners' cases can be found in Local Rule 48 of the United States District Court for the Southern District of New York.

69. ADVISORY GROUP REPORT, *supra* note 67, at 93.

70. Telephone Interview with Lois Bloom, Senior *Pro Se* Staff Attorney, United States District Court for the Southern District of New York (May 21, 1997).

71. ADVISORY GROUP REPORT, *supra* note 67, at 95.

72. *Id.*

73. Care must be taken when defining the substance and timing of initial disclosure requirements so as not to undermine one of the purposes of the qualified-immunity defense — to protect defendants from the "burdens of broad-ranging discovery" in cases where the rights they allegedly violated were not "clearly established." Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). If the immunity issue to be resolved is the purely legal one of whether the right allegedly violated was "clearly established" at the time of the alleged violation, the court may be able to resolve this issue during the initial screening of the complaint under 28 U.S.C. § 1915A(a),(b)(2). If the court, on the other hand, believes that it needs to hear the arguments of the parties before resolving this issue, it might solicit this input and then resolve the immunity issue before requiring any automatic disclosures. But if the qualified-immunity issue is essentially a factual one, the automatic disclosures will generally be needed to appropriately resolve this issue. *Cf.* Johnson v. Jones, 115 S. Ct. 2151, 2156 (1995) (interlocutory appeal from trial judge's finding that law was "clearly established" is permissible, but no interlocutory appeal will lie if the qualified-immunity dispute is essentially a factual one).

74. FED. R. CIV. P. 42(a).

75. Three of the Attorneys General surveyed during this project said that the federal district courts in their states sometimes unnecessarily delay the processing of *pro se* prisoners' civil-rights suits by failing to rule promptly on a dispositive motion. One of the Attorneys General reported that this problem occurs often and said that it sometimes takes the court one to two years to rule on a case-dispositive motion.

76. United States District Court for the District of Hawaii, Local Rules, Rule 220-14 (1995).

77. *See, e.g.*, United States District Court, Central District of Illinois, Rule 16.3(H).

78. 42 U.S.C. § 1997e(f).

79. The *Pro Se* Prisoner Litigation Committee appointed by the circuit court could provide helpful guidance to the district

courts by drafting a set of model instructions for these kinds of cases.

80. It was later determined that there was a problem with the line that carries the combination audio/video conference signal. Telephone Interview with Jan Ahrens, Secretary to Magistrate Judge Robert J. Kauffman (May 1, 1997).

81. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 14 (1996).

82. Letter from Susan T. O'Leary, Deputy Chief Legal Counsel, Illinois Department of Corrections, to Lynn S. Branham, Project Director (April 29, 1997).

83. At least with respect to some issues, such as the implementation of the filing-fee provisions of the Prison Litigation Reform Act, it would be most efficient if the different courts in a state work together with correctional officials, the Attorney General, and others in developing ways to more efficiently process *pro se* prisoners' civil-rights lawsuits.

84. The United States District Court for the District of Nevada is an example of one court where this kind of cooperation between the court, correctional officials, and the Attorney General has proven successful in identifying and implementing procedures to improve the processing of *pro se* prisoners' civil-rights suits.

85. One purpose of the model forms would be to avoid unnecessary duplication of effort by the district courts. If they wish though, district courts could still use some or all of their own forms.

CHAPTER 6

STEPS CORRECTIONAL OFFICIALS AND ATTORNEYS GENERAL CAN TAKE TO PROCESS PRO SE PRISONERS' CIVIL-RIGHTS SUITS MORE EFFICIENTLY AND EFFECTIVELY

In the past, discussions about the steps that can be taken to process *pro se* prisoners' civil-rights suits more efficiently and effectively have centered on the courts. How can courts be staffed, researchers and the courts have asked themselves, and what processes and programs can they adopt to more effectively winnow out legally frivolous lawsuits and to ensure that meritorious claims are justly resolved. Little attention has been given to two other key players in the processing of *pro se* prisoners' civil-rights suits -- correctional officials and states' Attorneys General. Yet the feedback received during this study, particularly from the federal courts, suggests that the actions, and inaction, of correctional officials and state Attorneys General can make a potentially dramatic difference in whether those lawsuits can be quickly and correctly resolved.

In the surveys distributed to a federal district judge and a magistrate judge in fifteen federal districts, each judge was asked the following question: "In your opinion, how frequently, if ever, do the actions or inaction of the attorneys representing correctional officials sued in *pro se* prisoners' civil suits unnecessarily delay the processing of those suits?" The judges were given five options from which to choose -- "never," "rarely," "sometimes," "often," and "very often."

Almost 80% of the judges who responded to this question (19 of the 24 respondents) said that correctional attorneys sometimes, often, or very often cause unnecessary delay in the processing of *pro se* prisoners' civil suits. And almost 30% of the judges (7 of the 24 responding) said that the unnecessary delay occurs often or very often.[1]

The judges were then asked to describe what, if anything, the attorneys representing correctional officials do or fail to do which causes unnecessary delay in the processing of *pro se* prisoners' civil suits. They were also asked to identify steps that the state's Attorney General or correctional administrators could take, or programs they could adopt, to decrease the burdens of *pro se* inmate litigation without undermining prisoners' constitutional rights.

During this study, the state Attorneys General who were surveyed were also asked how, if at all, correctional administrators unnecessarily delay the processing of *pro se* prisoners' civil suits. An attorney who serves as legal counsel for the Department of Corrections in the same state was asked a

similar question about the Attorney General. From these survey responses, the court surveys, and other feedback received during this study, steps that correctional administrators and states' Attorneys General could take to process *pro se* prisoners' civil-rights suits more efficiently and effectively were identified. When reviewing their handling of *pro se* prisoners' civil-rights claims, correctional administrators and the Attorney General in a particular state can determine the extent to which these steps, which are set forth below, have already been taken, or might still need to be taken, in that state.

I. STEP ONE: DEVELOP AN EFFECTIVE, THOUGH PERHAPS LIMITED, LEGAL-ASSISTANCE PROGRAM

The first step that correctional administrators can take to limit the burdens of *pro se* prisoner litigation has already been discussed in Chapter 3. But because of the importance of this step to the weeding out of legally frivolous claims before they even enter the courthouse door, as well as to the just resolution of meritorious claims as soon as possible, this step bears repeating.

It is critically important to the efficient and effective processing of *pro se* prisoners' civil-rights suits that prison officials, at a minimum, make at least limited legal advice and assistance available to prisoners who are contemplating bringing a *pro se* civil-rights suit. The person providing this assistance should be a nonprisoner who is trained in prisoners' rights law and is, and is viewed by prisoners as, bound to represent their best interests. This person would be responsible for, and have the authority to, discourage prisoners from filing frivolous claims and would make an effort to settle other claims early on, preferably before a lawsuit is filed. If the filing of a lawsuit were necessary in order for the violation of a prisoner's rights to be redressed, the legal assistant would also draft, or help prisoners draft, complaints containing nonfrivolous claims so that these better-drafted complaints can be more easily processed by the courts and responded to by defense counsel.

II. STEP TWO: FACILITATE SERVICE OF PROCESS

As was mentioned in the previous chapter, one of the nettlesome problems in processing *pro se* prisoners' civil-rights suits is effecting service of process on defendants whom a prisoner has sued. Sometimes, a prisoner will not even know the name of a correctional official who allegedly violated his or her constitutional rights. Even if the prisoner provides the last name of the defendant in the service papers, some prison officials will return the process with a notation, "Cannot identify," according to some of the U.S. Marshals surveyed during

this project. In addition, tracking down former correctional employees can be particularly difficult, time-consuming, and costly for the United States Marshal's Office.

Some Departments of Corrections, Attorneys General, and courts have, commendably, already adopted methods to reduce the burdens of serving process in *pro se* prisoners' civil-rights suits. For example, the Attorneys General in some states, such as Maryland, Missouri, Nevada, and Texas, will accept or waive service of process on behalf of defendants currently employed by the state's Department of Corrections. In Maryland, the United States District Court for the District of Maryland has encouraged and rewarded this procedure through a standing order. Under this order, the Attorney General is automatically given sixty days in which to respond to a complaint filed against a defendant currently employed in one of the state's prisons when the Attorney General accepts service of process on behalf of the defendant.[2]

In Utah, a different method is used to limit the time and costs of serving process in civil suits brought by *pro se* prisoners. One individual at each of the state prisons has been designated to accept process for all current employees. In a survey, the Chief Deputy Marshal described this practice as "very effective" in limiting the time and costs of serving process.

In the preceding chapter, it was recommended that early case-evaluation hearings generally be held in *pro se* prisoners' civil-rights cases that survive the court's initial screening process for frivolousness and failure to state a claim, unless a case is immediately routed into an ADR program. If this practice became the norm in a court, the most efficient way to handle service of process would probably be to handle it at the early case-evaluation hearing, as is the practice of the United States District Court for the District of Nevada. In that court, as has been discussed, the Assistant Attorney General observing the hearing accepts service of process on behalf of current employees of the Nevada Department of Prisons. This acceptance of service is reflected in the clerk's minutes, so no further paperwork is required by the court clerk or the U.S. Marshal to effect service of process.[3]

During the site visit to the Nevada court, it was noted that there was one type of situation where, as occurs in other courts, service of process gets bogged down -- in cases involving former DOP employees.[4] Under a policy of the Nevada Department of Prisons, the Attorney General's Office only has the authority to accept service of process on behalf of current DOP employees.[5] One of the concerns underlying this limitation is that the Attorney General might otherwise accept service of process on behalf of a former DOP employee and then be unable to find that person. The Attorney General would then be unable to obtain, as

required by law,[6] the former employee's consent to have the Attorney General's Office represent him or her, and a default judgment might be entered against the former employee. In addition, the Attorney General might not have access to the facts needed to successfully defend the case.

Significant and costly delays in the processing of *pro se* prisoners' civil-rights suits can, however, ensue as the U.S. Marshal's Office attempts to locate and serve process on former employees of a state's corrections department. These delays can not only slow the processing of claims against former employees, but on occasion, also claims against current employees. For example, a claim against a current employee that survived the defendant's motion for summary judgment would typically be set for trial. That trial might, however, later be held in abeyance to resolve a separate motion for summary judgment filed by a former correctional employee upon whom service of process had only recently been effectuated.

Steps have been taken in some states to facilitate the service of process on former employees of the state's Department of Corrections. In Texas, for example, the Attorney General's office will send a certified letter to a former employee at the employee's last-known address. The letter includes a copy of the complaint and a form which the former employee must sign in order to be represented by the Attorney General's Office. If the former employee signs this form and returns it to the Attorney General's Office, then the Attorney General's Office will waive service of process on the defendant.

The United States District Court for the Central District of Illinois employs a different means to effectuate service of process on former employees of the Illinois Department of Corrections. In a scheduling order issued at the time the court grants a prisoner's petition to proceed *in forma pauperis*, the court directs the department to furnish the U.S. Marshal with the last-known addresses of former employees. The court emphasizes in the order that this information is only to be used by the marshal to effectuate service of process. To protect the safety of the former employees, the addresses are not to be kept in the court file nor disclosed by the marshal.

