

Chapter Three: How to Start Your Lawsuit

This chapter explains how to start a lawsuit under Section 1983. It explains what legal papers to file, when, where, and how to file them, and it provides forms to guide your writing. It also explains what to do in an emergency, when you need immediate help from the court. The next chapter, Chapter Four, discusses what happens after a suit is started. Neither chapter gives all the rules or procedures for this kind of suit. These details are in the **Federal Rules of Civil Procedure** issued by the U.S. Supreme Court. The Federal Rules are supposed to be in your prison library as part of Title 28 of the United States Code Annotated (U.S.C.A.). The U.S.C.A. gives short summaries of important court decisions which interpret each rule. Chapter Six explains how to use the U.S.C.A. and other law books.

TIP: Before you start writing your complaint, request the following documents from your District Court:

1. The District Court's Local Rules;
2. Forms for a Section 1983 *pro se* action;
3. *In Forma Pauperis* forms;
4. Forms for Appointment of Counsel.

The Federal Rules are not too long and they are very important. When we refer to a specific rule in this Handbook, you should read the rule if you possibly can. The rules are revised every few years, so be sure to check the “pocket parts” in the back of the books in the U.S.C.A. or read a current copy of the paperback. You may find reading the rules frustrating, since they are written in very technical language, and even lawyers and judges can't always agree on what they mean. For this reason, you may want to read a book that explains the Federal Rules and court decisions that interpret the Rules. If your library has it, a good book to read is *Wright and Miller's Federal Practice and Procedure*. You may also want to read the Advisory Committee notes which are printed in some editions of the rules. These notes explain the purpose of the rules and how they are supposed to work.

In addition to the Federal Rules, each United States District Court issues “Local Rules of Practice,” which are based on the Federal Rules. The Local Rules cover details of procedure that may be different in each particular district. You can get a copy from the Clerk of the U.S. District Court for each district, but you may have to pay a small fee. You may want to request these

rules when you write the court to get forms (explained below). Look in Appendix H to find the address of your District Court. Or, if you have a friend or relative with internet access, he or she can download the rules for free from the specific District Court's website.

A. WHEN TO FILE YOUR SECTION 1983 SUIT

If you are trying to stop an official policy or practice within the prison, you will, of course, want to act as quickly as possible. If a rule has been issued or an official decision has been made, you do not need to wait until the new procedure is put into effect. You can sue right away to block it.

If you are suing mainly to recover damages for an abuse that has already ended, you may not be in such a hurry. But it is usually best to get your suit going before you lose track of important witnesses or evidence.

1. Statute Of Limitations

For damage suits there is a “statute of limitations” which sets a deadline for how long you can wait, after the events occurred, before you start your suit. If your time runs out your case is “time-barred,” which means you will not be able to bring it. To meet a statute of limitations, you need to file your suit before the deadline. The deadline for a Section 1983 suit is determined by your state's general personal injury statute. *Owens v. Okure*, 488 U.S. 235, 236 (1989). This same rule applies to *Bivens* actions brought by federal prisoners. In some states, the statute of limitations is as short as one year, but most states give two or more years. Statutes of limitations can change, so always check current state statutes to make sure. To discover the statute of limitations in your state, look in the “civil code” or “civil procedure” section of the state code.

If you expect to get out of prison fairly soon – for example, you already have a parole date – then you might be better off waiting until you are out before you start a suit that is only for damages. You will obviously have more freedom to get your suit together when you're out, and you'll have access to a more complete law library. You may be able to raise the money to hire a lawyer, and prison officials will have a harder time getting back at you for filing suit. Also, some sections of the PLRA do not apply to prisoners who have been released.

You do not have to worry about the statute of limitations if you have a suit for an injunction, because

you must be experiencing on-going harm to get an injunction. If you are still being harmed, than each harm brings you a new period within which you have a right to sue. On the other hand, if you want an injunction you have to start and finish your suit while you are inside to avoid the problem of “mootness” explained in Chapter Four, Section E

If you file your suit in time, but then need to file an amended complaint to add new claims, you should be fine. However, you may have trouble if you try to add new defendants after the statute of limitations has run out. Read Federal Rule of Civil Procedure Rule 15(c) to learn whether your new complaint will “relate back” to your first filing.

