

## Pace Law Review

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Volume 24

Issue 2 Spring 2004

*Prison Reform Revisited: The Unfinished Agenda*

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Article 14

April 2004

# A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs

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### Recommended Citation

Alphonse A. Gerhardstein, *A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs*, 24 Pace L. Rev. 691 (2004)

Available at: <http://digitalcommons.pace.edu/plr/vol24/iss2/14>

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# A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs\*

Alphonse A. Gerhardstein†

## I. Introduction

This article is designed to serve as a practice guide for those representing prisoners in civil rights jury trials. In the past, the vast majority of prisoner litigation, including cases pursued by this author, focused on injunctive relief to improve conditions of confinement and we therefore did bench trials. However, the 1996 Prison Litigation Reform Act (PLRA)<sup>1</sup> has changed our focus. As will be explained, the PLRA forces prac-

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\* The author wishes to thank Jennifer Branch of Laufman & Gerhardstein and Carrie Wood an intern at the Prison Reform Advocacy Center for her assistance with the preparation of the text.

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Mr. Gerhardstein founded and serves as President of the Board of the Prison Reform Advocacy Center (PRAC), a non-profit public interest legal center promoting criminal justice reform, safe correctional settings, empowerment of women and rehabilitation as an alternative to extended prison terms. He serves on the Editorial Board of the *Correctional Law Reporter* and has contributed several articles to that journal on prisoner litigation and law. Mr. Gerhardstein is a frequent speaker on civil rights and prison reform.

1. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

tioners to sue for substantial damages.<sup>2</sup> This article should help a prisoner-plaintiff's attorneys do just that. From case selection through verdict, I provide guidance on the practical and legal aspects of prisoner representation.

In the first part of this article we will address case and client selection. We will then work backward from our desired verdict. Litigators must stay focused on the result that they want. They must know what question the jury will be answering and go about advocating for the right answer. Therefore, this article is largely organized backward from the verdict, similar to the manner in which you would prepare for trial.

## II. Trying Prisoner Cases to Win

### A. *Client Selection, Case Selection and Discovery*

Jurors hate prisoners. Most are shocked to learn that prisoners have the right to sue corrections officials and even more shocked to learn that they will be asked to award damages to those prisoners. If the prisoner has a long record of assaults while in prison, has thrown human waste at officers or has attempted escapes, and if counsel cannot keep these prior "bad acts" out of evidence, this prisoner may be a challenging plaintiff in a civil rights case. But, even the most obnoxious prisoner can be a winning plaintiff if the case is presented well and the need for professionalism and law abiding conduct by the defendants is thoroughly established.

In order for the prisoner-plaintiff's attorney to accurately assess the prospects for success thorough fact investigation and research should precede a formal retainer. A simple checklist of prefilng activities that should be undertaken in most cases includes:

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2. See *infra* Part II.K.

## New Prisoner Case Checklist

Name: \_\_\_\_\_  
 Current Prison: \_\_\_\_\_  
 Date of event: \_\_\_\_\_

Number: \_\_\_\_\_  
 Former Prison: \_\_\_\_\_  
 Statute of Limit Deadline: \_\_\_\_\_

### To Do

- 1. Send the client a questionnaire.
- 2. Obtain a medical release from the client.
- 3. Request medical records from the prison(s) and any outside hospital(s).
- 4. Obtain public portions of the client and witness (discipline) file from the prison(s).
- 5. Interview the client by telephone, for a brief assessment of the case.
- 6. Obtain all paperwork that the client has related to:
  - a. Grievances;
  - b. Kites;
  - c. Medical forms; and
  - d. Computer information.
- 7. Determine if the client has any outstanding restitution orders or unpaid filing fees etc., that might be deducted from a verdict<sup>3</sup> and advise the client.
- 8. Interview family members by telephone (someone who knows the facts and can testify to humanize the client).
- 9. Interview any outside witnesses by telephone.
- 10. Grievances:
  - a. Was one filed?
  - b. Appealed?
  - c. Get the paper trail.
- 11. Send an investigation only retainer.
- 12. Write to prisoner witnesses and notify them that you will be interviewing them (if you request a written version of events will it be discoverable or remain work product?).
- 13. Call the state patrol trooper (if the incident was investigated) and chat.
- 14. Obtain the state patrol file (after the criminal investigation is over) and request photos.
- 15. Request personnel records on all personnel involved in the incident.
- 16. Visit and interview the client, decide whether to accept the case and sign a retainer.
- 17. If the prisoner is deceased an estate may need to be opened; some probate courts will authorize subpoenas for prisoner files and other records that could assist with an investigation of a potential claim.

All issues arising under the PLRA must be identified and addressed before the case can move forward.<sup>4</sup> The PLRA is mainly codified at 42 U.S.C. § 1997e and 28 U.S.C. § 1915, but additional requirements are codified at 18 U.S.C. § 3626 and 28

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3. See 18 U.S.C. § 3682 (1986).

4. In this section I will simply summarize the law since there are already several excellent and comprehensive materials available to help the practitioner with compliance.

U.S.C. § 1914. The PLRA was designed to reduce prisoner litigation and it has certainly been effective. Unfortunately, among those cases dismissed under the PLRA many have been meritorious.<sup>5</sup>

The requirement that a prisoner exhaust administrative remedies, under § 1997e(a), has been the most daunting for prisoner complaints since the passage of the PLRA.<sup>6</sup> A prisoner must fully exhaust *all* administrative remedies though the prison's grievance system before proceeding as a plaintiff in a lawsuit.<sup>7</sup> Typically, this requires securing a decision from the chief inspector or the decision maker who hears the last administrative appeal.<sup>8</sup>

If a prisoner has three or more prior lawsuits dismissed as "frivolous, malicious, or [for] fail[ure] to state a claim," that prisoner is not allowed to file another lawsuit or appeal a judgment in a civil action unless the prisoner "is under imminent danger of serious physical injury."<sup>9</sup> The court, "notwithstanding any filing fee,"<sup>10</sup> may dismiss the action or appeal if it is "frivolous or malicious . . . fails to state a claim on which relief can be granted" or if it "seeks monetary relief against a defendant who is immune from such relief."<sup>11</sup> A prisoner cannot bring a claim for mental or emotional injury suffered while in prison without first proving physical injury.<sup>12</sup>

There are also limitations on attorney fees.<sup>13</sup> A portion of the damage award must be used to pay the prisoner-plaintiff's

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5. See, e.g., *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003) (holding that the prisoner failed to exhaust his administrative remedies under the PLRA by failing to name the observing officers in the grievance).

6. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1628 (2003).

7. See, e.g., MASS. GEN. LAWS ch. 127, § 38E (2002); OHIO REV. CODE ANN. § 2969.26 (Anderson 2004); TENN. CODE ANN. § 41-21-817 (2004); TEX. GOV'T CODE ANN. § 501.008 (Vernon 2004); ARIZ. DEP'T OF CORR., DEPARTMENT ORDER MANUAL, DEPARTMENT ORDER 802 (2000) (detailing the procedures involved in Arizona's "Inmate Grievance System") [hereinafter ORDER MANUAL]; see also *supra* note 5.

8. *But see Boyd v. Corr. Corp. of Am.*, 2004 FED App. 0299P (6th Cir.) (failure of prison administrator to timely respond to grievance accepted as compliance with exhaustion requirement).

9. 28 U.S.C. § 1915(g) (2004).

10. *Id.* § 1915(e)(2).

11. *Id.* § 1915(e)(2)(B)(i)-(iii).

12. 42 U.S.C. § 1997e(e) (2004).

