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EASTERN DISTRICT of WISCONSIN BAR ASSOCIATION

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PRACTICAL TIPS FOR PRO BONO COUNSEL IN PRISONER CIVIL RIGHTS CASES

This outline was used at CLE presentations in Milwaukee on October 28, 2022, and in Green Bay on November 10, 2022.

42 U.S.C. § 1983
Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

"To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he or she was deprived of a right secured by the Constitution or the laws of the United States, and that this deprivation occurred at the hands of a person or persons acting under the color of state law." *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015) (citing *Buchanan–Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009)).

42 U.S.C. § 1997e
Prison Litigation Reform Act (PLRA)

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

> **(1)** The court shall on its own motion or on the motion of a party dismiss any action 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 if the court is satisfied that the action is frivolous,

malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(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 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 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 of this title.

(e) Limitation on recovery. 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 (as defined in section 2246 of Title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

BASIC LEGAL STANDARDS FOR COMMON CLAIMS

I. Inadequate Medical Care

A. Claims by Pretrial Detainees – 14th Amendment

Pretrial detainees have a right to adequate medical care under the Fourteenth Amendment. *See Williams v. Ortiz*, 937 F.3d 936, 942 (7th Cir. 2019); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). To survive summary judgment, a plaintiff must show that he had a serious medical condition and that the defendants' response was objectively unreasonable. *Williams*, 937 F.3d at 942. Unlike the more demanding "deliberate indifference" standard under the Eighth Amendment, "[t]his standard requires courts to focus on the totality of facts and circumstances faced by the individual alleged to have provided inadequate medical care and to gauge objectively . . . whether the response was reasonable." *McCann v. Ogle Cnty.*, 909 F.3d 881, 886 (7th Cir. 2018). This standard does not reach negligent conduct; rather, the plaintiff must show the defendants acted "with purposeful, knowing, or reckless disregard of the consequences" of their actions. *Miranda*, 900 F.3d at 354.

Common Scenarios: Often issues related to medication, including alleged denial of prescribed medications, ineffective pain relief (generally offer only over-the-counter medications), failure to address withdrawal symptoms, refusal to refer to specialists (jails are ill-equipped to deal with anything serious because they generally do not house inmates long term).

B. Claims by Prisoners – 8th Amendment

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The court uses a two-part test to evaluate whether medical care amounts to cruel and unusual punishment; it asks (1) "whether a plaintiff suffered from an objectively serious medical condition" and (2) "whether the individual defendant was deliberately indifferent to that condition." *Gabb v. Wexford Health Sources, Inc.*, 945 F.3d 1027, 1033 (7th Cir. 2019) (internal quotation marks and citation omitted). "[D]eliberate indifference describes a state of mind more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Prison officials show deliberate indifference when they "realize[] that a substantial risk of serious harm to a prisoner exists, but then disregard[] that risk." *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015) (citing *Farmer*, 511 U.S. at 837).

Common Scenarios: Alleged delays in treatment, delays/refusals to order diagnostic testing (MRI, CT Scan, etc.), discontinuation of medication (often due to alleged or potential abuse), persistence in ineffective treatment (often related to pain medication/treatment), disagreements with treatment (medical accommodations like bunk restrictions, extra mattresses, surgery, etc.).

II. Failure to Protect

A. Self-Harm – Prisoners – 8th Amendment

Self-harm claims are predicated on the principle adopted by the Supreme Court in *Estelle v. Gamble* that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. 97, 104 (1976). This principle derives from the fact that "[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." *Id.* at 103; *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Claims of self-harm differ from those at issue in *Estelle* and *Farmer*, however, in that the threat to the plaintiff's safety from which he claims the defendants failed to protect him was himself. The plaintiff typically claims that he suffers from a severe mental disorder that relieves him of all responsibility for the self-destructive behavior he engages in while serving his sentence and renders those entrusted with his care responsible for any harm he does to himself. This type of claim is common in prisoner cases. *See, e.g.*, *Taylor v. Wausau Underwriters Ins. Co.*, 423 F. Supp. 2d 882 (E.D. Wis. 2006).

To establish deliberate indifference in a case where the risk to an inmate's safety is a suicide, attempted suicide, or other act of self-harm, the plaintiff must show that the defendant "(1) subjectively knew the prisoner was at substantial risk of committing suicide and (2) intentionally disregarded that risk." *Collins v. Seeman*, 462 F.3d 757, 760 (7th Cir. 2006) (citation omitted). In other words, "[a]n official must be 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and the official 'must also draw the inference.'" *Pittman ex rel. Hamilton v. Cnty. of Madison, Illinois*, 746 F.3d 766, 776 (7th Cir. 2014) (quoting *Higgins v. Corr. Med. Servs. of Ill., Inc.*, 178 F.3d 508, 511 (7th Cir. 1999)). While prison staff are under an obligation to protect inmates from self-harm, *Taylor*, 423 F. Supp. 2d at 889, ignoring "an insincere suicide threat from an inmate wanting nothing more than attention" does not confer liability under the Eighth Amendment. *Lord v. Beahm*, 952 F.3d 902, 905 (7th Cir. 2020). "A risk of future harm must be 'sure or very likely' to give rise to 'sufficiently imminent dangers' before an official can be liable for ignoring that risk." *Davis-Clair v. Turck*, 714 F. App'x 605, 606 (7th Cir. 2018) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008) (Roberts, C.J., plurality opinion)).