2. Exhaustion of Administrative Remedies

The PLRA states that “[n]o action shall be brought with respect to prison conditions ... 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.A. § 1997e(a).

This provision is known as the “exhaustion” requirement, and it means that you have to use the prison grievance system before you file your lawsuit. If you try to sue a prison official about anything he or she has done to you, the court will almost always dismiss your case unless you have first filed an inmate grievance or complaint form provided by your prison. Not only do you have to file this form, but you also need to wait for a response, and appeal that response as far up as possible.

Because of the PLRA, you must use the grievance system. It doesn’t matter if you believe your prison’s grievance system is inadequate, unfair or futile. You may know that nothing is going to change by you filing a grievance, but you still need to do it. **Your case will be dismissed if you do not follow the rules.**

Very rarely, exhaustion may not be required if you can show that you were *unable* to file a grievance through *no fault of your own*. For instance, if you are in protective custody, and not allowed to file a grievance, or if a prison official told you not to file a grievance, the court **may** decide to excuse the exhaustion requirement in your case. However, courts are very skeptical of these claims, so you should definitely go through the grievance process unless you are truly unable.

The exhaustion requirement applies to all type of prison cases. Although “prison conditions” sounds like it

might only include claims about things like inadequate food or dirty cells, in a case called *Porter v. Nussle*, 534 U.S. 516 (2002), the Supreme Court held that “prison conditions” refers to everything that happens in prison, including single incidents of guard brutality or inadequate medical care. Under another important Supreme Court case, *Booth v. Churner*, 532 U.S. 731 (2001), you even have to use the prison’s grievance system if it does not offer the type of relief you would like to sue for. The prisoner in that case, Timothy Booth, wanted money damages and the administrative grievance system at his prison did not allow money damages. The Court decided that even though Mr. Booth’s prison administrative grievance system could not award him money damages, Mr. Booth was still forced to go through the entire administrative grievance process before coming to court to seek monetary damages.

It is not entirely clear yet if you have to exhaust each separate issue in your case, or name each defendant, or what will happen if you miss a prison grievance deadline. For this reason, you should try to be as detailed as possible in your grievance and try to comply with all the prison’s grievance rules and deadlines, even if they don’t make any sense.

If the court does dismiss your case for failure to exhaust, it will probably be a “dismissal without prejudice” which means that you can exhaust your remedies, and then re-file. The dismissal will probably not be considered a “strike” against you. However, if the statute of limitations has run by the time you are done exhausting, you will be out of luck.

B. WHERE TO FILE YOUR SUIT

You will file your lawsuit at the federal trial court, called a “district court.” This is where all cases start. There is often more than one district in a state. In total there are 94 U.S. district courts. Some states, such as Alaska, only have one district. Others have several. New York, for example, is composed of four districts: the Northern, Western, Eastern, and Southern Districts. What district you should file in is determined by the law of “venue.” The main venue rule for a suit based on Section 1983 is section 139(b) of Title 28 of the United States Code.

It is usually easiest to file in the district “in which the claim arose.” That is, you should file in the district that includes the prison in which your rights were violated. To determine what district this is and to get the address of the district court, locate your state in Appendix H, and then check to see which district covers the county

your prison is in.

You do not *have* to say in your complaint why you decided to file in a particular district. It is up to the defendants to challenge your choice of venue if they think you filed in the wrong place. However, the district court often will return your papers, instead of delivering them to the defendants, if the judge decides you sued in the wrong court. For this reason, we have included a sentence on “venue” in our sample complaint in Section C, Part 1 of this chapter.

Always be sure to send the Court Clerk a letter stating that your address has been changed if you are transferred to a different prison.