13. See *infra* Part II.L.

attorney fees.<sup>14</sup> The damage award is also subject to any debt or restitution payments that the prisoner might owe.<sup>15</sup> Additionally, if the judgment is against the prisoner, the court can require that prisoner to pay costs, regardless of his or her financial status.<sup>16</sup>

In addition to the PLRA, plaintiff's counsel must also understand and properly apply prisoner rights law and basic § 1983 principles.<sup>17</sup> Defendants must be identified based on investigation and legal research. Limit the number of defendants. Each defendant adds a greater burden with no increase in compensatory damages.<sup>18</sup> Similarly, claims should be reduced to those which are necessary. Redundant claims, with confusing, overlapping jury instructions covering the same conduct can backfire. At the same time a plaintiff does not want an "empty chair" across the well—a clearly culpable, missing defendant. Make sure there is solid evidence against each defendant supporting each claim and dismiss any defendants that do not meet this test.

A case plan should be drafted that sets out the necessary discovery. Depositions should be pursued with a clear idea of the theory of the case. As set out below, much of the trial presentation involves testimony from prison officials.<sup>19</sup> The deposition transcripts are crucial tools in maintaining witness control. Now we are ready to plan the trial itself.

### B. *The Final Pretrial Conference*

The final pretrial conference typically results in the approval of the final pretrial statement which has been prepared jointly by the parties. In one portion the plaintiff is invited to provide a short statement of the claim. This statement is often read to the jury during the voir dire and again as part of the jury instructions. The statement should use short, simple sentences and convey the core of the case.

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14. 42 U.S.C. § 1997e(d)(2).

15. *See* 18 U.S.C. § 3626 (2004).

16. 28 U.S.C. § 1915(f)(2).

17. While this article focuses on trial practice and not substantive law, a clear understanding of prisoners' rights law and of § 1983 is essential to success.

18. *See Weeks v. Chaboudy*, 984 F.2d 185, 189 (6th Cir. 1993) (liability for compensatory damages is joint and several in a § 1983 prisoner case).

19. *See infra* Part II.H.

The joint final pretrial statement also lists the uncontroverted facts. These are often read to the jury as stipulations and deserve careful attention. They offer the prisoner-plaintiff an opportunity to set out facts which will prepare the jury to focus on the real issues of the case. Remember, jurors are skeptical of prisoner claims. It is very helpful to learn that on February 24th the prisoner was escorted by the defendant correctional officers, the prisoner was in restraints, force was used on the prisoner and the prisoner suffered a broken arm. Such stipulations reassure the jury that the defendants did cause harm to the plaintiff and focus their attention on the need for and degree of force. Stipulations eliminate any notion that the prisoner fabricated the entire story.

The final pretrial conference should be used to clarify:

- The level of inquiry that will be permitted at *voire dire*.
- When drafts of the jury instructions and the verdict form will be due from the parties.
- The schedule that will be set for motions in limine.
- The security provisions that will be needed for prisoner witnesses.
- What, if any, "cross-examination" will the court permit if plaintiff calls correction employee witnesses as hostile witnesses during the plaintiff's case in chief.
- The questioning that the court will permit regarding the prisoner-plaintiff's criminal background.

### C. *The Verdict Form*

In a jury trial everything comes down to how the jury completes the verdict form. Counsel therefore must think backwards from that point. All decisions, from defendant selection to witness order, should reflect a course of action most likely to result in a successful verdict. Questions on the verdict form should be simple and undiluted with legal baggage.<sup>20</sup> Save all legalese for the jury instructions.

Plaintiffs must have their burden of proof described with utmost simplicity, so that a juror who believes that a guard beat

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20. For example ask, "Did the defendant Ashcroft use excessive force on the plaintiff?" *not* "Did the plaintiff prove by a preponderance of the evidence that the defendant Ashcroft engaged in acts constituting cruel and unusual punishment under the Eighth Amendment of the United States Constitution?"

the prisoner-plaintiff can see immediately what must be done on the verdict form. There is no need, or obligation, to repeat all of the definitions, cautions and barriers that the juror waded through in the jury instructions. Plaintiff's counsel should argue that any such attempt is necessarily incomplete, and gives undue weight to the partial instructions the defendants seek to repeat on the jury form. Jurors need punch lines. Simple questions that sum up the critical points for determining liability against each defendant. As you can see, advocating for a simple verdict form is extremely important.

#### D. *Jury Instructions*

Plaintiffs should focus on the critical civil rights issues in the case and make sure that the jury instructions on those issues can be applied to the proof that will be presented to support a verdict.

##### **Jury Instructions For A Prisoner Case All Persons Equal Before The Law**

The fact that the plaintiff is a prisoner and that the defendant is a state official must not enter into or affect your verdict. "This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons[, including prisoners and state officials,] stand equal before the law and are to be treated as equals"<sup>21</sup> in a court of justice.

##### **Credibility of Witnesses**

I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

"You, as jurors, are the sole and exclusive judges of the credibility [or 'believability'] of each of the witnesses . . . and only you determine the . . . weight [to be given to each witness' testimony]."<sup>22</sup> In weighing the testimony of a witness you should consider the witness' relationship to the plaintiff or to the defendant; the witness' interest, if any, in the outcome of the case; his or her manner of testifying; the witness' opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the wit-

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21. KEVIN O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS CIVIL § 103.11 (5th ed. 2000).

22. *Id.* at § 15.01.



ness' candor, fairness, and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.<sup>23</sup>

The fact that a witness comes before you as a correctional official should not affect the way you judge his or her credibility. Such testimony does not deserve either greater or lesser believability simply because of the official status of a witness. Similarly, the fact that a witness is or was a prisoner does not automatically suggest that less weight be given to that testimony. Whether or not you believe a witness must be determined from his or her testimony, not his or her occupation or status outside the courtroom. You should form your own conclusions as to whether or not a witness is believable.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.<sup>24</sup>

#### 42 U.S.C. § 1983

The plaintiff has asserted his claims under a federal law, 42 U.S.C. § 1983. "Section 1983 . . . provides that a person may seek relief in this court by way of damages against any persons or persons who, under color of any state law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."<sup>25</sup>

In this case the defendant acted under color of state law.

#### Obligation to Protect Prisoners<sup>26</sup>

State actors are obligated to protect those whom the state government is punishing by incarceration from know risks of serious physical harm. A prisoner must rely on prison authorities for such protection because he is not free to protect himself from all potential harms. Failure to protect a prisoner from such risks constitutes cruel and unusual punishment and is proscribed by the Eight Amendment.

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23. *See id.*

24. *Id.* at § 14.16.

25. *Id.* at § 165.10.

26. *See generally* O'MALLEY ET AL., *supra* note 20, at § 166.20.

### Failure to Protect<sup>27</sup>

The Eighth Amendment to the United States Constitution imposes upon prison officials an affirmative obligation to protect prisoners from being assaulted by other prisoners. A prison official's deliberate indifference to the safety of a prison inmate constitutes cruel and unusual punishment.

Deliberate indifference requires something more than mere negligence. It is a recklessness standard. That is, the plaintiff need not "show that the [prison] official acted or failed to act believing that harm actually would befall an inmate; it is sufficient that the official acted or failed to act despite the official's knowledge of a substantial risk of harm."<sup>28</sup>

To find the defendant liable in this case, you must first find that the defendant knew of a substantial risk of harm to Plaintiff's health or safety and disregarded that risk. You may infer that the risk was known if you find that the risk was obvious.

