FEDERAL COURT PRISON LITIGATION HANDBOOK

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This handbook provides procedural and substantive information for pro bono attorneys representing incarcerated people in civil actions in the District of Colorado.

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Photo of Colorado State Penitentiary courtesy of the Colorado Department of Corrections website

Disclaimer: The contents of this guide are provided for informational purposes only and do not constitute legal advice.

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INTRODUCTION

In the District of Colorado, the Court may appoint "eligible, volunteer attorneys to represent without compensation eligible, unrepresented parties in civil actions to provide general or limited representation when requested by the court." *See* D.C.COLO.LAttyR 15(a). Because civil actions involving incarcerated plaintiffs present specific procedural and substantive issues that eligible attorneys may not address in their everyday practice, this Manual provides procedural and substantive information for pro bono attorneys representing prisoners in civil actions in the District of Colorado.

In particular, this Manual addresses the following topics:

- **Chapter 1:** The mechanics of how pro bono attorneys are appointed to cases in the District of Colorado, general information regarding how to communicate with an incarcerated client, and resources available to pro bono attorneys.

- **Chapter 2**: The assessment of a complaint, including screening by the Court and the requirements for cognizable claims.

- **Chapter 3**: The basic legal framework and required elements for the different types of prisoner civil rights claims.

- **Chapter 4**: Discovery issues specific to incarcerated clients and the Federal Bureau of Prisons (BOP) or Colorado Department of Corrections (CDOC), including obtaining records, depositions of incarcerated clients or witnesses, use of protective orders, and entries on land.

- **Chapter 5**: Considerations for trial, including the mechanics of attendance of an incarcerated plaintiff or witness at trial.

- **Chapter 6**: Relief available, including damages, injunctions and consent decrees, and attorney's fees.

- **Chapter 7**: Settlement mechanics, including the court's mediation program and process for any settlement with the BOP or CDOC.

- **Chapter 8**: Special issues that may arise during the litigation that are not addressed above.

- **Chapter 9**: Additional resources and statistics on prisoner civil rights cases in the District of Colorado.

- **Appendix - Prison Facilities, Locations, Forms, and Rules**

This Manual is not meant to be, nor should it be used as, a "how to guide" or a comprehensive listing of all relevant case law. Rather, consistent with the obligations of all attorneys, attorneys should conduct their own independent research and make their own strategic determinations for any case. Further, this Manual is limited to prisoner civil rights cases. It does not address criminal appeals, writs of habeas corpus, or any other claims challenging an incarcerated person's conviction or sentence.

Chapter 1: Pro Bono Appointment

You've Been Asked to Represent an Incarcerated Person in a Conditions of Confinement Case. Here are Some First Steps/Things To Know.

1. Prison Litigation 101

Most people convicted of a crime and sentenced to prison will serve their sentence in a state prison operated by the Colorado Department of Corrections (CDOC) or a federal prison operated by the Federal Bureau of Prisons (BOP).

a. CDOC – General Information

CDOC incarcerates approximately 15,000 people in 21 prisons: 19 are state-run and two are private. Information about specific prisons is available on the CDOC website. The website also has a search feature that allows counsel to enter a person's name and/or CDOC number to find out in which prison clients (and witnesses) are currently being housed.

CDOC policies and procedures usually take the form of Administrative Regulations (ARs), Implementation/Adjustments (I/As), Operational Memoranda (OMs), and Executive Directives (EDs). Generally, ARs provide operational guidelines for CDOC systemwide, while I/As are procedures administered by a particular prison to accomplish the intent of an AR. For more information about CDOC policy, *see* AR 100-01 - Administrative Regulation Process. Many, though not all, ARs can be found on the Department Policies page of CDOC's website. Please note: these policies can change—sometimes frequently—so it's important to check the website for updates.

The Office of Legal Services is responsible for the management of all civil cases brought by incarcerated people against CDOC. Legal Services also manages the grievance process and incoming CORA/CCJRA (Colorado Open Records Act & Colorado Criminal Justice Records Act) and medical records requests. Additionally, disability accommodation requests (for incarcerated people and visitors) are handled through the ADA Inmate Coordinator (AIC) in Legal Services. The names and contact information for individuals in the Office of Legal Services can be found here. Requests for waivers of service often can be sent via email to the Litigation Coordinator for CDOC.

b. BOP – General Information

The Federal Bureau of Prisons (BOP) incarcerates approximately 152,000 people in 122 prisons throughout the United States. In Colorado, people are confined at FCI Englewood (FCI stands for "Federal Correctional Institution"); the facility in Englewood is a low security prison with an adjacent minimum security satellite camp and a detention center) or in one of four prisons that comprise the Florence Correctional Complex (FCC) in Florence, CO: FCI-Florence (medium security) with an adjacent satellite camp (minimum security); USP-Florence (USP stands for "United States Penitentiary") the facility in Florence that is a high security penitentiary; and ADX-Florence (ADX stands for "administrative maximum"). Information about federal prisons can be found on the BOP website. The website also has a search feature that allows counsel to enter a person's name or register number to find out where clients (and witnesses) are currently being housed.

Generally, BOP policy is codified in (1) federal regulations, which can be found at 28 CFR Chapter V; (2) Program Statements, which constitute national policy implementing the regulations and are available on the Policy & Forms section of the BOP website; and (3) Institution Supplements, issued by wardens to provide local complex or facility instructions for implementing BOP directives. For more detailed information about these and other forms of BOP policy and their force and effect, *see* PS 1221.66 - Directives Management Manual. Additionally, the Legal Resource Guide to the Federal Bureau of Prisons contains useful information as well, including contact information for Regional Counsel and Consolidated Legal Center Offices. *Id*. at App'x B.

2. Appointment via the Civil Pro Bono Panel

The U.S. District Court Civil Pro Bono Panel Program

Origins and Goals of the Program

The U.S. District Court, District of Colorado's Civil Pro Bono Panel is the offspring of the U.S. District Court's 2011 Strategic Planning Conference under then-Chief Judge Wiley Y. Daniel. The court's Standing Committee on Pro Se Litigation,[1] – comprised of judges, court staff, and representatives of organizations that have interests in pro se issues – initially fostered the development of a pilot program, followed by the permanent Pro Bono Panel program. It now oversees and monitors the program, as well as other access to justice goals. On December 1, 2014, **Local Attorney Rule 15 – Civil Pro Bono Representation** of the court's local rules was promulgated as a permanent rule.

A goal of the Standing Committee was to have the Panel program apply to all causes of action available in the district court rather than the traditional, limited few categories of cases. The majority of cases that require pro bono representation has always been prisoner civil rights cases. This was true with the Faculty of Federal Advocates' Counsel/Co-counsel program, the

[1] *See* **D.C.COLO.LAttyR 15 - Civil Pro Bono Representation** for the full text of the Civil Pro Bono Panel rule - including the Standing Committee's charge and composition; pro se party eligibility; judicial, clerk's office, and pro bono attorney roles in the appointment procedure; expectations of pro bono counsel; reimbursement policy; and attorney fee agreements.

predecessor to the Panel program, and continues to this day, with approximately 70 percent of pro bono appointments made with prisoner civil rights matters under 42 U.S.C. § 1983. Note that habeas corpus cases under 28 U.S.C. §§ 2241, 2254 and 2255 are not covered under the Civil Pro Bono Panel program – the Court has the authority to appoint paid counsel, using court funds, under the Criminal Justice Act in those cases.[2]

The Panel program places a special focus on allowing counsel to be appointed at all stages of a case and not limited to the traditional stepping-in-at-trial pro bono representation for pro se parties who had survived initial merit review and dispositive motions. During the Counsel/Co-counsel program, court staff would be called on to enlist counsel to commit to acting as trial counsel with only a month or so's notice. While many lawyers and firms did actually enter appearances on short notice, the Standing Committee agreed that it is often a pro se party's initial complaint with serious or unique allegations, or a layperson's difficulties in pretrial matters, that make it apparent that pro bono counsel should be available at all stages of a case. This also has the practical effect of broadening the scope of pro bono counsel's training experience by engaging in all aspects of pretrial matters and discovery.

Panel Operation / Appointment Procedure

The basic premise of the Civil Pro Bono Panel, and what makes it a viable and realistic tool for attorneys, is the voluntariness of case assignments – counsel who are asked to review a case are **not** obliged to accept it, and no penalty ensues for declining a case. On joining the Panel, a member commits to the idea that they will be randomly called at some point to serve as pro bono counsel, while at the same time allowing the attorney to "opt out" from the types of cases that do not match the attorney's preferences – and the attorney has the freedom to decline a case. The program encourages individuals, law firms, nonprofit organizations, or law school student practice clinics to join, and attorneys or law firms can specify how many cases per year will be taken, with no more than that amount will be assigned per year (a case lasting more than a year means a new, additional case will not be assigned, unless the lawyer or law firm requests it). If a law firm signs on to the program, it assigns an attorney to act as Panel Liaison who makes the selection of pro bono counsel within the firm. Many law firm members of the Panel use the Panel membership and cases as a federal practice training tool and as an expansion of their own in-house training.

The appointment process works as follows, under **LAttyR 15(f)-(g)**:

- An incarcerated person may request appointment of counsel at any time during the course of a case – but a case must have been initially filed (in other words, pro bono counsel would not be appointed in anticipation of a future case). All unrepresented plaintiffs, whether they have requested in forma pauperis status (filing fee payment schedule) or have

[2] **18 U.S. Code § 3006A(a)(2)(B)- Adequate representation of defendants**.

> (2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—
>
> *****
>
> (B) is seeking relief under section 2241, 2254, or 2255 of title 28.

paid the filing fee in full are eligible for pro bono counsel appointment. Among the forms and explanatory handbooks available for incarcerated people (and sent by the USDC Clerk's Office on request) is a sample motion for appointment of counsel form that is pre-written with a list of factors the court must consider in appointing counsel.[3] Note that a similar form is available for *attorneys* on the website, which allows an attorney who is aware of an existing case in which they want to assist – or who files a case on behalf of an incarcerated plaintiff (with the *in forma pauperis* motion) – to request a Panel appointment as pro bono counsel.[4]

- Besides acting on a motion from the plaintiff or attorney, the Court may *sua sponte* decide an incarcerated person should have pro bono representation, such as when the plaintiff's case is undergoing the "initial review" process required for all prisoner cases under Local Civil Rule 8.1 and 28 U.S.C. §§ 1915, 1915A. *See* Initial Court Screening Process in Chapter 2 of this Handbook.

- Once assigned to a judge, further "screening" takes place for a merits determination. If the Court is considering whether to appoint pro bono counsel, it will apply the screening factors listed in LAttyR 15(f)(B), which will appear in the appointing court's order:

    - the nature and complexity of the action;
    - the potential merit of the claims or defenses of the unrepresented party;
    - the demonstrated inability of the unrepresented party to retain an attorney by other means; and the degree to which the interests of justice, including the benefits to the court, will be served by appointment of counsel.

- The Court may then do any of the following: 1) enter a document named "Order Appointing Pro Bono Counsel," 2) rule from the bench granting a motion during a hearing, or 3) simply enter a text order on the docket granting an appointment motion. Whichever type of order the Court uses, the judge's chamber or court staff must notify the Attorney Services Division (ASD) staff of the court, supervised by the court's Legal Officer, who oversees the appointment process. (Unfortunately, the Attorney Services Division doesn't always receive the order, so occasional delays in notification occur.) Once the order is entered, the ASD staff begin compiling information about the case, review who the available counsel are for the type of case, and randomly pick a series of lawyers/law firms to receive notice about the case. ASD staff must consider the following in selecting counsel:

    - the existence of counsel who is willing to accept appointment who is already representing the pro se party in another action;
    - the relevant preference and expertise of the members of the Panel;
    - the equitable distribution of appointments among the Panel members.

- In sending notice of the case to selected counsel, one lawyer at a time receives the notice by e-mail and has approximately one week to review the case, determine their initial

[3] *See* the Forms/Prisoner-Detainee page of the U.S. District Court website.
[4] See the Forms/Attorney-Law Student page of the U.S. District Court website.

availability and interest, and run a conflicts check. On urgent or unique occasions, the ASD staff may telephone lawyers, but does so only when attempting to contact a lawyer who is not a member of the Panel who has practice experience that matches a case's needs, or geographic relevance. The notice that ASD staff sends by e-mail has the following elements: a case description, a list of parties, excerpts from important case documents such as the complaint and a judicial decision(s), a summary of pending deadlines, relevant Faculty of Federal Advocates information, and important case documents attached, including the complaint, pending dispositive motions, and the latest docket sheet. Also included is the Civil Pro Bono Panel's group PACER system login and password to allow counsel to review all case documents without incurring a fee.[5]

- The lawyer or law firm officially has five days to review the case and report back to ASD staff, though usually more time is given, from 10 days to two weeks. Counsel may decline the matter, in which case ASD staff contact the next lawyer on the random list of lawyers interested in the subject matter of the case. If counsel is preliminarily interested, ASD staff contact the pro se party by U.S. mail, sending a letter of introduction of appointed counsel to the party, a copy of the Court's initial appointment order, a copy of the court's Pro Bono Representation local rule, and a copy of a Notice of Appointment document. The Notice of Appointment document is filed in the case and notifies the parties and the Court which lawyer or law firm has preliminarily accepted the case, that the lawyer has 30 days to make a final decision to either enter an appearance as pro bono counsel or to decline the case, and that in the meantime the pro se litigant is still responsible for litigating the case. ASD staff send a copy by e-mail of all the above to the designated pro bono lawyer.

- The lawyer may need more information about the case, updated contact information about the potential client, or more time to review the case; may have difficulty locating or copying records; or may have problems arranging an interview of the client through the prison. The ASD staff are available to help to the extent that they are permitted, which may include contacting opposing counsel or the prospective client's case manager, copying records such as video clips filed in the case and providing them to prospective pro bono counsel, or seeking an extension of a deadline informally through the appointing judge's chambers. During the course of a case, ASD or other Clerk's Office staff are available to assist with other logistical assistance (with the Court's approval or order), for such services as records copying, arranging video or phone depositions in a courtroom, or other activities that help ensure successful representation of the pro se client.

- Local Attorney Rule 15 provides that the clerk (ASD staff) will select four attorneys in succession, and after the fourth declines, notify the appointing judges' chambers and end the search for counsel unless the court directs otherwise. In reality, ASD staff contact at least five lawyers or law firms (the court usually directs staff to keep trying at least one more time; hence the five attempts), and at the same time <u>all</u> Panel members are also notified as a group through a monthly list that is distributed to all Panel members by e-mail.

[5] Please note that the use of the shared Pro Bono Panel PACER account login and password **<u>did not</u>** change with the District of Colorado's conversion to the NextGen CM/ECF system in August 2021. The exempt PACER docket and document-viewing account is available to all members – individuals and law firms – of the court's Civil Pro Bono Panel.

The cases that exceed five attempts are also placed on the court's Civil Pro Bono Panel page on the court website, available to all attorneys, not just Pro Bono Panel attorneys.

- Initial membership in the Civil Pro Bono Panel requires little, other than completion of an application form to inform staff about what types of cases counsel will accept and various other preferences, and that the attorney be a member in good standing of the US District Court bar. A Panel member can withdraw from the Panel either temporarily or permanently.

As Court-Appointed Counsel, the principal duties or expectations to keep in mind are:

- On receipt of the Notice of Appointment, the attorney is required to promptly communicate with the pro se party to discuss potential conflicts of interest, and whether the action can be resolved more by other means.

- No later than 30 days after receipt of the Notice of Appointment, the attorney is to file a) an Entry of Appearance under D.C.COLO.LAttyR 5(a); or b) a Notice Declining Appointment – ASD staff can assist with the documentation and filing of the Notice.

- The appointment of pro bono counsel does not extend to an appeal after final judgment or to any other civil action. Several cases have proceeded to appeal and appointed Panel counsel have chosen to remain with the case anyway, which then included valuable appellate oral argument experience.

- Appointed Panel attorneys represent the pro se party from the date of the Entry of Appearance until a) the court permits the attorney to withdraw, b) the case is dismissed, c) the case is transferred to another district or remanded to state court; or d) final judgment is entered. Therefore, representation for a case ends at final judgment, not the appellate case or post-judgment matters such as fee motions or costs hearings.

3. Finding and Communicating with Your Client

Generally, an incarcerated pro se litigant will include their current mailing address on filings but before writing or scheduling a legal call or visit, counsel may wish to confirm the prospective client hasn't been transferred to another prison. Both the Colorado Department of Corrections (CDOC) and the Federal Bureau of Prisons (BOP) have online locators where counsel may search for individuals:

- CDOC: http://www.doc.state.co.us/oss/.
- BOP: https://www.bop.gov/inmateloc/.

As with non-incarcerated clients, maintaining communication is crucial. But communication with incarcerated clients requires advance planning and compliance with prison procedures to ensure communication is timely and confidential.

a. Mail

By default, mail into and out of prison is subject to being read and copied by prison staff. Attorney-client correspondence is an exception, but the outside of the envelope ***must*** be marked with the required language or prison staff can (and probably will) treat it as non-legal mail. Treating mail as non-legal mail typically means the prison staff will open and inspect the correspondence and, in some situations, make and retain a copy of the correspondence.

For legal mail sent to people incarcerated in **state (CDOC) prisons**, the envelope must include:

- Attorney's first and last name;
- Attorney's registration or bar number;
- Attorney's complete business address;
- "PRIVILEGED" OR "CONFIDENTIAL".

For your client's mail to you to be treated as confidential by prison staff, the client must write the attorney's bar number on the outside of the envelope.

For additional information about CDOC legal mail requirements, including what can be sent to a client and how, *see* AR 300-38 - Offender Mail and AR 750-03 - Offender Legal Services.