C. WHAT LEGAL PAPERS TO FILE TO START YOUR SUIT

As you will see, a lawsuit requires an amazing amount of paperwork. There are two basic papers for starting any federal lawsuit: a “**summons**” and a “**complaint**.” They are described in Part 1, below. If you have very little or no money, you will want to request that the court allow you to sue “*in forma pauperis*,” to give you more time to pay the court filing fee. *In forma pauperis* papers are described in Part 2. You will also probably want to ask the court to appoint a lawyer for you, and this is described in Part 3. Eventually, you may want to submit “**declarations**” to present additional facts in support of your complaint. Declarations are described in Part 4 of this Section.

The courts expect legal papers to be written a certain way, which is different from how anyone ordinarily writes. But don’t be intimidated! **This does not mean that you need to use legal jargon, or try to sound like a lawyer.** This chapter will include forms for each basic document that you will need. The forms and examples in this chapter show only one of the many proper ways to write each type of paper. Feel free to change the forms to fit your case. If you have access to copies of legal papers from someone else’s successful Section 1983 lawsuit, you may want to follow those forms instead.

If you need a legal paper that is not covered by this chapter or Chapter Four, you may want to see if your prison library has a book of forms for legal papers. Two good books of forms for federal suits are: *Moore’s Manual-Federal Practice Forms* and *Bender’s Federal Practice Forms*. Some U.S. District Courts have special rules about the form your legal papers should follow – like what kind of paper to use, what line to start typing on and what size type to use. You will find

these rules in the Local Rules you request from your district court, described above.

Most district courts also have a packet of forms that it will send for free to prisoners who want to file actions *pro se* (without a lawyer). You can write a letter to the court clerk explaining that you are a prisoner, that your rights were violated in your prison, and request forms for a 42 U.S.C. § 1983 action. The court may or may not require you to use their forms. **If you can get these forms, use them. They are the easiest way to file a complaint!** With or without the forms, you will need to be sure to include all of the information described below. It is a good idea to request both the Local Rules and the Section 1983 forms before you start trying to write your complaint.

Generally, you should type if you can. Large type is best. Check with the local court rules or court clerk to see if you need to use a particular type or length of paper. Type or write on only one side of each sheet, and staple the papers together at the top.

Try to follow the forms in this chapter, and Chapter Four, and the special rules for your district. But don’t let these rules stop you from filing your suit. Just do the best you can. If you can’t follow all the rules, write the court a letter that explains why. For example, you can tell the court that you were not allowed to use a typewriter, or you could not get the right paper. The courts should consider your case even if you do not use the correct form. When a prisoner files a lawsuit without help from a lawyer, the federal courts will even accept handwritten legal papers.

Do not worry about using special phrases or fancy legal words. These are never necessary. **Just write clearly and simply and try to keep it short.**

Be sure to put your name and address at the top left hand corner of the first page of your complaint and any motion you submit. All the prisoners who bring the suit should sign the complaint. At least one plaintiff should sign each motion.

The summons and complaint and any other papers you submit to the court must be served by a marshal or someone appointed by the court. This is explained below. Whenever you submit a motion or other legal paper after the suit is started, mail a copy to the Deputy Attorney General who represents the prison officials. His or her name and address will be on the legal papers submitted by the prison officials.

1. Summons And Complaint

You start a Section 1983 suit by mailing a legal document called a “complaint” to the appropriate U.S. District Court.

The Complaint

The complaint is the most important document in your lawsuit. In it, you officially describe your lawsuit. You explain who you are (plaintiff), whom you are suing (defendants), what happened (factual allegations), what you want the court to do (relief), and what laws give the court the power to rule in your favor (legal claims). If your complaint does not meet all the requirements for a Section 1983 lawsuit, your suit could be dismissed at the very start.

Getting all the right facts down in your complaint can be difficult but is very important. The following is a sample complaint. Yours should be on a full sheet of paper, not in two columns like it is here. You can copy the parts of this form that are appropriate for your suit, and add your own facts to the *italicized* sections. The letters (A) through (J) in grey by each section should not be included in your complaint. They are just there for your reference. Each section will be explained below.