Common Scenarios: Failure to act to prevent pill overdoses or other self-harm (cutting oneself). Plaintiffs typically have significant mental health issues.

B. Inmate Assaults – 8th Amendment

Jail and prison officials have a duty under the Eighth Amendment to protect inmates from violence caused by other inmates when they are aware that the inmate faced "a substantial risk of serious harm" and "disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *see also Pierson v. Hartley*, 391 F.3d 898, 903–04 (7th Cir. 2004).

III. Excessive Force

A. Claims by Arrestees (prior to probable cause determination) – 4th Amendment

Under the Fourth Amendment, the court applies an objective reasonableness test, considering the reasonableness of the force based on the events confronting the defendant at the time and not on his subjective beliefs or motivations. *See Horton v. Pobjecky*, 883 F.3d 941, 949–50 (7th Cir. 2018) (citations omitted). This test carefully balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 949 (citations omitted). This balance "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citations omitted). The court must consider "the totality of the circumstances, including the pressures of time and duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances," without resort to "hindsight's distorting lens." *Id.* at 950 (citations omitted).

Common Scenarios: Challenges to the amount of force used during arrest.

B. Claims by Pretrial Detainees (after probable cause determination but pre-sentencing) – 14th Amendment

Because Plaintiff was a pretrial detainee at the time of the alleged assault, his claim must be analyzed under the Fourteenth Amendment's standard of objective reasonableness, which "turns on the 'facts and circumstances of each particular case.'" *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The court must judge the reasonableness of a particular use of force "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* Under an objective reasonableness inquiry, "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (citations omitted). The proper application of this standard requires consideration of the following factors: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. *Kingsley*, 576 U.S. at 397. This list is not exhaustive but illustrates some of the "objective circumstances potentially relevant to a determination of excessive force." *Id.*

Common Scenarios: Challenges to force used during cell extractions or while transporting plaintiff to court.

C. Claims by Prisoners (after sentencing) – 8th Amendment

The "central question" when evaluating whether force used against a prisoner is excessive is "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

Common Scenarios: Challenges to force used during cell extractions or interactions between guards and prisoners through their cell doors.

IV. Conditions of Confinement – 8th Amendment

Prison officials are "required to provide humane conditions of confinement, ensuring that inmates receive adequate food, clothing, shelter, and medical care, and take reasonable measures to guarantee safety of inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). A prison official is not liable for inhumane conditions of confinement "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Id.* at 837.

Common Scenarios: Extreme heat or cold, denial of lower bunk or double mattress, feces in cell, insects/vermin, inadequate exercise time, etc.

V. Retaliation – 1st Amendment

To succeed on a retaliation claim, a plaintiff must show that "'(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take the retaliatory action.'" *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015) (quoting *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009)).

Common Scenarios: Allegations that prison officials took some negative action (property confiscated, institution transfer, accommodations removed, general harassment) against Plaintiff in response to the filing of a grievance or complaint against officers.

RECRUITMENT OF COUNSEL LEGAL STANDARD

The Seventh Circuit has instructed district courts to consider two things when deciding whether to recruit counsel:

(1) Has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so? and

(2) Given the difficulty of the case, does the plaintiff appear competent to litigate it himself?

See Pruitt v. Mote, 503 F.3d 647, 654–55 (7th Cir. 2007). More recently, the Seventh Circuit has clarified that the district court should also "engage in 'closer scrutiny of the merits and what is at stake.'" *See Watts v. Kidman*, 42 F.4th 755, 764 (7th Cir. 2022) (quoting *Cole v. Janssen Pharm., Inc.*, 265 F. Supp. 3d 892, 900 (E.D. Wis. 2017)) (cleaned up).

OVERVIEW OF MEDIATION IN THE EASTERN DISTRICT OF WISCONSIN GREEN BAY DIVISION

I. There is no cost to mediate before a magistrate judge.

II. Both parties must agree to mediation before it will be ordered by the court.

III. Typically, for Green Bay Division cases, Magistrate Judge Jim Sickel is appointed as the mediator.

IV. Magistrate judges have allowed prisoner plaintiffs to appear by Zoom for mediations. The plaintiff should make the request to appear via Zoom with the magistrate judge.

Note: Plaintiff and plaintiff's counsel can speak privately during a mediation by using the Zoom "breakout room" feature.