For legal mail to people incarcerated in **federal (BOP) prisons**, the front of the envelope must say:

> [ATTORNEY NAME], Attorney[6]
> SPECIAL MAIL – OPEN ONLY IN PRESENCE OF INMATE

For more information about legal mail procedures for clients in BOP custody, see 28 C.F.R. § 540.19 - Legal Correspondence. Some BOP prisons will call an attorney to confirm that attorney is the sender of legal mail before delivering the mail to the prisoner-recipient. To ensure that a client receives legal correspondence, an attorney should ensure they are available to confirm they sent legal mail if the BOP contacts the attorney to inquire.

b. Legal calls

Clients in CDOC custody: According to CDOC policy, "DOC will ensure and facilitate access to counsel and assist offenders in making confidential contacts with their attorneys and their authorized representatives," including telephone calls. *See* AR 750-03 - Offender Legal Services and AR 300-01 - Offender Visiting Program, Section IV(K) at 8. To have a confidential (unmonitored) legal call with a client incarcerated in a CDOC prison, counsel or their representative must provide a copy of the attorney's bar card along with a written request for the call on your letterhead. If an incarcerated client wants to call counsel on an unmonitored line, the

[6] Counsel should be aware that the BOP does not view "Esq." as an acceptable substitute for "attorney" on the envelope. Failure to write "attorney" may result in BOP staff treating the legal mail designation as noncompliant with the regulation and if so, may read and copy your correspondence.

client must provide counsel's attorney registration number on AR Form 850-12, Colorado Inmate Phone System (CIPS) Offender Phone List along with counsel's business address and phone number. If there is an "imminent, previously unknown, court deadline within the next ten days or less" counsel may be allowed to communicate with the client by phone on an emergency basis. *Id.* at 9. The regulation notes "[i]t will be the responsibility of both the attorney and the offender to ensure that the offender has requested that the attorney be placed on the offender's CIPS list to make unmonitored legal calls." *Id.*

Clients in BOP custody: BOP policy regarding legal calls is contained in several Program Statements (national BOP policy): PS 5264.08 - Inmate Telephone Regulations and PS 1315.07 - Legal Activities, Inmate. Pursuant to 28 C.F.R. § 540.103, the warden of a federal prison "may not apply frequency limitations on inmate phone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate." To schedule a legal call with a client, counsel will need to call the prison where the client is incarcerated and request the call through the client's correctional counselor. Generally, counsel will want to request a legal call at least several days in advance; the more advance notice, the better.

c. Email (not confidential)

Some incarcerated people have access to email. It is not confidential. In **CDOC**, the email provider is JPay; to use it, counsel must create an account through JPay. In the **BOP**, email is via CorrLinks, which also requires an account. Because neither CDOC nor the BOP treats any email messages sent or received as privileged regardless of any kind of legal/attorney-client designation, it is critical to avoid using email for confidential attorney-client communication.

d. Legal visits

The process for arranging and conducting legal visits with clients and witnesses differs between state and federal prisons and even among prisons within each system.

CDOC: The Administrative Regulations governing legal visits with clients and witnesses in CDOC facilities are AR 750-03 - Offender Legal Services and AR 300-01 - Offender Visiting Program. An attorney must review both of these administrative regulations carefully as they contain important information about what counsel can and cannot bring to a legal visit, required attire, required identification, etc.

For legal visits with clients and witnesses in CDOC facilities, counsel must request the visit with the prison's visiting office or the litigation coordinator **at least** 24 hours prior to the visit via fax, mail, or email. Visits with clients in CDOC are generally allowed Monday through Thursday 8 a.m. to 5 p.m. provided they do not disrupt facility operations and/or Parole Board meetings, but it's important to check the webpage of the particular prison where the client is incarcerated for more specific information about days and hours of visitation. (If visiting is cancelled at a particular prison, that information will sometimes (but not always) be on the prison's website, too.) An attorney may wish to call the prison on the evening before or morning of the visit to confirm that the legal visit appointment is confirmed and will be honored.

BOP: Legal visits with clients or witnesses in BOP facilities are governed by 28 C.F.R. § 543.13 and PS 1315.07 - Legal Activities, Inmate. As with legal calls, counsel typically will need to schedule a legal visit with a client or witness in advance, via the client's or witness's correctional counselor. That said, "the Warden shall make every effort to arrange for a visit when prior notification is not practical." *Id*. at 15, citing 28 C.F.R. § 543.13(c). Attorney-client and other legal visits are confidential (not subject to auditory supervision (though visits are subject to visual monitoring)). *Id.* at § 543.13(e). Prison staff "may not ask the attorney to state the subject matter of the lawsuit or interview." 28 C.F.R. § 543.13(d). Federal regulations also make clear that "[t]he Warden generally may not limit the frequency of attorney visits since the number of visits necessary is dependent upon the nature and urgency of the legal problems involved." *Id.* An attorney may wish to call the prison on the evening before or morning of the visit to confirm that the legal visit appointment is confirmed and will be honored.

In both state and federal prisons, when counsel arrives at the prison for a legal visit with a client or witness, they will need to provide a driver's license (or other acceptable form of identification) as well as a bar card. It is also important to review visiting information for any prison where counsel plans to meet with a client or witness in person, as many prisons have restrictions on what visitors are allowed to wear and bring (including laptops, watches, food/water, and cash). Counsel should assume they will not be allowed to bring a cell phone into the prison. As stated above, regardless of whether the visit will take place in state or federal prison, it's worth calling the prison the day of the visit—before the drive there—to confirm the client or witness has not been transferred and that the legal visit will be honored.

4. Faculty of Federal Advocates (FFA) and Court Resources

The Faculty of Federal Advocates manages the Civil Pro Bono Panel Reimbursement Fund. The Fund provides limited reimbursement of out-of-pocket expenses in cases handled by panel attorneys for the Civil Pro Bono Panel of the U.S. District Court for the District of Colorado. The Memorandum of Understanding between the Court and FFA may be found HERE, and a letter establishing the Fund may be found HERE. Panel attorneys may download the reimbursement information here.

Costs: Reimbursement funding for costs incurred by counsel (not fees) is available from the Faculty of Federal Advocates. Reimbursement in any single case *may* be limited for non-expert costs. An additional reimbursement for expert fees may be requested in advance in cases where expert witnesses are reasonably required. See the FFA Website for current limitations for costs. Counsel are *encouraged to seek exceptions* to the cost limitations where appropriate and submit supporting reasons for such exceptions to the Civil Pro Bono Panel Reimbursement Fund/Pro Bono Committee.

Fees: As a general rule, the focus of the program is to have counsel represent the unrepresented parties without remuneration; however, the court recognizes the sacrifice Panel members make to take such cases. Accordingly, Local Rule LAttyR 15 also permits counsel to enter into a contingent fee agreement that complies with the Colorado Rules Governing Contingent

Fees, or in the alternative, retain attorney fees that are earned if an unrepresented party recovers attorney fees or a monetary award or settlement.

Mentoring: Mentoring is an important component of the Civil Pro Bono Panel program, as Judge Martinez and his former law clerk Jenna Grambort described in a *Colorado Lawyer* article:

> Beyond the laudable goals of selflessly assisting the underserved, there are many reasons—perhaps less selfless, but no less meritorious—to join the panel. For new attorneys, or those inexperienced in a particular area of law, being appointed to a civil case through the pro bono panel provides an invaluable opportunity to gain experience in federal court with a support structure of training and mentorship opportunities. Panel attorneys attend an annual training seminar presented by the Faculty of Federal Advocates (FFA), and receive related materials.
>
> Attorneys with limited experience can be formally matched with a mentor attorney with specialized experience or informally matched with an experienced attorney willing to answer questions, offer insight, and otherwise coach the appointed attorney. Once appointed, you may request that co-counsel be ap pointed when necessary.
>
> More experienced attorneys can sign up to serve as mentors or co-counsel with newer panel members, helping the next generation of Colorado attorneys to succeed. Even attorneys with extensive experience in an area of specialization can take advantage of the opportunity to work on new types of cases or handle challenging issues they may not see in their daily practice.

43 The Colorado Lawyer 59 (April 2014).

Like its predecessor Counsel / Co-counsel Program, the Civil Pro Bono Panel program promotes mentoring by matching experienced counsel – either formally as co-counsel or informally as advisors – with less experienced lawyers or by identifying more experienced counsel to serve in an advisory role. For example, in 2019-2020 the Mentoring Pairings were as follows:

- In house: **28**
- Different firms: **9**
- Informal: **1**

Limited Representation: Under the court's local rules, attorneys are now permitted -- either on a pro bono basis, or for a fee – to represent ALL unrepresented parties in civil cases on a limited basis. For more information on Limited Representation, including an Instruction Guide with the applicable rules, forms, checklist, and FAQs, please see the court's website here: (http://www.cod.uscourts.gov/AttorneyInformation/LimitedRepresentation.aspx).

Chapter 2: Assessment of the Complaint

1. Duty To Investigate And Eliminate Frivolous Claims

a. Initial Court Screening Process

After the case is commenced, the Clerk of Court assigns every action filed by an incarcerated plaintiff to a designated judicial officer for initial review. Initial review is required by 28 U.S.C. § 1915A, 28 U.S.C. § 1915(e), 42 U.S.C. § 1997e(c), and D.C.COLO.LCivR 8.1(b). Initial review is completed prior to service of the complaint.

More specifically, pursuant to Local Rule 8.1(b) of the Local Rules for the U.S. District Court for the District of Colorado:

> A judicial officer designated by the Chief Judge shall review the pleadings of a prisoner (whether represented by counsel or not) to determine whether the pleadings should be dismissed summarily if the prisoner is
>
> (1) proceeding without prepayment of fees;
> (2) challenging conditions of confinement;
> (3) seeking redress from a governmental entity, officer, or employee; or
> (4) asserting claims pertinent to his or her conviction or sentence, except in death penalty cases.
>
> A judicial officer may request additional facts or documentary evidence necessary to make this determination.

The judge checks basic things, such as use of the correct form, that the pleading is signed, and that the filing fee has been addressed (either paid or leave requested to proceed *in forma pauperis* under 28 U.S.C. § 1915). The judge also reviews for claims that are frivolous or malicious, seek damages against an immune defendant, or do not comply with applicable procedural rules. Initial review can include entries of orders to cure deficiencies, orders to amend pleadings, and orders to show cause.

After review is complete, the judge will enter an order either drawing the case to a presiding judge, dismissing the case in part and drawing the remaining claims, or dismissing the case in its entirety.

b. Locating the Client's Records

People incarcerated in state and federal prison will often have voluminous records in various locations and/or facilities. At the earliest opportunity, counsel should talk to the client and obtain signatures using current release forms to obtain intake and screening Records, disciplinary records, housing records, medical and mental health records, and time computation records. (Note: if the case is already filed, counsel may have to seek the relevant records through formal discovery tools.)

The client will often have a very good idea of what documents exist about their claim. The nature of the claim will dictate the relevance of these records. However, review of these records is critical and must be done as early as possible in the representation in order to assess the claim(s), amend or modify the complaint, and determine a course of discovery. Often counsel will need to work with prison representatives to be sure counsel obtains a complete set of the client's records, either through an informal or formal discovery.

While CDOC and BOP have designated release and waiver forms, it is important to also remember that counsel has the ability to compel disclosure of many records and institutional policies through the Colorado Criminal Justice Records Act, Colorado Open Records Act, and the Federal Freedom of Information Act. For cases already in litigation, it is important to check whether the availability of the civil discovery tools limits counsel's ability to use CCJRA/CORA/ FOIA to obtain records.

Obtaining records is often a process that requires patience and persistence. It requires diligent follow up by counsel to ensure timely disclosure.

2. Necessary Parties

Assessing the proper parties to a client's claim is critical at the earliest stages of representation. Often the plaintiff has filed a pro se complaint already naming parties and capacities. It is critical to evaluate the claims early on in representation to determine if the proper parties have been identified. Simply being involved in a claim may not make a defendant a proper party. In the institutional context, plaintiffs often have claims involving federal/state employees, contractors, and volunteers. It is important to carefully assess the role of the actor and whether they are acting at the behest of the state or independently. Particular care may be taken with religious volunteers when assessing claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Religious Freedom Restoration Act (RFRA).

For more information about naming the proper defendants based on the type of claim brought and relief requested, see Sections 4 and 5 in this chapter.

3. Filing Fee / 28 U.S.C. § 1915

A party instituting a civil action in a federal district court, whether by an original filing or removal, must pay a filing fee of $350 (plus a $52 administrative fee[7]), except for applications for a writ of habeas corpus, which require a $5 filing fee. 28 U.S.C. § 1914. Not everyone can afford to pay a filing fee. Thus, "Congress enacted the federal IFP [*in forma pauperis*] statute, 28 U.S.C. § 1915, to ensure that the poor could take legal action despite their inability to pay court fees." *Woodson v. McCollum*, 875 F.3d 1304, 1305 (10th Cir. 2017) (citation omitted). Over time, Congress observed that lawsuits filed by prisoners "represented a disproportionate share of federal filings." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1762 (2015). The Prison Litigation Reform Act (PLRA) amended the *in forma pauperis* statute at 28 U.S.C. § 1915 to require incarcerated plaintiffs who file a civil action to pay the full amount of the filing fee.

[7] The administrative filing fee does not apply to people granted in forma pauperis status under 28 U.S.C. § 1915. See District Court Schedule of Fees (http://www.cod.uscourts.gov/CourtOperations/FeeSchedule.aspx).

If the plaintiff is a prisoner as defined by the PLRA, *see* § 1915(h), and the person cannot afford to pay the filing fee, they may request leave to proceed *in forma pauperis* by filing a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 or Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 in a habeas corpus action. Required forms are available on the District of Colorado's Forms page of the court's website.

If the plaintiff is a detainee in immigration custody, the plaintiff is not considered a "prisoner" under the PLRA. *Cohen v. Clemens*, 321 F. App'x 739, 743 (10th Cir. 2009) (unpublished) (collecting cases). In that context, the plaintiff may use the non-prisoner form Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form).

a. Payment by an Incarcerated Plaintiff

A prisoner who is totally indigent may not be prevented from filing suit. 28 U.S.C. § 1915(b)(4). An incarcerated plaintiff who has funds when they file suit, however, must pay an initial partial filing fee, set as "20 percent of the greater of" the average monthly deposits in the plaintiff's account or the average monthly balance of the account over the preceding six months. § 1915(b)(1). The plaintiff must pay the remainder of the fee in monthly installments of "20 percent of the preceding month's income credited to the prisoner's account." § 1915(b)(2). The initial fee and the subsequent monthly installments are assessed on a per-case basis each time the prisoner files a lawsuit. *See Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016) ("We hold that monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis.").

Where the plaintiff has sufficient income to pay a partial filing fee, the court may order them to pay such amount. *Cosby v. Meadors*, 351 F.3d 1324, 1327 (10th Cir. 2003). A plaintiff's failure to comply with an order directing payment can result in the dismissal of the civil action under Fed R. Civ. P. 41(b). *Id.* ("when a prisoner has sufficient income to pay a monthly partial filing fee and instead spends his money on amenities at the prison canteen, he cannot be excused for failing to make the required partial payments").

b. Three Strikes Rule

The PLRA sets forth three grounds for denying *in forma pauperis* status to an incarcerated plaintiff: the plaintiff has not established indigence; if the plaintiff is litigating an appeal, the appeal is in bad faith; or the plaintiff has three strikes. *See* 28 U.S.C. § 1915(a)(2)-(3), (g). Under the three strikes rule in § 1915(g), an incarcerated person cannot file a new case without prepaying the entire filing fee if:

- The plaintiff filed three (or more) cases while they were incarcerated or detained, and
- The court dismissed each of those cases for being frivolous, malicious, or failing to state a claim upon which relief may be granted.

Dismissals that count as a strike include:

- Frivolous or malicious. § 1915(g).

- Failure to state a claim upon which relief may be granted. §1915(g).
- Barred by *Heck v. Humphrey,* 412 U.S. 744 (1977). *See Mendia v. City of Wellington*, 432 F. App'x 796, 798 n.1 (10th Cir. 2011) (unpublished).
- Even where the dismissal is pending appeal, it must be counted as a dismissal for purpose of § 1915(g). *Coleman*, 135 S.Ct. at 1761.

Exceptions to the three strikes rule include:

- If the plaintiff is in "imminent danger of serious physical injury." § 1915(g). To meet this exception, the plaintiff must make "specific, credible allegations" of imminent danger present at the time the complaint is filed. *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1179 (10th Cir. 2011), *abrog. on other grounds by Coleman*, 135 S. Ct. 1759.
- Habeas corpus proceedings. *Al-Pine v. Richerson*, 763 F. App'x 717, 720 (10th Cir. 2019) (unpublished) (collecting cases).
- A state court case removed to federal court: § 1915(g) "does not prevent an indigent prisoner-plaintiff with three strikes from proceeding in a case that someone else filed in federal court." *Woodson*, 875 F.3d at 1307 (citation omitted).

4. Vehicle For Bringing Federal Constitutional Claim

Depending on where the client is incarcerated, the vehicle for bringing the client's claims—*i.e.*, the cause of action—will differ. Generally speaking, the cause of action for claims arising out of the Colorado Department of Corrections or any city or county jail will be 42 U.S.C. § 1983. Section 1983 permits a federal suit for damages *or* injunctive relief for a violation of a constitutional right carried out by a person acting under color of state law. In contrast, there is no express right of action to recover damages for constitutional violations committed by federal actors, so for people confined in the federal system, the plaintiff will have to assert any damages claims for constitutional violations under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The "*Bivens* Doctrine," as it has come to be known, is narrow and provides for a right to recover damages for only certain constitutional violations. *See, e.g.*, *Ziglar v. Abassi*, 582 U.S. ___, 137 S. Ct. 1843 (2017). For constitutional claims seeking purely injunctive (or other equitable) relief, the plaintiff's cause of action likely arises directly out of the constitutional provision at issue or, on the federal level, the Administrative Procedures Act. *See generally Simmat v. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

The state/federal distinction impacts claims against operators and employees of private prisons as well. For private prisons on the state, county, or local level, 42 U.S.C. § 1983 still likely provides the primary vehicle for relief for claims seeking both damages and equitable relief. In contrast, private prisons operating on the federal level (*e.g.*, private immigration prisons) are immune from damage suits for constitutional violations. *See Minneci v. Pollard*, 565 U.S. 118 (2012); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). State-law torts, such as negligence, assault, and battery, may be available for people incarcerated in these facilities.

Beyond constitutional claims, counsel may also wish to investigate and pursue claims under certain federal statutes, including the Americans with Disabilities Act (ADA) or the Rehabilitation Act of 1973, the Religious Land Use And Institutionalized Persons Act (RLUIPA)

or Religious Freedom Restoration Act (RFRA), the Federal Tort Claims Act (FTCA), the Administrative Procedure Act (APA), and other statutes protecting similar rights. As with the constitutional claims, be sure to be mindful of the entity and/or persons the client is suing and whether the statute at issue applies to state and local or federal entities/officials. For more information, see Chapter 3.

5. Suing The Right Defendants

a. Relief Sought

Identifying the appropriate defendants in a lawsuit depends, in part, on the type of relief the plaintiff is seeking. If the plaintiff is seeking damages for past violations of the constitution (*e.g.*, via 42 U.S.C. § 1983, *Bivens*), the lawsuit should name the individuals whom the plaintiff alleges personally participated in the violation. *See, e.g.*, *Gallagher v. Shelton*, 587 F.3d 1063 (10th Cir. 2009). If the plaintiff is seeking damages for past *systemic* constitutional violations occurring at a municipal or county level, the plaintiff may name the municipality or county. *See generally Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). Municipal- or county-level liability is available only upon a showing of an unconstitutional "policy of custom" and *not* on the basis of vicarious liability for the torts of the municipality's or county's employees.