The Complaint Form:

IN THE UNITED STATES	
DISTRICT COURT FOR THE	(A)
_____.	
-----X	
<i>Names of all the people</i>	:
<i>bringing the suit,</i>	:
Plaintiff,	:
	:
	: COMPLAINT
v.	: Civil Action No. __
	:
	:
<i>Names of all the people</i>	:
<i>the suit is against,</i>	:
individually and in their	:
official capacities,	:
Defendants	:
	:
	:
-----X	

I. JURISDICTION & VENUE (B)

1. This is a civil action authorized by 42 U.S.C. Section 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the

United States. The court has jurisdiction under 28 U.S.C. Section 1331 and 1343 (a)(3). Plaintiff seeks declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202. Plaintiff’s claims for injunctive relief are authorized by 28 U.S.C. Section 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.

2. The [name of district you are filing your suit in] is an appropriate venue under 28 U.S.C. section 1391 (b)(2) because it is where the events giving rise to this claim occurred.

II. PLAINTIFFS (C)

3. Plaintiff, [your full name, and names of other plaintiffs], is and was at all times mentioned herein a prisoner of the State of [state] in the custody of the [state] Department of Corrections. He/she is currently confined in [name of prison], in [name of City and State].

III. DEFENDANTS (D)

4. Defendant, [full name of head of corrections department] is the [Director / Commissioner] of the state of [state]. He is legally responsible for the overall operation of the Department and each institution under its jurisdiction, including [name of prison where plaintiffs are confined].

5. Defendant, [warden’s full name] is the [Superintendent / Warden] of [name of prison]. He is legally responsible for the operation of [name of prison] and for the welfare of all the inmates of that prison.

6. Defendant, [guard’s full name] is a Correctional Officer of the [state] Department of Corrections who, at all times mentioned in this complaint, held the rank of [position of guard] and was assigned to [name of prison].

7. Each defendant is sued individually and in his [or her] official capacity. At all times mentioned in this complaint each defendant acted under the color of state law.

III. FACTS (E)

8. State IN DETAIL all the facts that are the basis for your suit. You will want to include what happened, where, when, how and who was there. Remember that the judge may know very little about prison, so be sure to explain the terms you use. Divide your description of the facts into separate short paragraphs in a way

that makes sense – by time, date, or event.

9. You may want to include some facts that you do not know personally. It may be general prison knowledge, or it may be information given to you by people who are not plaintiffs in your lawsuit. It is proper to include this kind of information, but you need to be sure that each time you give these kinds of facts, you start the paragraph with the phrase “Upon information and belief.”

10. You can refer to documents, affidavits, and other materials that you have attached at the back of your complaint as “exhibits” in support of your complaint. Each document or group of documents should have its own letter: “Exhibit A”, “Exhibit B” etc.

IV. EXHAUSTION OF LEGAL REMEDIES (F)

11. Plaintiff [name] used the prisoner grievance procedure available at [name of institution] to try and solve the problem. On [date filed grievance] plaintiff [name] presented the facts relating to this complaint. On [date got response] plaintiff [name] was sent a response saying that the grievance had been denied. On [date filed appeal] he/she appealed the denial of the grievance.

V. LEGAL CLAIMS (G)

12. Plaintiffs reallege and incorporate by reference paragraphs 1 – 11 [or however many paragraphs the first four sections took].

13. The [state the violation, for example, beating, deliberate indifference to medical needs, unsafe conditions, sexual discrimination] violated plaintiff [name of plaintiff]’s rights and constituted [state the constitutional right at issue, for example, cruel and unusual punishment, a due process violation] under the [state the number of the Constitutional Amendment at issue, usually Eighth or Fourteenth] Amendment to the United States Constitution.

14. The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which plaintiff seeks.

VI. PRAYER FOR RELIEF (H)

WHEREFORE, plaintiff respectfully prays that this court enter judgment granting plaintiffs:

15. A declaration that the acts and omissions described herein violated plaintiff’s rights under the Constitution and laws of the United States.

16. A preliminary and permanent injunction ordering defendants [name defendants] to [state what it is you want the defendants to do or stop doing].