Probably the most efficient way to handle the matter of service of process on former DOC employees would be to extend the mechanism for accepting service of process at early case-evaluation hearings to former DOC employees. The acceptance of process would have to be a conditional one -- conditioned on the Attorney General or Department of Corrections locating a former employee and obtaining a request for representation from him or her within a specified number of days -- perhaps thirty or sixty -- after the date of the hearing.[7] If the former employee could not be located, then the former employee's last-known address

could be turned over to the U.S. Marshal. The U.S. Marshal would then follow the more traditional, but costly methods in attempting to serve process on the former employee.

This method of handling service of process on former DOC employees would be particularly efficient. It requires none of the paperwork associated with service of process that court clerks and U.S. Marshals reported in their survey responses can be costly and time-consuming. This mechanism for serving process also avoids the multiple two- to three-hour trips that some marshals reported were sometimes needed to effectuate service of process on former DOC employees. And finally, this mechanism imposes no great burdens on Attorneys General and Departments of Corrections since former DOC employees must be contacted at some point in any event to secure the requests for representation typically required by state law.

There is precedent for devising a mechanism for conditional acceptance of service of process for former DOC employees. In the United States District Court for the District of Nevada, for example, the Attorney General's acceptance of service of process on behalf of current employees is, in effect, also a conditional one. If an employee were to refuse to be represented by the Attorney General, the employee would have to be served with process by the U.S. Marshal.

Effectuating service of process on former DOC employees at early case-evaluation hearings is also practical because former employees rarely refuse the free legal assistance available from the Attorney General's Office. In an interview conducted during this project, for example, an Assistant Attorney General from Texas reported that only one person out of the thousands of current and former employees sued in cases in which she has been involved has ever refused to give the Attorney General permission to represent him. Similarly, the Senior Deputy Attorney General in Nevada reported that she could recall no instances when a current or former employee of the Department of Prisons who had been sued by a prisoner had not wanted to be represented by the Attorney General.

Officials from the federal district court, the U.S. Marshal's Office, the Attorney General's Office, and the Department of Corrections would need to meet and work together to identify the most cost-effective method in that state to serve process in *pro se* prisoners' civil-rights suits. It would be advisable to have a representative from the court clerk's office involved in these meetings since the court clerk typically has to process the paperwork to and from prisoners and to and from the U.S. Marshal's Office that bears on the service of process.

Adopting the most cost-effective mechanism to serve process in *pro se* prisoners' civil-rights suits may require some changes

in state law, and the Attorney General and the Department of Corrections can take the initiative to secure the necessary changes. In addition, changes in the internal procedures of the Department of Corrections that could expedite the locating of former employees and the obtaining of requests for representation from them can be identified by the service-of-process working group and then adopted by the Department of Corrections.

One important matter to be discussed and resolved by the working group is the method through which the full names of defendants whom a *pro se* prisoner has sued can be obtained. As was mentioned earlier, the failure to name, or fully name, defendants is a recurring problem in *pro se* prisoners' civil-rights suits. Very often, prisoners do not know, and therefore cannot provide, the full names of the DOC employees or former employees who allegedly violated their constitutional rights. Attorneys General and DOC officials typically refuse to accept process on behalf of these individuals since there may be, for example, several different "Officer Smiths" who work at the prison in question.

Processing of the case then gets muddled and prolonged since the prisoner must often attempt to obtain the name of the unknown correctional official through discovery. By the time this name is procured and service of process can be effectuated on this person, the claims against other defendants may be close to final disposition. The processing of these claims will then often be halted while the other claim "catches up" with the rest.

Adopting the case-processing recommendations set forth in the previous chapter will diminish the problem with unnamed or not fully-named defendants. The names of these persons will often be in the documents, such as the medical records, incident reports, and disciplinary records, provided to the court and the prisoner-plaintiff for the early case-evaluation hearing.

Another step is utilized in Nevada to diminish the problem with unnamed defendants. The Nevada Department of Prisons has issued a directive to its employees requiring them to give the inmate their full name upon request.[8]

In some cases though, a prisoner might still not know the full name of a defendant before filing suit. For example, a prisoner might be transferred to a different prison before being able to ask the officer his or her name. And the documents produced at the early case-evaluation hearing might not reveal the person's name. The question then is what is the most cost-effective way for the name to be procured so that the case can be efficiently processed.

The answer to that question may depend on the circumstances of a particular case. But at least in some, and perhaps many,

cases, the names can be fairly easily procured by the Attorney General or correctional officials. For example, one early case-evaluation hearing observed in the Nevada court involved several claims, one of which was a medical claim against a nurse whom the prisoner had described as a 200-hundred-pound, black woman. Since the Deputy Attorney General who was participating in the hearing has ready access to the medical records from which this nurse could be identified, the district judge asked her if she could find out who the nurse was. The Deputy Attorney General readily agreed.

There will be times though when identifying a defendant would require a labor-intensive investigation on the part of the Attorney General or correctional officials or require them to make a judgment call as to whom the prisoner had intended to sue. In those situations, other mechanisms for identifying "John Doe defendants" may have to be employed by the court. The names can either be obtained through the discovery process or, as was discussed in Chapter 3, the court can appoint counsel for the very limited purpose of assisting the plaintiff in identifying the unnamed defendant.

III. STEP THREE: APPOINT LITIGATION COORDINATORS

About one third of the Attorneys General surveyed during this project reported that correctional officials in their state either do not keep or promptly provide them with the documents they need to litigate *pro se* prisoners' civil-rights suits efficiently and effectively. Another concern of some of the Attorneys General was that some of the correctional officials who are parties or witnesses in a case are dilatory in returning their calls and signing affidavits, which further impedes the work of the Attorney General's office. In addition, several courts expressed concerns about motions for summary judgment being filed by Attorneys General without the supporting documentation which would permit the courts to grant what appeared to be meritorious motions.

Appointment by the Department of Corrections of a litigation coordinator at each prison and at DOC headquarters can alleviate or prevent the problems mentioned by some of the Attorneys General. These appointments can also, in conjunction with some steps discussed subsequently in this chapter that can be taken by the Attorneys General, help to ensure that all pertinent documentation is submitted along with motions for summary judgment filed on behalf of correctional officials sued by *pro se* prisoners.

During a telephone survey, an Assistant Attorney General from Maryland reported that the designation of a litigation coordinator at each prison in the state and at DOC headquarters

has proven "effective" in diminishing the burdens of *pro se* prisoners' civil-rights suits. In addition to working with the Attorney General's office to expedite document retrieval, get affidavits signed, and facilitate communications between attorneys from the Attorney General's office and DOC employees, litigation coordinators can assist in the processing of *pro se* prisoners' civil-rights suits in many other ways. For example, if service of process is not, as has been recommended in this manual, effected at early case-evaluation hearings, then litigation coordinators can be assigned as the agent to accept service of process for DOC employees who work at the facilities to which the coordinators are assigned.

The litigation coordinators can also help channel requests for representation to current and former DOC employees. The litigation coordinators can, furthermore, be responsible for making the logistical arrangements needed to comply with a court's directive that steps be taken to enable a prisoner-plaintiff to obtain an affidavit from a witness, such as a prisoner transferred to another prison, that is needed to refute a defendant's motion for summary judgment. And finally, the litigation coordinators can make the arrangements needed for prisoners who are witnesses or litigants to appear on time at court hearings that are conducted either telephonically, through videoconferencing, or in person.

The Texas Board of Criminal Justice has taken the concept of litigation coordinators one step further by establishing a formal Litigation Support Program (LSP). The purpose of the Litigation Support Program is not confined to providing the support services needed to effectively and efficiently defend against prisoners' civil-rights suits. LSP also performs a management and evaluation function.[9] For example, LSP tracks and eliminates financial waste in the litigation of *pro se* prisoners' civil-rights suits and engages in research to better understand the factors driving *pro se* inmate litigation and the ways in which to respond to that litigation. LSP also establishes policies and procedures to streamline the processing of prisoners' civil-rights suits and writes policies and procedures to avoid those lawsuits.[10] Finally, LSP works with the courts to identify ways in which prisoners' civil-right suits can be processed more efficiently.

IV. STEP FOUR: CONSENT TO MAGISTRATE JUDGE'S JURISDICTION

Magistrate judges play a key role in the processing of *pro se* prisoners' civil-rights suits in many federal courts. This is particularly true in those districts that have established a special *Pro Se* Division to handle all *pro se* prisoners' civil-rights suits. The *Pro Se* Division in the Southern District of Florida, for example, is headed by a magistrate judge who has

acquired a great deal of experience and acumen in the handling of these cases.

One impediment though to the use of magistrate judges to efficiently and effectively process *pro se* prisoners' civil-rights suits is that without the parties' consent, magistrate judges lack dispositive authority in a case. In other words, a magistrate judge cannot dismiss a case, enter summary judgment, or enter judgment after a hearing or trial in a case unless the parties have previously agreed to the magistrate judge's exercise of this kind of dispositive authority.[11]

Two kinds of inefficiency ensue. First, the work of a magistrate judge in preparing a report and recommendations regarding, for example, the granting of a motion for summary judgment must then be duplicated as the motion is separately reviewed by the district judge. This duplication of effort is costly and causes delay in the processing of *pro se* prisoners' civil-rights lawsuits. And secondly, the expertise of certain magistrate judges in prisoners' civil-rights litigation cannot be fully taken advantage of.

During this project, reports were received that, at least in some states, prisoners are often willing to consent to the magistrate judges's jurisdiction over the case but that the Attorney General and/or DOC officials are regularly withholding their consent. By contrast, the Attorney General in Florida has instructed all of the Assistant Attorneys General to generally consent to trial before a magistrate judge. In an interview, the Chief of the Corrections Branch of the Office of the Florida Attorney General reported that this policy of consenting to the magistrate judge's jurisdiction has had positive effects from the Attorney General's perspective. A magistrate judge who is familiar with a case handles the case from start to finish, cases are resolved more quickly, and the cases are resolved by magistrate judges who have developed "strong expertise" in correctional law.[12]

To facilitate the processing of *pro se* prisoners' civil-rights suits, each Attorney General's Office and Department of Corrections can review its own policies regarding consent to a magistrate judge's jurisdiction in *pro se* prisoners' civil-rights suits. Consideration should then be given to amending those policies, where necessary, so that consent to a magistrate judge's jurisdiction is the norm, rather than the exception.

If needed to obtain that consent though, courts can consider adopting a bifurcated consent process, as was discussed in Chapter 5. Under this bifurcated approach, even when the Attorney General and Department of Corrections consent to the magistrate judge's jurisdiction in all dispositive pretrial proceedings, such as the entry of summary judgment, they will

still have the option, if the case goes to trial, of having it tried before, and decided by, a federal district judge. Because of the benefits mentioned earlier of having magistrate judges with expertise in these kinds of cases handle them from start to finish, it may still be preferable if the Attorney General and the Department of Corrections, as a general rule of thumb, consent to a magistrate judge's jurisdiction over the entire case.