In contrast to claims at the municipal or county level, various forms of immunity prevent a plaintiff from naming a state government (and its subdivisions and agencies) and the federal government (and its agencies) in a lawsuit for damages arising under the constitution. *See generally Ex Parte Young*, 209 U.S. 123 (1908) (prohibiting damages lawsuits against states via the Eleventh Amendment); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005). If the plaintiff is seeking damages via a statutory right (*e.g.*, ADA, RLIUPA, RFRA), the plaintiff will need to ensure that Congress has abrogated any immunity protections as to that particular cause of action and against the entity at issue before naming a state or federal government or subdivision. Once such congressional abrogation of the federal government's sovereign immunity is the Federal Tort Claims Act: If the plaintiff is seeking damages via the Federal Tort Claims Act (FTCA), the appropriate defendant is the United States of America. *See* 28 U.S.C. § 1346(b)(1).

If the plaintiff is seeking equitable relief to remedy an ongoing violation of the law, the lawsuit should name to entity or individual(s) with the authority to effect the relief requested. *See Goines v. Pugh*, 152 Fed. App'x 750 (10th Cir. 2005). For further information about naming the proper defendants, see Section 2.5.b below.

b. Official vs. Individual Capacity

In prisoners' rights suits alleging constitutional claims, defendants are generally federal, state, or county/municipal employees or entities. In such lawsuits, the plaintiff must specify whether they are naming any individuals in the individuals' "official capacity" or "individual capacity." The differences turn largely on the type of defendant sued and the relief requested, and different laws of sovereign immunity apply to each group. For example, because naming an individual in their official capacity is effectively considered a lawsuit against the entity of which the individual is a part, and the Eleventh Amendment bars damages suits against states, a lawsuit

seeking damages against state officials should not name those state officials in their official capacity.

Generally, the following rules apply to each group of potential defendants:

(1) Federal Officials must be sued in their official capacity in cases seeking injunctive relief. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005). Federal officials may not be sued for damages in their official capacity. For claims against federal officials under the Federal Tort Claims Act, the appropriate defendant is the United States of America. *See* 28 U.S.C. § 1346(b)(1). Federal officials may be sued for damages in their individual capacity only under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

(2) State Officials may be sued only in their individual capacity for damages, and in their official capacity for injunctive relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the Eleventh Amendment bars suits for retrospective relief against a state); *Ex Parte Young*, 209 U.S. 123 (1908). The proper defendant for injunctive relief is any individual with the authority to effectuate the equitable relief sought. *See, e.g.*, *Goines v. Pugh*, 152 Fed. App'x 750, 753 (10th Cir. 2005).

(3) City and County Officials may be sued in both their official and individual capacities.

(4) Entities: the Eleventh Amendment bars federal suits against states and state entities, like the Colorado Department of Corrections (see above "State Officials"). However, there is no such restriction on the federal level, so suits for equitable relief may name the entity or entities with the authority to effectuate the equitable relief sought, whether that is the individual prison in which the plaintiff is incarcerated or the Federal Bureau of Prisons itself. *See, e.g.*, *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005). In addition, cities may be sued directly for retrospective damages or prospective relief. However, under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), respondent superior is not a basis for municipal liability. Municipal liability is based on injury caused by a "policy or custom."

6. Supplemental Jurisdiction and State Law Claims

Section 1983 establishes a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by an official acting "under color of" state law. 42 U.S.C. § 1983; *see also Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (internal quotation omitted). In other words, no action lies under § 1983 unless a plaintiff has asserted the violation of a *federal* right. *See Middlesex Cty. Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Cummings v. Dean*, 913 F.3d 1227, 1243, 1245 (10th Cir. 2019) (reversing a lower court's denial of qualified immunity where its reasoning was flawed for "equat[ing] a violation of a clear obligation under *state* law with a violation of clearly-established *federal* law." (footnote omitted)), *cert. denied sub nom. Cummings v. Bussey*, 140 S. Ct. 81 (2019)).

Where the plaintiff states a plausible claim under federal law, the court has discretion to exercise supplemental jurisdiction over related state law claims that are part of the same case or controversy. In particular, 28 U.S.C. § 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Section 1367(c) provides, however, that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Where the plaintiff fails to state a plausible federal claim, the court may decline jurisdiction over the remaining state law claims. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229 (10th Cir. 2010) ("[I]f federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of [pendent] jurisdiction by dismissing the case without prejudice."). Colorado law recognizes that "if a plaintiff asserts all of his or her claims, including state law claims, in federal court, and the federal court declines to exercise supplemental jurisdiction [over the state claims], the plaintiff may refile those claims in state court." *Dalal v. Alliant Techsystems, Inc*., 934 P.2d 830, 834 (Colo. App. 1996) (relying on 28 U.S.C. § 1367(d), which pertains to supplemental jurisdiction and states the period of limitation for a state claim is tolled while claim is pending in federal court and for thirty days after it is dismissed unless state law provides for a longer tolling period).

7. Early Procedural Issues

Beyond the basic Rule 12(b)(6) requirements that are addressed via screening of a complaint, there are a number of procedural issues for consideration.

a. Exhaustion of remedies

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[E]xhaustion is mandatory under the PLRA [--] unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007) (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). The Tenth Circuit has held that because the statute refers to "a prisoner," a plaintiff who brings suit while not confined need not exhaust administrative remedies. *See Norton v. The City Of Marietta*, 432 F.3d 1145, 1150 (10th Cir. 2005).

For plaintiffs who are currently incarcerated, "proper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks and citation omitted). "Even where the 'available' remedies would appear to be futile at providing the kind of remedy sought, the prisoner must exhaust the administrative remedies available." *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (quoting the PLRA) (citing *Booth v. Churner*, 532 U.S. 731, 740 (2001)); *see also Patel v. Fleming*, 415 F.3d 1105, 1109-10 (10th Cir. 2005) (concluding federal prisoner failed to exhaust administrative remedies because he failed to file Administrative Remedy Request within twenty days of the date on which the basis for the Request occurred). With that said, exhaustion applies on a claim-by-claim basis – a court cannot "dismiss an entire lawsuit on the basis of failure to exhaust where one or more of the claims were properly exhausted; instead, [the court] must "proceed[ ] with the good and leave[ ] the bad." *See Jones*, 549 U.S. at 221.

The "only limit" to the PLRA's exhaustion "mandate is the one baked into its text: [a]n inmate need exhaust only such administrative remedies as are 'available.'" *Ross v. Blake*, 136 S. Ct. 1850, 1856-60, 1862 (2016). The Supreme Court has recognized three circumstances in which administrative remedies are not "available": (1) "when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmate;" (2) when "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use;" and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1859-60. The "defendant bears the burden of 'proving that the plaintiff did not [exhaust his] administrative remedies,' [and] once the defendant has carried that burden, 'the onus falls on the plaintiff to show that remedies were unavailable to him.'" *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019) (quoting *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011)).

The "applicable procedural rules" that a prisoner must properly exhaust are defined not by the PLRA, but by the prison grievance process itself. *Jones*, 549 U.S. at 218.

For people incarcerated in state prisons CDOC AR 850-04, Grievance Procedure, applies. This regulation is revised and updated from time to time, but generally requires an attempt to resolve the complaint informally, as well as three formal steps: at Step 1, grievances are investigated and answered by a DOC employee, contract-worker, or volunteer appointed by an administrative head or designee; at Step 2, grievances are investigated and answered by the administrative head or designee; and at Step 3, grievances are investigated and answered by the

grievance officer. Exhaustion requires that each of these steps must be taken, and that they be taken within a prescribed period of time.

With respect to people in federal custody, the BOP has promulgated an administrative remedy system which is codified in 28 C.F.R. §§ 542.10–19, and BOP Program Statement 1330.18, Administrative Remedy Program.[8] The administrative remedy process is a method by which an incarcerated person may seek formal review of a complaint related to any aspect of their imprisonment. 28 C.F.R. § 542.10. To exhaust their remedies, an incarcerated person must first file an informal remedy request through an appropriate institution staff member via a BP-8, prior to filing a formal administrative remedy request with the Warden (BP-9). If the issue is not resolved, the person must file an appeal with the Regional Director (BP-10) and then with General Counsel (BP-11).

People incarcerated in county jails are also required to exhaust available administrative remedies before they file an action under § 1983. Each jail has its own policy for exhaustion of administrative remedies.[9]

The Supreme Court has held that failure to exhaust is an affirmative defense that must be raised by defendants, not a pleading requirement for plaintiffs. *Jones v. Bock*, 549 U.S. 199, 212-16 (2007). That means failure to exhaust is not failure to state a claim except where non-exhaustion is apparent on the face of the complaint.[10] *Id*. It is difficult for non-exhaustion—i.e., failure to comply with the PLRA exhaustion requirement—to be genuinely apparent on the face of the complaint, since there are many circumstances in which failure to exhaust does not violate the statute. Courts must "ensure that any defects in exhaustion were not procured from the action or inaction of prison officials" and that the incarcerated plaintiff is "without valid excuse" for non-exhaustion. *Aquilar Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007) (because plaintiff's complaint was silent as to whether he had exhausted his administrative remedies—which is acceptable under *Jones*—the district court erred in requesting plaintiff to supplement the record on that issue). Because exhaustion is a threshold issue, prison officials may raise this defense in a motion to dismiss or a motion for summary judgment specifically addressed to exhaustion early in the case.

b. Joining parties in time—statute of limitations, tolling, service of summons

The applicable statute of limitations depends on the type of claim asserted. For claims brought under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the court looks to the statute of limitations from the personal-injury statute of the state in which the federal

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[8] The Code of Federal Regulations is available online at https://www.govinfo.gov/app/collection/cfr and BOP's policy documents, including its program statement, are available online at https://www.bop.gov/PublicInfo/execute/policysearch?todo=query (both links accessed Jan. 3, 2019).

[9] See, for example, the Denver Sheriff's Department **Policies & Procedures** page for regulations regarding the Denver County Jail.

[10] *Jones* resolved a circuit split and overruled a body of law—including from the Tenth Circuit—that had required plaintiffs to plead exhaustion with specificity, with district courts directed to dismiss sua sponte for noncompliance with that requirement. *See Steele v. Fed. Bureau of Prisons*, 355 F.2d 1204, 1210 (10th Cir. 2003). *Steele* is no longer good law.

district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008) (stating the standard for § 1983 actions); *Young v. Davis*, 554 F.3d 1254, 1257 (10th Cir. 2009) ("A *Bivens* action is subject to the limitation period for an action under 42 U.S.C. § 1983. . . .") (quoting *Roberts v. Barreras*, 484 F.3d 1236, 1238 (10th Cir. 2007)). Colorado provides a two-year limitations period. COLO. REV. STAT. § 13-80-102(1)(i) (West 2019); *Jenkins v. Chance*, 762 F. App'x 450, 454 (10th Cir. 2019) (collecting and analyzing cases in light of Colorado's multiple personal injury statutes of limitations), *cert. denied*, No. 19-372, 2019 WL 5301302 (U.S. Oct. 21, 2019).

The statute of limitations can be equitably tolled under certain circumstances, with the court looking to the equitable tolling rules from the state where the alleged constitutional violation occurred. *See Garrett v. Fleming*, 362 F.3d 692, 696–97 (10th Cir. 2004) (relying on a Colorado statute of limitations rules). The time spent exhausting administrative remedies, however, is generally not a valid basis for tolling. *Compare Braxton v. Zavaras*, 614 F.3d 1156, 1162 (10th Cir. 2010) (determining that equitable tolling did not apply where neither defendants nor extraordinary circumstances prevented plaintiff from filing suit within the statutory period); *with Gillings v. Banvelos*, 650 F. App'x 662, 623–24 (10th Cir. 2016) (reversing dismissal and remanding to the district court an evaluation of allegations that, if true, excused failure to exhaust).

Where a complaint includes multiple defendants and claims, the statute of limitations applies on a claim-by-claim and defendant-by-defendant basis. While a plaintiff may list "unnamed defendants so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process eventually can be served," *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996), the statute of limitations continues to run as to these un-named defendants. *Garrett*, 362 F.3d at 695–97. The plaintiff will need to submit an amended complaint naming the identified officer defendant before the expiration of the statute of limitations. *Id.*

Finally, each named defendant must be properly served with summons.[11] Failure to serve a defendant within 120 days of the filing of the action may result in a dismissal without prejudice. FED. R. CIV. P. 4(m). Although a new action may be filed against the dismissed defendant, the new pleading must be filed within the two-year statute of limitations.

c. Effect of transfer of client on litigation

Transfer of the plaintiff does not affect the court's jurisdiction over claims for damages. The Tenth Circuit has explained:

> In *Blango v. Thornburgh*, 942 F.2d 1487, 1490 (10th Cir. 1991), we specifically rejected a theory that a transferring jurisdiction loses jurisdiction over a transferred inmate: "Criminal jurisdiction over a

[11] Service in a case with a plaintiff prisoner who has filed an in forma pauperis motion is carried out by the U.S. Marshals Service. The U.S. District Court **does** place the burden on the plaintiff to determine the current address of any defendant **not currently employed** by the Colorado Department of Corrections, privately-run prison facilities, or the Federal Bureau of Prisons, all of whom have service of process agreements with the court.

> state's inhabitants remains when the respective states and territories under whose jurisdiction the prisoners were originally sentenced." Thus, [transferred prisoners] [a]re always incarcerated under the authority of the [transferor] State . . . .

Overturf v. Massie, 385 F.3d 1276, 1279 (10th Cir. 2004) (quoting *Blango*).

A prisoner's transfer to another facility may, however, render a claim for equitable relief "constitutionally moot" where the relief sought is specific to a particular facility. *See Jordan v. Sosa*, 654 F.3d 1012, 1029 (10th Cir. 2011). For example, where the named defendants are not located at the same prison as the plaintiff's current location and do not have authority over that location or the ability to effectuate the requested relief at the plaintiff's current location, then "they would not be responsible for actually issuing (or authorizing others to issue)" the equitable relief sought. *Id.* at 1030. In that scenario, relief in such a transferred plaintiff's favor "would have no effect on the defendants' behavior towards him," and "run afoul of the Supreme Court's prohibition against advisory opinions." *Id.* (citations and quotations omitted).

Further, "[e]ven if [a court] conclude[s] that [a prisoner-plaintiff's] claims could survive [ ] constitutional-mootness inquiry," it may sometimes nevertheless "bar [the same] claims on prudential-mootness grounds." *Id.* at 1033. In *Jordan*, the Tenth Circuit performed an analysis of the "capable of repetition yet evading review" analysis and explained that a plaintiff is required to show that the allegedly unconstitutional behavior is "*necessarily* of short duration—e.g., that an inmate is likely to be moved from the institution where he is subject to the allegedly unconstitutional action *before* he is able to litigate his claim." *Id.* at 1037; *see also Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir.1997) (collecting cases finding prisoner's claims for declaratory and injunctive relief moot in light of release from confinement).

This doctrine demonstrates that naming the proper defendants in a case seeking equitable relief is critical: If the defendant in an injunctive-relief case is the warden is a particular prison and the plaintiff is transferred to a location where that warden has no authority or ability to effectuate the requested relief, the plaintiff's claim is likely moot. However, if the defendant in an injunctive-relief case is the Federal Bureau of Prisons and the plaintiff is transferred from one federal prison to another—and the alleged violation is ongoing at the new prison—the plaintiff's claim is likely not moot because the *entity*, as the defendant, has the ability to effectuate the requested relief no matter the plaintiff's assigned location. *See, e.g.*, *Chapman v. Federal Bureau of Prisons*, 285 F. Supp. 3d 1204 (D. Colo. 2016) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010)).

Chapter 3: Substantive Prison Law

- *Framework of Prisoner Civil Rights Claims*

1. Conditions of Confinement (8th Amendment Cruel/Unusual Punishment)

The Eighth Amendment to the Constitution prohibits the infliction of "cruel and unusual punishments." "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). This duty extends to prisons, for it is well-established that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). In ascertaining the content of those standards, the Supreme Court interprets the Amendment "in a flexible and dynamic matter." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). This means that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

People incarcerated after conviction/sentence make claims under this provision to challenge many aspects of their conditions of confinement: inadequate medical and mental health care, correctional officers' use of force against them, solitary confinement, failure to protect them from violence from other incarcerated people, inadequate nutrition, unsanitary environmental conditions, and more.

Eighth Amendment doctrine recognizes two general categories of claims:

- *Use of force claims*, which are governed by a "purpose" standard, with liability turning on whether a prison official acted "maliciously and sadistically for the very purpose of causing harm"; and

- *Non-force claims*, which are governed by a "deliberate indifference" standard, which occurs when a defendant knows about a serious risk of harm and disregards it.

a. Overview – Deliberate Indifference standard

The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the 'evolving standards of decency that mark the progress of a maturing society,' or which 'involve the unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal citations omitted).

An incarcerated person bringing an Eighth Amendment claim to challenge prison conditions must satisfy a two-pronged test with objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

The objective prong requires the plaintiff to demonstrate the challenged condition is sufficiently serious because it deprives them of "the minimal civilized measure of life's necessities" (or a "basic human need"). *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The Supreme Court has listed as basic human needs food, clothing, shelter,[12] medical care, reasonable safety, warmth, and exercise. *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Wilson*, 501 U.S. at 304. And the Tenth Circuit has held that the inquiry of whether the challenged deprivation is sufficiently serious "by necessity relies on the particular facts of each situation; the circumstances, nature, and duration of the challenged conditions must be carefully considered." *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("[Eighth Amendment] inquiry turns not only on the severity of the alleged deprivations, but also on their duration"); *Allen v. Avance*, 491 Fed. Appx. 1, 3 (10th Cir. 2012) ("The failure to provide basic necessities, if sufficiently prolonged and severe, can satisfy the objective prong").

The Supreme Court also has held that conditions that "pose an unreasonable risk of serious damage to a [person's] future health" may violate the Eighth Amendment even if the damage has not yet occurred and may not affect every incarcerated person exposed to the conditions. *Farmer*, 511 U.S. at 836; *Helling*, 509 U.S. at 32. In cases involving risks to health or safety, courts "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id*. at 36.

The subjective prong requires a showing that prison officials acted with "deliberate indifference" in imposing or maintaining the condition despite knowing about the harm or risk of harm. *Farmer*, 511 U.S. at 836. In other words, an incarcerated plaintiff must prove that the defendant knew of the risk posed by the challenged condition and disregarded that knowledge by failing to take reasonable measures to abate the risk. *Martinez v. Beggs,* 563 F.3d 1082, 1088-89 (10th Cir. 2009). Deliberate indifference falls somewhere between mere negligence and actual malice; the Supreme Court has held that a prison official can be found reckless or deliberately indifferent if "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. The fact that a risk was obvious is circumstantial evidence that permits a conclusion that a prison official knew of the risk, even absent direct evidence about what the official knew. *Farmer*, 511 U.S. at 842-43; *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). A prison official need not know the precise nature of the risk to be found deliberately indifferent, as long as they know that a serious risk exists. *Farmer*, 511 U.S. at 843.

b. Medical and Mental Health Care

The Supreme Court has held that the Eighth Amendment obligates the government to provide medical care for those whom it punishes by incarceration: "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 102-04. This obligation also extends to the provision of adequate treatment for

[12] "Shelter" includes various aspects of physical conditions including lighting, ventilation, and structural deterioration.

mental illness, including psychological or psychiatric care.[13] *Ramos v. Lamm*, 639 F.2d 559, 574-75 (10th Cir. 1980). Prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when they are deliberately indifferent to the serious medical needs of people in their custody. *Estelle*, 429 U.S. at 106; *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (1999).