17. Compensatory damages in the amount of \$ ___ against each defendant, jointly and severally.

18. Punitive damages in the amount of \$ ___ against each defendant.

19. A jury trial on all issues triable by jury

20. Plaintiff’s costs in this suit

21. Any additional relief this court deems just, proper, and equitable.

Dated: _____ (I)
Respectfully submitted,

Prisoners’ names and addresses

VERIFICATION (J)

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at [city and state] on [date]

Signature
Type name of plaintiff

Explanation of Form:

Part (A) is called the “caption.” It looks strange, but it is how courts want the front page of every legal document to look. There is no one right way to do a caption, so you should definitely check your court’s local rules to see what they want. As you can see, the top line is the name of the court. You will have already figured out where you are filing your lawsuit by reading Section B of this chapter, and referring to Appendix H. If you are suing in the Western District of New York, where many New York prisons are, you would insert those exact words “Western District of

New York” where the blank is. Inside the box, you need to put the full names of all the plaintiffs, and the full names and titles of all the defendants. Think carefully about the discussion in Chapter Two, Sections D and E about whom you can sue, and remember to include that you are suing them in their “official capacity,” if you want injunctive relief, and their “individual capacity” if you want money damages. The plaintiffs and defendants are separated by “v” which stands for “versus” or “against”. Across from the box is the title of your document. This is a complaint, so call it that. Each document you file in your case will have a different title. Under the title is a place for your civil action number. Leave that line blank until you are assigned a number by the court. You will get a number after you file your complaint.

Part (B) is a statement of the court’s jurisdiction (paragraph 1) and venue (paragraph 2). Jurisdiction really means “power.” Federal courts, unlike most state courts, are courts of “limited jurisdiction.” This means they can only hear cases that Congress has said they should hear. For the purposes of a complaint, all you have to understand about jurisdiction is what statutes to cite. All prisoners bringing Section 1983 suits should cite 28 U.S.C. Section 1331 and 1343 (a)(3) in this paragraph. The other statutes you cite depend on what kind of case you are bringing:

- ❑ If you are seeking declaratory relief (see Chapter Two, Section D), you should include a sentence stating “Plaintiffs seek declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202.”
- ❑ If you are seeking injunctive relief (see Chapter Two, Section D) you should include a sentence stating “Plaintiff’s claims for injunctive relief are authorized by 28 U.S.C. Section 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.”
- ❑ If you have included state law claims in your complaint you should include a sentence stating “the court has supplemental jurisdiction over plaintiff’s state law claims under 28 U.S.C. Section 1367.”

Rules of venue are about physical location. Venue rules can help you decide which federal district court you chose in which to file your case. Prisoners will almost always want to bring their case where the actions occurred. See Section B, above, and Appendix H.

Part (C) is a list of the plaintiffs in the lawsuit. This may just be you. Or, you may have decided to file suit with other prisoners who are having or had similar

problems. In this paragraph, you should tell the court who you are, and where you are incarcerated. If you are bringing an equal protection claim, you may also want to include your race, ethnicity, or gender, if relevant. If you have more than one plaintiff, you can list them all in one paragraph, unless there are differences in their situations that you need to note. For example, one plaintiff could have been released since the event occurred. If you or any of the other plaintiffs were transferred from one facility to another since the events occurred, indicate where you were at the time of the event, and where you are now.

Part (D) is a list of potential defendants and their titles. This is just an example. You may sue more people or less people. They may be all guards, or all supervisors. As explained above, you will need to put careful thought into whom you are suing, and whether to sue them in their official or individual capacity. **Only sue people who were actually involved in your violating your rights!** You will also want to include, for each defendant, a statement of why they are responsible for what happened to you. Generally, this just means stating a defendant’s job duties. **You must be sure to include the statement in Paragraph 6: that at all times, each defendant acted under color of state law.** As you may remember from Chapter Two, Section B, this is one of the requirements for Section 1983 actions.