V. STEP FIVE: AVOID BOILERPLATE MOTIONS AND ANSWERS

One of the most common steps that the surveyed Attorneys General reported having taken to reduce the burdens of *pro se* inmate litigation was to develop computerized brief banks and form motions.[13] The Attorneys General typically described these brief banks and form motions as "very effective" or "effective" in reducing litigation burdens. During a telephone survey, one Assistant Attorney General went even further in expressing his accolades about this litigation tool. Creating his own description category, the Assistant Attorney General reported that the brief bank used in his office was "astoundingly effective." The attorney added that 95% of the briefs filed by his office were "canned" and that the attorneys in his office rarely had to do any original writing when preparing these documents.

The positive view that some Attorneys General have about their brief banks and form motions is not, however, apparently shared by many courts. In fact, about one third of the federal courts from whom feedback was received during this project singled out the filing of what they described as "boilerplate motions" by the Attorney General's Office as a problem.

The courts appeared to have two concerns about these boilerplate motions. First, the motions include a lot of unnecessary and unhelpful discussion and fail to get to "the heart of the matter." And second and perhaps most importantly, the motions do not tie the facts of a particular case into the legal discussion. The end result, according to some courts, is unnecessary delay in the processing of *pro se* prisoners' civil-rights suits. Courts either end up denying boilerplate motions that do not coherently and specifically explain why, for example, summary judgment in a particular case should be entered on behalf of the defendants, or the courts must laboriously wade through exhibits appended to motions trying to determine the factual basis for the defendants' legal contentions.

The reports of unnecessary delay in the processing of *pro se* prisoners' civil-rights suits due to the filing of boilerplate motions by some correctional attorneys does not mean that standardized documents need to be jettisoned entirely by

Attorneys General. Instead, they need to be modified. First, they need to be shortened so that they get right to the crux of the question that the court must resolve. And second, they need to be modified so that in each case, the critical facts bearing on the resolution of a legal issue are highlighted for the court's attention.

As was discussed in the preceding chapter, some courts might want to pilot the use of court-prepared forms for summary-judgment motions filed in cases brought by *pro se* prisoners. These forms could be drafted in such a way as to ensure that a party moving for summary judgment immediately identifies the central issue or issues to be resolved by the court, identifies the facts that support his or her arguments, and identifies where in the affidavits and documents appended to the motion the necessary confirmation of those facts' existence can be found. In addition, this kind of streamlined motion might be more readily understandable to a *pro se* prisoner.

If these forms are not available from the court, however, correctional attorneys can take the initiative, where necessary, and revise their own forms. In addition, as is discussed more fully below, training programs for staff attorneys within the Attorney General's Office, as well as the Department of Corrections, can be reviewed and, where necessary, revamped to ensure that the staff attorneys receive adequate training about how to prepare an effective motion for summary judgment.

VI. STEP SIX: TRAINING

Four of the courts from which feedback was received during this project observed that the efficient processing of *pro se* prisoners' civil-rights suits was encumbered by untrained or undertrained Assistant Attorneys General assigned to handle these cases. One federal district judge, for example, said that on a scale of one to ten, with one being the lowest level of competency and ten being the highest, the attorneys from the Attorney General's Office who were litigating *pro se* prisoners' civil-rights suits in his court were a one. This judge, however, noted that there were some extraordinarily competent attorneys in the Attorney General's Office; they just weren't assigned, in that state, to handle *pro se* prisoners' civil-rights suits.

Many courts did not mention any concerns about the quality of the advocacy of Assistant Attorneys General, so this may not be a problem in most states. Yet the depth of concern expressed by some judges about this matter (One magistrate judge, for example, said flat out, "The Assistant Attorneys General are incompetent.") suggests that it would be advisable for each Attorney General's Office to critically examine the content and quality of the training provided to Assistant Attorneys General

who handle *pro se* prisoners' civil-rights suits to ensure that there are no deficiencies in the training program.

The word "critically" needs to be emphasized here because at least in some states, deficiencies in training programs have gone unrecognized by Attorneys General. For example, in one of the states surveyed during this project, the Attorney General described the training program developed for its attorneys involved in prisoner litigation as being "very effective" in limiting the burdens of *pro se* inmate litigation. By contrast, both a federal district judge and a magistrate judge from a court within the same state reported that the Assistant Attorneys General handling *pro se* prisoners' civil-rights suits were not adequately trained and that this lack of training delayed the processing of these lawsuits.

VII. STEP SEVEN: AVOID LITIGATION DELAYS

Thirteen of the federal courts from whom feedback was received during this project reported problems with Attorneys General delaying the processing of *pro se* prisoners' civil-rights suits. Many of these courts reported that the Attorney General's Office in the state regularly missed deadlines for filing answers, case-dispositive motions, and discovery requests and responses. In addition, several courts mentioned that the Attorneys General were not prepared for final pretrial conferences and also regularly sought extensions of time to prepare for trial.

The failure to file timely case-dispositive motions is a particular concern because this failure often presents courts with a Hobson's choice. If the courts consider and grant, for example, a tardily filed motion for summary judgment, they will be encouraging further delays in the filing of such motions in the future. But if they disallow the motion because it was not timely filed, the case will go to trial even though it is really a waste of time and money to try the case.

There are several steps that Attorneys General can take to avoid causing the kinds of delays about which different federal courts have complained. As a first step, each Attorney General can ensure that the division of the Attorney General's Office which handles prisoners' civil-rights cases is appropriately staffed. If the prisoner litigation division is, like the Attorney General's Office described by one court, "woefully understaffed," then it will be difficult, if not impossible, for the Attorney General's Office to meet court-imposed deadlines.

Second, each Attorney General's Office can utilize a computer tickler system to help keep track of the status of prisoners' civil-rights suits and to ensure that the Attorney

General's Office meets all deadlines for the filing of answers, case-dispositive motions, and discovery.

And finally, the Attorneys General can take steps to ensure that their staff do not engage in what some courts described as obstructive discovery practices. This obstructiveness, according to the courts, takes several forms. First, some Attorneys General are sometimes slow in producing, or even fail entirely to produce, required discovery. (As mentioned earlier in this chapter, at least part of this problem though may be due in some states to the failure of correctional officials to set up efficient document-retrieval mechanisms.) Second, according to the courts, some Attorneys General have an excessively narrow view of relevance, thereby requiring court intervention to get relevant discovery into prisoner-plaintiffs' hands. And finally, according to some courts, some Attorneys General make routine and unsupported objections to prisoners' permissible discovery requests.

Some of these problems with discovery, problems which can impede both the efficient and accurate processing of a case, may be diminished by courts taking the hands-on approach to discovery in *pro se* prisoners' civil-rights suits recommended in the preceding chapter. But regardless of the changes that courts may or may not make in the way they manage and oversee discovery in these cases, Attorneys General can adopt policies and monitor their implementation so that prisoner-plaintiffs are promptly provided relevant discovery without the need for court intervention. If all of the attorneys in an Attorneys General's Office cooperate in the discovery process, and none obstruct that process, the chances that *pro se* prisoners' civil-rights cases can be resolved efficiently and accurately will be greatly enhanced.

VIII. STEP EIGHT: IMPLEMENT CASE-RESOLUTION REVIEWS THAT HAVE A PROBLEM-SOLVING EMPHASIS

Another concern mentioned by five of the courts was the frequency with which correctional attorneys in their state, generally those from the Attorney General's Office, balk at the notion of settling a *pro se* prisoner's civil-rights suit. This recalcitrant attitude towards settlement, it was noted, exists even when prisoners raise legitimate concerns about prison conditions or operations and even when a lawsuit could be resolved for a relatively small sum of money.

The views of some federal courts that correctional attorneys' no-settlement policies lead to the incursion of unnecessary costs in the processing of some *pro se* prisoners' civil-rights suits stand in marked contrast to the views of several of the Attorneys General surveyed during this project.

These Attorneys General reported that they rarely or never settle *pro se* prisoners' civil-rights suits, even those which involve small amounts of money, and they described their no-settlement policies as "very effective" or "effective" in diminishing the burdens of *pro se* inmate litigation. One Senior Deputy Attorney General explained the basis for her opinion: when attorneys from her office refuse to settle *pro se* prisoners' civil-rights cases and instead go to trial, they "always" win. So, she remarked, it makes no sense to settle.

It was interesting during this project though to see how very differently a private corrections provider, Corrections Corporation of America, defines what constitutes a "win" in *pro se* prisoner litigation. During an interview, CCA's vice-president of legal affairs stated: "If a prisoner establishes that due to our negligence, his tennis shoes were lost, we will spend $40 to buy him a new pair of tennis shoes. And we *should* because it was our fault. By contrast, an attorney who represents a Department of Corrections will spend $4000 of the taxpayers' money to avoid paying the prisoner $40." The CCA attorney added that the obduracy of some correctional attorneys working in the public sector towards settlement was upsetting. "We're all taxpayers," she noted. "And it's our money being wasted."

CCA's vice-president of legal affairs reported that even correctional administrators working for CCA have become sensitized to the cost-effectiveness of settling certain prisoners' *pro se* civil-rights suits. She recounted one incident when a warden had actually called her to complain that there had been no settlement discussions in a case which he believed should be settled.

The correctional attorneys from the public sector who refuse to talk settlement in *pro se* prisoners' civil-rights cases might rejoin that it still makes sense from an economic standpoint to spend $4000 to avoid buying an inmate a $40 pair of tennis shoes because if they buy the prisoner-plaintiff a pair of shoes, that will encourage many other prisoners to file suit seeking compensation for lost tennis shoes. There are several responses to this argument. First, CCA does not provide compensation to, nor would correctional officials provide compensation to, any inmate who happens to claim that prison officials lost his or her property. Rather CCA only reimburses those prisoners who can adequately establish that their property was lost due to the negligence of CCA employees.

Second, if prison officials are responsible for having lost a prisoner's property, then they should replace it for the very simple reason cited by CCA's vice-president for legal affairs: because it is right to do so and wrong not to.

Third, now that prisoners, under the Prison Litigation Reform Act, must at some point pay the full filing fee of $150 and at least an initial fee up front when they file a civil-rights lawsuit in federal district court, the risk that they will file copycat suits may be diminished, and perhaps substantially diminished.

And finally, measures can be taken to prevent the settlement of a case from leading to an avalanche of similar claims from other *pro se* prisoners. CCA, for example, employs confidentiality agreements when settling some prisoners' *pro se* civil-rights suits. In one case in which an inmate had lost $100 worth of property because of the negligence of CCA employees, the payment by CCA to the prisoner of $100 was stretched out over the remaining year of the prisoner's sentence. Under a signed confidentiality agreement, the prisoner-plaintiff was not to tell any other inmate of the settlement. If he did, he would forfeit future payments. According to CCA's vice president of legal affairs, the prisoner-plaintiff told no one of the settlement agreement.