The objective prong in a medical care case can be satisfied in two different ways. First, a plaintiff can demonstrate that his medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000) (quoting *Hunt*, 199 F.3d at 1224); *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014) (citing *Oxendine v. Kaplan,* 241 F.3d 1272, 1276 (10th Cir. 2001)). Second, a plaintiff can show that the medical need is one that puts him at substantial risk of serious future harm. *Helling,* 509 U.S. at 33; *Shannon v. Graves*, 257 F.2d 1164, 1168 (10th Cir. 2001) ("There is no requirement that an inmate suffers serious medical problems before the condition is actionable"). Under this second test of the objective prong, the question is not limited to whether the plaintiff's symptoms render a medical need sufficiently serious, but also extends to whether the potential harm to the plaintiff is sufficiently serious. *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005).

The Tenth Circuit has held that a delay in providing medical care is sufficiently serious "if the delay resulted in substantial harm" (*Oxendine*, 241 F.3d at 1272; *Sealock*, 218 F.3d at 1210; *Kikumura v. Osagie*, 161 F.3d 1269 (10th Cir. 2006)), and that "several hours of untreated severe pain" counts as substantial harm. *Chapman v. Santini*, 805 Fed. Appx. 548, 553 (10th Cir. 2020), quoting *Al-Turki,* 762 F.3d at 1194; *Mata*, 427 F.3d at 755.

While a plaintiff who "merely disagrees with … a prescribed course of treatment does not state a constitutional violation" (*Perkins v. Kansas Dep't of Corr*., 165 F.3d 803, 811 (10th Cir. 1999)), the provision of any medical or medical health care does not establish that the treatment is adequate. *Halpin v. Simmons*, 33 F. App'x 961, 964 (10th Cir. 2002); *Hunt*, 199 F.3d at 1224 ("the fact that [a plaintiff] has seen numerous doctors [does not] necessarily mean that he has received treatment for serious medical needs"). The Tenth Circuit also has held that the rendering of medical services by unqualified personnel is deliberate indifference (*Oxendine*, 241 F.3d at 1278-79).

c. Personal Safety (Prisoner Assaults)

Prison officials must take reasonable measures to protect prisoners from assault by other incarcerated people, including sexual assault. *Farmer*, 511 U.S. at 833. A prisoner need not wait until an assault has occurred before obtaining injunctive relief (*Id.* at 845), and the Tenth Circuit has held that the Eighth Amendment does not preclude a claim for damages by a plaintiff who is subjected to a risk of assault, even if they are not actually assaulted. *Benefield v. McDowall*, 241

[13] In addition, the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) provides for the creation of protection and advocacy (P&A) systems designed to "(A) protect and advocate the rights of individuals with mental illness; and (B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 10801 *et seq*.

F.3d 1267, 1271 (10th Cir. 2001). Additionally, "it is clearly established in this circuit that labelling a prisoner a snitch constitutes deliberate indifference"). *Id.*

d. Housing (Crowding, Solitary, Sanitation, Etc.)

An incarcerated person must be provided with "shelter which does not cause his degeneration or threaten his mental and physical well-being." *Ramos*, 639 F.2d at 568.

- ***Crowding.*** There are no fixed constitutional limits on prison crowding; instead, courts examine the overall conditions of confinement as well as the amount of space per person to determine how crowding affects people's lives. *Rhodes*, 452 U.S. at 366; *Brown v. Plata*, 563 U.S. 493, 531 (2011).

- ***Heat.*** Inadequate or excessive heat can violate the Eighth Amendment. *Wilson v. Seiter*, 501 U.S. 304 (1991) (warmth is a basic human need; low temperatures and no blankets would violate the Eighth Amendment).

- ***Sanitation.*** The Eighth Amendment requires adequate arrangements for cleaning and garbage disposal. *Ramos*, 639 F.2d at 569-70. Exposure to sewage can constitute a sufficiently serious risk to health and safety to violate the Eighth Amendment. *Taylor v. Riojas*, 141 S.Ct. 52 (2020); *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *Ramos,* 639 F.2d at 569-70; *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001). "At the same time, the frequency and duration of the condition, as well as the measures employed to alleviate the condition, must be considered." *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001), citing *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978).

- ***Solitary confinement.*** Eighth Amendment cases in this circuit challenging long-term solitary confinement have asserted that isolation deprives people of basic human needs such as human/social interaction, environmental stimulation, sleep, light, and others. *See, e.g., Silverstein v. Fed. Bureau of Prisons*, 559 Fed. Appx. 739 (2014). Plaintiffs have also argued that solitary confinement puts them at substantial risk of serious harm. *Id*. To date, neither the Supreme Court nor the Tenth Circuit has held that solitary confinement is per se unconstitutional. *See, id.; Grissom v. Roberts,* 902 F.3d 1162, 10th Cir. 2018). That said, in recent years both courts have suggested that society's growing knowledge about the harms of solitary may result in a different conclusion. *See, e.g., Davis v. Ayala*, 135 S.Ct. 2187, 2209 (2015) (Kennedy, J., concurring); *Ruiz v. Texas*, 137 S.Ct. 1246 (2017) (Breyer, J., dissenting); *Apodaca v. Raemisch*, 139 S. Ct. 5 (Sotomayor, J., dissenting from denial of cert.) (2018); *Grissom*, 902 F.3d at 1175 (Lucero, J., concurring) (2018). And other circuits have held that prolonged or indefinite solitary confinement violates the Eighth Amendment. *See, e.g*., *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019); *Porter v. Pennsylvania Dep't of Corrections*, 974 F.3d 431 (3d Cir. 2020); *Johnson v. Penn. Dep't of Corr*., 2021 WL 567802 (3d Cir. Feb. 16, 2021).

e. Pre-Trial Detainees

In-custody treatment claims brought by pretrial detainees arise under the Due Process Clause of the Fourteenth Amendment, not the Cruel and Unusual Punishments Clause of the Eighth Amendment. This is so because, as the Supreme Court has held:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions…[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

Ingraham v. Wright, 430 U.S. 651, 671-72 n. 40 (1977).

In *Kingsley v. Hendrickson*, the Supreme Court held that the Eighth Amendment standard for excessive force claims, which requires that defendants act "maliciously and sadistically to cause harm" does not apply to Fourteenth Amendment excessive force claims brought by pretrial detainees, which require showing only that defendants' use of force was "objectively unreasonable." 135 S. Ct. 2466, 2473 (2015). The circuits are split on whether *Kingsley* alters the standard for conditions of confinement (including inadequate medical care claims) brought by pretrial detainees, and the Tenth Circuit has, so far, declined to address the question. *See Sawyers v. Norton,* 962 F.3d 1270, 1282 n. 11 (10th Cir. 2020); *Burke v. Regalado*, 935 F.3d 960, 991 (10th Cir. 2019); *Perry v. Durborow*, 892 F.3d 1116, 1122 n. 1 (10th Cir. 2018). Thus, post-*Kingsley*, the Tenth Circuit has assumed without deciding that in conditions of confinement cases brought by pretrial detainees under the Fourteenth Amendment, "we apply an analysis identical to that applied in Eighth Amendment cases." *Burke*, 935 F.3d at 991.

2. Excessive Force By Staff

People convicted of crimes are protected from misuse of force by the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Supreme Court has held that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). In deciding whether prison officials used force "maliciously or sadistically," the extent of injury inflicted is "one factor" and "the absence of serious injury is therefore relevant to the Eighth Amendment inquiry but does not end it." *Id.* at 7; *Wilkins v. Gaddy,* 559 U.S. 34, 37 (2010); *see also U.S. v. LaVallee*, 439 F.3d 670, 688 (10th Cir. 2006) (no requirement to prove plaintiff suffered a certain level or type of injury to establish excessive force). Even *de minimis* force may be unconstitutional if it is "repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 9-10; *Brosh v. Duke*, 616 Fed. Appx. 883, 888 (10th Cir. 2015); *see also Ullery v. Bradley*, 949 F.3d 1282, 1297 (10th Cir. 2020).

The Supreme Court has rejected the idea that *de minimis* injury means *de minimis* force, stating "injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue and

excessive force claim merely because he has the good fortune to escape without serious injury." *Wilkins*, 559 U.S. at 38.

The Tenth Circuit has held that an excessive force claim "involves two prongs: (1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials acted with a sufficiently culpable state of mind." *Giron v. Corr. Corp. of America*, 191 F.3d 1281, 1289 (10th Cir. 1999). In addition to the extent of the injury, other relevant factors in the "malicious and sadistic" analysis are "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'" *Hudson*, 503 U.S. at 7, quoting *Whitley v. Albers*, 475 U.S. 312 (1986). Whether correctional defendants used force in "a good faith effort to restore discipline" versus whether they applied it "maliciously or sadistically for the purpose of causing harm" may involve factual issues that preclude summary judgment. *Ali v. Dinwiddie*, 437 Fed. Appx. 695 (10th Cir. 2011).

In cases involving bystanders (as opposed to targets) of force, the Tenth Circuit has held that the appropriate framework is the excessive force test, not the conditions of confinement test. *See Redmond v. Crowther*, 882 F.3d 927 (10th Cir. 2018) (plaintiff's claim of exposure to tear gas directed at another incarcerated person analyzed under excessive force framework). Cases involving sexual abuse of a plaintiff by a guard are "generally" analyzed as excessive force claims. *Giron*, 191 F.3d at 1290; *Graham v. Sheriff of Logan Cty*., 741 F.3d 1118 (10th Cir. 2013). In cases involving claims for damages for sexual assault, "the clearly established weight of persuasive authority in our sister circuits as of 2015 would have put any reasonable corrections officer . . . on notice his alleged conduct would violate the Eighth Amendment." *Ullery*, 949 F.3d at 1291.

3. Civil Liberties

a. Overview – Turner/Reasonable Relationship Standard

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court outlined the applicable framework appliable to these claims, explaining that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. *Turner* outlines four factors for the Court to consider:

> (1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and (4) whether ready,

> easy-to-implement alternatives exist that would accommodate the prisoner's rights.

Beerheide v. Suthers, 286 F.3d 1179, 1185 (10th Cir. 2002) (summarizing *Turner* factors); *see also Searles v. Dechant*, 393 F.3d 1126, 1131 (10th Cir. 2004); *Wardell v. Duncan*, 470 F.3d 954, 960 (10th Cir. 2006). This analysis requires the courts to "balance the guarantees of the Constitution with the legitimate concerns of prison administrators," and "on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoners' constitutional rights may be curtailed." *Beerheide*, 286 286 F.3d at 1185.

The first factor "is the most important; . . . it is not simply a consideration to be weighed but rather an essential requirement." *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012) (quotation marks omitted). For this factor, the "logical connection between the regulation and its asserted goal(s) cannot be so remote as to render the regulation arbitrary or irrational," and "the legitimate governmental objective must also be neutral." *Jones v. Salt Lake Cty*., 503 F.3d 1147, 1153 (10th Cir. 2007) (citing *Turner*, 482 U.S. at 89-90).

As to the second factor regarding alternative means of exercising the right, *Turner* provides "courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation." 482 U.S. at 90. The "alternatives need not be ideal[;] they need only be available." *Wardell*, 470 F.3d at 961; *see also Jones*, 503 F.3d at 1153.

As to the third factor addressing the impact an accommodation will others, *Turner* explains that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." 482 U.S. at 90; *see also Jones*, 503 F.3d at 1153-54 ("[W]here the right in question can only be exercised at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike, the courts should defer to the informed discretion of corrections officials[.]") (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989)).

Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation," whereas "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner*, 482 U.S. at 90 (quotation marks omitted); *Jones*, 503 F.3d at 1154. Under this analysis:

> This is not a least restrictive alternative test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90-91 (citation and quotation marks omitted); *Jones*, 503 F.3d at 1154.

At the pleading stage, the plaintiff need not address four *Turner* factors, but must nonetheless "plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Al-Owhali*, 687 F.3d at 1240 (quoting *Gee v. Pacheco*, 627 F.3d at 1178, 1188 (10th Cir. 2010)). The plaintiff will ultimately have the burden of establishing a violation of his constitutional rights. *See Jones*, 503 F.3d at 1161 (citing *Wirsching v. Colorado*, 360 F.3d 1191, 1200 (10th Cir. 2004)).

b. Freedom of Expression

Inmates have First Amendment rights "while in prison to the extent the right is not inconsistent with prisoner status or the legitimate penological objectives of the prison." *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004) (citations omitted).

i. Correspondence

The Supreme Court has held that "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." *Procunier*, 416 U.S. at 817-18, *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Indeed, "the Supreme Court has recognized that the control of mail to and from prisoners is a necessary adjunct to penal administration." *Brown v. Saline Cty. Jail*, 303 F. App'x 678, 683 (10th Cir. 2008) (citing *Thornburgh*, 490 U.S. at 407–08). With that said, "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Thornburgh*, 490 U.S. at 413 (1989).

Whether a restriction on correspondence violates the First Amendment depends on Turner's four-factor, fact-bound analysis. Examples addressed by the Supreme Court and Tenth Circuit include:

- *Turner v. Safley*, 482 U.S. 78 (1987) (determining that inmate-to-inmate correspondence rule was reasonably related to legitimate security concerns).
- *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (affirming district court requirement "that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of the letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence").
- *Al-Owhali v. Holder*, 687 F.3d 1236, 1241 (10th Cir. 2012) (affirming dismissal of claim based on restrictions placed inmate in corresponding with relatives where complaint "include[s] no facts indicating that the government lacks a legitimate penological interest in limiting his correspondence or that the restrictions are unrelated to the prison's concerns that inmate's "communications or contacts with persons could result in death or serious bodily injury to persons").
- *Wardell v. Duncan*, 470 F.3d 954, 960 (10th Cir. 2006) (affirming dismissal of claim regarding confiscation of mailed items because they had been paid for by a third party who

was on the list of visitors for another prisoner; the penological purpose of the restriction was to prevent contraband or other prohibited activity facilitated through the assistance of third parties outside the prison).

- *See also Treff v. Galetka*, 74 F.3d 191, 195 (10th Cir. 1996) ("A refusal to process any mail from a prisoner impermissibly interferes with the addressee's First and Fourteenth Amendment rights").
- *See also Lewis v. Clark*, 663 F. App'x 697, 701 (10th Cir. 2016) (affirming dismissal of claim based on ban of prisoner-to-prisoner correspondence where prohibition was reasonably related to safety and security).
- *See also Shupe v. Wyoming Dep't of Corr*., 290 F. App'x 164, 167 (10th Cir. 2008) (affirming dismissal of claim based on restriction of communications with the media as inadequately pled).

ii. Publications

Courts have recognized that both "inmates and those who send them publications" have a First Amendment rights, subject to the *Turner* analysis. *Jacklovich*, 392 F.3d at 433. Examples of Supreme Court and Tenth Circuit applying this analysis to publications include:

- *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) (distinguishing "between rejection of a publication 'solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant' (prohibited) and rejection because the publication is detrimental to security (permitted)").
- *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (holding that "a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores" was "a rational response by prison officials to an obvious security problem" of providing a means for smuggling contraband).
- *Jacklovich v. Simmons*, 392 F.3d 420, 422 (10th Cir. 2004) (determining that fact issues existed where prisoner challenged regulations that "(1) provide a $30 per month limit on outgoing inmate funds for books, newspapers and periodicals, subject to exceeding the limit once every three months for a newspaper subscription, (2) require that all inmate purchases of books, newspapers and periodicals be made by special purchase order through the institution, thereby prohibiting gift subscriptions, and (3) provide that books, newspapers and periodicals otherwise received be censored, with notice only to the inmate, but not the sender").
- *Gee v. Pacheco*, 627 F.3d at 1178, 1188 (10th Cir. 2010) (holding that an incarcerated person's allegations that the prison "forced him to dispose of magazines to which he subscribed" failed to state a viable claim).
- *Jones v. Salt Lake County*, 503 F.3d 1147, 1155-56 (10th Cir. 2007) (applying *Turner* to policy banning sexually explicit materials and finding no First Amendment violation where: (1) the policy served to protect "jail personnel and other inmates;" (2) prison security and safety is a legitimate governmental objective; (3) plaintiff could access other correspondence; and (4) plaintiff provided no alternative that would fully accommodate his rights while imposing "de minimis cost to valid penological interests").
- *See also Khan v. Barela*, 808 F. App'x 602, 608 (10th Cir. 2020) (determining that incarcerated plaintiff plausibly alleged a First Amendment claim with regard to the

newspaper clipping his mother sent him that because the ban "could be reasonably construed as an intent to punish rather than as a reasonable response to a legitimate penological concern")

- *Heard v. Chavez*, 669 F. App'x 788, 791-92 (10th Cir. 2017) (reviewing New Mexico's prison policy banning sexually explicit materials and holding that, under *Turner*, the policy did not violate prisoner's constitutional rights).
- *Al-Owhali v. Holder*, 687 F.3d 1236, 1242 (10th Cir. 2012) (affirming dismissal of claim based on restriction of Arabic-language media where complaint failed to assert that "the new restrictions were an abuse of the warden's broad discretion to limit incoming information" or address prison's rationale of "the need to prevent Al-Owhali from acting upon contemporary information or receiving coded messages").
- *Sperry v. Werholtz*, 413 F. App'x 31, 41 (10th Cir. 2011) (rejecting claim based on ban on sexually explicit material, and explaining that the regulation was neutral where "it bans sexually explicit material due to its impact on prison security, regardless of gender or sexual orientation," and noting that to establish a "rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned materials actually caused problems in the past, or that the materials are likely to cause problems in the future").

iii. Visiting/Phone Calls

The Supreme Court has acknowledged that "the Constitution protects 'certain kinds of highly personal relationships.'" *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). "[O]utside the prison context, there is some discussion in [Supreme Court] cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." *Id*. (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). In the prison context, the Supreme Court has recognized that "freedom of association is among the rights least compatible with incarceration. . . . Some curtailment of that freedom must be expected . . . ." *Overton*, 539 U.S. at 131 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc*., 433 U.S. 119, 125-26 (1977); *Hewitt v. Helms*, 459 U.S. 460 (1983)).