Part (E) is the factual section of your complaint. It is very important, and can be very rewarding if done well. It is your chance to explain what has happened to you. In this section, you must be sure to state (or “allege”) enough facts to meet all the elements of your particular claim. This can be a very big task. We would suggest that you start by making a list of all the claims you want to make, and all the elements of each claim. For example, in Chapter Two, Section C, Part 5, you learned that an Eighth Amendment claim based on guard brutality requires a showing that:

- (1) you were harmed by a prison official,
- (2) the harm caused physical injury (necessary for money damages under PLRA) and
- (3) the guard’s actions were not necessary or reasonable to maintain prison discipline.

This means that in your complaint, you will need to state facts that tend to show that each of these three factors is true. It is fine to state facts that you believe are true but don’t know to be true through personal knowledge, as long as you write “upon information and belief.”

Make sure that you include facts that show how **each**

defendant was involved in the violation of your rights. If you do not include facts about a certain defendant, the court will probably dismiss your claim against that person.

Part (F) is a statement that you have exhausted your administrative remedies by using the prison grievance system. While all courts in the country require exhaustion under the PLRA, only some courts require you to state the facts about exhaustion in your complaint. To be safe, it can't hurt to state **all the steps** you have taken to exhaust your complaint, and attach copies of your grievance and appeal forms as exhibits.

Part (G) is where you state your legal claims, and explain which of your rights were violated by each defendant. In all complaints, you need to be sure to include the sentence in Paragraph 11 so you do not have to restate all the facts you have just laid out. You should have one paragraph for each individual legal claim. For example, if you feel that prison officials violated your rights by beating you and then denying you medical care, you would want to list these two claims in two separate paragraphs. If all the defendants violated your rights in all the claims, you can just refer to them as "defendants." If some defendants violated your rights in one way, and others in another, then refer to the defendants individually, by name, in each paragraph. Here is an example:

1. Defendant Greg Guard's use of excessive force violated plaintiff's rights, and constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution.
2. Defendants Nancy Nurse, David Doctor and Wilma Warden's deliberate indifference to plaintiff's serious medical needs violated plaintiff's rights, and constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Paragraph 14 is only necessary if you are applying for injunctive relief. You should include that sentence in any complaint that requests an injunction.

Part (H) is where you tell the court what you want it to do. You can ask for a declaration that your rights were violated, an injunction, money damages, costs, and anything else the court thinks is fair. Once again, this is just an example. Do not include paragraph 16, requesting injunctive relief, unless you are eligible for injunctive relief. If you request an injunction, you should spend some time thinking about what it is you actually want the prison to do or stop doing. Be

creative but also specific. And make sure that the injunction you request is related to a continuing violation of your rights. You should review Chapter Two, Section D on injunctive relief before writing this section. You should also think carefully about how much money you want in compensatory and punitive damages. If you cannot figure out how much to ask for, just request compensatory and punitive damages without including a dollar amount. Review Chapter Two, Section E on damages before writing this section.

Part (I) is where you sign and date the complaint. You must always sign a legal document.

Part (J) is a "verification." This part is optional. You do not have to verify a complaint, but if you do, you can use it as evidence if the defendants file a motion for summary judgment against you (see Chapter Four, Section D) or to support your request for a temporary restraining order (see Section E of this Chapter). When you verify a complaint, you are making a sworn statement that everything in the complaint is true to the best of your knowledge. Making a sworn statement is like testifying in court. If you lie, you can be prosecuted for perjury.

- **Note:** You are expected to tell the truth in an "unverified" complaint as well.

If you want to change your complaint after you have submitted it, you can submit an "amended complaint" which follows the same form as your original complaint. The amended complaint is still about the same basic events. But you might want to change who some of the defendants are, ask the court to do slightly different things, add or drop a plaintiff, or change your legal claims. You also might discover that you need to make some changes in order to avoid having your complaint dismissed. See Chapter Four, Section C.

When and how you can amend your complaint is governed by Rule 15(a) of the Federal Rules of Civil Procedure. You have a right to amend once before the defendants submit an Answer in response to your complaint. You need the court's permission, or the consent of the defendants, to submit a second amended complaint or to submit any amendment after the prison officials have filed an Answer. According to the Federal Rules of Civil Procedure, Rule 15(a), the court should grant permission "freely... when justice so requires."