GENERAL RESOURCES

I. **Eastern District of Wisconsin's website:** https://www.wied.uscourts.gov/resources-pro-bono-attorneys
   - Guide for Attorneys Recruited to Represent Plaintiffs in Section 1983 Cases
   - Prisoner Litigation Guide for Recruited Attorneys: Full Representation
   - Prisoner Litigation Guide for Recruited Attorneys: Mediation

II. **Seventh Circuit Pattern Jury Instructions:** For substantive guidance, in addition to WIED resources, see the Seventh Circuit Pattern Jury Instructions, https://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

III. **Mentoring:** Attorneys who have previously represented pro se litigants in federal court have volunteered to informally consult with attorneys looking for guidance. If you would like to connect with an experienced pro bono attorney, the court can provide you with contact information. Contact pro se staff attorneys at ProSeStaffAttorneys@wied.uscourts.gov for more information.

IV. **Professional Liability Insurance:** The State Bar of Wisconsin provides free malpractice coverage for pro bono legal services. For more information, visit https://www.wisbar.org/formembers/probono/Pages/Insurance.aspx.

Locating Incarcerated Individuals:

I. **Individuals in DOC Custody:** https://appsdoc.wi.gov/lop/welcome

II. **Individuals in County Jails:**

Most counties have information on individuals in custody on or through the Sheriff's website. Information on some counties' detainees may only be available through online third-party vendors, such as Vinelink.

Common County Inmate Locator Websites:

a. Brown County Jail: https://lookup-inmate-jail.browncountywi.gov/IML
b. Milwaukee County Jail: http://www.inmatesearch.mkesheriff.org
c. Kenosha County Jail: http://inmate.kenoshajs.org/NewWorld.InmateInquiry/kenosha/
d. Racine County Jail: http://rci-web.goracine.org/
e. Waukesha County Jail: https://www.waukeshacounty.gov/currentinmatelist/

Obtaining Documents and Communicating with Clients:

I. To obtain DOC records and arrange confidential attorney visits or attorney calls with clients, contact social services at the institution where the individual is incarcerated.

II. Institution-specific policies are available at the Division of Adult Institution's website: https://doc.wi.gov/Pages/OffenderInformation/AdultInstitutions/AdultFacilities.aspx

III. Clients must sign DOC personal health information & non-personal health information authorizations to release information for most records:

   A. Non-Health Disclosure Authorization: https://doc.wi.gov/Documents/AboutDOC/PublicRecords/NonHealthDisclosureAuthorization.pdf

   B. Health Disclosure Authorization: https://doc.wi.gov/Documents/AboutDOC/PublicRecords/PHIDisclosureAuthorization.pdf

IV. Be cautious when communicating with clients through Corrlinks, the email system individuals in DOC prisons use. Those messages are ***not confidential*** and may be reviewed by DOC staff. While communications through Corrlinks may be appropriate for scheduling purposes or conveying public information, it should not be used for substantive attorney-client communication.

Discovery in Prison and Jail Cases:

I. **Deposing DOC or jail employees:** Provide notice of deposition to defendants' counsel. Often depositions are taken at the institution, rather than at a lawyer's office. Leave extra time to get attorneys and court reporters through security, especially with staffing shortages post-COVID.

II. **Deposing incarcerated lay witnesses:** Subpoena, but the attorney must also notify defense counsel and institution staff far enough in advance to make it happen.

III. Generally, counsel will not get a sense of the physical space during attorney visits because those visits are limited to the visiting rooms. Consider requesting to enter and inspect portions of the institution grounds under Fed. R. Civ. P. 34(a)(2) and (b)(1)(B) if that is relevant to the case.

Expert Witness Considerations:

I. Types of cases in which experts are necessary:

   A. Medical malpractice cases require an expert to testify to the physician's standard of care and causation (at a minimum).

   B. Eighth Amendment deliberate indifference cases do not technically require expert testimony, even though the case involves allegations of inadequate medical treatment. However, such testimony will be important in all but the most extreme cases.

   C. First Amendment and RLUIPA cases, and even most cases involving assaults, failure to protect, and conditions of confinement, may be litigated without experts. Experts can often be useful to establish how other correctional institutions operate or to refute safety rationales for institutional policies or practices.

II. Paying for expert witnesses: The Pro Bono Fund *may* pay for expert costs, up to $5,000. *See* https://www.wied.uscourts.gov/pro-bono-fund. Consider asking retired doctors, who are often willing to help, or other acquaintances you may have in the relevant field to be experts.

Practical Trial Considerations:

I. The court enters a writ of *habeas corpus* for the incarcerated individual's appearance at trial.

II. The Eastern District of Wisconsin has a clothing closet for individuals who need street clothes to attend trial.

Effects of COVID-19:

I. COVID-19's effects are diminishing, as most facilities allow in-person visits and inspections of records on site.

II. Staffing shortages, especially in jails and higher-security prisons, have led to more delays.