Examples of Supreme Court and Tenth Circuit cases applying the *Turner* analysis to restrictions on visitors and/or phone calls include:

- *Overton v. Bazzetta*, 539 U.S. 126 (2003) (upholding prison regulations that (1) excluded certain minor extended family members from visitation and required others to be accompanied by a legal guardian; (2) prohibited prisoners from visiting with formerly incarcerated people; and (3) subjected prisoners with two substance-abuse violations to ban of at least two years on future visitation).
- *Wirsching v. Colorado*, 360 F.3d 1191, 1198 (10th Cir. 2004) (affirming grant of summary judgment on claim challenging denial of visitation with his child where restriction was due to inmate's sex offender status).
- *Burnett v. Jones*, 437 F. App'x 736, 745 (10th Cir. 2011) (rejecting claim-based challenge requiring that collect phone calls be approved via a letter on the attorney's letterhead stating that he was the plaintiff's attorney of record and would accept the call).

- *Ricco v. Conner*, 146 F. App'x 249, 255 (10th Cir. 2005) (determining that five-year visitation restriction imposed in this case does not violate the Eighth Amendment).
- *Robinson v. Gunja*, 92 F. App'x 624, 627 (10th Cir.2004) (unpublished) (in rejecting claim based on monitoring of phone calls, recognizing that "'a prisoner's right to telephone access is subject to rational limitations in the face of legitimate security interests of the penal institution.'" (quoting *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir.1994)).

c. Religious Freedoms

i. Religious Land Use and Institutionalized Persons Act (State Prisons)

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling government interest. *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 859 (2015). RLUIPA provides greater protection for religious exercise than is available under the First Amendment. *Id.* at 862. RLUIPA is valid, although the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA), the statute on which RLUIPA is based, because RFRA's application on the States and their subdivisions was beyond Congress's power under Section 5 of the Fourteenth Amendment. *Id.* at 860 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at 860 (quoting 42 U.S.C. §§ 2000bb–1(a), (b)). ("RLUIPA thus allows prisoners 'to seek religious accommodations pursuant to the same standard set forth in RFRA.'" *Holt*, 135 S. Ct. at 860 (2015) (citing *Gonzales v. O Centro Espírita Beneficente Uniõ do Vegetal*, 546 U.S. 418, 436 (2006)).

The plaintiff bears the burden of showing the policy implicates their religious exercise. In *Holt*, the prison did not dispute the sincerity of the plaintiff's belief that growing a beard was a dictate of his religious faith. *Id.* at 862. The plaintiff also bears the burden of proving the policy substantially burdens the religious exercise, a burden easily carried where, if the plaintiff disobeys a policy prohibiting the religious practice (e.g., beards in the case of *Holt*) they would face serious disciplinary action. *Id.*

Importantly, unlike First Amendment analysis required by prior free-exercise cases, "the availability of alternative means of practicing religion" is *not* the analysis required under RLUIPA, which "provides greater protection" of religious exercise than does the First Amendment. *Holt*, 135 S. Ct. at 862. Instead, "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened a religious exercise (in *Holt*, the burdened exercise was the growing of a ½–inch beard)."

If a plaintiff meets his burdens, the burden shifts to the defendant(s) to show that refusal to allow the plaintiff's exercise of religion falls under RLUIPA's exceptions, namely that the refusal

"(1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest," *Holt*, 135 S. Ct. 853, 863 (quoting at 42 U.S.C. § 2000cc–1a) (alternation removed). In *Holt*, defendants argued that preventing plaintiffs from disguising their identities and hiding contraband were compelling interests furthered by its beard-policy. Applying a detailed analysis, the Court found neither RLUIPA exception was met, particularly given the "exceptionally demanding" nature of the least-restrictive means test. *Id.* at 863–65 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

Notably, the Court looked to prison policies in a "vast majority of states and the federal government" to reach the conclusion that the security concerns raised by the defendant were not the least restrictive means. *Id.* at 866. "[W]hen so many prisons offer an accommodation, a prison must, at minimum, offer persuasive reasons why it believes it must take a different course" while "[c]ourts . . . must not 'assume a plausible, less restrictive alternative would be ineffective.'" *Id.* (quoting *United States v. Playboy Entm't*, 529 U.S. 803, 824 (2000)).

When a client is seeking a religious accommodation under RLUIPA, in addition to examining the relevant CDOC regulations, it is important to research whether there is consensus among the correctional institutions of a "vast majority of states and the federal government" because "when so many prisons offer an accommodation, a prison must, at minimum, offer persuasive reasons why it believes it must take a different course." *Holt*, 135 S.Ct. at 866 (citing both Brief for Petitioner at 24–25, *Holt v. Hobbs*, 574 U.S. 352 (2015) (No. 13-6827), 2014 WL 2200467 and Brief for United States as Amicus Curiae Supporting Petitioner at 28–29, *Holt v. Hobbs*, 574 U.S. 352 (2015) (No. 13-6827) 2014 WL 2329778).

Applicable CDOC Regulations

CDOC AR 800-01	Religious Programs, Services, Clergy, Faith Group Representatives & Practices
CDOC AR 800-02	Religious Trust Fund Services
CDOC AR 800-06	Offender Marriages and Civil Unions

ii. Religious Freedom Restoration Act (Federal Prisons)

For people incarcerated in the federal system, the Religious Freedom Restoration Act provides largely the same protections. The U.S. Supreme Court affirmed recently that RFRA provides for injunctive relief as well as damages against individuals. *See Tanzin v. Tanvir*, 592 U.S. ___ (2020). Similar to the RLUIPA analysis described above:

A plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion. The burden then shifts to the government to show that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened. The government must also establish that the substantial burden is the least restricted means of furthering that interest.

Chesser v. Director Federal Bureau of Prisons, No. 15-cv-1939, 2018 WL 3729511, at *10 (D. Colo., Aug. 6, 2018) (alterations and citations omitted).

Applicable BOP Regulations

iii. First Amendment (State and Federal Prisons)

In addition to the statutory protections of RLUIPA and RFRA, the First Amendment may provide relief for violations of an incarcerated person's right to free exercise of their religion, so long as the belief the plaintiff alleges is restricted or burdened is "religious in nature" and "sincerely held." *United States v. Seeger*, 380 U.S. 163 (1965). Courts analyze First Amendment free exercise claims under the *Turner* standard (described above), meaning that a challenged prison regulation or practice will not impinge on an incarcerated person's constitutional right if the regulation or practice is "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1979)).

d. Searches

The Supreme Court considers the underlying Fourth Amendment jurisprudence when considering the legality of a challenged search in a civil rights lawsuit. As a general principle, the Fourth Amendment only prohibits unreasonable searches, and to answer whether the search is reasonable one must consider whether the search intrudes on a reasonable privacy expectation. *Grady v. North Carolina*, 575 U.S. 306, 310 (2015).

Strip Searches

Detainees many times face strip search upon entry into jail. The constitutionality of a strip search is evaluated by balancing the need for the particular search against the invasion of personal rights that the search entails. *Shroff v. Spellman*, 604 F.3d 1179, 1191 (10th Cir. 2008) (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

"[C]orrectional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." *Sweat v. Rickards*, 712 F. App'x 769, 782–83 (10th Cir. 2017) (quoting *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 328 (2012)). The court in *Sweat* thus reasoned that a "strip search of an arrestee being booked into [a] correctional facility is constitutionally permissible, at least where the strip search is no more intrusive than the one the Supreme Court upheld in *Bell* . . . ." *Sweat*, 712 F. App'x at 782.

The Tenth Circuit recently reiterated, however, that some humiliating strip searches of even convicted prisoners have been held to violate the constitution; at the same time, the court questioned whether its holding on this point properly relied on the Fourth Amendment, rather than the Eighth Amendment. *See Colbruno v. Kessler*, 928 F.3d 1155, 1164 (10th Cir. 2019).

In *Colbruno*, the court held that challenges to strip searches that occur in pre-trial confinement are generally appropriately evaluated under the Fourteenth Amendment's Due Process Clause. *Id.* at 1161–63, 1165. "[A] pretrial detainee can establish a due-process violation by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id.* at 1163. *Colbruno* surveyed past cases in which Tenth Circuit has repeatedly found strip searches

could violate the Constitution. *Id.* at 1163–65 (citing, inter alia, *Shroff v. Spellman*, 604 F.3d 1179, 1184 (10th Cir. 2010) (finding a violation where mother was required to pump breastmilk under female cadet's observation even though she could have been afforded privacy in a guarded room); *Hill v. Bogans*, 735 F.2d 391, 393 (10th Cir. 1984) (finding a violation where arrestee for traffic violations forced as part of booking process to drop pants and undershorts in a lobby area with ten to twelve people even though the search was unnecessary to discover contraband or weapons)).

4. Procedural Due Process

a. Overview – What Liberty Means; What Process Is Due

The Due Process Clause of the United States Constitution prohibits the government from depriving "any person of life, liberty or property with due process of law." U.S. Const. amend. V, amend. XIV, § 1. The procedural guarantees of the Fifth and Fourteenth Amendments' Due Process Clauses apply only when a constitutionally protected liberty or property interest is at stake. See *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977). A liberty interest can arise from the Constitution and from state law (subject to the limits of *Sandin v. Conner*, 515 U.S. 472 (1995). See *Wilkinson v. Austin*, 545 U.S. 209, 221-22 (2005). When deciding whether the Constitution itself protects an alleged liberty interest, the court will consider whether the practice or sanction in questions "is within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976) and *Hewitt v. Helms*, 459 U.S. 460, 466-70 (1983), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995).

Procedural due process claims brought by incarcerated plaintiffs often involve placement in solitary confinement (sometimes referred to as "restrictive housing," "administrative detention," "disciplinary segregation," "segregation housing unit (SHU)", etc.). In *Sandin*, the Supreme Court considered whether a plaintiff's sentence to thirty days in disciplinary segregation gave rise to a protected liberty interest. The Court held that "states may under certain circumstances create liberty interests which are protected by the Due Process Clause. These interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to ordinary incidents of prison life." *Id*. at 483-84.

Once a liberty interest is established, the court must turn to the question of what process is due the incarcerated person; due process requirements must be "flexible and cal[l] for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, (1972). The Supreme Court has generally declined to establish rigid rules and instead embraces a framework of three factors to evaluate the sufficiency of particular procedures. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (citing *Mathews v. Eldridg*e, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Due process is satisfied if, in the example of assignment to a maximum security facility, a plaintiff receives the following: (1) a sufficient initial level of process, i.e., a reasoned examination of the assignment; (2) the opportunity to receive notice of and respond to the decision; and (3) safety and security concerns are weighed as part of the placement decision. *McMillan v. Wiley*, 813 F. Supp. 2d 1238, 1249 (D. Colo. 2011) (citing *Estate of DiMarco v. Wyo. Dept. of Corr.*, 473 F.3d 1334, 1344 (10th Cir.2007)).

Prison inmates in the CDOC may seek judicial review of prison disciplinary convictions in the state district courts through C.R.C.P. 106.5.

b. Disciplinary Proceedings

The right to procedural due process in the context of disciplinary hearings requires the prison/jail to provide notice and hearing if the discipline sought to be imposed deprives the inmate of life, liberty, or property. Notice of the alleged violation and right to an administrative hearing must be given in order to uphold the disciplinary measure against the inmate. Counsel may look to *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Sandin v. Conner*, 515 U.S. 472 (1995) for further guidance.

Prison disciplinary hearings must meet the following requirements to satisfy the Due Process Clause: (1) written notice of the charge against the prisoner, given at least twenty-four hours prior to the hearing, *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); (2) the right to a decision rendered by a decisionmaker who is not biased and dishonestly suppressing evidence of innocence, *see Edwards v. Balisok*, 520 U.S. 641, 647 (1997*)*; (3) the right to call witnesses and to present documentary evidence when to do so will not unduly jeopardize institutional safety or correctional goals, *Wolff*, 418 U.S. at 566; (4) a written statement of reasons for the disciplinary action taken, *id.* at 564. Due process requires not only that *Wolff* be satisfied, but also that the disciplinary decision be supported by "some evidence." *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445 (1984).

- In contrast to the Sixth Amendment right to confront and cross examine witnesses in a criminal prosecution, "'there is no general right to confront and cross-examine adverse witnesses' in the context of prison disciplinary proceedings." *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 812–13 (10th Cir. 2007) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 321 (1976)).

- The majority of federal court cases arising out of prison disciplinary proceedings concern loss of good time credits. The Supreme Court has held that good time credits must not be taken away without the minimal safeguards of due process, as set forth above in *Wolff*. *See Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985) (citing *Wolff v. McDonnell*, 418 U.S. 539, 563–67 (1974)). The decision of a disciplinary board to revoke an inmate's good time credit must be supported by "some evidence." *Hill*, 472 U.S. at 455. "A disciplinary board's decision can be upheld by a reviewing court 'even if the evidence supporting the decision is "meager."' *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 812 (10th Cir. 2007) (quoting *Mitchell v. Maynard*, 80 F.3d 1443, 1445 (10th Cir. 1996))."Ascertaining

whether [the 'some evidence'] standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Howard*, 487 F.3d at 812 (quoting *Hill*, 472 U.S. at 455–56).

- "[I]nmates have no right to retained or appointed counsel at prison disciplinary proceedings." *United States v. Gouveia*, 467 U.S. 180, 185 n.1 (1984).

- If a prisoner elects to remain silent at his prison disciplinary hearing, that silence may be used against him. *Baxter v. Palmigiano*, 425 U.S. 308, 317–20 (1976). A prison disciplinary hearing is civil in nature and therefore the Fifth Amendment does not apply. *See id.* at 318–19.

- "[E]rrors made by prison officials in denying witness testimony at official hearings are subject to harmless error review." *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 813 (10th Cir. 2007) (quoting *Grossman v. Bruce*, 447 F.3d 801, 805 (10th Cir. 2006)).

- The prisoner's right to call witnesses is not absolute: prison officials may bar witnesses called by the prisoner. *See Ramer v. Kerby*, 936 F.2d 1102, 1104 (10th Cir. 1991) (ruling witness-requests "should . . . be denied if officials determine testimony would be irrelevant, cumulative or otherwise unnecessary for the committee to come to a fair resolution of the matter," although, when the inmate faces a credulity problem whereas the called staff-witness does not, a determination that testimony would be "merely corroborative" is generally insufficient to justify denial of an inmate's request) (citing *Graham v. Baughman*, 772 F.2d 441, 445 (8th Cir. 1985)); *see also Wolff v. McDonnell*, 418 U.S. 539, 598 (1974) (Douglas, J., concurring) ("[E]ven in a criminal trial the right to present one's own witnesses may be limited by the trial judge's finding that the evidence offered is irrelevant, incompetent, or needlessly repetitious, and certainly the same restrictions may apply in the prison setting.").

The District of Colorado has observed that "there is no constitutional right to claim self defense in a prison disciplinary proceeding." *Saleh v. Davis*, No. 09–cv–02607–PAB–KLM, 2010 WL 5676524, at *6 (D. Colo. Nov. 4, 2010) (citing *Rowe v. DeBruyn*, 17 F.3d 1047, 1052–53 (7th Cir. 1994)). It further noted "crediting such a defense 'may simply beget more prison violence.'" *Saleh*, 2010 WL 567524, at *6 (quoting *Martin v. Tilton*, No. 07-cv-01022, 2008 WL 474393, at *6 (S.D.Cal. Feb. 19, 2008)). The court in *Saleh* evaluated a BOP disciplinary proceeding.

The Colorado Department of Corrections' Code of Penal Discipline specifically provides that "self-defense" (a term it defines at "Self Defense" may be a defense to the within defined charges of Murder, Manslaughter, Assault on Offender, Fighting Class I, and Fighting Class II. CDOC AR 150-01.

c. Disciplinary Segregation

Placement in segregation as a disciplinary sanction requires the prison/jail to give notice and right to a hearing. This, however, is distinct from classification. Typically, incarcerated people

have no liberty interest in classification. Counsel should investigate whether the form of discipline sought to be imposed implicates a liberty interest. The Court in *Sandin* ruled that in order to establish a state created liberty interest, a prisoner-plaintiff must show (1) mandatory objective state criteria for imposing disciplinary sanction, and (2) that the sanction imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, at 484.

The inquiry in a due process claim challenging long-term or indefinite solitary confinement, disciplinary segregation or other forms of isolation as a result of a disciplinary action is as follows:

- Was the inmate subjected to atypical and significant conditions of confinement as compared to the ordinary incidents of prison life? If no there is likely no liberty interest, and therefore no due process violation.
- If the answer is yes, did the inmate receive any procedure prior to placement in segregation? If the answer is no, then there has been a due process violation.
- If the answer is yes, was the procedure adequate? If it was not, there is a due process violation. If the procedure was adequate, there is no due process violation.
- If the answer is no, could the procedure ever be adequate for the conditions imposed? [14]
- When considering whether conditions of confinement were humane, counsel may investigate living space, access to exercise, access to hygiene and sanitation, heating and ventilation, and lack of amenities.
- While one factor may rise to the level of a substantive due process violation, counsel may also whether the cumulative effect of multiple conditions rise to the level of a substantive due process violation.

d. Administrative Segregation

Placement in administrative segregation (i.e., solitary confinement conditions not imposed as part of a disciplinary sanction) implicates a liberty interest but does not afford the same degree of procedural due process as placement in disciplinary segregation. Notice and opportunity to challenge the placement at an informal hearing are required. However, the incarcerated person is not entitled to a full adversarial hearing such as calling witnesses and assistance in preparing for the hearing. See *Hewitt v. Helms*, 459 U.S. 460 (1983); see also *Wilkinson v. Austin*, 545 U.S. at 224 (2005), and *Estate of DiMarco v. Wyo. Dept. of Corr.*, 473 F.3d at 1344.

Categorically, the Tenth Circuit holds that "restrictions on an inmate's telephone use, property possession, visitation and recreation privileges are not different in such degree and duration as compared with the ordinary incidents of prison life to constitute protected liberty interests under the Due Process Clause." *Requena v. Roberts*, 893 F.3d 1195, 1218 (10th Cir. 2018) (quoting *Marshall v. Morton*, 421 F.App'x 832, 838 (10th Cir. 2011)), *cert. denied*, 139 S. Ct. 800 (2019). For example, in light of the *Sandin* case's abrogation of prior holdings employing a methodology for identifying state-created liberty interests that emphasized the language of a

[14] If the procedure could not be adequate for the conditions imposed, counsel may consider whether there has been a substantive due process violation such as whether the conditions of confinement were humane.

particular regulation instead of the nature of the deprivation, the Tenth Circuit no longer holds that there is a liberty interest created by the expectation that prisoner-account money not used for specified reasons will be returned to the inmate at the end of his incarceration. *Clark v. Wilson*, 625 F.3d 686, 691 (10th Cir. 2010).

Post-*Sandin* and *Wilkinson,* in determining whether a protected liberty interest exists, the Tenth Circuit "typically consider[s] four nondispositive factors" to decide whether, under *Sandin*, a hardship is "atypical and significant in relation to the ordinary incidents of prison life . . . ." *Requena v. Roberts*, 893 F.3d 1195, 1217 (10th Cir. 2018). Namely, whether "(1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement . . . , and (4) the placement is indeterminate." *Id.* (quoting *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007).