Second, to find a defendant liable, you must find that given all of the facts known to the defendant, that the defendant's conduct was not a reasonable response to the risk of harm.

A prison official who knows that a prisoner is at risk of harm from another prisoner but does not take reasonable steps to guarantee the safety of that prisoner will thus be held liable to the prisoner even though the official did not actually strike blows or otherwise commit acts against the prisoner.

### Excessive Force Defined<sup>29</sup>

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments"<sup>30</sup> shall not be inflicted.

Plaintiff claims that he was subjected to excessive force or cruel and unusual punishment while he was incarcerated at [prison]. The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments"<sup>31</sup> upon prisoners.

To prevail on an excessive force claim, plaintiff must prove by a preponderance of the evidence that one or all defendants applied force to him maliciously and sadistically for the purpose of causing harm rather than in a good faith effort to maintain or restore

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27. See generally *id.* at § 166.

28. *Id.*

29. See generally *id.* at § 166.23.

30. U.S. CONST. amend. VIII.

31. *Id.*

discipline. Plaintiff need not show that he suffered a significant physical or mental injury for you to find he suffered cruel and unusual punishment.

You should consider the following factors in making this determination:

- a. The need for the application of force;
- b. The relationship between the need and amount of force used;
- c. The extent of the threat to the safety of staff and prisoners as reasonable perceived by the responsible officials on the basis of facts known to them; and
- d. Any efforts made to limit the amount of force.

### E. *Jury Selection*

Jurors are taxpayers, voters, victims of crime and often next of kin or friends of law enforcement officers. Jurors are challenged by a legal system that would award a prisoner damages when the victim of the prisoner's crime may never be compensated for the brutality of that prisoner. Jurors likely have bought into the "tough-on-crime" agenda. Equally important, most jurors are white and far too many prisoners are black.<sup>32</sup> Because of these realities, jury selection is the most important aspect of the trial.

Plaintiff's counsel must seek an opportunity to question jurors. No amount of canned questions posed by the court can replace the role of counsel in exposing bias; jury panel members always assure the court that they will be fair. Counsel-directed voir dire can be effective at exposing bias, establishing challenges for cause<sup>33</sup> and identifying jurors that are actually willing to be fair to the plaintiff. The prisoner's crimes that are going to be revealed during trial should be named during the voir dire. Prospective jurors should be asked questions that will expose those who harbor prejudices too deep to overcome and reveal those jurors who are truly open to following the instructions of the court. What follows is an outline of a voir dire in

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32. See DENNIS SCHRANTZ & JERRY McELROY, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (Jenni Gains Borough & Marc Mauer eds., 2000), available at <http://www.sentencingproject.org/pubs-08.cfm>.

33. The author has been involved in jury selections that have resulted in one-third of the panel being excused for cause.

which the plaintiff Jane Doe, a transsexual, was attacked by another prisoner. The defendants, officials in a protective custody unit, were sued for failure to protect<sup>34</sup>:

### Voir Dire For A Prisoner Case

#### Law Enforcement

**Attorney:** I see that several of you have been in law enforcement jobs or have relatives who are police officers, prison guards or prison staff, probation or parole officers.

**Q:** Mr. X, you have worked as a teacher for Ohio Department of Youth Services (DYS)—you are aware of instances when managing prisoners can be difficult, correct?

**Q:** You work with a security staff, who keep order?

**Q:** Security staff must protect civilian staff like teachers?

**Q:** Security staff must also protect prisoners from other prisoners?

**Q:** Did you have any positive experiences with DYS prisoners?

**Q:** Did you have any negative experiences?

**Q:** You have had no prior experiences with Ms. Doe?

**Q:** Now, can you set that experience aside—approach this with open mind?

**Q:** Here's what I mean by that. The judge will instruct you that all people are equal under the law. This means that no one is assumed to be telling the truth just because he wears a uniform or a badge. Can you set aside your tough experiences with convicts and follow that instruction? When you hear facts from officers can you give their testimony *no more or no less weight* simply because they are officers?

#### Victim of the Crime

**Attorney:** Many of you have also been the victim of a crime.

**Q:** Mr. X, tell us briefly what happened?

[*Get the facts*]

**Q:** Frightening?

**Q:** You felt violated?

**Q:** You probably remember those events often?

**Q:** Think about it when you're in unfamiliar settings?

**Q:** It would be normal to do that; to still be angry about it.

**Q:** You still have feelings about it?

**Q:** The person who committed that crime was not Jane Doe?

**Q:** What I will ask you is not easy. Can you honestly set aside that awful experience and listen to Jane Doe testify without bringing that terrible episode to mind?

#### Convicts Can Sue

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34. Doe v. Bowles, 254 F.3d 617 (6th Cir. 2001).

**Attorney:** Members of the panel, in this case a former convict is suing two prison staff members for failing to protect her. That is, she claims that the defendants failed to protect her from an assault by another prisoner. Does anyone have a problem; is anyone uneasy with the idea that a convict can even do this—come into court and make such accusations against her jailers?

**Q:** Does it bother anyone that such cases can even be heard?

**Q:** Does anyone feel that it is a waste of your time to hear this type of case?

**Q:** Now, if the judge tells you that Jane Doe has a right to be in this court and a right to make these allegations, will you follow the law and serve on this case with an open mind?

### **Plaintiff Criminal Record**

**Attorney:** I will also tell you that this former convict—Jane Doe—is not just any convict. You will learn that she was serving time from 1993 to 1997. She has been a free, employed citizen for over *four* years. But, previously, she was serving time in Ohio for felonious assault, misuse of a credit card, forgery, and receiving stolen property. You will also learn that, in 1997, she served several months in Arizona for two counts of forgery, and that she was on probation for fraud and theft in Colorado in 1992. You will learn that she has used other names—aliases—in the commission of some of these crimes.

**Q:** How many of you are troubled by that criminal record?

**Q:** That's natural. Will that natural feeling of disgust make it hard for you to accept that Jane Doe has a right to use the courts to pursue these claims that her civil rights were violated?

**Q:** And what if you do believe that the defendants failed to protect Doe, will any disgust at ex-convict Doe for all of these crimes keep you from following the law and ruling in her favor? I mean, is this just too great a stretch for you?

### **Comfort with Different People**

**Attorney:** If you had a choice of where you could work and live—assuming equal safety, income etc.,—and one choice was a community of people that shared your religion, lifestyle and values, and the other choice had people who were *law abiding* but they were different—people who did not share your religion, lifestyle and values; so one community where people are basically the same and the other community where people are different.

**Q:** How many would choose to live and work in the community where religion, lifestyle and values were shared?

[*Show of hands*]

**Q:** How many would choose to live and work in the community where the members followed the law but where religion, lifestyle and values were not shared?

[*Show of hands*]

**Q:** How many do not know?

[*Show of hands*]

### **Gender, Sexual Orientation and Perceptions**

**Attorney:** This case raises sensitive issues about gender, sexual orientation and perceptions. Some people believe that everyone is born heterosexual and that people should not mess with their sexual identity—these individuals would have personal objections to those who do not live a standard heterosexual lifestyle. *Not judging*, but many people base this view on religious or other beliefs. We can do this at the sidebar if necessary because I really want to respect your privacy on sensitive matters, but I would like to start with the people in the jury and ask you to rate yourself on a one to five scale. One being accepting of any sex orientation; tolerant, no problem in interacting with folks who are gay, lesbian, bisexual or transgendered (G/L/B/T). Five being that you really cannot accept people who claim not to be heterosexual or who do not act heterosexual. If you are a five that's ok—do not feel bad—this is what jury selection is about, trying to determine if the facts in the case will push out of your comfort zone. So one—accepting of any sexual orientation, no problems with a person just because they are G/L/B/T, to five—really cannot accept people who claim not to be heterosexual or who do not act heterosexual.