The rigid, no-settlement posture of some correctional attorneys from the public sector can not only greatly increase the monetary costs of *pro se* inmate litigation, but it also conflicts with the problem-solving ethos, discussed in Chapter 2, that is needed for effective correctional management. You will recall from the discussion in that chapter that some correctional officials have concluded that, from a correctional management standpoint, an obsession with reducing the number of *pro se* prisoners' civil-rights lawsuits is misdirected. If the lawsuits somehow disappear but the core problems driving many of those lawsuits go unresolved, then little, in actuality, has been accomplished. As the Director of the Missouri Department of Corrections stated in an interview, "Litigation is a symptom of a problem. If you stop the litigation, you don't stop the problem." This problem and others prompting lawsuits will continue to fester, making it ever more difficult to run the correctional facility safely and effectively. In addition, correctional officials can expect to see recurring grievances and lawsuits filed about these unresolved problems.

It would therefore, it would seem, be prudent, from both a correctional management and a cost-effectiveness standpoint, for the public attorneys who defend correctional officials and health-care providers sued by *pro se* prisoners to review and reassess their settlement or, to describe them more accurately in some states, no-settlement policies. Those policies can then be revised to reflect an emphasis on problem solving when reviewing prisoners' civil-rights suits to determine whether they can be resolved without litigation. To effectuate this commitment to problem solving, correctional attorneys may want and need to establish formal links with the Constituent Services Office or

similar entity in the Department of Corrections since the Constituent Services Office will often have had a great deal of experience addressing similar problems in a nonlitigation setting.

As Attorneys General and Departments of Corrections reexamine and change the substance of their settlement policies, they can also look at settlement timing issues. A case filed by a *pro se* prisoner that can and should be settled -- because it would be a waste of the taxpayers' money to litigate the case, because correctional officials have been guilty of wrongdoing, or because the case involves a problem that correctional officials should, in any event, resolve -- should be settled as soon as possible during the litigation process to avoid the needless expenditure of time and resources on the case by the court, Attorney General, and correctional officials.

To facilitate the resolution of *pro se* prisoners' claims, a structured process can be put in place by the Department of Corrections, in conjunction with the Attorney General, to evaluate prisoners' claims, for settlement purposes, as soon as possible after they are filed and after any information needed to make that settlement assessment has been gathered. This settlement-review process might be called an "early case-resolution review" or perhaps an "early problem-solving and case-resolution review." These names for the review process avoid the baggage that comes with the term "settlement," which, to some people, suggests that officials are inappropriately capitulating to the demands of prisoners. The different terminology, particularly the latter phrase, also more accurately depicts the purpose of the review process -- to avoid the waste of taxpayers' money and to address legitimate concerns that have been raised about a prison's operations or conditions.

Whatever the review process is called, it would seem that correctional officials should be at the forefront of the case-resolution review process since they will have greater knowledge about ways to creatively resolve problems highlighted in a prisoner's complaint. In addition, if a case, for some reason, cannot be resolved at the outset, before the early case-evaluation hearing, the structured resolution-review process put in place should provide for resolution reviews at subsequent points in the litigation process. It might become apparent that a prisoner's claim which did not initially appear capable of resolution without litigation can in fact be resolved as additional information about the claim comes to light. Two points during the litigation process when, at a minimum, a further case-resolution review should be undertaken are right before the first scheduling and case-management conference (after a limited amount of discovery has been completed but no dispositive motions have been filed) and before the final

pretrial conference (when discovery has been completed but trial preparations have not).

IX. CONCLUSION AND RECOMMENDATIONS

During this project, the Attorneys General who were surveyed expressed very different views about *pro se* prisoners' civil-rights suits. One Assistant Attorney General capsulized the views of some of the other Attorneys General when he said, "This is recreational (75% of the cases), and the rest are lacking merit." Another Senior Deputy Attorney General concurred with this view, stating that the majority of *pro se* prisoners' civil-rights suits (98%) are "baloney." This Senior Deputy Attorney General added that only claims involving medical care and the excessive use of force should be paid attention to because "the rest are frivolous."

Several Attorneys General, however, expressed very different views about *pro se* prisoners' civil-rights suits. One Senior Assistant Attorney General, for example, noted that "the vast majority of complaints are not recreational." An attorney who oversees prisoner litigation in another Attorney General's Office said that to decrease the burdens of *pro se* inmate litigation, "correctional administrators must abandon the 'us' versus 'them' mentality (correctional officers versus inmates). They must change that frame of mind and see that inmates can be right also." Or as one federal district judge who was surveyed advised, some states' Attorneys General need to "take a less adversarial and more administrative posture in the case."

The reality is that if the Attorney General and correctional administrators in a particular state were to view *pro se* prisoners' civil-rights suits only in "us versus them" terms -- only as legal contests to be won rather than administrative problems to be resolved -- then the steps described in this manual to reduce the burdens, but realize the benefits discussed in Chapter 1, of inmate litigation will be largely unsuccessful in that state. It is with this reality in mind that the first recommendation set forth below is made.

Recommendations

1. The federal government should fund a pilot project to facilitate the establishment of, and analyze the effects of, a DOC-based, early case-resolution review process. Since such a process is not only a litigation-related program but a correctional management program, possible funding sources might include federal agencies whose work centers on court operations and/or agencies whose work centers on or focuses in part on

corrections. Applicants for a grant to establish and evaluate such a program should have to demonstrate the commitment of the Department of Corrections, the Attorney General, and the court in which the project will be piloted to the program and its purposes.

2. Each Department of Corrections should work with the Attorney General and courts within the state to identify steps that the department can take that will lead to pro se prisoners' civil-rights suits being processed more efficiently and effectively. The steps to be taken by the Department of Corrections should, at a minimum, include:

- the development of a legal-assistance program that will help siphon frivolous claims from the courts and ensure that nonfrivolous claims filed with courts are coherent and well-drafted;

- the development of a mechanism through which service of process can be conditionally accepted or waived for both current and former DOC employees at early case-evaluation hearings;

- the development of efficient mechanisms for obtaining requests for representation from past and former DOC employees sued by *pro se* prisoners;

- the appointment of a litigation coordinator at each prison and DOC headquarters;

- the development of an efficient system for retrieving documents needed to conduct early case-resolution reviews and for the litigation and court processing of a case; and

- the institution of early case-resolution reviews that will focus on solving problems that may be driving lawsuits, both to improve correctional operations and to avoid costly litigation.

3. Each Attorney General should work with the Department of Corrections and courts within the state to identify steps that the Attorney General can take that will lead to pro se prisoners' civil-rights suits being processed more efficiently and effectively. The steps to be taken by the Attorney General should, at a minimum, include:

- the development of a mechanism through which service of process can be conditionally accepted

or waived for both current and former DOC employees at early case-evaluation hearings;

- the development of efficient mechanisms for obtaining requests for representation from past and former DOC employees sued by *pro se* prisoners;

- holding regular meetings with DOC litigation coordinators to identify steps that can be taken to improve the efficiency with which *pro se* prisoners' civil-rights suits are defended;

- adopting a policy under which consent is generally given to a magistrate's case-dispositive authority over all proceedings or at least all pretrial proceedings in a case;

- the review of all forms and documents utilized by the Attorney General's Office so that they are streamlined and can be and are tailored to the particular facts of a case;

- enhanced training of attorneys involved in the litigation of *pro se* prisoners' civil-rights suits;

- adequately staffing the division of the Attorney General's Office which handles prisoners' civil-rights suits;

- the utilization of a computer tickler system to ensure that deadlines for the filing of answers, case-dispositive motions, and discovery are met;

- the adoption of policies, and the monitoring of their implementation, to ensure that prisoner-plaintiffs are promptly provided relevant discovery without the need for court intervention; and

- abandoning any no-settlement policy and working with the Department of Corrections to implement an early case-resolution-review process with a problem-solving emphasis.

NOTES

1. Twelve of the judges who responded to this question stated that correctional attorneys sometimes cause unnecessary delay in the processing of *pro se* prisoners' civil-rights suits. Three of the judges said that the correctional attorneys often cause unnecessary delay, and four judges said that correctional attorneys very often cause unnecessary delay in these kinds of cases. The remaining five judges said that correctional attorneys are only rarely responsible for unnecessary delay in the processing of these kinds of cases.

2. In Re State Prisoner Litigation, Misc. No. 92-27 (D.Md. 1997).

3. If an early case-evaluation hearing is not held in a particular case, the Nevada court sends a copy of the complaint to the Attorney General with a request that the Attorney General accept service of process on behalf of the defendant or defendants.

4. After the site visit to the Nevada court, new procedures for serving process on former DOP employees were worked out between the Attorney General, the court, and the Nevada Department of Prisons. Under these new procedures, the Attorney General will send a letter to the Department of Prisons asking the department to determine whether a defendant who does not appear on the department's current list of employees was employed by the department sometime within the past two years (the limitations period for filing civil-rights suits in Nevada). If the defendant was employed by the department within that time period, the department will send a copy of the complaint and a "Request for Waiver of Service" to the defendant. If the defendant was not employed by the department within the two-year period or the department has no forwarding address for the former employee, the department will apprise the Attorney General of this fact, and the Attorney General, in turn, will inform the court. If the department does not hear back from the former employee, neither the department nor the Attorney General will pursue the matter further. Telephone Interview with Anne Cathcart, Senior Deputy Attorney General, Office of the Nevada Attorney General (May 12, 1997).

5. Nevada Department of Prisons, DOP Information Bulletin #93-69, §§ V.A., B.1.c., B.2.c. (April 29, 1994).

6. NEV. REV. STAT. § 41.0339.

7. What would be the appropriate amount of time before a conditional acceptance of process tendered at an early case-evaluation hearing would lapse will depend, in part, on how far

before the hearing the court provides the Attorney General with a copy of the complaint.

8. Nevada Department of Prisons, DOP Information Bulletin #93-69, § III (April 29, 1994).

9. Texas Board of Criminal Justice, Litigation Support Program Overview (1996).

10. One example of LSP's efforts to avoid litigation through the rewriting of policies and procedures is its rewriting of policies concerning prisoners' religious practices to ensure that legal requirements are met. Telephone Interview with Amber Rives, Program Specialist, Texas Department of Criminal Justice/ Litigation Support Program (May 14, 1997).

11. 28 U.S.C. § 636(b)(1)(A)-(B),(c)(1).

12. Telephone Interview with David Brannon, Chief of the Corrections Branch, Office of the Florida Attorney General (May 14, 1997).

13. There was little overlap in the steps that the Attorneys General reported having taken to reduce the burdens of *pro se* prisoners' civil litigation. Three of the seventeen Attorneys General who were surveyed reported that no steps had been taken by their Offices to decrease the burdens of *pro se* inmate litigation. Of the fourteen remaining Attorneys General, six reported having developed brief banks and/or form motions to reduce those burdens. In three states in addition to those six, however, district courts which were surveyed reported problems with the filing of boilerplate motions by the Attorney General.