For example, the Tenth Circuit has held certain people had no liberty interest in avoiding transfer without due process to the BOP's supermax prison (ADX) in Florence, Colorado. *Rezaq v. Nalley*, 677 F.3d 1001, 1004, 1016 (10th Cir. 2012). The court's evaluation under the *DiMarco* factors concluded that (1) the ability to better monitor inmates and the transfer based on the nature of the inmate's terrorism-related offenses were legitimate penological interests, (2) the conditions in the general population unit at ADX were "not extreme as a matter of law[,]" (3) the placement did not increase the duration of confinement, and (4) placement was not indeterminate because "periodic review process included opportunities for plaintiffs to participate." *Rezaq*, 677 F.3d. at 1013–16.

That said, in another Tenth Circuit case involving a due process challenge brought by a plaintiff in CDOC, the court assumed without deciding that "A prison system that holds a prisoner in administrative confinement under conditions that constitute an atypical and significant hardship for approximately seven years, with the sole justification of encouraging the prisoner to modify his behavior, is required under the Due Process Clause to provide the prisoner periodic meaningful reviews." *Toevs v. Reid*, 685 F.3d 903, 917 (10th Cir. 2012).

A person not convicted of a sex offense who denies being a sex offender may have a liberty interest in not being stripped of good time earned for treatment depending on a sex-offender label. *Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1242 (2000). In *Chambers*, because the plaintiff had, over the course of several years, earned time credits based on the label that were stripped when he refused to admit to allegations associated with it, the consequences of the label are not a privilege, but something of value entitled to procedural due process. *Id.* at 1242–43. More broadly, a plaintiff may have a liberty interest in the consequences of a mandatory (i.e., not subject to CDOC's discretion) label, where CDOC has "whatever discretion it chooses in deciding what satisfies the consequences of the label." *Id.* at 1243. The consequences may be a benefit that cannot be taken away without some process. *Id.* Prison officials nevertheless retain discretion to place a person in administrative segregation based on a history of escapes, extreme violence, and other conduct and, because of this placement, refuse to grant earned time credits. *Id.* at 1243 n.16 (citing *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994)).

e. Transfers

Incarcerated people are often transferred between facilities. There is no right to be free from transfer to another facility in general. *Meachum v. Fano*, 427 U.S. 215, 225-27 (1976). (holding the Due Process Clause does not entitle a state prisoner to a hearing when transferred to a prison with substantially less favorable conditions unless there is a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events); *Montanye v. Haymes*, 427 U.S. 236 (1976) (holding there was no basis in New York law, which imposed no conditions on the discretionary power to transfer prisoners, to invoke the protections of the due process clause, despite plaintiff's allegations that the transfer was retaliatory). There is no right to remain at a particular institution in a particular state. *Olim v. Wakinekona*, 461 U.S. 238, 245-47 (1983). Prisoners do, however, have a liberty interest in not being transferred for involuntary psychiatric treatment. *Vitek v. Jones*, 445 U.S. 480, 494 (1980). Where transfer to is a facility where conditions are much harsher than most other facilities, the transfer may implicate a liberty interest. Simply being transferred from minimum security to a maximum facility may not implicate a liberty interest. But in *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court found that the conditions at the Ohio supermax were so harsh that the transfer implicated a liberty interest. Thus, the plaintiffs were entitled to notice, the opportunity to challenge the transfer and periodic review as part of procedural due process protections. *Wilkinson,* 545 U.S. at 225.

There are, of course, exceptions: transfers that retaliate for the exercise of a vested right, transfers in response to a prisoner's suit alleging a violation of civil rights, and transfers that put the prisoner at risk because of known, identified enemies at the transferee institution (although within limits this issue can be resolved often at the administrative level of the CDOC).

Transfers to out-of-state prisons pursuant to agreement with those states and transfers of mentally ill prisoners raise much more complex issues. The cases cited below touch on these issues.

- Transfer of state prisoner from Hawaii to California did not violate due process. *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983). A state creates a protected liberty interest by placing substantive limitations on official discretion. *Id.* at 249. Hawaii's prison regulations placed no such limitations on transfer decisions merely by establishing procedures. *Id.* Procedures standing alone do not create a substantive interest to which the individual has a legitimate claim of entitlement. *Id.* at 250–51.

- A defendant whose initial imprisonment was interrupted for a single day was nevertheless covered under "the literal language of Article IV(e)" of the Interstate Agreement on Detainers, 18 U.S.C. § 2, p.292, and this fact "bars any further criminal proceedings—because the defendant was 'returned to the original place of imprisonment' before 'trial' was 'had.'" *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001).

- Where the federal government never lodged a detainer with Colorado, the Interstate Agreement on Detainers did not apply and thus could not be violated by the federal government. *United States v. Ray*, 899 F.3d 852, 859–60 (10th Cir. 2018). The Interstate Agreement on Detainers Act is inapplicable to probation or parole revocation detainers. *United States v. Romero*, 511 F.3d 1281, 1284 (10th Cir. 2008). There is no constitutional duty to provide prisoners an adversary parole

hearing until they are taken into custody as parole violators, and until a warrant is executed, plaintiff is not yet entitled to any such procedural protections. *Id.*

- Where reclassification into administrative segregation does "not occur because of an exercise of discretion, but rather was an automatic and mandatory sanction resulting from an erroneous misconduct conviction and the misconduct inevitably affected the duration of a plaintiff's sentence [it] therefore deprived him of a liberty interest. *Wilson v. Jones*, 430 F.3d 1113, 1123 (10th Cir. 2005).

i. Transferor State Does Not Lose Jurisdiction

The Tenth Circuit has "specifically rejected a theory that a transferring jurisdiction loses jurisdiction over a person transferred to a prison in another state: 'Criminal jurisdiction over a state's inhabitants remains when the respective states and territories under whose jurisdiction the prisoners were originally sentenced.' Thus, [transferred prisoners] [a]re always incarcerated under the authority of the [transferor] State . . . ." *Overturf v. Massie*, 385 F.3d 1276, 1279 (10th Cir. 2004) (quoting *Blango v. Thornburgh*, 942 F.2d 1487, 1490 (10th Cir. 1991)).

ii. Transfer May Moot Claims for Equitable Relief

In some cases for equitable relief, when evaluating "facts occurring after" the event purported to have caused injury, the Supreme Court has noted the "obvious" need to limit the evidentiary weight given to effects (whether harmful or beneficial) within the control of a party to the litigation, noting that "violators could stave off . . . [court] actions merely by refraining from" the otherwise challengeable "behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497 504-05 (1974). "[T]he probative value of such evidence[,]" the Court found, was "extremely limited." *Id.* at 504.

However, in the context of prison litigation, the Tenth Circuit holds that a plaintiff's transfer to another facility may render a claim "*constitutionally* moot" i.e., a court "cannot afford [a plaintiff] prospective relief that would have any effect in the real world" via injunctive or declaratory relief where a plaintiff fails to challenge a regulation on a system-wide basis. *See Jordan v. Sosa*, 654 F.3d 1012, 1029 (10th Cir. 2011). The court in *Jordan* found "speculative" the "belief that [the plaintiff] might be returned" to the prison, and was instead persuaded by "the government['s] represent[ation] that the 'BOP has no plans in the foreseeable future to transfer [plaintiff] to a BOP facility within the Tenth Circuit.'" *Id.* at 1032. For example, with respect to injunctive relief, where any of the sued officials are not located at the same penal institution as the plaintiff's current location and do not have authority over that location, then "consequently, they would not be responsible for actually issuing (or authorizing others to issue)" the equitable relief sought. *Id.* at 1030. Similarly, the court in *Jordan* reasoned that any declaratory relief in such a transferred plaintiff's favor "would have no effect on the defendants' behavior towards him." *Id.* (quoting *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997)). Thus, such relief would "run afoul of the Supreme Court's prohibition against advisory opinions." *Id.* (citations omitted).

"Even if [a court] conclude[s] that [a prisoner-plaintiff's] claims could survive [ ] constitutional-mootness inquiry," it may sometimes nevertheless "bar [the same] claims on prudential-mootness grounds." *Id.* at 1033. Thus given that "a BOP official, stationed in Florence,

Colorado, who does not purport to have any personal knowledge concerning [plaintiff's] current conditions of confinement" and at the same time "was unaware" of the inmate's current location, where the new conditions of confinement (due to the transfer) moot some predicate of the inmate's argument (e.g., that solitary confinement status would prevent the sought relief from affecting other inmates), then "any prospective relief that we might fashion with respect to the named BOP defendant officials would not fully take into account [plaintiff's] current confinement circumstances." *Id.* at 1033–34.

In *Jordan*, the Tenth Circuit performed an analysis of the "capable of repetition yet evading review" doctrine outside the class action context, and found that a plaintiff is required to show that the allegedly unconstitutional behavior is "*necessarily* of short duration—e.g., that an inmate is likely to be moved from the institution where he is subject to the allegedly unconstitutional action *before* he is able to litigate his claim. *Id.* at 1037.

iii. Transfer Made in Retaliation

"Retaliation may be actionable . . . even when the retaliatory action does not involve a liberty interest." *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011) (quoting *Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000)) (quotation marks omitted) (alteration in original) (reversing dismissal where the court below erred in concluding that plaintiff's retaliation claim was frivolous because he had no constitutional right to employment). For example, "while a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution." *Milligan*, 659 F.3d at 1294 (quoting *Frazier v. Dubois*, 922 F.2d 560, 561–62 (10th Cir. 1990)) (internal quotation marks omitted) (alteration removed).

"Prison officials may not retaliate against or harass an inmate because of his right of access to the courts." *Gee v. Pancheo*, 627 F.3d 1178, 1189 (10th Cir. 2010) (quoting *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990)). Accordingly, allegations state a claim that "(1) identify constitutionally protected activity in which [plaintiff] engaged (filing specific grievances against Defendants and a habeas petition), (2) describe a responsive action that would 'chill a person of ordinary firmness' (transfer to an out-of-state supermax prison), and (3) recite facts indicating the action was 'substantially motivated as a response to [his] exercise of constitutionally protected conduct (that Defendants were aware of his protected activity, that his protected activity complained of Defendant's actions, and that transfer was in close temporal proximity to the protected activity)." *Gee*, 627 F.3d at 1189 (quoting *Shero v. City of Grove*, 510 F.3d 1196 (10th Cir. 2007)).

iv. Out-of-State Transfers, the Thirteenth Amendment, and International Transfers

"Neither the United States Constitution nor any federal law prohibits the transfer of an inmate from one state to another." *Montez v. McKinna*, 208 F.3d 862, 865–66 (10th Cir. 2000).

v. Transfers Are Not Habeas Claims

"[A] request by a federal prisoner for a change in the place of confinement is properly construed as a challenge to the conditions of confinement and, thus, must be brought pursuant to [*Bivens*]." *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) (quoting *United States v. Garcia*, 470 F.3d 1001, 1003 (10th Cir. 2006)).

vi. Transfers of Foreign Nationals

Although the CDOC's executive director and the governor of Colorado have authority to approve the transfer of eligible foreign-national offenders, such a transfer is a privilege and not a right, and the governor and the executive director may approve or deny the transfer at their sole discretion. CDOC AR 550-05-IV.B. The Tenth Circuit found that the executive director's initial approval of such a transfer did not create a liberty interest because the regulation explicitly indicates the transfer is not a right, and thus the executive director had discretion to deny a transfer after initially granting it. *Al-Turki v. Tomsic*, 926 F.3d 610, 613, 619–20 (10th Cir. 2019).

Applicable CDOC Regulations

CDOC AR 250-40	Transfer of [Parole] Supervision within the State of Colorado
CDOC AR 550-05	Transfer of Foreign National Offenders to Treaty Nations
CDOC AR 1300-01	Interstate Transfer of Parole Supervision to Compact States
CDOC AR 1300-02	Interstate Probable Cause Hearings
CDOC AR 1300-03	Interstate Compact Offender Tracking System (ICOTS), Offender Records, Computer Security, Access, and Usage

Chapter 4: Discovery

For cases against state prisons or employees, CDOC AR 750-03 - Litigation Management provides numerous, detailed procedures for interviewing employees, depositions conducted at a correctional facility, and access to CDOC facilities for site investigations in civil matters. Extensive coordination with CDOC, both in advance and while at the facility is repeatedly specified by the policies. If counsel's case does not involve CDOC, they will need to consult similar BOP or county/local jail policies concerning records management and discovery.

1. Obtaining The Client's Prison File And Medical/Mental Health Records

As early as possible in the case, counsel should request the client's departmental file (sometimes referred to as a "jacket") and medical file. Medical records and mental health records as maintained as separate files, and are not part of the departmental record of a person who is incarcerated. An attorney will likely need to submit to the prison releases signed by the client to obtain both sets of records. See also § 2(b) of this Handbook.

2. Preservation of Evidence

Soon after taking on a case, an attorney should consider sending a preservation letter requesting the preservation of any and all records relating to the subject matter of the litigation. This may prove especially important for any video evidence that might exist. Prisons and jails have

extensive surveillance and monitoring systems that may record video relevant to a client's claims. The systems are often on a short retention schedule, sometimes as short as 48 or 72 hours. Relatedly, many systems (including the Colorado Department of Corrections) have short document retention policies, sometimes as short as 30 days.

Therefore, as soon as counsel learns from a client that there may be relevant video and/or documentary evidence, counsel should request the preservation of that evidence as well. The prison or jail will likely ask that the attorney specific the date, time and location of the incident that the attorney believes was recorded so that the staff may identify the relevant footage and/or begin to collect the relevant documentation.

3. Depositions

Federal Rule of Civil Procedure 30(a)(2)(B) requires that a party must obtain leave of the court to depose a person confined in a prison. Although these issues will more likely be defendant's counsel's responsibility if taking the deposition of an incarcerated client, the incarcerated plaintiff's attorney should be aware that depositions occurring in a prison or jail require more advance preparation than usual. All individuals attending the deposition, including the court reporter, will likely need to complete background check paperwork before being granted access to the prison for the deposition. The plaintiff's attorney should obtain clear guidelines from the prison on the sorts of materials they will be permitted to bring into the deposition room (laptop, charging cords, pens, binders, exhibits, etc.), and the attorney should ensure that the prison will provide a private space separate from the deposition room for them to speak with their client during deposition breaks.

Counsel should also ask in advance whether the client will be shackled (at the wrists, ankles, or both) during the deposition. Providing clear and useful deposition testimony may be difficult for a client who is restrained for several hours, so the plaintiff's attorney may wish to try to negotiate with their opposing counsel and the prison administration to relieve the burdens of the shackles or somehow ensure that the plaintiff is comfortable enough to provide testimony.

Counsel should also consult with opposing counsel and the prison administration about the breaks a plaintiff will receive during the deposition, whether the staff will deliver the plaintiff's meals to the deposition site, whether the plaintiff will be permitted to pray, take bathroom breaks, etc. during the deposition.

4. Use of Protective Orders

Pursuant to Federal Rule of Civil Procedure 26(c), "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." This "'good cause' standard of Rule 26(c) is 'highly flexible, having been designed to accommodate all relevant interests as they arise." *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008) (quoting *United States v. Microsoft Corp*., 165 F.3d 952, 959 (D.C. Cir. 1999)).

A protective order may, among other things, "forbid the disclosure of discovery." *Id.* Indeed, parties may seek stipulated "blanket" protective orders, which "allow the parties to make

full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, 'to secure the just, speedy, and inexpensive determination of every action.'" *United Nuclear Corp. v. Cranford Ins. Co*., 905 F.2d 1424, 1427 (10th Cir. 1990) (quoting Fed. R. Civ. P. 1).

The need for a protective order in prisoner cases may arise where discovery involves sensitive and confidential information, including, for example, information regarding the plaintiff or other incarcerated people (e.g., information concerning a prisoner's victims, family, medical and mental health, criminal record, disciplinary records, gang affiliation, housing, and security), individual defendants (e.g., personnel records), or the prison, CDOC, and/or BOP (e.g., administrative records regarding security and safety). As in all cases, the party seeking a protective order, or the parties jointly if stipulated, bear the burden of establishing its necessity. *Centurion Indus., Inc. v. Warren Steurer & Assoc*., 665 F.2d 323, 325 (10th Cir. 1981). Both the terms and entry of a protective order are within the sound discretion of the court. *See Rohrbough*, 549 F.3d at 1321 (10th Cir. 2008).

5. Entry on Land

Pursuant to Federal Rule of Civil Procedure 34(a)(2), a party may serve a request "to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." Given that the plaintiff is often housed by the defendant, Rule 34(a)(2) is the mechanism whereby counsel and their experts may inspect the conditions of confinement and conduct evaluations of the plaintiff, as the facts of the case warrant. A party initiates this discovery by serving a request for entry on land. This request:

> (A) must describe with reasonable particularity each item or category of items to be inspected;
>
> (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
>
> (C) may specify the form or forms in which electronically stored information is to be produced.

Fed. R. Civ. P. 34(b)(1). In turn, the responding party generally has 30 days to respond, and "must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." Fed. R. Civ. P. 34(b)(2). See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 07-cv-02471-PAB-KMT, 2009 WL 1451684, at *2 (D. Colo. May 20, 2009).

Chapter 5: Trial

1. Whether and How to Request That Your Client (and Incarcerated Witnesses) Appear in Person for Trial

Unlike in criminal cases, an incarcerated plaintiff in a civil case does not have the automatic right to be physically present at trial. But there is a constitutional right to a fair trial in a civil case, which requires that plaintiffs have the opportunity to present their cases so the trier of fact can make a meaningful search for the truth. *Latiolais v. Whitley*, 93 F.3d 205 (5th Cir. 1996); *see also Lemmons v. Law Firm of Morris & Morris*, 39 F.3d264, 268 (10th Cir. 1994) (although a prisoner generally has no constitutional right to attend trial, once a court has ordered his production, obstructing his court appearance may deny the right of court access). If the client (and/or incarcerated witnesses) want to attend trial in person, counsel must file a petition for *writ of habeas corpus ad testificandum* pursuant to 29 U.S.C. §2241(c)(5). *Ballard v. Spradley*, 557 F.2d 476, 480 (5th Cir. 1977). "In determining whether to grant the writ, the court must weigh the incarcerated person's need to be present against concerns of expense, security, logistics and docket control." *Hawkins v. Maynard*, 89 F.3d 850 (10th Cir. 1996) (citing *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 111-12 (4th Cir. 1988).

a. Considerations for and Against

In deciding whether to file a writ seeking a client or witness's in-person appearance in court, it is critical to consult with the incarcerated person. They may have reasons for or against wanting to appear in person that you may not be aware of. Some factors to discuss with the client include: (1) the conditions in which the client will be housed if they are transported from the prison to attend trial in person (this can involve staying in Denver for several days before and/or after the trial; (2) your ability to communicate with your client during the trial; (3) your ability to communicate with your client before and after each day of trial (this may be difficult if the client remains at the prison and appears via video or phone); (4) what type of physical restraints the client may be subjected to if they appear in person (e.g., handcuffs/black box and Martin chain, leg irons, stun belt, etc.); (5) the client's medical ability to travel or request to appear via video as an accommodation (*see, e.g., Session v. Romero*, 14-cv-02406-PAB-KLM). Additionally, if the client is going to appear at trial in person, you will also want to consider what they will wear and whether/how you can provide them courtroom attire.

b. Writ of Habeas Corpus Ad Testificandum

While the decision to issue a writ of *habeas corpus ad testificandum* is within the "sound discretion of the district court," Ballard, 557 F.2d at 489, a "court may not summarily exclude a prisoner-plaintiff from the trial of his civil rights suit." *Latiolais*, 93 F.3d at 207-08. When a prisoner-plaintiff's own testimony is especially critical to his case, "the reality of justice is obviously threatened by his absence." *Muhammad*, 849 F.2d at 111. *See also Eaves v. El Paso County*, 16-cv-01065-KLM, ECF 205, (citing *Valdez v. Motyka*, No. 15-CV-0109-WJM-STV, 2021 WL 1216525, at *1 (D. Colo. Mar. 31, 2021).