**Q:** Juror X, you rated yourself as a five. If the law did not permit discrimination against people based on whether they were G/L/B/T and you had to apply that law, as a juror would that push you so far away from your own beliefs that you could not follow the law?

**Q:** Is this too much of a stretch for anyone else?

#### **Transsexual**

**Attorney:** You will learn that Jane Doe was born a biological male but had undergone a partial gender transformation from male to female prior to her arrest. So Jane Doe is a transsexual—it's like being born into the wrong skin—physically one sex but emotionally the other.

**Q:** Does anyone personally know a transsexual?

**Q:** Does anything about your experience with that transsexual make it hard for you to be fair and impartial?

**Q:** Has anyone seen a transsexual portrayed in a play, movie or show?

**Q:** Can you separate what you learned there?

**Q:** There is a CBS television show on Sunday Night—*The Education of Max Bickford*.<sup>35</sup> One of the characters is a male who underwent sex reassignment surgery to become a female. The lead character has been friends with the transsexual both before and after her gender reassignment and has a positive relationship with her. Is anyone familiar with the show?

**Q:** Is there anything about the way the transsexual character is portrayed on that show that makes it hard for you to be fair and impartial in this case?

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35. *The Education of Max Bickford* (CBS 2001).

**Q:** Jane Doe was in the protective custody unit at the prison because she had some female characteristics—she was female from the waste up and male from the waste down. Does the fact that Doe was a transsexual when she was in need of protection in prison—does that fact in and of itself—make it hard for you to approach the case with an open mind?

**Q:** Is this too weird?

**Q:** Too difficult to approach without overcoming some negative feelings you may have against convicts or transsexuals? I mean, this is a lot to absorb and we haven't even told you what the proof is!

#### **G/L/B/T and Ex-offender Experience**

**Attorney:** Does anyone know any people who are G/L/B/T?

**Q:** Is there anything about an experience with that person that makes it hard to be fair in this case?

**Q:** Does anyone know any people who are ex-offenders, people who have been incarcerated in prison?

**Q:** Anything about an experience with that person that makes it hard to be fair in this case?

#### **Conclusion**

**Attorney:** Okay, there's more. This is not just a swearing match between a former convict and law enforcement officers. The judge will instruct you that the Eighth Amendment to the United States Constitution prevents prison staff from inflicting cruel and unusual punishment on prisoners and that it requires staff to protect prisoners. If you hear all of the evidence and law in this case and decide based on the evidence and law that the former convict should win and that the prison staff members did fail to protect the prisoner will you be open to awarding money damages to the prisoner as compensation for her injuries?

**Q:** Or is that just too much? Money damages to a person who committed so many crimes? Money damages to a person who entered prison as a transsexual? Can you clear your mind enough and accept as a jury the duty to be open to that result? Or does that just push you too far? Please raise your hands if I am asking too much of you  
[*Show of hands*]

There is no script for an effective voir dire. The key is to establish rapport with the jury and to make them respond honestly. Once a jury is empanelled the focus turns to the actual testimony, telling the story effectively.

### **G. Trial Presentation: Tell an Honest Tale**

#### **i. Excessive Force**

Each case has its own story and the presentation theme must arise from that story. Some general comments are appro-

priate based on the type of claim. In excessive force cases the plaintiff must prove actions that are "malicious[] and sadistic[.]"<sup>36</sup> In reality the officer probably acts appropriately 99% of the time. On the day in question, the officer "went-off," "snapped," or otherwise acted out. Obviously a pattern of similar conduct will help to tell the story, but even a single incident can result in a verdict if the story is relayed in a manner that answers all of the obvious questions. What triggered the incident? What portion of the force was excessive? Does the medical proof confirm the story? Was the matter supposed to be videotaped but was not? Was the officer disciplined?

A typical excessive force case involves an incident provoked by the prisoner. For example, the prisoner is using abusive language toward the escort officer who decides to retaliate with force rather than to simply write a disciplinary ticket. Officers may feel that the disciplinary process is too slow or too lenient and they may occasionally "supplement" formal discipline with an "attitude adjustment" for a prisoner who acts out against the officer. In such a case the prisoner should testify fully. He should agree that he was indeed speaking disrespectfully and that he deserved a ticket and discipline for his act. He was in restraints and did not "head-butt" or use force. The video and/or medical reports do not support the story of the officer. The point is not to pretend that all prisoners are angels and all officers are evil. The plaintiff need only prove that at that time and place excessive force was used. That burden is most easily met if accurate stories that reflect the true prison environment are forth for the jury.

## ii. *Medical Claims and Failure to Protect*

Allegations that defendants denied a prisoner adequate medical care or failed to protect the prisoner do not require proof of evil, sadistic or malicious conduct. Rather, plaintiff will prevail if the defendant was deliberately indifferent to the serious medical<sup>37</sup> or security<sup>38</sup> needs of the plaintiff. The legal standard is lower, but as a practical matter these cases are more

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36. *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

37. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

38. See *Farmer v. Brennan*, 511 U.S. 825, 830-32 (1970).



difficult to win. The defendant typically does not cause the harm, but rather just does not do his job well enough. The defendant may be an overworked doctor; a staff member supervising an overcrowded block; or an onlooker who saw the violation but failed to act quickly. The jury must not be promised evil. The presentation must anticipate the instruction<sup>39</sup>—focusing on the seriousness of the risk; the obviousness of the risk; the alternative courses of action that were open; the decision to proceed with a course of action that ended with predictable injury. The defendant is a trained professional, when he acts causing injury in the face of an obvious risk that makes him liable.

In many failure to protect cases the defendant argues he had no knowledge of the risk of harm. Therefore, the focus at trial is to prove the obviousness of the risk.<sup>40</sup> However, when the defendant admits knowledge of the risk the focus at trial is on the response by that defendant. Here you may be able to demonstrate that the actions taken actually increased the risk of harm.

In deliberate indifference cases it is often helpful to have expert testimony. A classification expert can reassure the jury that housing an assaultive prisoner with the plaintiff violates all reasonable standards. A medical expert can similarly explain that the defendant acted beyond all reasonable boundaries for the delivery of medical care.

## H. *Witness Order, Topics*

### i. *Prison 101*

The walls that keep prisoners in, keep others out. Prison for most people is a foreign place, known only from various media presentations. Prisons appear to be dark structures where prisoners are expected to fend for themselves. Most jurors expect that violence is common and deprivations routine. Jurors need to learn from corrections witnesses that prisons are expected to be safe; that staff is professional and that policies, procedures and routines govern all activities which are recorded on contemporaneous logs and reports and, at times, on video. Only

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39. See generally O'MALLEY ET AL., *supra* note 20, at § 166; see also *supra* note 19 and accompanying text.

40. See *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994).

by learning the norm may jurors appreciate the deviation related to the incident portrayed in the trial.

The first witness, therefore, is typically a relatively neutral corrections employee whose questions and answers result in a "Prison 101" course for the jury. Terms, procedures, equipment, post orders and the like will all be quickly explained and then used when framing the important facts leading up to the violation of the prisoners rights. It is often effective to show a video of the scene and have the first witness narrate that video.