APPENDIX

AUDIT FORMS, PRISON GRIEVANCE PROCEDURES,
MISSOURI DEPARTMENT OF CORRECTIONS

INMATE INTERVIEW

Name: HU

1. Do you feel you have access to IRR's? How do you obtain an IRR?

2. Do you feel you have access to grievance forms if not satisfied with IRR response?

3. Do you feel IRR's are adequately investigated?

4. Grievances?

5. What could be done to make the grievance procedure better?

6. State one positive point of the grievance process?

OTHER COMMENTS:

IRR REVIEW INTERVIEW

UNIT: _____ COORDINATOR: _____

What is procedure for obtaining an IRR?

At the time of issuance, is inmate asked what complaint is about?

Who logs, investigates and responds to IRR?
Who reviews IRR responses?

How does inmate receive IRR response?

Does discussion occur when inmate receives IRR response?

Is discussion of complaint documented?

If an IRR is determined to be an emergency, what do you do?
If the claim is physical abuse, what do you do?

OTHER:

IRR's Documentation/Time frames

UNIT: _____ COORDINATOR: _____

Check sample IRR's & grievances (past six months)

Is there adequate documentation attached?

Are responses complete and do they address complaint?

Are signatures complete/appropriate?

Are time limits being abided by?
(note: many inmates may have transferred)

Samples:

CHECKLIST FOR SAMPLE GRIEVANCE FILES

INMATE

NUMBER

HU

GRIEVANCE

IRR FILED
Logged:
Inmate's Date:

IRR RESPONDED TO
Investigator:
Responder:
Supt.:

INMATE RECVD.

GRIEVANCE FILED
Inmate's Date:
G.O. Stamped:

GRIEVANCE RESPONDED TO

INMATE RECVD.

1ST APPEAL FILED
Inmate's Date:
G.O. Stamped:
Zone Received:
Ret'd to Inst:

CORRECT CATEGORY?

INMATE RECVD

ADEQUATE DOCUMENTATION?

2nd APPEAL

INSTITUTION RECVD.

INMATE RECVD.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI DIVISION

Plaintiff,	)	
vs.	)	Case No.
Defendants.	)	

PRETRIAL SCHEDULING ORDER

It is **ORDERED** that, within 45 days from the date of this Order, the parties shall make the initial disclosures mandated by Fed. R. Civ. P. 26(a)(1). In so doing, defendants shall provide to plaintiff the identity of all persons who were present at, witnesses, or investigated the events from which plaintiff's claims arose. Defendants do not need to provide the addresses and telephone numbers of persons with knowledge, but shall provide plaintiff with the names and places of employment, if known, of persons who have first-hand knowledge. Defendants also shall provide copies of any documents prepared by an employee of the ( ) in connection with the events from which plaintiff's claims arose including, but not limited to: conduct violation reports, intradepartmental memoranda, use of force reports, information resolution reports (IRR's), witness statements, medical services requests (MSR's), and medical treatment records (if release is authorized). Defendants and their counsel may redact documents produced to protect the identity of confidential informants, but unredacted copies shall be retained for production to the court upon request.

It is further **ORDERED** that, within 30 days after initial disclosures are made or are due, the parties shall notify the court in writing what additional discovery is required. **If the parties do not timely notify the court that they need additional discovery, the court will assume that none is**

required, and discovery shall close on the date dispositive motions are due.

It is further **ORDERED** that each party shall file **appropriate dispositive motions** and suggestions in support, within 180 days from the date of this Order, unless otherwise ordered by the court. Motions for summary judgment raising the defense of qualified immunity will not be permitted after that time without leave of court. Untimely motions may be stricken.

For guidance in discovery procedures, all parties should consult with Local Rule 15 and Fed. R. Civ. P. 26-37. The Clerk of the Court is **ORDERED** to forward to plaintiff a copy of Local Rule 15.

Failure to comply with this order or to participate in good faith in discovery may result in appropriate sanctions, including dismissal of this action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - x

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

- - - - - - - - - - - - x

Pursuant to Fed. R. Civ. P. 33, 34 and 45, the Defendants shall answer, under oath, the following interrogatories, and produce copies of the following documents, within 90 days of the service of the Complaint in this action, at the Plaintiff's current address and at the United States Courthouse, Pro Se Office, 40 Centre Street, Room 41, New York, N.Y. 10007.*

APPLICABILITY OF THESE REQUESTS

These requests apply in Use of Force Cases, Inmate Against Inmate Assault Cases and Disciplinary Due Process Cases, as defined below, in which the events alleged in the complaint are alleged to have occurred while the Plaintiff was in the custody of either the Department of Corrections of the City of New York or the New York State Department of Correctional Services.

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* If within the 90 day period any Defendant moves for dismissal under Fed. R. Civ. P. 12(b)(6) or 12(c) on the basis that the pleadings do not state grounds sufficient to overcome Defendant's immunity from suit, response by that Defendant shall occur at the later of (i) 90 days from service of the complaint or (ii) 30 days from denial of such motion in whole or in part.

DEFINITIONS

1. "Use of Force Case" refers to an action in which the complaint alleges that any employee of the Department used physical force against the Plaintiff in violation of the Plaintiff's rights.

2. "Inmate against Inmate Assault Case" refers to an action in which the complaint alleges that any Defendant was responsible for Plaintiff's injury resulting from physical contact with another inmate.

3. "Disciplinary Due Process Case" refers to an action in which (i) the complaint alleges that a Defendant violated or permitted the violation of a right or rights in a disciplinary proceeding against Plaintiff, and (ii) the punishment imposed upon Plaintiff as a result of that proceeding was placement in a special housing unit for more than thirty days.

4. "Incident" refers to the event or events described in the complaint. If the complaint alleges a due process violation in the course of prison disciplinary proceedings, "Incident" also refers to the event or events that gave rise to the disciplinary proceedings.

5. "Department" refers to either the Department of Correction of the City of New York, or the New York State Department of Correctional Services, whichever had custody of the Plaintiff at the time of the Incident.

6. "Facility" refers to the correctional facilities where the Incident occurred.

7. "Identify," when applied to persons, shall mean state:

(i) current or last known business address;*

(ii) for Department employees, Department badge number or numbers if any;

(iii) for former or present inmates, any and all inmate identification numbers, including "book and case," "DIN" and "NYSID" numbers.

INSTRUCTIONS

1. Defendants are instructed to produce documents and provide information in the Defendants' custody, possession or control, and in the custody, possession or control of the Department.

2. If counsel for one or more Defendants concludes in good faith that production of documents responsive to Request No. 3 may disrupt or interfere with prison discipline or procedures, such documents may, at the option of Defendants' counsel, be produced only to the Pro Se Office, which shall make the documents available to the Court upon request or to any attorney who has or is considering accepting appointment as counsel for the plaintiff. Such counsel shall agree as a condition of access to the

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* In the alternative, with respect to employees or former employees of the Department, Defendant's counsel may undertake to forward process or correspondence to the identified person.

documents that the information they contain shall be held in confidence unless the Court otherwise orders.

3. If Defendants object to or withhold any part of Document Requests 3 or 4, counsel for Defendant should nevertheless obtain copies of the requested files from the appropriate agencies and provide sufficient information as to the contents of the withheld documents to permit further consideration by the court and parties in accordance with Local Civil Rule 46(e)(2).

4. Defendants may redact documents produced in order to protect the identity of confidential informants. If this is done, unredacted copies of such documents shall be retained by counsel for Defendant so that they may be supplied to the Court upon request.

5. Defendants are instructed to answer interrogatories on the basis of their own personal knowledge, on the basis of examination of the documents listed in Document Request 2, and on the basis of examination of such logs, charts or schedules as the Facility maintains.

INTERROGATORIES

1. Identify all Department employees who were present at, witnessed or investigated the Incident, or who at or about the time of the Incident were assigned to work

in the area where the Incident occurred (if such area is identifiable and discrete) and for each state:

(i) each assignment, post or location during the Incident;

(ii) the name and date of any reports or other documents prepared by the person regarding the Incident.

2. Identify all persons other than Department employees who were present at the Incident, and for each provide:

(i) each assignment or location during the Incident;

(ii) the author, transcriber and date of any written statements prepared by or taken from the person regarding the Incident.

DOCUMENT REQUESTS

1. Produce all documents identified in response to Interrogatories 1(ii) and 2(ii).

2. Produce any and all of the following documents prepared by any employee of the City of New York, the State of New York or any other governmental entity in connection with the Incident: incident reports, intradepartmental memoranda (including memoranda sometimes referred to as "to/froms"), use of force reports, unusual incident reports witness statements, injury to inmate reports, reports of infraction, notices of infraction, dispositions of any infraction, misbehavior reports. With respect to any disciplinary hearing regarding the Incident: all

disciplinary hearing record sheets, hearing transcripts*, disposition sheets, notices of administrative appeal and any accompanying documents, and any decisions on administrative appeal.**

3. For each Defendant, produce documents sufficient to identify each instance in which records of the Department reflect that the Defendant, in the course of his or her employment with the Department, (a) was charged with having made a false report, or with having made a false or misleading statement in a disciplinary proceeding or investigation; or (b)(i) in a Use of Force Case, was charged with having used force on an inmate; (ii) in an Inmate against Inmate Assault Case, was charged with having failed properly to supervise an inmate or observe an assigned area; or (iii) in a Disciplinary Due Process Case, was charged

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* If no hearing record has been transcribed and a tape recording or other electronic recording of the hearing exists, a copy of such tape shall be produced subject to any state law or regulation barring access on grounds of security. If the tape is not produced to the Plaintiff, counsel shall retain the tape and make it available to the Court upon request.

** Documents generated by the Department of Investigation, the Inspector General or the Internal Affairs Division concerning the Incident need not be produced under this document request, and instead should be produced in accordance with Document Request 8 of Plaintiff's Second Set of Interrogatories and Requests for Production of Documents, answers to which are required within 150 days of the service of the complaint in this action.

with having violated the same regulation or right alleged to have been violated in the Complaint.

4. Produce each closing memorandum and summary report, and each statement by Plaintiff or any Defendant, made in the course of any completed investigation by the Department of Investigations, Inspector General or Internal Affairs Division into the Incident.* If the Incident or the conduct of persons involved in the Incident is the subject of a disciplinary proceedings, criminal investigation or outstanding indictment or information, discovery under this request shall be suspended until the termination thereof (whether by completion of the investigation without criminal charges being brought, or by disposition of such charges). Response shall be due 30 days after such termination.

5. If Plaintiff alleges physical injury and has authorized release, produce records of all medical treatment provided to the Plaintiff in connection with such injury.