The Tenth Circuit and this District have applied the multi-factor test set out by the Fourth Circuit in Muhammad when deciding to grant a petition for writ of habeas corpus ad testificandum. *See Hawkins*, 89 F.3d 850 at 7; *Provencio v. Stark*, 09-cv-02329-WJM-KLM (D. Colo. Dec. 10, 2012) at 2-3. As a threshold issue, *Muhammad* instructs that courts should consider whether the prisoner's presence should be at his or the government's expense. 849 F.3d at 111. Following that analysis, courts are directed to weigh the following factors:

> (1) Whether the prisoner's presence will substantially further the resolution of the case, and whether alternative ways of proceeding, such as trial on depositions, offer an acceptable alternative;
>
> (2) The expense and potential security risk entailed in transporting and holding the prisoner in custody for the duration of the trial;
>
> (3) The likelihood that a stay pending the prisoner's release will prejudice his opportunity to present his claim, or the defendant's right to a speedy resolution of the claim.

Id. at 113.

In deciding whether incarcerated witnesses should be produced, courts generally have relied on the same considerations as with an incarcerated plaintiff.

2. What to Expect and Plan for if Your Client Appears for Trial in Person

a. Housing While in Trial

Incarcerated plaintiffs are generally housed at a local detention center in United States Marshals Service (USMS) custody. The Marshals Service many times contracts with area county jails to house inmates with ongoing federal cases. Transport to and from court is done by the USMS or the contracting county sheriff's department. There is no particular place that housing occurs. Practically speaking, prisoners in CDOC and BOP will likely be transferred to a local detention centers under such as the Denver Jail, Jefferson County Jail, Clear Creek County Jail, or Federal Detention Center (FDC) Englewood. Prisoners in CDOC may be transferred to or from their long term CDOC facility through the Denver Reception and Diagnostic Center.

b. Communication with Client

Aside from the limited ability to confer with the in-custody client at court, USMS is generally good about access to lockup at the courthouse before and after the trial day to confer with the client. The lockup facility is on the third floor of the Arraj Courthouse.

c. Attire

Counsel is encouraged to check with the USMS and facility in which the client is housed. In any case, this is something that needs to be done in advance of trial. USMS will defer to the

facility where the client is housed at times and sometimes USMS will handle clothing as provided by counsel. No belts, traditional ties, or shoes with strings are allowed.

d. USMS presence

The USMS will have at least two marshals present at all times during trial for an incarcerated plaintiff. Traditionally they are well dressed and do their best to blend in. They try to appear as observers without giving the jury the impression they are there because the plaintiff is incarcerated or security threat.

3. What To Expect and Plan for if Your Client Appears for Trial Via Video

Representing an incarcerated client at trial has many challenging components. First, will the client be present in the courtroom for the duration of the trial? To obtain the client's presence at trial, counsel will need to seek a writ of *habeas corpus ad testificandum* from the court.

In addition to seeking the client's physical presence, counsel may also wish to consider discussing with opposing counsel, the court, and the prison administration whether the client will be permitted to wear civilian clothing during the trial, which table will plaintiff's counsel sit at (some judges have required incarcerated plaintiffs and their counsel to sit at the table furthest from the jury), will the client be shackled during the trial and if so, will the shackles be visible, etc. All of these issues may contribute to the prejudice a juror may harbor toward an incarcerated plaintiff simply because he or she is incarcerated. Counsel may wish to attempt to ameliorate any of those obvious signs of incarceration long before the trial begins.

If counsel is unsuccessful in obtaining a writ of *habeas corpus ad testificandum* for the client's presence during the trial, they will likely have to coordinate the client's observation of the trial (and testimony) via video conference. This will also require the court's leave and plaintiff's counsel's coordination with opposing counsel and the prison administration. If an attorney is arranging for the client's participation in the trial via video, they may wish to keep in mind that there will be technical issues that they will need to work out, including figuring out where in the prison the incarcerated plaintiff will be participating via video, whether plaintiff's counsel will have a means of communicating privately with their client during breaks and after the trial day, and how counsel will provide exhibits to their client during the client's testimony. See, for example, 14-cv-2406-PAB *Session v. Romero* specifically ECF No. 404, "Unopposed Motion for Order to Direct CDOC to Make Arrangements for Plaintiff to Appear and Monitor Trial Via Live Videoconference," ECF 432, "Unopposed Motion for Order to Cancel Writ of Habeas Corpus Ad Testificandum for Kenneth Walker," and ECF 436, "Unopposed Motion for Order Directing CDOC To Allow Plaintiff To Wear Civilian Clothing During Trial Testimony."

Counsel should also ask the prison administration what the client will be wearing to observe the trial and testify, and whether the client will be shackled while observing and/or testifying. Any physical appearance issues that might cause juror prejudice that counsel may try to ameliorate for the client's actual presence in the courtroom counsel should also consider for the client's video

presence as well. Counsel may wish to have a member of the trial team present in the prison with the client throughout each trial day to coordinate communication and navigate any issues that arise.

Video conferencing technology continues to improve but there are still differences from live testimony. One difference is the lag that often comes in the transmission of the video. If there is a lag in the video conferencing system the court is using, an attorney should be sure to account for this in the examination of their client. The attorney should speak slowly and ensure the client has finished speaking before asking another question.

Coordinating remote trial participation is challenging, and there are inevitable delays and issues an attorney may not foresee or account for. For this reason, counsel should try to build in extra trial time to accommodate any technical or other issues that arise.

Chapter 6: Available Relief and the PLRA

1. Damages

a. Compensatory - Physical Injury Requirement

Available damages, whether compensatory, punitive, and/or nominal, turn on both the defendant and harm at issue.

As to the particular defendant, "Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief." *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011). This distinction exists because official-capacity defendants are not "persons" within the meaning of the statute such that the Eleventh Amendment bars such claims in federal court. *See Duncan v. Gunter*, 15 F.3d 989, 991 (10th Cir. 1994) ("Neither states nor state officers sued in their official capacity are 'persons' subject to suit under section 1983.") (citing *Will v. Mich. Dept of State Police*, 491 U.S. 58, 70-71 (1989)). Stated differently, "the Eleventh Amendment precludes a federal court from assessing damages against state officials sued in their official capacities because such suits are in essence suits against the state." *Hunt v. Bennett*, 17 F.3d 1263, 1267 (10th Cir. 1994). Further, municipal entities are immune from punitive damages under § 1983. *Burke v. Regalado*, 935 F.3d 960,1029 (10th Cir. 2019) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981)).

As to the harm at issue, the PLRA provides that emotional or mental injuries, in the absence of physical injury, are not compensable:

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

b. Cap

The Tenth Circuit has held that the PLRA "limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional." *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001). The PLRA does not, however, bar the plaintiff's recovery of nominal or punitive damages, even in the absence of a showing of physical injury. *Id.* at 880–81 ("[A]s a general rule, punitive damages may be recovered for constitutional violations without a showing of compensable injury."); *McDaniels v. McKinna*, 96 F. App'x 575, 581 (10th Cir. 2004) (noting that "Searles did not foreclose prisoners' claims for First Amendment violations that only sought nominal damages or punitive damages.").

c. Client's Restitution Order and/or Other Debts to State Satisfied First

Finally, where a plaintiff is ultimately awarded damages at trial, any restitution owed to victims and certain debts such as child support, taxes, and higher education loans, will be paid first. *See* C.R.S. § 24-30-202.4; *see also* C.R.S. § 18-1.3-602(3)(a) (defining restitution in criminal actions). Further, the PLRA provides that a portion of the plaintiff's attorney's fees shall be paid from the judgment. In particular, if attorney's fees are authorized under 42 U.S.C. § 1988, then "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." See *Murphy v. Smith*, 138 S. Ct. 784 (2018) (Prison Litigation Reform Act requires that compensation for prisoner's attorney fees come first from prisoner's damages award, and that only if 25% of that award is inadequate to compensate counsel fully can defendants be responsible for balance.).

2. Injunctions and Consent Decrees

The PLRA contains several provisions that limit courts' abilities to enter and maintain prospective relief in prison cases. Under the PLRA, courts may not enter prospective relief in prison cases "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the federal right." 18 U.S.C. § 3626(a).[15] A number of courts refer to this as a "need-narrowness-intrusiveness" finding. Additionally, "the court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief. *Id.* The PLRA also prohibits injunctive relief that requires state or local law officials to exceed their authority or violate state or local law unless federal law requires such relief, such relief is necessary to correct a federal law violation, and no other relief will correct the violation. 18 U.S.C. § 3626(a)(1)(B). The PLRA also limits federal court prospective relief to correcting violations of "federal rights."

Settlements that include prospective relief must meet the same requirements that the PLRA establishes for injunctions: the court must find that the settlement is narrowly drawn, necessary to correct federal law violations, and is the least intrusive way of doing so. 18 U.S.C. §§ 3626(c)(1),

[15] This tailoring requirement is consistent with the ordinary rules governing contested entry of injunctions in federal court. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996).

3626(g)(7) (defining "prospective relief" to include "all other relief than compensatory monetary damages"). Parties can enter into private settlement agreements that don't meet the PLRA standards but those agreements cannot be enforced in federal court, except the reinstatement of the civil proceeding that the agreement settled. 18 U.S.C. §§ 3626(g)(9), 3626(c)(2)(A). Instead, they must be contracts enforceable in state court. *Id. at* § 3626(c)(2)(B).

As a practical matter, parties seeking to reach agreement have three strategies for getting those agreements approved: craft an acceptable stipulation, structure their settlement as a conditional dismissal, or anticipate state-court enforcement of a settlement. *See generally*, Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519 (2015).

In a number of cases, litigants have settled PLRA-governed cases with consent judgments that provide for time periods for implementation and monitoring of the relief that are longer than prescribed by the PLRA before a motion to terminate can be filed, sometimes explicitly agreeing that no such motion shall be filed before a prescribed time has passed. *See, e.g., Cunningham v. Bureau of Prisons*,12-cv-1570-RPM, Doc. 382 (Plaintiffs' Unopposed Mtn. for Prelim. Approval of Settlement Terms and Proposed Notice to Class) (Nov. 16, 2016). The reason for such agreements is that the parties realize that compliance with substantive judgment requirements cannot be reliably assessed within the statutory time periods, and in some cases the relief cannot even be implemented within that time. Litigants have also agreed to conditions for the termination of judgments, or portions of them, that are different from the PLRA's provision that relief may be continued only upon showing of a current and ongoing violation of federal rights. Such agreements usually focus on compliance with the agreement's terms rather than proof of a continuing constitutional violation, presumably because the parties agree that compliance with the judgment terms is necessary to establish constitutional compliance.

a. Need-Narrowness-Intrusiveness Requirement

The practical meaning of "narrowly drawn" and "least intrusive" is not always clear. *See Caruso v. Zenon*, 2005 WL 5957979, *5 n. 9 (D. Colo., Oct. 18, 2005) (pointing out that the narrower a remedy is, the more it may intrude on officials' ability to exercise discretion). Enjoining prison officials to follow the language of a statute they have violated is appropriate under the PLRA. *See, e.g., Rodley v. Lappin*, 2006 WL 889744, *2 (D.D.C., Mar. 30, 2006) (holding the appropriate remedy for Bureau of Prisons' violation of APA rulemaking provisions is for the plaintiff to participate in the rulemaking process, rather than vacating the rule or enjoining its consequences).

Systemic relief is permissible if supported by proof of a systemic violation; the command that remedies extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs" means only that "the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court." *Brown v. Plata*, 563 U.S. 493, 531 (2011). Agreements between the parties are "strong evidence," if not dispositive, that provisions reflecting those agreements comply with the need-narrowness-intrusiveness requirement. *Benjamin v. Fraser,* 156 F.Supp.2d 333, 344 (S.D.N.Y. 2001), quoting *Cason v. Seckinger*, 231 F.3d 777, 785, n. 8 (11th Cir. 2000) (noting particularized findings are not

necessary concerning undisputed facts and parties may make concessions or stipulations as they deem appropriate).

b. Two-Year Time Limit

The PLRA provides that court orders in prison litigation, including consent judgments, may be terminated after two years unless the court finds a "current and ongoing violation" of federal law. After this two-year period, orders may be challenged every year. 18 U.S.C. § 3626(b) (1, 3). The statute provides that courts must rule promptly on motions to terminate prospective relief, and that such prospective relief is automatically stayed on the 30th day after such motion is made. The 30 days can be extended for an additional 60 days for good cause shown. 18 U.S.C. § 3626(e)(3). *See Skinner v. Uphoff*, 410 F.Supp.2d 1104, 1112 (D. Wyo. 2006) (postponing automatic stay in prisoner violence case based on allegations of ongoing violence, delays in defendants' remedial actions, etc.), *aff'd,* 175 F.App'x. 255 (10th Cir. 2006).

c. Preliminary Injunctions and TROs

Preliminary injunctions must meet the same standards described above for other prospective relief, and they automatically expire after 90 days unless the court has made the order final. 18 U.S.C. § 3626(a)(2).

3. Attorney's Fees and Costs

Fed R. Civ. P. 54(d)(2) sets forth the procedures for presenting claims for fees. See also D.C.COLO.LCivR 54.3.[16] A motion for attorneys' fees must (i) be filed no later than 14 days after entry of judgment; (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award; (iii) state the amount sought or provide a fair estimate of it; and (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made. Fed. R. Civ. P. 54(d)(2)(B).

Fee Agreement. Engagement letters are an important tool used by many pro bono lawyers as part of a healthy attorney-client relationship. Counsel may enter into a fee agreement with the client and should consider all applicable ethical and legal standards. Sample engagement letters used in the limited representation context – but which can be tailored for full representation – are available in the Court's "Attorney "How-To" Instruction Packet About Limited Representation" available on the U.S. District Court **website**.

42 U.S.C. § 1997e - Suits by prisoners - provides:

(d) Attorney's fees

[16] D.C.COLO.LCivR 54.3 - ATTORNEY FEES
(a) Motion Supported by Affidavit. Unless otherwise ordered, a motion for attorney fees shall be supported by affidavit.
(b) Content of Motion. The motion shall include the following for each person for whom fees are claimed:
(1) a summary of relevant qualifications and experience; and
(2) a detailed description of the services rendered, the amount of time spent, the hourly rate charged, and the total amount claimed.

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [1] of this title, such fees shall not be awarded, except to the extent that—
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 1 of this title; and
> > (B)
> > > (i)the amount of the fee is proportionately related to the court ordered relief for the violation; or
> > > (ii)the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.
>
> (4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 1 of this title.

ADA and Rehabilitation Acts. These statutes both have their own attorney's fees provisions. Therefore, while exhaustion of administrative remedies is required under the PLRA for these claims, there is no cap on attorney's fees.

Attorney's Fees Under 42 U.S.C. § 1988

> The Civil Rights Attorney's Fees Awards Act of 1976 provides in part:
>
> In any action or proceeding to enforce a provision of [inter alia, 42 U.S.C. § 1983, RFRA, or RLUIPA], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .
>
> 42 U.S.C. § 1988(b)

The Supreme Court has upheld a fee award of $245,000, when the plaintiff recovered only $33,000 in damages. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). But "the amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded." Id. at 574.

But see PLRA, 42 U.S.C. § 1997e(d); *Robbins v. Chronister*, 435 F.3d 1238, 1240–41, 1244 (10th Cir. 2006) (en banc) (holding § 1997e(d) limits attorney fee awards to 150 percent of damages if the lawsuit is filed by a prisoner and the damages are awarded under § 1988). See also *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983)

Attorney's Fees Under Equal Access To Justice Act: 28 U.S.C. § 2412

The Equal Access to Justice Act ("EAJA") provides for attorney's fees in actions against the United States, not employees of the Colorado Department of Corrections. The relevant section provides in part:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."
>
> 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

See also *Mark Jordan v. Michael Pugh, et al.*, 02-cv-001239-MSK-KLM, Motion for Attorney Fees and Expenses Pursuant to 28 U.S.C. § 2412(d)(1), (ECF No. 362); and Stipulated Settlement Agreement By And Between Plaintiff And Defendants Concerning Attorneys' Fees And Expenses, (ECF No. 402).

4. Taxable Costs Under 28 U.S.C. § 1920

Certain "nontaxable" costs – i.e., attorney *expenses* - may be awarded under certain civil rights provisions as part of an attorney's fees and costs motion. See 42 U.S.C. § 1988; see also *Ramos v. Lamm*, 713 F.2d at 560. As a matter of general practice, the District of Colorado awards "taxable" costs under the general costs statute, 28 U.S.C. § 1920, and as a matter of course, costs are habitually awarded in favor of a prevailing party, despite a losing party's in forma pauperis status. As a matter of judicial discretion, however, a court may determine that costs will not be imposed on indigent party. *See Debord v. Mercy Health System of Kansas, Inc*., 737 F.3d 642, 659–60 (10th Cir. 2013) (quoting *Cantrell v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 458 (10th Cir. 1995)).

In the District of Colorado, there are several examples of when the court has applied its discretionary authority and declined to award costs against an indigent party. *See, e.g., Shapiro v. Rynek*, 250 F. Supp. 3d 775, 780 (D. Colo. 2017) (declining to award costs where jury determined that constitutional violation occurred but no individual violator identified; representation by appointed pro bono counsel and law school clinic student lawyers added additional factor to decline costs); *see also Broadus v. Corr. Health Partners, Inc*., No. 15-CV-0182-WJM-KLM, 2019 WL 859702, at *3 (D. Colo. Feb. 22, 2019) (declining to award costs due to close and

difficult issues, coupled with plaintiff's limited financial means and appointment of pro bono counsel). It may be wise for pro bono counsel to submit a motion requesting a waiver of costs before a bill of costs is submitted by the prevailing defendant; if a bill of costs hearing is held before the clerk, it is very likely that costs will be awarded since the clerk lacks discretion to consider an indigency argument.