### ii. *Calling Defendants as Hostile Witnesses*

It may also be very effective to call the defendant during the plaintiff's case, as if on cross-examination<sup>41</sup>. This examination should be carefully scripted and thoroughly anchored in the deposition transcript. It should commence with a review of the defendant's conduct as it should have occurred based on post orders or other policies and it should move to challenge the defendant on the core facts of the case. At the final pretrial conference ask the judge to require that direct examination be delayed until the defendant's case, thus allowing your story into evidence without interruption.

### iii. *Plaintiff and Other Prisoner Witnesses*

Counsel should aggressively argue to present the prisoner-plaintiff live, in court. The plaintiff should also be present during the entire trial, including the voir dire. Some practitioners seek to have the client dressed in street clothes, provided at the courthouse and worn at all times the prisoner is in the presence of the jury. It is enough that the client is in clean clothes that fit appropriately. If some restraints are required a black box is less noticeable than handcuffs.<sup>42</sup> If at all possible the client

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41. FED. R. EVID. 611(c) permits the court to authorize the examination of a hostile witness by leading questions.

42. Several cases have addressed the issue of restraining the civil prisoner-plaintiff. The courts look first to whether the prisoner-plaintiff's history deems restraint necessary and, if so, if the restraints would be unduly prejudicial given the nature of the case or the role credibility would play in its outcome. The decision must be one made by the court; it is impermissible for the court to delegate its authority to the security personnel or to the court marshals. If restraints are found necessary the court should still use the least restrictive restraints and take steps to further minimize any prejudicial effect, including instructions to the jury.

should be permitted to attend the trial without restraints. This should be resolved at the final pretrial conference. Similarly, at the final pretrial conference the court should direct that the prisoner be housed close enough to the courthouse to avoid exhaustion during trial.

Testimony from the plaintiff should flow easily. This is worth as many pretrial trips to the prison as it takes to get it right. Give the client his deposition testimony and all of the statements he has given during any investigations. Practice cross-examination. The story should not change but the prisoner should relate the story in terms the jury can follow and free of all expletives. If the criminal record will come into evidence it, and any inappropriate conduct by the prisoner on the day in question, should all be brought out on direct, demonstrating that the plaintiff has nothing to hide. Some prisoners claim to remember the sequence of each blow and kick in excessive force cases. Even if true, such testimony is rarely credible to juries. It is better practice to simply have the prisoner state, for example, that he was repeatedly kicked and punched. Injuries should not be overstated but it is important to present injury testimony so that the jury has some sense of what the beating or other harm was like. If the juror can visualize the events, the prospects for damages for pain, suffering and mental anguish are more likely.

Use as few prisoner witnesses as possible. Prisoner witnesses may be subject to some level of cross-examination about their crimes, under the Federal Rules of Evidence (Federal Rules),<sup>43</sup> which can be a distraction to the jury. Many prisoner witnesses also have discipline records that may be admissible under the Federal Rules.<sup>44</sup> It is simply more persuasive to prove the case primarily through prison records, the absence of expected prison records and corrections officials.

Nonetheless, a prisoner witness often is needed to offer crucial facts. Under the PLRA a federal judge may permit prisoner

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See *Illinois v. Allen*, 397 U.S. 337 (1970); see also *Davidson v. Riley*, 44 F.3d 1118, 122-23 (2d Cir. 1995); *Woods v. Thieret*, 5 F.3d 244, 247-48 (7th Cir. 1993); *Lemon v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993); *Holloway v. Alexander*, 957 F.2d 529, 530 (8th Cir. 1992).

43. See FED. R. EVID. 609.

44. See FED. R. EVID. 404(b); see also *infra* Part II.I.ii.

testimony to be presented by trial deposition.<sup>45</sup> Many prisons have teleconference equipment available for their medical specialty consultations. That same equipment may be available for real-time trial testimony. If the prisoner testifies live the court should set the ground rules. Counsel should make sure that the prisoner is dressed in clean, pressed prison blues and not in some baggy coveralls. Male witnesses should be permitted to shave and all witnesses should be permitted a timely shower. Transport should be set so as not to have the prisoner awake from 2:00 a.m. for testimony at 3:00 p.m. These matters should be discussed at the final pretrial conference and, if necessary, addressed in the writ of habeas corpus ad testificandum. Prisoner testimony should be short and focused directly on the matter for which their testimony is needed. In a beating case, testimony from a prisoner eye witness may be as brief as ten minutes. One technique for enhancing the credibility of prisoner witnesses is to use witnesses that were relied upon by the state in disciplinary proceedings and, if possible, make this fact known to the jury.

### I. *Admissibility of a Prisoner's Criminal Record and Other Bad Acts*

When the plaintiff or witness is a prisoner most judges will allow the criminal conviction leading to incarceration to be admitted into evidence. The best practice is simply to get a stipulation or ruling on exactly what will be permitted. Typically the type of crime and the sentence imposed are admitted. Permitting the defendant to explore the details of the crime would be very prejudicial and is not generally permitted.

#### i. *Criminal Record of the Prisoner-Plaintiff*

The use of the criminal record for impeachment of a witness, other than the accused, is subject to a weighing of the probative value versus its prejudicial effect.<sup>46</sup> Conduct more than

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45. See 42 U.S.C. §1997e (f)(1) (2004).

46. See FED. R. EVID. 609. After the 1990 amendment to Rule 609 evidence that a witness, other than the accused, has been convicted of a crime shall be subject to FED. R. EVID. 403. Prior to the 1990 amendment, prejudice to the defendant was the only consideration and a civil plaintiff's felony record was compelled. Compare *Earl v. Denny's, Inc.*, No. 01-C5182, 2002 U.S. Dist. LEXIS 24066, 2002

ten years old is rarely admitted for impeachment purposes, except for under extraordinary circumstances.<sup>47</sup> Even if within the ten period, the plaintiff's criminal record cannot be used for impeachment purposes if the potential for prejudice substantially outweighs its probative value under Federal Rule 403.<sup>48</sup> For example, in *Lewis v. Velez*, the court excluded the prisoner-plaintiff's prior assault conviction when the present claim was one of excessive force.<sup>49</sup> The court found that the assault conviction did not relate to the elements of the excessive force claim and that admitting it was too prejudicial.<sup>50</sup> However, if the criminal record does not result in unfair prejudice, under Federal Rule 609(a)(1),<sup>51</sup> and falls within the narrow definition of those convictions listed under Federal Rule 609(a)(2),<sup>52</sup> it can be admitted for purposes of assessing credibility. In *Young v. Calhoun*, the court admitted the fact that the prisoner-plaintiff was a felon as well as the amount of time imposed through sentence.<sup>53</sup> The nature of the conviction and the details of the crime were not admitted.<sup>54</sup>

Even if prior criminal convictions are inadmissible for impeachment they can still become admissible evidence "if [they are] relevant to a material issue and if [their] probative value

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WL 31819021 (N.D. Ill. Dec. 13, 2002), with *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); see generally *Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988).

47. See *Zinman v. Black & Decker, Inc.*, 983 F.2d 431, 434 (2d Cir. 1993) (quoting S. REP. NO. 1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7062). The ten year period runs either from the date of conviction or the date of release from confinement, whichever is later. FED. R. EVID. 609(b).

48. See FED. R. EVID. 609(a)(1); see also *Miller v. Hoffman*, No. 97-7987, 1999 U.S. Dist. LEXIS 9276, 1999 WL 415402 (E.D. Penn. June 22, 1999) (specifically defining the balancing test of Federal Rule 403 in the context of Federal Rule 609).

49. *Lewis v. Velez*, 149 F.R.D. 474, 483 (S.D.N.Y. 1993).