6. If any Defendant claims to have been physically injured in the Incident, produce all records and claims of injury and all records of medical treatment provided to that Defendant in connection with such injury. If Defendant refuses to give his consent to the release of

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* In producing such documents, Defendant may take reasonable measures to ensure that Department letterhead, forms and stationery are not misused by Plaintiff.

medical records as to which his consent to release is required, Defendant shall state whether he was treated at a prison facility, a clinic or by a private doctor and the date and place of each such treatment.

7. Produce to the Court but not to the Plaintiff any videotape recording of the Incident.

8. If any person claimed physical injury as a result of the Incident, produce any photographs of the Plaintiff, Defendant or other subject taken in connection with the Incident or any investigation thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 33, 34 and 45, the plaintiff hereby requests that the Defendants answer, under oath, the following interrogatories, and produce copies of the following documents, within 150 days of the service of the complaint in this action at the plaintiff's current address and at the United States Courthouse, Pro Se Office, 40 Centre Street, Room 41, New York, N.Y. 10007.*

DEFINITIONS

1. "Incident" refers to the event or events described in the Complaint. If the Complaint alleges due process violations in the course of prison disciplinary proceedings, "Incident" refers to the event or events that gave rise to the disciplinary proceedings.

2. "Department" refers to either the Department of Correction of the City of New York, or the New York State

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* If within this 150 day period any Defendant (i) moves for dismissal under Fed. R. Civ. P. 12(b)(6) or 12(c) on the basis that the pleadings do not state grounds sufficient to overcome Defendant's immunity from suit or (ii) moves for summary judgment on the ground that no triable issue of fact exists that would overcome Defendant's qualified immunity from suit, response by that Defendant shall occur at the later of (i) 150 days from service of the complaint or (ii) 30 days from the denial of such motion in whole or in part.

Department of Correctional Services, whichever had custody of the Plaintiff at the time of the Incident.

3. "Facility" refers to each correctional facility or other institution where the Incident occurred.

4. "Identify," when applied to persons, shall mean state:

(i) current or last known business address;

(ii) for Department employees, Department badge number or numbers if any;

(iii) for former or present inmates, any and all inmate identification numbers, including "book and case," "DIN" and "NYSID" numbers.

5. "Use of Force Case" refers to an action in which the complaint alleges that any employee of the Department used physical force against the Plaintiff in violation of the Plaintiff's rights.

6. "Inmate against Inmate Assault Case" refers to an action in which the complaint alleges that any Defendant was responsible for Plaintiff's injury resulting from physical contact with another inmate.

7. "Disciplinary Due Process Case" refers to an action in which (i) the complaint alleges that a Defendant violated or permitted the violation of a right or rights in a disciplinary proceeding against Plaintiff, and (ii) the punishment imposed upon Plaintiff as a result of that proceeding was placement in a special housing unit for more than thirty days.

INSTRUCTIONS

1. Defendants are instructed to produce documents and provide information in the custody, possession or control of each individual Defendant, and in the custody, possession or control of the Department.

2. If Defendants object to any part of Document Requests 2, 3, or 8, counsel for Defendant should nevertheless obtain copies of the requested files from the appropriate agencies and maintain them pending further consideration by the Court and parties.

3. Defendants may redact documents produced in order to protect the identity of confidential informants. If this is done, unredacted copies of such documents shall be retained by counsel for Defendants so that they may be supplied to the Court promptly upon request.

4. If any of Interrogatories 3, 4 or 5 is answered in the affirmative, the document recording or reflecting the review or procedure need not be produced or identified, but shall be made available to the Court upon request or to counsel appointed, or considering acceptance of appointment, in the case upon the provision by such counsel of a satisfactory assurance that the document will be maintained in strictest confidence.

INTERROGATORIES

1. If any person received or claims to have received medical treatment in the Facility clinic as a result of the Incident, identify all medical care providers assigned to work in the Facility clinic on the date of the Incident, and for each provide the name and date of any reports or other writings prepared by the person regarding the Incident or regarding the treatment of any person involved in the Incident.

2. Other than for the Department Commissioner, any Deputy Commissioner or Assistant Commissioner, the Governor of the State of New York, and other persons named as Defendants but not employed by the Department, identify each employment-related proceeding against any Defendant whether administrative, civil or criminal, that was commenced within ten years of the filing of the complaint in the instant action, and that was based upon allegations of false statements or falsifications of any kind, allegations of unnecessary or excessive use of force, or failure to report or to report accurately a use of force, and for each state:

(i) the agency or court in which the proceeding was filed;

(ii) the docket number or other identification number of the proceeding;

(iii) the date the proceeding was commenced;

(iv) whether the Defendant testified in connection with the proceeding; and

(v) the disposition of the proceeding.

If the present action is a Disciplinary Due Process Case, prior actions and proceedings against the Defendant involving any allegations of unnecessary or excessive use of force need not be identified.

3. For each Defendant, in a Use of Force Case state (a) whether there are documents in the possession, custody or control of any Defendant or the Department that record or reflect any review of the Defendant's prior conduct in connection with a use of force or report of a use of force, including but not limited to records of reviews of staff use of force conducted pursuant to Directive 5003, New York City Department of Correction, and other reports (including unusual incident reports, use of force reports, incident reports, injury to inmate reports, etc.) concerning a use of force or report of force by the Defendant and (b) state what remedial action, if any, was taken against the Defendant in respect thereto.

4. For each Defendant who at the time of the Incident was employed by the New York State Department of Correctional Services, state whether any counseling memos were prepared for use with Defendant concerning any allegation that that Defendant used force unnecessarily or excessively or prepared or filed a false report. If the

present action is a Disciplinary Due Process Case, prior actions and proceedings against the Defendant involving any allegations of unnecessary or excessive use of force need not be identified.

5. For each Defendant who at the time of the Incident was employed by the Department of Correction of the City of New York, state whether there are any records of corrective interviews with the Defendant concerning any allegation that that Defendant used force unnecessarily or excessively or prepared or filed a false report. If the present action is a Disciplinary Due Process Case, prior actions and proceedings against the Defendant involving any allegations of unnecessary or excessive use of force need not be identified.

DOCUMENT REQUESTS

1. Produce all documents identified in response to Interrogatory 1. If Defendant refuses to give his consent to the release of medical records as to which his consent to release is required, Defendant shall state whether he was treated at the Facility clinic as a result of the Incident and the date(s) of such treatment.

2. Other than documents already produced in response to Plaintiff's First Request for Production of Documents, produce all documents prepared by any employee of the City of New York, the State of New York or any other governmental entity in connection with or regarding the

Incident, including but not limited to CCC reports; 24 hour reports; preliminary telephone reports; infraction log entries (or, alternatively, state whether any infractions or dispositions were recorded with respect to the Incident); Board or Commission of Correction inquiries or reports; Watch Commanders Log entries; and Facility Control Post Log entries (or, alternatively, set out and certify the accuracy of the text of each such entry in its entirety).*

3. Produce from the Plaintiff's inmate file for the period of incarceration during which the Incident arose (and any other City or State inmate file for Plaintiff if any Defendant intends to rely on any of its contents), all documents relating to any occasion in which Plaintiff was subject to discipline.

4. If Plaintiff has alleged physical injury as a result of the Incident and has authorized release of his medical records, produce all Plaintiff's medical records generated during his current term of incarceration and during the term of incarceration during which the Incident arose, other than records already produced in response to Plaintiff's First Request for Production of Documents. If Defendants seek to rely on plaintiff's pre-existing medical

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* Documents generated by the Department of Investigation, the Inspector General or the Internal Affairs Division concerning the Incident need not be produced under this document request, and instead should be produced in accordance with Document Request 8.

condition as a complete or partial defense to any claim raised in the complaint, produce all plaintiff's medical records generated during any term of incarceration prior to the term of incarceration during which the Incident arose.

5. Produce from the inmate file of any inmate disciplined in connection with the Incident all documents relating to the Incident.

6. For any inmate who will testify at any evidentiary hearing in this action, produce ten days prior to such evidentiary hearing all documents relating to any occasion on which the inmate was subject to discipline.

7. For any inmate who will testify at a deposition in this action, produce ten days prior to such deposition all documents relating to any occasion on which the inmate was subject to discipline.

8. Other than documents already produced in response to Plaintiff's First Request for Production of Documents, produce all files of completed investigations of the Department of Investigation, the Inspector General or Internal Affairs Division into Defendants' conduct in the Incident.* Also produce each closing memorandum prepared in any investigation completed by the Department of Investigation, the Inspector General or Internal Affairs

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* In producing such documents, Defendant may take reasonable measures to ensure that Department letterhead, forms and stationary are not misused by Plaintiff.

Division since July 1, 1987, but in no event more than ten years ago, in which allegations of misconduct by Defendants who are Department employees were substantiated, or in which allegations were made that force was improperly used or that a use of force was not reported, or not reported accurately, as required by Departmental directives. If the Incident or conduct of any Defendants who are Department employees is the subject of a criminal investigation or of an indictment or information, discovery under this request shall be suspended until the termination thereof, whether by completion of the investigation without criminal charges being brought, or by disposition of such charges. Response shall be due 30 days after the termination of the criminal investigation.*

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* If any document responsive to this request exists in the form of a tape recording or other electronic recording, and has not been transcribed, a copy of suc tape or electronic recording shall be produced, subjec to any state law or regulation barring access on grounds of security. If the tape or electronic recording is not produced to Plaintiff, Defendant's counsel shall retain the tape and make it available upon request to the Court, appointed counsel or any person considering acceptance of an appointment as counsel in the case.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

	*	
Plaintiff,	*	
v.	*	CIVIL ACTION NO. H-
	*	
Defendant	*	

ORDER FOR ANSWERS TO INTERROGATORIES

Plaintiff, filing pro se, brings this action for violation of civil rights. Plaintiff is ORDERED to answer the following interrogatories and must include in his answer the following affirmation: "I swear under penalty of perjury that these answers are true and correct to the best of my knowledge."

Specifically, plaintiff shall state:

(1) Fully explain the medical condition you are complaining about.

(2) Explain when this medical condition came about and what caused it.

(3) When did you first notice this medical condition?

(4) When were you admitted to TDCJ-ID (or jail)?

(5) Give the dates of admission and release for any of your prior terms in TDCJ-ID.

(6) What is your current diagnosis?

(7) Who made this diagnosis? (name, title and who employed by)

(8) When and by whom were you first diagnosed with this

medical condition?

(9) List all the occasions that you were denied medical care. For each occasion state:

(a) When.

(b) Who denied you medical care.

(c) Why were you denied medical care.

(d) What medical care were you denied?

(e) At the time of the denial were you already on medication or receiving treatment or therapy for the same condition. Explain.

(f) Did you file a grievance for denial of medical care? What responses did you receive?

(10) List all the occasions that you received inadequate medical care. For each occasion state:

(a) When.

(b) Who rendered the inadequate medical care.

(c) Explain why you believe the care was inadequate.

(d) At the time of the inadequate medical care were you on medication or receiving treatment or therapy for the same condition. Explain.

(e) Did you file a grievance for inadequate medical care? What responses did you receive?

