CORRECTIONS ON TRIAL - How to Prepare for a Lawsuit

(Defending a Correctional Institution)

There are several authorities, and more experienced attorneys than I, who have written on this broad subject. My comments are only those which I have gained from experience.

First, as in every problem solving situation, I have found it absolutely required to determine what is the issue or what is the specific subject of the complaint. If you've dealt with pro-se petitions or written cop-outs by inmates, as I'm sure most of you have, this is not always as simple as it may sound. You may have to wade through pages on pages of irrelevent material to come to the one or more specific complaints or issues. Make a written outline of those complaints or allegations in numerical order and place them in the language of the alleged denial, i.e.; denial of medical care, denial of discipline due process, etc., and then state specifically is possible the denial alleged by the inmate.

The Second step is to determine what the true facts are. This resolves to the following:

(1) Do you have enough facts from the petitioner to determine the specific complaint?

If you do not have enough to conduct an investigation, which is frequently the case, tools of discovery are available for use by the attorney, such as interrogatories, depositions, motion to make more definite and certain.

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(2) Once the facts of the complaint as alleged are determined, either by discovery or pre-trial hearing, those facts must be investigated to determine if true, and if untrue, what are the true facts.

The material available to make the determination is the documentation or file on the inmate and the correctional staff's statements. Documentation is, in my opinion, the most important tool, after the fact, that we have available to refute the allegations and the thrust of the lawsuits. Without a record which reflects the who, when, what, where, and how, of the inmates' care, custody, control and treatment, investigation and fact finding is thwarted, as the appropriate staff members who have the key knowledge and facts generally cannot be found, and even if known, without some written record, their memory is short lived, as it is impossible for any of us to remember all the transactions or incidents.

Just what is the documentation and how is it applicable. This material should be made and stored in the inmate's institutional file, or what is commonly referred to as his "jacket". For instance, on a suit by an inmate alleging a denial of visitation, the jacket should reflect those persons approved for visits and the reason either by the treatment team, caseworker, or visiting room officer, by memo or other record, why, when, and who, and by whom a visit was denied.

On a complaint by an inmate that he is to be inappropriately transferred, the treatment team or classification team's record should indicate the why, when, where, and the transfer and the decision makers. On a suit alleging denial of due process or justification on a disciplinary action, the disciplinary team record, findings, and charge must be made a part of the "jacket".

On each actual denial or incident there must be a record by the staff. Only in those alleged incidents of complete fabrications should the record be silent.

It cannot be overemphasized that as administrators it is imperative the staff not only make written records as to specific factual actions, but also be attuned to anticipating the situation that will generate legal action with records made on those occasions. Legal action can be anticiapted in many situations; i.e., a forceable move of an inmate to segregation, or at the time of any physical injury an inmate may suffer, or any confrontation between an inmate and another. Such incidents must be recorded with basic information of who, what, when, where, and why, but also the parties present and available as witnesses and for information.

Once the documentation available has been examined, then contact with those staff members involved in the matter must be made. Generally, a written statement or an affidavit is first procured. In many instances, depending upon the type of suit and procedure involved, the original documentation relative to the matter is sufficient for the attorney representing the institution to make the initial response. However, it is better practice to discuss with the employee or staff member his statement to insure its accuracy prior to the case of the facts in any answer or response, as the wording of his statement may be misleading of the true meaning and additional information can generally be elicited.

In any litigation prior to testimony the witness must be interviewed. This establishes rapport between the witness and the attorney as well as to inform the witness as to what he may expect in the court room. Most people are rightfully concerned and many fearful of being a witness. It is the attorney's job to explain, inform and prepare the witness for

testifying and ally his fears, if any. The attorney can also emphasize to the witness the importance of his testimony, and particularly the facts critical to the case. Also, his demeanor, his dress, and the anticipated questions from cross-exam should be discussed.

All the witnesses should be interviewed separately and then together in a group. The group discussion will usually elicit more information and facts than the individual interview, as well as refresh the memory of each witness, and combine them in a joint effort. It should be pointed out to the witness that he can anticipate a question of whether he discussed the facts with anyone else and should answer affirmatively, but that his testimony is his own and not that of another.

My experience has been that inmate testimony cannot usually be utilized since it will place the inmate in jeopardy. Further, the anticipated testimony is rarely the testimony as recorded in court.

Finally, it must be determined that the facts are in accordance with the rules and policy of the institution. As in most organizations, the policy and rules are not only voluminous, but are subject to the interpretation placed thereon. Therefore, it is necessary to have an administrator available at trial to explain the actual meaning and application of the rules, and a prior interview with him, if there is a misunderstanding as to the meaning of the policy. Further, it should be determined that there is no other conflicting written policy with the policy being applied to the issue. It has been my misfortune to find such occurrence during the progress of trial.

On the initial interview with staff as to the available policy and meaning, the reason or justification, or purpose of the policy must be discussed unless same is self-evident as it is the attorney's job to justify

the actions under the policy in relation to established legal principle, or to establish a new principle, if no prior precedent in the field. In many instances the administrator can explain not only the reason for the policy, but convincingly demonstrate by their experience the hazards to the operation of an institution without such policy.

The operation of the institution should also insure that the policy is known to the inmate, particularly if he is to be disciplined for failure to follow same, and that written policy is available to him.

It is the lawyer's job to insure that the policy prescribes to the law of the jurisdiction in which the policy is in force. If there is a conflict, then he must adequately explain and aid the administrator in revision of same. Policy is really nothing more than what the court requires the correctional administrator to perform in the care, treatment and custody of an inmate, or what the administrator believes and can justify why it should be.

In sum, we have said that the basic principles are:

1. Determine the issue or issues involved in the suit.
2. Determine the true facts of the issues.
3. Determine the policy applicable thereto.

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