50. *Id.*; see *Essick v. Debruyn*, No. 3: 94-CV-804RP, 1995 U.S. Dist. LEXIS 18458, 1995 WL 729313 (N.D. Ind. Nov. 22, 1995).

51. "[F]our factors when balancing probative weight and prejudicial effect under 609(a)(1): [include] 1) the nature (i.e., impeachment value) of the prior conviction; 2) the age of the conviction; 3) the importance of credibility to the underlying claim; and 4) the potential for prejudice from admitting the convictions." *Miller*, 1999 U.S. Dist. LEXIS 9276, at \*6, 1999 WL 415402, at \*2; *Daniels v. Loizzo*, 986 F. Supp. 245, 250 (S.D.N.Y. 1997).

52. This list is limited to those crimes "involv[ing] dishonesty or false statement," and is interpreted narrowly. FED. R. EVID. 609(a)(2); see *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

53. *Young v. Calhoun*, No. 85 CIV 7584 (SWK), 1995 U.S. Dist. LEXIS 4555, at \*12, 1995 WL 169020, at \* 4 (S.D.N.Y. Apr. 10, 1995).

54. *Id.*

outweighs the possibility of unfair prejudice,” per Federal Rules 401 and 403.<sup>55</sup> Under this standard, courts have allowed facts beyond that of the charge, the date and the conviction to enter the record. Although defendants cannot use these facts to shift the focus of the trial, they can use some of the facts surrounding the criminal record, under Federal Rule 401, in so much as they are relevant to elements of the claim, such as defendant’s state of mind.<sup>56</sup> The specific details of the crime should not be admitted as they are minimally relevant, especially in a cumulative presentation because it will shift the focus of the civil trial to that of re-trying the criminal case.<sup>57</sup>

ii. *Prior Bad Acts of the Prisoner-Plaintiff*

In *Huddleston v. United States*, the Supreme Court set out a test for the admissibility of prior bad acts, such as a prisoner’s disciplinary record.<sup>58</sup> While evidence “of crimes, wrongs, or acts [are] not admissible to prove the character . . . ”<sup>59</sup> or criminal propensity of a prisoner, they may be admissible to prove motive, intent or plan under Federal Rule 404(b). However, in order to be admissible for these purposes the evidence must be

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55. *Gora v. Costa*, 971 F.2d 1325, 1331 (7th Cir. 1995).

56. *Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990) (the names and ages of the victims of a sexual assault and the physical evidence found at the crime scene was allowed to show the defendants’ state of mind when using a gun to prevent plaintiff’s escape from the police station).

57. *Walker v. Mulvihill*, No. 94-1508, 1996 U.S. App. LEXIS 14397, at \*8-10, 1996 WL 200288, at \*2-4 (6th Cir. Apr. 24, 1996) (admitting repetition of the hysteria of the crime victim by four witnesses—at least one of which was not witness to the arrest—a detailed account by the victim herself, an admission by the prisoner-plaintiff of his crime and repeated details of the victim and the crime by the defense council constituted reversible error).

58. 485 U.S. 681 (1988). The Court found,

that the protection against unfair prejudice emanates . . . from four . . . sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

*Id.* at 691-92 (citations omitted).

59. FED. R. EVID. 404(b).

relevant to the factual inquiry in the case.<sup>60</sup> This applies to a prisoner-plaintiff's disciplinary records and criminal records.<sup>61</sup>

There is another relevance inquiry required by *Huddleston* that applies to a prisoner's disciplinary records in particular. This is the requirement, under Federal Rule 104(b), that a jury can "reasonably conclude the act occurred and that the [prisoner] was the actor."<sup>62</sup> This is the preponderance of the evidence standard,<sup>63</sup> and it allows for the admission of such evidence as prisoner disciplinary records or rule infraction board (RIB) files.<sup>64</sup> This evidentiary standard means that the "government must at least provide some evidence that the [prisoner] committed the prior bad act."<sup>65</sup> Prior to admission, the evidence should be subject to a balancing test, weighing its probative value against its potential prejudice to the prisoner;<sup>66</sup> the strength of the evidence is also considered in the balancing test.<sup>67</sup> Once the evidence is admitted it must be accompanied by a limiting instruction.<sup>68</sup>

The Seventh Circuit, in *Young v. Rabideau*, upheld as admissible general questions about a prisoner's past discipline in a § 1983 excessive force claim where the past discipline was probative of the plaintiff's intent.<sup>69</sup> In that case the plaintiff testified that he pointed a finger in the guard's face by accident.<sup>70</sup> The defense argued that this action was not an accident,

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60. See FED. R. EVID. 401; see also *Eng v. Scully*, 146 F.R.D. 74, 77-78 (S.D.N.Y. 1993) (a fact of consequence or relevance was the amount of force applied; plaintiff's intent or motive will not aid in this inquiry); *Lombardo v. Stone*, No. 99 Civ. 4603 (SAS), 2002 U.S. Dist. LEXIS 1267, 2002 WL 113913 (S.D.N.Y. Jan. 29, 2002) (prior assaults were excluded because offered to show propensity and the defendants were unaware of the prior assaults at the time of the incident, so they inadmissible to show state of mind; the recent assault on an aide was admissible because it went to defendants' state of mind and provided an explanation for their response).

61. *Scully*, 146 F.R.D. at 77-78.

62. 485 U.S. at 689.

63. *United States v. Ramirez*, 894 F.2d 565, 569 (2d Cir. 1990).

64. *Id.*

65. *United States v. Gonzalez*, 936 F.2d 184, 189-90 (5th Cir. 1991).

66. 485 U.S. at 691-92; see also FED. R. EVID. 403.

67. 485 U.S. at 689 n.6.

68. *Id.* at 692; *Loizzo*, 986 F. Supp. 245, 248 (S.D.N.Y. 1997) (admitting bond warrants but not the crimes for which they were issued).

69. 821 F.2d 373, 379 (7th Cir. 1987).

70. *Id.* at 377.

but rather that his actions were intended to provoke the officer and to start a fight.<sup>71</sup>

The Seventh Circuit established a four-part test for the admissibility of such prior misconduct:

[A]dmission of evidence of prior or subsequent acts will be approved if (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue . . . , (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.<sup>72</sup>

The court found that "admission of past misconduct is proper when presented in rebuttal to [the prisoner-plaintiff's] main defense that he did not intend to pole the prison guard in the face . . . ." <sup>73</sup> Having found that the evidence established plaintiff's intent, a matter in issue other than propensity to commit the act, the court also found that the "record clearly and convincingly shows that his other actions were similar enough and close enough in time to be relevant to the matter in issue."<sup>74</sup> The court then determined that because the evidence was limited to general questions about the plaintiff's disciplinary record "the danger of unfair prejudice was minimized and the probative value of the evidence dominated."<sup>75</sup>

Federal Rule 608(b) prohibits the introduction of extrinsic evidence of specific instances of conduct to attack the credibility of a witness, except for criminal convictions. Therefore, counsel can ask questions about whether a particular instance occurred, if the instance goes to the truthfulness or untruthfulness of the witness, but cannot introduce any evidence surrounding that

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71. *Id.* at 379.

72. *Id.* at 378 (quoting *United States v. Shackelford*, 738 F.2d 776, 779 (7th Cir. 1984)).

73. *Id.* at 379.

74. 821 F.2d at 381.