(11) What medical treatment have you received for the condition involved in this suit?

(12) On what dates did you receive medical treatment?

(13) What was the specific treatment you received on each date, including medication?

(14) Were you hospitalized for your condition ? If so, for how long? Where? What was done while you were hospitalized?

(15) Have you requested medication for your condition?

(16) For each request for medication, state:

(a) To whom did you make the request?

(b) The date and time of the request.

(c) Did you make the request verbally or in writing?

(d) What happened in response to your request?

(17) What medical treatment have you been denied?

(18) Is there some specific medical treatment you are claiming you should have received that you did not receive? If so, explain what treatment and why you feel you should have received it.

(19) Have you requested any specific medication or treatment which the defendants refused you? If so, explain.

(20) List all occasions that you were seen by medical personnel and state for each occasion:

(a) The date.

(b) The name and title of the person you saw.

(c) Where you saw them (hospital, infirmary, clinic, etc.)

(d) What you told them and what they told you.

(e) Were you examined?

(f) What treatment did you receive?

(g) What medication or prescription for medication did you receive? Did you receive any over-the-counter type medication?

(21) What harm was caused to you by the events made the basis

of this suit.

(22) Does your medical condition interfere with your normal activities? Explain.

(23) What is the personal involvement of each of the defendants in the events and situation forming the basis of this lawsuit? Be specific as to personal involvement.

(24) Has any state or federal court ever ordered you to pay a fine or sanction? If so, explain which court and what fine or sanction.

(25) Has any state or federal court ever barred you from filing any other lawsuits until certain conditions were met, such as judicial approval or payment of fine or sanction? If so, explain which court and what condition.

(26) Have any of your lawsuits been dismissed as frivolous, malicious, duplicative, successive or repetitive under 28 U.S.C. § 1915? If so, explain which lawsuit(s), which court, and what kind of dismissal.

(27) List all the civil lawsuits you have filed in state and federal court, including the case number, case name, type of case, and the outcome.

Plaintiff is ORDERED to submit the answers by copying each question as posed by the court and writing the answer under each question, in numbered paragraphs corresponding to each question.

Plaintiff is further ORDERED to respond within thirty (30) days of entry of this order by submitting to the Clerk an original of your answers and a copy for each defendant you have named so

that they may be served upon each defendant, along with plaintiff's original complaint. The Clerk will not issue summons until plaintiff's answers are evaluated by the Court. Failure to comply as directed may result in the dismissal of this action.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Office of the Clerk
Post Office Box 25670
Raleigh, North Carolina 27611

DAVID W. DANIEL,
Clerk of Court

(919) 856-4370

January 9, 1997

M E M O R A N D U M

TO: Pro Se Litigants in United States District Court for the Eastern District of North Carolina

FROM: David W. Daniel, Clerk

RE: Instructions on handling your own case in court

Your case (^C, 5:^C-CT-^C) has been set for ^C on ^C at ^C before ^C. Because you are not represented by an attorney, here are some instructions that you must follow in order to properly present your case.

I. PRE-TRIAL PROCEDURE

The Federal Rules of Civil Procedure, Rule 16, and the Local Rules of this court, Rule 25.00, require you to submit a "pre-trial order." The purpose of this order is to inform the court as to what you intend to prove at your trial and how you intend to prove it. Your order should include the following things:

(a) A short statement of your contentions. Briefly tell the court what you think your case is about. Also tell the court what relief you want. This should be the same as you stated in your complaint.

(b) List the exhibits you plan to offer at trial, such as documents or other items which you believe will help you prove your case. NOTE: If you fail to list an exhibit in your pre-trial order, the court may not allow you to present it at trial.

(c) List the witnesses you plan to call at trial and their addresses, clearly indicating which of these witnesses are in custody. You must also state what you expect these witnesses to testify about. The court will not subpoena a witness unless you provide the information about the witness. NOTE: The court **is not** responsible for costs associated with the attendance of a witness at trial, including mileage, witness attendance fees and lodging. All costs must be paid by you for your witnesses.

YOUR PROPOSED PRE-TRIAL ORDER MUST BE COMPLETED AND SENT TO THE CLERK'S OFFICE BY MAIL ON OR BEFORE ^C (BROUGHT WITH YOU TO THE PRE-TRIAL CONFERENCE). A COPY MUST ALSO BE MAILED TO THE ATTORNEY FOR THE DEFENDANT(S) WHOSE NAME AND ADDRESS IS ^C. Counsel for defendant will also have prepared a proposed pre-trial order similar to yours that will be submitted to the court by this date, a copy which you will receive.

II. TRIAL PROCEDURE

1. When your case begins, you should sit at the counsel table facing the judge. The law clerk or bailiff will show you where to sit. Always address the judge as "Your Honor" and stand when you are speaking to him. Do not speak to the defendant or his attorney unless the judge tells you to. You should remain seated at all time except when you are speaking to the judge or arguing your case to the jury.

2. If you or the defendants have made a timely request for a jury trial, the presiding judge or magistrate judge will first select the jury. He does this by having a panel of prospective jurors placed in the jury box. Usually he begins with 18 prospective jurors. He then identifies to them the names of the parties, lawyers, and anticipated witnesses and determines if anyone on the panel knows any of the people involved in the case so that they would not be able to act impartially. All who cannot act impartially are removed from the panel and replaced with others. Next, the basic subject matter of the case is described to the panel to see if anyone happens to know enough about the case that they cannot base their decision on the

evidence presented, as they are required to do. Each panel member is asked questions to determine whether he or she can be fair and impartial. All parties may submit to the court a list of the questions he wishes to have asked of the panel. For example, a prisoner plaintiff might want the following question asked: Has any member of the panel ever been employed as a police officer or uniformed guard or been closely related or associated with a police officer or guard?

You should give thought before trial to the questions you would like asked of the panel during jury selection and hand up a list of such questions to the presiding officer when he ask for them. While he is questioning the panel, pay careful attention and make notes of the panel's responses. At the end of the questioning, the defendant will be able to remove any three people he wishes from the panel and then the plaintiff may remove any three of those left. The 12 remaining will constitute the jury. The parties will be asked to stipulate that the case can be tried by as few as ten jurors in the event one or two jurors get sick or become unable to serve through the trial. If the parties do not so agree, the presiding officer may decide to select one or two alternate jurors.

3. Opening statements. After the jury is selected, the next step is for each side to give a brief opening statement explaining what they expect their evidence will prove in the case. These statements should be short and state anticipated facts. They should not be arguments about why those facts entitle a party to win. For example, it would be correct to state: The evidence will show that I was struck in the head by the defendant when I had done nothing to provoke it. It would be incorrect to argue (at this state of the proceedings): It was wrong for a guard to beat a prisoner and he should be made to pay for it.

4. Presentation of evidence. Next the evidence is presented. The plaintiff, having brought the suit, has the burden of proving his case by the greater weight of the evidence and the plaintiff's evidence is presented first. Evidence may consist of the sworn testimony of a party and other witnesses,

and papers, documents, photographs and objects. Ordinarily, affidavits (whether notarized or not) or other written statements will not be admitted as evidence. Affidavits or signed statements of someone who testifies live at trial may be used by the side that didn't call the witness to show that the witness may be lying. This is called "impeachment of a witness by use of prior inconsistent statement."

A witness may be allowed to refer to his own written notes during his testimony if it is necessary to refresh his recollection. If he does so, the other side may inspect the notes and ask questions about them.

5. Order of examination of a witness. The party calling a witness asks him question first. This is called direct examination. When he is finished, the other side asks questions on cross-examination. Then the first party gets one more chance to ask further questions on redirect examination and the last questions are by the other side on re-cross examination. You should prepare in advance of trial an outline of the questions you want to ask your witnesses and perhaps a list of questions to ask the witnesses you expect the other side to call. During the trial, while a witness is being examined by the other side, you may want to take notes so that you can better ask questions when it is your turn to do so.

During this process your should be careful to **ask questions** and not make statements or argue with the witness.

Leading questions are those which suggest the answer. For example: The traffic light was red, wasn't it? Non-leading questions usually start with: Who, what, when, where or why. For example: What color was the traffic light? You may ask leading questions on cross or re-cross examination but you should not on direct or re-direct examination.

When the plaintiff has finished presenting his evidence, the defendant may present evidence is he wishes to do so. Remember that after the defendant finishes his examination of each witness, the plaintiff may ask questions on cross-examination and re-cross if there has been a re-direct.

Objections may be made whenever either party believes a

question to be improper or other offered evidence to be inadmissible. When an objection is made, the witness should not answer the question until the ruling is made. If the objection is **SUSTAINED**, the witness may not answer. If the objection is **OVERRULED**, the witness must answer, if he knows the answer.

6. Arguments or Summation. After both sides finish putting on evidence, each party will be given a chance to give an argument or summation as to what they contend the evidence has shown. In a jury trial, this argument is directed to the jurors. For a non-jury trial, it is directed at the judge or magistrate judge. The plaintiff has the last or closing argument. The court may set time limits for the arguments depending on the amount and complexity of the evidence offered. Often each side is given a total of 30 minutes for argument. The plaintiff may divide his total time into two parts, an opening and closing, or may reserve it all for a closing only, waiving opening.

7. Jury Charge. If there is a jury, the court will next deliver a charge to the jury of the law involved. Either side may request that particular instructions of law be given. These should be prepared in advance and given to the judge or magistrate judge at the earliest opportunity, but no later than at the conclusion of all the evidence.

Any objections to any portion of the jury charge should be made as soon as the instructions are completed and before the jury retires so that the judge or magistrate judge may correct any errors before the jury starts deliberating.

8. Jury deliberation. The jury will have been given a set of written issues to decide. These will be taken into the jury room and the jury will deliberate until either (a) they unanimously agree on a verdict, or (b) they decide they are hopelessly deadlocked. In the latter event, a mistrial may be declared, which would mean the case would have to be tried again.

9. Verdict or decision. If there is a jury, the verdict will ordinarily be announced in open court by the judge or magistrate judge. If there is not a jury, often the judge or magistrate judge will wait a short while to file a written opinion. The written opinion will list the findings of fact and

conclusions of law and it is sometimes helpful to the judge or magistrate judge to take time to review the trial notes and perhaps conduct legal research before writing the opinion.

10. Appeal. If you are dissatisfied with the verdict or decision, you may appeal to the United States Court of Appeals for the Fourth Circuit by filing a written notice of appeal and serving a copy on counsel for defendant(s) within 30 days of the judgment.

III. SUMMARY

Here are some points to remember:

1. Be on time. The court has many cases to handle and cannot overlook tardiness.

2. Always be polite and show respect to the court, the jury and opposing counsel. Rudeness will not help your case.

3. Do not talk to defendants or defense counsel unless the judge gives you permission.

4. Decide what you need to prove and how you are going to prove it.

5. To each witness you intend to call, make an outline of questions you need to ask. Also, anticipate what witnesses the other side may call and prepare questions to ask them on cross-examination.