Whether a Panel client is the prevailing party or not, under the Court's Pro Bono Representation local rule, technically a lawyer's status as appointed counsel ends upon entry of the final judgment. LAttyR 15(g)(4)(D). If counsel chooses to continue to represent the client for post-judgment issues such as fees and costs, the specific procedures, deadlines, forms, and practices followed by the clerk and guidance for parties is thoroughly described and continually updated in the Hearing Officer's Guide to Taxation of Costs. The Guide itself is available on the Court's website on a subpage devoted to the topic, along with a list of Frequently Asked Questions and the correct forms, available here.

Chapter 7: Settlement

1. Mediation Program

The Standing Committee on Pro Se Litigation created the Pro Bono Mediation Panel in the spring of 2018. The Mediation Panel was developed to assist the lawyers on the court's Civil Pro Bono Panel with a fair, cost-efficient, and informal means to resolve their pro bono cases that are ripe for resolution through mediation, using the professional pro bono mediation services of a group of experienced volunteers. Civil Pro Bono Panel lawyers who have accepted cases have repeatedly asked about settlement or mediation alternatives, especially since the U.S. District Court in 2014 significantly reduced the settlement conference role played by the magistrate judges, allowing them only to occur on motion by parties in a case and showing good cause for the need to use the resources of magistrate judges (see Local Rule LCivR 16.6).

The Mediation Panel has between 15 to 20 members, and includes well-known and respected Denver area lawyers in the mediation field employed by law firms, mediation/arbitration firms such as JAG and JAMS, and retired state and federal court judges - including former U.S. Magistrate Judge Boyd Boland (who managed the court's Initial Review process of pro se cases). The group is chaired by Jane Michaels of Holland & Hart and Scott Barker of Wheeler Trigg O'Donnell. Unfortunately, due to a lack of publicity about the program, the Mediation Panel is underutilized, contrary to what the Attorney Services Division experienced in the past and which initially created the demand for the Mediation Panel.

Initially, the Pro Bono Mediation program focused only on non-prisoner cases, but the Standing Committee approached the Mediation Panel as a group and the mediators have agreed to work on cases involving incarcerated litigants. Magistrate Judge Hegarty provided several video-recording presentations of his experiences and insights about conducting mediations in prisoner cases, in light of his frequent assignments by the district judges to conduct settlement conferences in prisoner cases, including the complex *Cunningham v. BOP* mental health care class action

against the federal supermax (12-cv-01570-CMA-MEH). The Panel Mediators have agreed to mediate prisoner civil rights lawsuits, by either visiting specific facilities or by conducting mediations by videoconference.

Regarding the assignment of a Pro Bono Panel case to the Mediation Panel, there is no process set by local rule or a general order of the court. The informal procedure that appears to work best is if the Pro Bono Panel lawyer who has accepted the case and finds the matter appropriate for a mediation effort, contacts opposing counsel and the two sides file a joint motion in the case, requesting the matter be allowed to be submitted to the Mediation Panel. The Court will likely grant the request, and possibly impose a short stay or continuance of upcoming pretrial deadlines in the case if requested. The Court will direct the Clerk's Office (Attorney Services Division) to contact the Mediation Panel. The ASD staff contact Ms. Michaels and Mr. Barker as the Mediation Panel coordinators with an e-mail similar to the Pro Bono Panel appointment email, with a short description of the case and pending claims, and the coordinators then contact the Mediation Panel members seeking assistance. The mediator does not need to enter an appearance in the case, be appointed as a special master, or follow any other special procedure other than establish the standard in-house rules, deadlines, document submission guidelines, etc. It is then up to counsel to then notify the court if a settlement is reached or not, with follow-up stipulation or voluntary dismissal paperwork left for the Court's and the parties' discretion.

Please also be aware that another mediation resource is available in U.S. District Court cases, the Roster of Private Professional Mediators that is created and sponsored by the Faculty of Federal Advocates and available as a link on the U.S. District Court website. It is open to any individual mediator to list their availability, contact information, and rates, and from a search of available areas of expertise that each mediator provides, several do state they are willing to assist with "reduced fees" and/or prisoner cases – see http://www.dcolomediators.org/.

2. Monetary Settlement From CDOC – Process

CDOC places deposits made on behalf of an incarcerated client in a prison bank account. CDOC is authorized to deduct a minimum of 20 percent of all deposits and apply these funds to pay an incarcerated person's fines, fees, costs, restitution, and child support. The executive director or designee is authorized to order amounts greater than 20 percent be applied to the same costs. If an inmate has a balance of more than $2,500.00 in the offender account a balance in excess of $2,500.00 may be applied to the same costs. Child support takes precedence in these circumstances. *See* CDOC AR 200-15 and C.R.S. 16-18.5-106.

Note that accounts with deposits of $3,000.00 or more may be subjected to an action by CDOC for cost of care. *See* C.R.S. 17-10-103(1).

Clients may consider settlement of the restrictions on their account and application of any damages award to outstanding court-ordered fees and costs. Counsel may consider working with the client to avoid depositing funds in excess of the prison's threshold amounts in the client's account.

3. Monetary Settlement From BOP – Process

The BOP also has regulations governing trust accounts. *See* Program Statement 4500.11.

BOP will prioritize payment of court ordered fees, costs, and restitution when considering deposits to a client's account.

Clients may also consider settlement of the restrictions on prison accounts and application to outstanding court-ordered fees and costs. Counsel may consider working with the client to avoid depositing funds in excess of the prison's threshold amounts in the client's account.

4. Monitoring/Retaining Jurisdiction

Regarding enforcement or modification of settlements and consent decrees, the PLRA explicitly provides that consent decrees may be terminated or modified. 18 U.S.C. § 3626(b), (e), (f)(5)–(6). The Act provides that "[i]n any civil action with respect to prison conditions in which prospective relief is ordered," the court-ordered relief is terminable "upon the motion of any party or intervener" either:

> (i) 2 years after the date the court granted or approved the prospective relief;
>
> (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
>
> (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.
>
> 18 U.S.C. § 3626(b)(1)(A).

Additionally, existing consent decrees are subject to *immediate* termination under the PLRA if they do not conform to the requirements set forth in the PLRA. 18 U.S.C. § 3626(b)(2). The Act allows a defendant to seek termination of any prospective relief if the relief was granted in the absence of a finding by the court that "the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *See id*. In addition, this section of the PLRA contains an "automatic stay" provision, which provides that a motion to terminate a consent decree will operate as a stay of the consent decree beginning 30 days after the motion is filed. 18 U.S.C. § 3626(e)(2)–(4).

Chapter 8: Special issues

1. If Your Client is Transferred

At some point during your case, your client may be transferred or moved to a different prison. If your client is in the state system, this will likely mean that he or she is moved to a different prison in the state. If your client is in the federal system, a transfer could mean your client is suddenly hundreds, if not thousands, of miles away.

CDOC and the BOP have websites where you can identify in which prison your client is incarcerated. If you have reason to believe the system is going to transfer your client, be sure to monitor the relevant site closely. The prison system will not tell you when or where your client is moving until after your client arrives at the new facility. If your client has been moved, you should contact the new prison right away to obtain the new case manager's information and set up a legal call with your client.

Depending on the nature of your case, your client's transfer may have an impact on the case itself, particularly if your case seeks injunctive or other equitable relief. You will want to investigate whether the case is moot (*i.e.*, whether the violation you've alleged is ongoing in the new prison). On many occasions, prison systems and opposing counsel argue that prisoner transfers moot out cases, impact venue, etc. Consult with your mentor or experienced prisoners' rights counsel to determine the appropriate steps for investigating whether the case should proceed and how to rebut opposing counsel's arguments to the contrary.

2. Retaliation [see also Ch. 3: Substantive Prison Law]

Retaliation is a reality of life in prison. Retaliation in prison takes many forms, but attorneys representing incarcerated people may notice changes in the way a client and/or a witness is treated by staff and fellow prisoners. Any change in treatment, from something as simple as how quickly a case manager delivers grievance forms to the client or witness to more frequent cell shakedowns (searches) to physical violence, may evidence retaliation. If the retaliation is severe enough, you may wish to seek the court's intervention.

3. Fed. Bureau of Prisons – Special Administrative Measures (SAMs)

A small number of people incarcerated in the BOP—especially ADX—are under Special Administrative Measures (SAMs), severe communication restrictions that are imposed by the Attorney General of the United States and carried out by the BOP. 28 C.F.R. § 501.3. The Attorney General may authorize the BOP to implement SAMs only upon written notification "that there is a substantial risk that a prisoner's communications or contact with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." *Id*.

SAMs restrictions "may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone." *Id.*

If your client is under SAMs, you will be required to sign an affirmation acknowledging your awareness and understanding of the SAM provisions and your agreement to abide by these provisions, particularly those that relate to contact between you and your client. In order to get a copy of the client's SAMs—and the attorney affirmation—you will likely need to contact whichever United States Attorney's Office requested imposition of the SAMs. You also will need to undergo a background check and receive clearance from the USAO to communicate with your client.

4. **Juveniles (Youth Offender System)**

- **Guardians Ad Litem (Court Appoints but Lawyer Needs to Consult)**

Regarding Guardians Ad Litem (GALs), under Fed. R. Civ. P. 17(c)(2), in conjunction with the Pro Bono Representation local rule LAttyR 15, a judicial officer has the discretion to initially appoint a Guardian Ad Litem for a juvenile. Appointing a *pro bono* GAL is of course dependent on the Clerk of the Court's ability to locate a volunteer GAL. Attorney Services Division staff are usually successful in finding a pro bono GAL for an incarcerated child. Note that in certain circumstances, judicial officers, at their discretion, have directed the Clerk to reimburse a portion of the GAL's fees using the court's Non-Appropriated Fund(NAF). *See e.g., Saunders v. Jacobsen, et al.,* 15-cv-02201-CBS (appointment of pro bono GAL); *A.R. v. Division of Youth Correction et al*., 16-cv-02544-LTB [Sealed] (reimbursement of GAL through NAF funds) (the Court's reimbursement order from the Attorney Services Division staff).

Chapter 9: Additional Resources and Statistics

1. Statistics on Judgments in Civil Rights Cases

From Magistrate Judge Hegarty's Statistics on Judgments – 2019 as an Example*

Civil Rights

The number of civil rights cases decreased from nine to eight in 2019. There were three excessive force trials, two First Amendment trials, one Fourteenth Amendment trial, one deliberate indifference trial, and one unlawful arrest trial. Plaintiffs prevailed in three of the cases.

-

Nature of Claim	Prevailing Party	Verdict
Excessive Force	D D D	
First Amendment	P P	$ 180,002 $ 12,000
Fourteenth Amendment	D	
Deliberate Indifference	D	
Unlawful Arrest	P	$ 2,995,004

* See 2019 Statistics - U.S. District Court, District Of Colorado, by Michael E. Hegarty, United States Magistrate Judge, Faculty of Federal Advocates presentation, Aug. 20, 2020.

In the last eighteen years, 123 civil rights cases have been tried to verdict. The plaintiffs won thirty-three cases (26.83%), and the defendants prevailed in ninety cases (74.17%). Historically, the largest civil rights verdict in the last eighteen years was a deliberate indifference claim resulting in an $11,399,936.00 verdict. In contrast, juries have returned $1.00 verdict three separate times. Plaintiffs' verdicts over the last eighteen years are reported below:

Nature of Claim	**Amount of Verdict**	**Nature of Claim**	**Amount of Verdict**
Deliberate Indifference	$ 11,399,936.00	Cruel and Unusual	$ 40,000.00
Prisoner Rights	Jmt Vacated: $ 6,000,000.00	Excessive Force	$ 32,002.00
Excessive Force	$ 4,650,000.00	Unlawful Arrest	$ 10,000.00
Disability Discrimination	$ 2,200,000.00	Unreasonable Search	$ 10,000.00
Unlawful Arrest	$ 1,790,000.00	Unlawful Arrest	$ 6,500.00
Taking/Due Process/Defamation	$ 1,669,177.56	Cruel and Unusual	$ 5,000.00
Unlawful Arrest	$ 1,000,000.00	Retaliation: 1st Amendment	$ 2,000.00
Retaliation: First Amendment	$ 779,590.00	Retaliation	$ 1,791.00
First Amendment Employment	$ 650,000.00	Equal Protection	$ 1,500.00
Excessive Force	$ 400,000.00	Prisoner Rights	$ 630.00
Excessive Force/Unlawful Seizure	$ 300,000.00	Unlawful Arrest	$ 250.00
Unreasonable Search and Seizure	$ 267,250.00	Excessive Force	$ 1.00
False Arrest and Excessive Force	$ 190,000.00	Unreasonable Search	$ 1.00
4th and 14th Amendment Violations	$ 130,000.00	Unlawful Arrest	$ 2,995,004
Excessive Force	$ 72,583.00	First Amendment	$ 180,002
Excessive Force	$ 50,000.00	First Amendment	$ 12,000
Excessive Force	$ 45,000.00		
		Average	**$1,057,279.32**

		Total	**$ 35,454,420.19*** *Note: These numbers include the $6,000,000 verdict in the vacated judgment. Without including this case the sum is $29,454,420.19 and the average is $902,819.30.

The average verdict in civil rights cases is $1,057,279.32. After excluding the anomalous $11 million verdict from 2014, the average is $734,071.30.

2. Video Depositions – Use of the Federal Courthouse

Pro bono counsel in the past have encountered various reasons and needs to use the courthouse as a site for a video deposition. The need may stem from an individual defendant's or government entity's wish to be in a "secure" facility where a law enforcement defendant's gun can be safely stored, or out of a logistical need where counsel cannot travel to the facility or it may be inaccessible to visitors. Be aware that both the Arraj and Rogers Courthouses have video conferencing equipment, so it is technically possible for depositions to be conducted in courtrooms, and judges of the district court have in the past permitted them to be held using courthouse electronic capabilities while your client is in detention, as long as the following conditions exist:

- Counsel has sought the court's leave – and has been granted permission – to conduct the deposition by motion, hopefully unopposed. *See, e.g.*, *Silverstein v. Federal Bureau of Prisons, et al.*, 07-cv-02471-PAB-KMT, ECF No. 126, Unopposed Motion for Leave to Use Court Facilities and Equipment for Videoconference Deposition, (Jan. 18, 2009).
- Counsel has arranged for the method of transcription to be done by a private court reporter, not one of the district court's own reporters. This responsibility also applies to making a video-recording of the deposition – the court's equipment and staff will not be available for that.
- With the privately retained reporting service, it will be expected that the reporter will administer the oath to the deponent(s).
- Technical arrangements will have been made with the Court's Information Technology Department – contact the Clerk's office by calling (303) 844-3433 and refer to the Court's order.

One caveat, however – leave to conduct a deposition in the courthouse is a matter of judicial discretion, and not all judicial officers permit it.

3. Faculty of Federal Advocates (FFA) Reimbursement and Discount Resources Website - Pro Bono Page

The Civil Pro Bono Panel Program provides for reimbursement of a portion of certain categories of costs, administered through the Faculty of Federal Advocates (FFA), for which panel attorneys may apply over the course of a case. Reimbursement in any single case may be limited

for non-expert costs. An additional reimbursement for expert fees may be requested in advance in cases where expert witnesses are reasonably required. See the FFA website (https://www.facultyfederaladvocates.org/Pro-Bono-Programs) for current limitations on costs. Counsel is encouraged to seek exceptions to the cost limitations where appropriate and submit supporting reasons for such exceptions to the Civil Pro Bono Panel Reimbursement Fund/Pro Bono Committee.

Reimbursement for non-expert costs in any one case is generally limited to $5,000. Charges for expert witness time will be reimbursed up to $7,500. Expert witnesses should be pre-approved using an FFA form. Attorneys may ask the Pro Bono Committee and Board for reasonable reimbursement in excess of the above limits. Attorneys anticipating the need to exceed the limits should submit the form before incurring the expenses. Counsel should expect payment within 90 days. Supporting documents, i.e., court reporter invoices and in-house and/or vendor copying charges, must be submitted in support of costs. Counsel who recover costs under Rule 54(d) agree to reimburse the FFA's Civil Pro Bono Reimbursement Fund for any costs the Fund actually paid. Should there be an award of expert witness or attorney's fees, pro bono counsel are also asked to consider a donation to the Pro Bono Reimbursement Fund.

Copied below is the FFA's description of the reimbursement policy and links to its forms from its Pro Bono Programs page of the FFA website:

> **Civil Pro Bono Panel Reimbursement Fund /Pro Bono Committee**
>
> The Faculty of Federal Advocates manages the Civil Pro Bono Panel Reimbursement Fund. The Fund provides limited reimbursement of out-of-pocket expenses in cases handled by panel attorneys for the Civil Pro Bono Panel of the U.S. District Court for the District of Colorado. The Memorandum of Understanding between the Court and FFA may be found HERE, and a letter establishing the Fund may be found HERE. Panel attorneys may download the reimbursement information here.
>
> FFA Civil Pro Bono Reimbursement Form.pdf
>
> FFA Civil Pro Bono Expert Fees Form.pdf
>
> CCRA [Colorado Court Reporters Association] Pro Bono Guidelines.pdf

Note that the FFA will also assist attorneys with finding stenographer and copying services willing to provide discounts for pro bono cases.

APPENDIX – Prison Facilities, Locations, Rules, Forms, and Important Website Links

FEDERAL BUREAU OF PRISONS
- Colorado Facilities
- BOP Regulations
- Forms
- Inmate Locator

COLORADO DEPARTMENT OF CORRECTIONS RULES & PROCEDURES
- Colorado Facilities
- Administrative Regulations
- Forms
  - CORA/CCJRA Records Request
  - Medical Records Request
- Inmate Locator

PRIVATELY-RUN PRISONS/DETENTION FACILITIES
- CDOC contracts (CoreCivic)
- Geo Group Inc.- Aurora ICE Processing Center
  (some USMS detainee contracts, and Immigration/Deportation clients may be detained here)

COUNTY FACILITIES
- Denver City and County Sheriff Department Regulations
- Denver Inmate Locator
- Other Counties

DESCRIPTIONS OF CORRECTIONAL INSTITUTIONS
- See Overview section of CDOC Annual Reports

SAMPLE LETTERS TO CLIENT
- Sample Engagement Letters (Limited Representation)

US DISTRICT COURT
- Civil Pro Bono Panel Materials
- Attorney/Pro Bono Forms
- Prisoner/Detainee Forms

FACULTY OF FEDERAL ADVOCATES
- Pro Bono Programs Information and Forms
- Training Materials/CLEs
  - 2019-2021
  - Previous