75. *Id.*; see *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996) (where defendants were unaware of the prison record it was inadmissible); see also *United States v. Bunch*, No. 91-6309, 1993 LEXIS , 1993 WL 5933, at \*2 (6th Cir. Jan. 13, 1993) (affirming decision not to admit prior acts); *Harris v. Davis*, 874 F.2d 461, 465 (7th Cir. 1989) (discipline record inadmissible to impeach credibility); *Lataille v. Ponte*, 754 F.2d 33, 37 (1st Cir. 1985).



incident.<sup>76</sup> Federal Rule 608(b) may keep the disciplinary file out of the record, but the defendant may still be able to inquire into plaintiff's conduct for impeachment purposes.<sup>77</sup>

#### J. *Admitting a Prison's Internal Investigation into Evidence*

The plaintiff's presentation will be even more persuasive if investigations of the incident that are favorable to the prisoner-plaintiff can be introduced into evidence. A use of force committee or other internal investigation may actually contain information and findings that are helpful to the prisoner-plaintiff in his civil rights case. Objections to prison reports will usually be on the basis of Federal Rule 801, the hearsay rule, as the reports will contain statements from officers, employees or prisoners that are not present to testify.<sup>78</sup> However, there are a number of exceptions under Federal Rule 803 that are applicable to prison reports or investigations which can be cited to support the admissibility of such reports.

Federal Rule 803(6) contains a "[r]ecord of regularly conducted activity"<sup>79</sup> or a business records exception and Federal Rule 803(8) contains a public records exception to the hearsay rule.<sup>80</sup> The documents that fall under these exceptions have been defined quite broadly.<sup>81</sup> It is important to note, however, that the business records exception requires that a person with knowledge transmit the reports.<sup>82</sup> Therefore, in order to admit a report under this exception a foundation must be laid showing that the person who wrote the report had actual, first-hand knowledge or that the sources cited therein were the actual, first-hand sources for those facts cited.<sup>83</sup> The business records exception can be used to admit the standard reports that an in-

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76. *Hynes*, 79 F.3d at 293-94 (since case hinged on credibility, questions to truthfulness of corrections officer should have been admissible, assuming there was a good faith basis).

77. *Eng. v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993).

78. *See* FED. R. EVID. 801(c).

79. FED. R. EVID. 803(6).

80. Both the business records and public records exceptions have a "trustworthiness" requirement.

81. *Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976).

82. FED. R. EVID. 803(6).

83. *Hynes v. Coughlin*, 79 F.3d 285, 294-95 (2d Cir. 1996). This showing can contribute to the trustworthiness of the report as well.

stitution generates following an incident, such as “use of force.”<sup>84</sup>

In order for a report to be admitted under the public records exception it must relate to “matters observed pursuant to [a] duty imposed by law . . . ”<sup>85</sup> or contain “factual findings resulting from an investigation made pursuant to authority granted by law . . . .”<sup>86</sup> Reports can also be admitted under the public records exception as extrinsic evidence, to show motive or intent in an excessive force case.<sup>87</sup> In *Combs v. Wilkinson*, the Sixth Circuit relied on the public records exception to allow an investigative committee’s report, detailing facts, conclusions and opinions, into evidence.<sup>88</sup> Portions of a report that contain interview transcripts or other statements of third parties may be excluded as “hearsay within hearsay,” which is not covered by the public records exception,<sup>89</sup> and there can be additional exclusions based on prejudice, relevance and trustworthiness.<sup>90</sup>

An investigative report could also be admitted under the general residual exception of Federal Rule 807. Federal Rule 807 requires trustworthiness and sufficient notice of the intent to offer the statement in advance of trial.<sup>91</sup> In addition, the court must find that the evidence fulfills the following three factors:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.<sup>92</sup>

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84. *Id.*

85. FED. R. EVID. 803(8)(B); see *Combs v. Wilkinson*, 315 F.3d 548, 554-56 (6th Cir. 2002) (using FED. R. EVID. 803(8)).

86. FED. R. EVID. 803(8)(C); see *White v. United States*, 164 U.S. 100, 103 (1896).

87. *Eng v. Scully*, 146 F.R.D. 74, 80 (S.D.N.Y. 1993).

88. See *Combs*, 315 F.3d at 554-56 (using FED. R. EVID. 803(8)); see also *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (“As long as the conclusion is based on a factual investigation and satisfies the Rule’s trustworthiness requirement, it should be admissible along with other portions of the report.”).

89. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 803.10 n.21 (Joseph M. McLaughlin ed., 2002).

90. See *Evans v. Dugger*, 908 F.2d 801, 809 (11th Cir. 1990).

91. See FED. R. EVID. 807.

92. *Id.*

A report resulting from the investigation of an incident can be admitted as it is reasonable to infer that the investigators who prepared the report relied on the first-hand knowledge of prison officials who have a duty to be accurate.<sup>93</sup> Even though the report may have been prepared in preparation for litigation, the evidence is being offered against the party for whom it was prepared so the report is circumstantially trustworthy.<sup>94</sup>

### K. *Damages*

The PLRA restricts damage awards.<sup>95</sup> The availability of compensatory and/or punitive damages depends on the constitutional claim brought by the prisoner-plaintiff and on the PLRA. Section 1997e(e) provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>96</sup> The definition of “physical injury” is generally more than de minimus, although it does not have to be substantial.<sup>97</sup>

The constitutional claims to which § 1997e(e) apply are currently under debate, although Eighth Amendment claims are certainly covered. Courts have reached different conclusions on whether § 1997e(e) bars an award of mental or emotional damages under First and Fourteenth Amendment claims. The Ninth and Seventh Circuits, along with some district courts, have held that the First and the Fourteenth Amendment entitle a prisoner-plaintiff to judicial relief completely separate from any physical injury that they can show.<sup>98</sup> Other circuits have barred compensatory damages for emotional injury on non-

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93. *Moffett v. McCauley*, 724 F.2d 581, 584 (7th Cir. 1984).

94. *Id.* at 584 n.1.

95. If possible, file the lawsuit after the prisoner is released from custody to avoid the PLRA completely.

96. 42 U.S.C. § 1997e(e) (2004).

97. *See, e.g., Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

98. *See, e.g., Calhoun v. Detella*, 319 F.3d 936, 941 (7th Cir. 2003) (citing *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999)); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *Mason v. Schriro*, 45 F. Supp. 2d 709, 717 (W.D. Mo. 1999).

Eighth Amendment constitutional injury claims that do not result in actual, physical injury.<sup>99</sup>

However, the physical injury requirement of 1997e(e) does not necessarily preclude the collection of nominal or punitive damages.<sup>100</sup> Nominal and punitive damages are not barred under the rationale that their preclusion would allow prison officials to intentionally harass or harm the rights of prisoners and, without inflicting physical injury, be allowed to escape suit.<sup>101</sup> In some circuits this is also true for Eighth Amendment violations that do not result in physical injury.<sup>102</sup> The Supreme Court's decision in *Carey v. Phipps*<sup>103</sup> dictates that nominal damages should be recoverable on pure constitutional injury claims.

Punitive damages are awarded under § 1997e(e) when the defendant has an evil motive or intent or when the behavior involves reckless or callous indifference.<sup>104</sup> Under this standard, punitive damages may be recovered under constitutional claims that do not result in physical injury.<sup>105</sup> In alleging and proving punitive damages, care should be taken not to base the award of punitive damages on the extent of emotional injury to the prisoner or the amount of compensatory damages awarded, rather damages should be based on the malicious behavior of the prison officials.<sup>106</sup>

It is also important to note that a portion of any damage award collected, up to twenty-five percent, is to be used to pay for attorney's fees.<sup>107</sup>

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99. *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000).

100. *Id.* at 251.

101. 319 F.3d at 940.