6. Prepare an outline of your opening statement showing what facts you believe the evidence will prove. Also prepare an outline of your closing argument.

7. Ask the court for instructions or explanations if you do not understand something or get confused. Everyone knows that you are not a lawyer and will try to make sure that you understand what is happening.

AGREEMENT
BETWEEN

_____

AND
CORRECTIONS CORPORATION OF AMERICA

THIS AGREEMENT entered into by and between _____, hereinafter ("**ATTORNEY**"), whose offices are located at _____ and **CORRECTIONS CORPORATION OF AMERICA**, hereinafter ("**CCA**), whose offices are located at 102 Woodmont Blvd., Suite 800, Nashville, Tennessee 37205 for provision of services at the _____, hereinafter ("**Facility**"), _____.

WITNESSETH:

In consideration of the mutual promises and covenants contained herein, and in all appendices, CCA and the Attorney hereby agree as follows:

1. SCOPE OF WORK

The purpose of this Agreement is to establish the terms and conditions under which the Attorney will provide to inmates incarcerated within the Facility sufficient legal services to meet or exceed constitutional mandates for meaningful access to the courts. This Agreement incorporates all past agreements, covenants and understandings between the parties hereto. No prior agreements or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

2. SERVICES

Services to be provided by the Attorney will not include representation in fee generating suits, but will include the following:

a. Consultation and assistance with post conviction and habeas corpus issues involving the inmate's custodial situation and institutional claims personally involving the inmate;

b. Personal interviews with inmates seeking assistance with the above referenced issues to include motions to proceed in forma pauperis and for appointment of counsel and the preparation of pleadings;

c. Consultation and assistance in fact gathering and legal research;

d. Consultation and assistance in referring inmates to;

i. legal organizations that provide specialized services;

ii. social service agencies; and

iii. Facility staff.

e. Consultation and assistance in the preparation of inmate grievances pursuant to Facility policy.

f. Comply with CCA Policy and Procedure 3-3, Standards of Business Ethics and Conduct, a copy of which is attached.

3. OPERATIONS

The Attorney will establish a schedule for meeting with inmates with legal concerns. This schedule will be forwarded to the Facility and the Facility staff will inform inmates of the availability of the legal services. The Attorney will visit the Facility no less than once every two weeks unless there are no inmates needing assistance. CCA staff reserves the right to divert certain inmates to other sources of legal assistance.

4. LEGAL STANDARDS

The services provided must meet all legal standards and the Attorney will, at all times, abide by the Code of Professional Responsibility in the State of _____.

5. INFORMAL PROBLEM SOLVING

If it is in the inmate's best interest, the Attorney should attempt to resolve inmate complaints through informal means prior to the filing of any legal complaint and will advise the inmate accordingly.

6. REFERRAL SYSTEM

The Attorney will establish and operate a referral system between the inmates and available community social and legal services. Emphasis should be placed on obtaining court appointed counsel when appropriate. The Attorney will establish a policy on referrals and will keep a record of all referrals made.

7. RECORD KEEPING

The Attorney will provide a monthly written report to the Vice President for Legal Affairs to include the number of inmates interviewed during the preceding month, number of meritless claims, referrals made and to whom, informal resolution attempted, the result of each and the number of lawsuits filed.

8. TERM OF AGREEMENT

CCA hereby employs and retains the Attorney from _____ to _____. At the end of the term of the Agreement, the parties will review the services provided and determine whether it is mutually beneficial to extend the Agreement.

9. COMPENSATION

CCA shall pay the Attorney _____ ($____) per hour for the duration of this Agreement. CCA will pay $_____ per hour for paralegal or law clerks services.

10. EXPENSES

The Attorney will be reimbursed Thirty-Two Cents ($.32) per mile for travel to and from their offices and the Facility and for expenses incurred including phone, fax, copying case law, forms or other information for inmates.

Each month, the Attorney will submit to the Vice President for Legal Affairs a statement showing the date, hours worked, person performing the work and the task for each reportable time period and expenses.

11. TERMINATION

Either party will have the right to cancel at any time upon the giving of 30 days written notice.

12. REPRESENTATION

It is specifically understood that the Attorney is not being retained to become counsel of record or provide court representation for inmates. However, should the Attorney wish to become counsel of record for an inmate, the attorney may do so provided that both the Attorney and the inmate acknowledge in writing that this representation is not at the expense of CCA and that the inmate and the Attorney may look only to each other for payment and/or performance.

13. DEFAULT

Either party may terminate the Agreement forthwith in the event, after notice of deficiency and a reasonable opportunity to correct same, which shall not be greater than thirty (30) days, if the party receiving notice fails to correct any material breach of any of the terms and conditions of this Agreement.

14. NOTICE

All notices, designations, consent, offers, acceptances or any other communication provided for herein required to be in writing shall be given by registered, certified mail, return receipt requested, addressed to the parties as shown below:

Attorney:

CCA: Linda G. Cooper, Vice President, Legal Affairs
Corrections Corporation of America
102 Woodmont Blvd., Suite 800
Nashville, TN 37205

15. GOVERNING LAW

This Agreement shall be governed by the laws of the State of _____ as to interpretation, construction and performance.

16. AMENDMENTS

This Agreement may be amended, changed or modified only by written agreement executed by the parties hereto. No waiver of any provision of the Agreement shall be valid unless in writing and signed by the party charged.

17. CONFIDENTIALITY

Any information given to or developed by the Attorney in performance of this Agreement shall be kept in confidence and shall not be made available to any individual or organization by the Attorney without the written approval of the Vice President, Legal Affairs.

18. ASSIGNMENT

The Attorney shall not assign or transfer any interest in this Agreement without the prior written approval of the Vice President for Legal Affairs.

19. INVALIDITY AND SEVERABILITY

In the event that any provision of this Agreement shall be held to be invalid, such provision shall be null and void, the validity of the remaining provisions of the Agreement shall not in any way be affected thereby.

20. COUNTERPARTS

This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which shall constitute one Agreement, notwithstanding that all parties are not signatories to the original or the same counterpart, or that signature pages from different counterparts are combined, and the signature of any party to any counterpart shall be deemed to be a signature too and may be appended to any other counterpart.

21. NON-DISCRIMINATION

CCA is an Equal Opportunity Employer. If this Agreement is subject to Executive Order 11246, as amended, a copy of the Federal Contract Supplement is made a part hereof. To the extent required by applicable laws and regulations, this Agreement also includes and is subject to Executive Order 11738 requiring certification of compliance with environmental regulations and to the affirmative action clauses concerning Disabled Veterans of the Vietnam Era (41 CFR 60-250) and employment of the Handicapped (41 CFR 60-741), and the appropriate clauses are either attached hereto or incorporated herein by reference.

22. THIRD PARTY RIGHTS

The provisions of this Agreement are for the sole benefit of the parties hereto and shall not be construed as conferring any rights on any other person.

23. SCOPE OF AGREEMENT

This Agreement incorporates all agreements, covenants, and understandings between the parties hereto concerning the subject matter thereto. No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

IN WITNESS WHEREOF, intending to be legally bound, the parties have caused their authorized representative to execute this Agreement as of the date first above written.

ATTORNEY

_____

_____

Social Security # or Federal ID#

CORRECTIONS CORPORATION OF AMERICA

BY:_____

LINDA G. COOPER
VICE PRESIDENT, LEGAL AFFAIRS

REVIEWED BY:

_____

DARRELL K. MASSENGALE
file:contract:attmodel

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Plaintiff	*	APPLICATION TO PROCEED WITHOUT
	*	PREPAYMENT OF FEES AND
vs.	*	AFFIDAVIT FOR INCARCERATED
	*	PRO SE PLAINTIFFS
Defendant	*	
	*	CASE NUMBER: _____

I, _____, Inmate Number _____, declare that (i) I am the petitioner/plaintiff/appellant in this proceeding, (ii) I am unable to prepay the costs of these proceedings, and (iii) I am entitled to the relief sought in my petition/complaint/appeal. In support of this application, I respond to the following under penalty of perjury:

I currently am incarcerated at the _____.
(Name of correctional institution)

_____ Yes _____ No I am employed at the above-named institution.

_____ Yes _____ No I receive payments from the above-named institution.

_____ Yes _____ No I have a prisoner trust account in my name at the institution.

_____ Yes _____ No I have other sources of income or savings outside of the institution.

If yes, list sources and amounts: _____

_____

I declare under penalty of perjury that the above information is true and correct.

_____ _____
Date Signature of Applicant

CERTIFICATE OF CORRECTIONAL OFFICIAL AS TO STATUS OF APPLICANT'S TRUST ACCOUNT

I hereby certify that as of the date applicant signed this application:

the applicant _____ has/ _____ does not have a trust account at this institution.

the applicant's trust account balance is $_____

the average monthly deposits during the prior six months is $_____

the average monthly balance during the prior six months is $_____

the attached account summary accurately reflects the status of the account.

_____
Date Authorized Signature Title Institution

DU Form PF-1

CONSENT TO COLLECTION OF FEES FROM TRUST ACCOUNT

I, _____, hereby consent to having the designated correctional officials at this institution withdraw from my trust account the funds required to comply with the order of this court for the payment of filing fees for: (*please check the type of action you are filing)*

____ Civil case ($150)

____ § 2254 action ($5.00)

____ Appeal to the Tenth Circuit Court of Appeals ($105)

My consent includes withdrawal from my account by correctional officials of partial initial payments to this court equal to 20% of the greater of:

(i) the average monthly deposits to my account for the six-month period preceding my filing of this action, or

(ii) the average monthly balance in my account for the six-month period preceding my filing of this action.

My consent also includes monthly withdrawals from my account by correctional officials of an amount equal to 20% of each month's income. Whenever the amount in my account reaches $10, said officials will withdraw that amount and forward it to the this Court until the required filing fee is paid in full. I understand that I am liable for paying the entire fee, even if my case is dismissed by the Court before the fee is fully paid.

_____

Date Signature of Inmate

FAILURE TO SIGN AND SUBMIT THIS FORM MAY RESULT IN DISMISSAL OF ACTION

EXHAUSTION OF ADMINISTRATIVE REMEDIES IN § 1983 ACTIONS

I, _____, hereby acknowledge that I am required under Title 48,
Inmate name printed or typed

U.S. Code. Section 1997(e), to seek to resolve my complaint using all the institutional grievance processes and administrative remedies available to me. I hereby certify that I have exhausted those processes and have been unsuccessful in resolving my § 1983 complaint. *Attached to this certification is a description, including dates and outcomes, of my attempts to resolve it.*

_____

Date Inmate's signature

This is certify that (i) I have reviewed above-named inmate's § 1983 complaint and description of efforts to resolve the issues through the administrative grievance processes; (ii) said inmate has exhausted the grievance procedures and administrative remedies available to inmates at this institution for resolving this complaint: and, (iii) said inmate has been unsuccessful.

_____

Date Printed name of Corrections Officer Title Officer's signature

DU Form PF-2