102. *Id.*

103. 435 U.S. 247, 266 (1978).

104. *Allah v. Al-Hafeez*, 226 F.3d, 247, 251-52 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

105. *See, e.g.*, *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002); *Doe v. Delie*, 257 F.3d 309, 314 n.3 (3d Cir. 2001).

106. *See Allah*, 226 F.3d at 252; *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001). It should be noted that the corrections defendant may often have a spouse or family members in the courtroom. The prisoner-plaintiff should do likewise. Jurors need to be reminded that even prisoners have loving families.

107. 42 U.S.C. § 1997e(d) (2004).

Despite the many burdens imposed by the PLRA, there have been significant damage awards, although most such awards stem from Eighth Amendment claims with serious physical injury.<sup>108</sup>

#### L. Attorney Fees

Attorney fees in civil rights actions are governed by 42 U.S.C. § 1988. However, the PLRA adds hurdles to obtaining attorney fees in prisoners' rights litigation. Under § 1988 attorney fees are awarded to the plaintiff when he is the prevailing party.<sup>109</sup> A prevailing party is defined as one that "succeed[s] on any significant issue in litigation."<sup>110</sup> A significant issue is one which achieves some of the benefit or the primary benefit that the parties sought in bringing suit.<sup>111</sup> When success is partial or limited, the court compares the product of hours reasonably expended on the litigation as a whole and a reasonable hourly rate, to the overall relief obtained by the plaintiff. The court

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108. *Gregory v. Shelby County*, 220 F.3d 433 (6th Cir. 2000) (compensatory damages in the amount of \$778,000; punitive damages totaling \$2,275,000; where a guard allowed a violent prisoner into the cell of the plaintiff who died as a result of the beating, prior to which there was evidence that the officer forced the now deceased to perform oral sex and then left the prisoner in his cell for ten hours before getting him medical attention); *Johnson v. Howard*, No. 1:96-CV-662, 2001 U.S. App. LEXIS 1317, 2001 WL 1609897 (6th Cir. Dec. 12, 2001) (Eighth Amendment claim under which plaintiff was attacked without provocation and the beating was covered up resulting in \$15,000 in actual or nominal damages and \$300,000 in punitive damages); *Williams v. Patel*, 104 F. Supp. 2d 984 (C.D. Ill. 2000) (deliberate indifference to medical needs resulting in loss of prisoner-plaintiff's eye; compensatory damages \$1 million and punitive damages \$1 million); *Miller v. Shelby County*, 93 F. Supp. 2d 892 (W.D. Tenn. 2000) (deliberate indifference to prisoner safety, where the plaintiff was injured in an attack which resulted in damages of \$40,000); *Beckford v. Irvin*, 60 F. Supp. 2d 85 (W.D.N.Y. 1999) (Eighth Amendment claim and ADA claim resulting in a total of \$25,000 in punitive damages and \$125,000 in compensatory damages, resulting in attorney fee award of \$50,899, \$6,250 of which to be paid from damage award); *Perri v. Coughlin*, No. 90-CV-1160(NPM), 1999 U.S. Dist. LEXIS 20320, 1999 WL 395374 (N.D.N.Y. June 11, 1999) (\$50,000 plus attorney fees and costs for deficient treatment of mental illness and cell conditions); *Trobaugh v. Hall*, No. C97-0125, 1999 U.S. Dist. LEXIS 23107, 1999 WL 336557 (N.D. Iowa Dec. 6, 1999) (\$100 a day for each day plaintiff was put in isolation in retaliation for his filing of grievances, but no punitive damages).

109. 42 U.S.C. § 1988(b) (2003).

110. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

111. *Id.*

then determines if attorney fees are excessive.<sup>112</sup> An hourly rate for attorney fees is that which is comparable to other attorneys in the community of similar background and experience.<sup>113</sup>

The PLRA caps the hourly rate awardable to prisoner-plaintiff attorneys at 150%<sup>114</sup> of the fee for court appointed criminal defense attorneys.<sup>115</sup> Fees are also limited by the amount of damages awarded. Attorney fees cannot exceed 150% of the award.<sup>116</sup> The court will then look at the lesser of the two calculations.<sup>117</sup> Additionally, the PLRA requires twenty-five percent of the damages to go to attorney fees. If twenty-five percent of the damages are less than the amount of attorney fees that the court finds reasonable, then the defendant pays the remainder.<sup>118</sup>

In order to obtain attorney fees on a preliminary injunction or a temporary restraining order counsel should ask that the court decide the injunction or restraining order on the merits. A decision on the merits can result in an award of attorney fees even if no final judgment is obtained.<sup>119</sup> A simple procedural win is not enough to award fees.<sup>120</sup>

So far, efforts to challenge the constitutionality of the PLRA fee caps have been largely unsuccessful.<sup>121</sup>

### M. *Using Verdicts to Solve Problems*

Most prison litigators have used litigation as a vehicle to improve conditions, including safety and medical care. Such prison reform cases are severely restricted under the PLRA. In

112. *Id.* at 436. (2,557 hours is reasonable in light of the fact that they succeeded on five of the six claims).

113. *Blum v. Stenson*, 465 U.S. 886, 900 (1984).

114. 42 U.S.C. § 1997e(d)(3) (1996).

115. 18 U.S.C. § 3006A (2000).

116. 42 U.S.C. § 1997e(d)(2); *Fouk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001).

117. *Schlanger*, note 6, at 1654.

118. 42 U.S.C. § 1997e(d)(2).

119. *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997); *Fitzharris v. Wolff*, 702 F.2d 836 (9th Cir. 1983); *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981).

120. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

121. *Morrison v. Davis*, 88 F. Supp. 2d 799 (S.D. Ohio 2000) (attorney fee caps do not violate equal protection); *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001) (same).

fact, the PLRA causes litigation to focus on money.<sup>122</sup> The cases counsel will likely pursue most vigorously are death claims and suits based on severe physical injuries. These have the greatest potential to generate the large damage award needed to finance the case and support adequate fees.

So what about prison reform? Settlements may still be employed to improve conditions. The best time is after verdict or after the court has denied summary judgment and the matter is clearly headed for trial. If the client is willing, non-economic terms can be included in the goals the prisoner seeks to achieve through alternative dispute resolution. In one recent case, a prisoner-plaintiff sued a warden at a reception center following a brutal attack by his cellmate. The plaintiff was a minimum security prisoner doing a flat one-year sentence for selling marijuana and his cellmate was a mass murderer. The attack was terrorizing but there were no severe physical injuries. After losing his bid to dismiss based on qualified immunity, the warden agreed to settle for \$50,000 in damages and fees, and included plaintiff's counsel in the dialogue that resulted in a new classification policy at the reception center.<sup>123</sup>

### III. Conclusion

The PLRA is forcing prison reform activists to press for large damage awards as a vehicle to trigger institutional reform. This article has hopefully helped the practitioner focus the trial presentation in a way that will make a plaintiff verdict more likely. When the state or local government must pay a large verdict conditions may return to the taxpayer agenda. There is no serious political lobby for prisoners. Often the only way their concerns will be addressed is through litigation. By keeping cases lean and presentations effective as recommended in this article, we can help prisoners secure at least a safe environment with adequate medical care.

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122. Alphonse A. Gerhardstein, *PLRA Can Affect Private Practitioner's Ability to Represent Inmates*, CORRECTIONAL L. REP. (Civic Research Institute, Kingston, N.J.), Feb.-Mar. 2002.

123. *Crutcher v. Edwards*, No. C2-01-1159 (S.D. Ohio Mar. 2003) (settlement).