You might also want to change your complaint to cover events that happened after you filed it. The guards might have beaten you again, confiscated your books,

or placed you in an isolation cell. Now you need to submit a “supplemental complaint.” This procedure is governed by Rule 15(c). The court can let you submit a supplemental complaint even if your original complaint was defective. The supplemental complaint also follows the same form as your original complaint.

The Summons:

Along with your complaint, you must submit a “summons” for the court clerk to issue. The summons notifies the defendants that a suit has been started against them and tells them by when they must answer to avoid having a judgment entered against them. A summons is much easier than a complaint. All you need to do is follow this form:

IN THE UNITED STATES	
DISTRICT COURT FOR THE	(A)
-----X	
<i>Names of all the people</i>	:
<i>bringing the suit,</i>	:
Plaintiff,	:
	: SUMMONS
v.	: Civil Action No. ___
	:
<i>Names of all the people</i>	:
<i>the suit is against,</i>	:
individually and in their	:
official capacities,	:
Defendants	:
	:
-----X	
TO THE ABOVE-NAMED DEFENDANTS:	
You are hereby summoned and required to serve upon plaintiffs, whose address is [<u>your address here</u>] an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service, or 60 days if the U.S. Government or officer / agent thereof is a defendant. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.	
Clerk of the Court	
Date: _____	

2. In Forma Pauperis Papers

The federal courts charge \$150 for filing a lawsuit, and another \$105 if you wish to appeal the court’s decision. If you can’t afford these fees, you will usually be allowed to pay them in installments by proceeding “*in forma pauperis*,” which means “as a poor person.” If you are granted this status, court fees will be taken in installments from your prison account. If you win your suit the court will order the defendants to reimburse you for these expenses. Before the PLRA, the court could let you proceed without pre-paying for filing or service. However, this is no longer possible. Now you must eventually pay the entire filing fee.

The legal basis for suing *in forma pauperis* is Section 1915 of Title 28 of the United States Code. To request this status, you will need to file an Application to Proceed *in Forma Pauperis*. Each court has a different application, so you should request this form from the district court clerk before filing your complaint, and the clerk will also send you paperwork for you to fill out regarding your prison account. You will also need to file a certified copy of your prison account statement for the past six months. Some prisoners have experienced difficulty getting their institution to issue this statement. If you are unable to get a copy of your prison account statement, include in your declaration an explanation of why you could not get the account statement. You will also need to file a declaration in support of your motion. The form of this declaration will probably also be available in the *pro se* packet, but in case it is not, use the following example.

Again, only use this declaration if you **cannot** get a declaration form from the District Court clerk’s office. If you have to use this declaration, copy it **exactly**, and fill in your answers, taking as much space as you need.

In Forma Pauperis Form:

IN THE UNITED STATES	
DISTRICT COURT FOR THE	(A)
-----X	
<i>Names of the first</i>	:
<i>plaintiff,</i>	: DECLARATION
Plaintiff,	: IN SUPPORT OF
	: MOTION TO
v.	: PROCEED IN
	: FORMA
<i>Name of all the first</i>	: PAUPERIS
<i>Defendant, et al.</i>	:
Defendants	:

: Civil Action No.

:

X

I, _____, am the petitioner / plaintiff in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. If you are presently employed, state the amount of your salary wage per month, and give the name and address of your employer _____. (B)

2. If you are not presently employed state the date of last employment and amount of salary per month that you received and how long the employment lasted.

3. Have you received, within the past twelve months, any money from any of the following sources:

a. Business, profession or form of self-employment?

YES ___ NO ___

b. Rent payments, interest or dividends?

YES ___ NO ___

c. Pensions, annuities, or life insurance payments?

YES ___ NO ___

d. Gifts or inheritances?

YES ___ NO ___

e. Any form of public assistance?

YES ___ NO ___

f. Any other sources?

YES ___ NO ___

If the answer to any of questions (a) through (f) is yes, describe each source of money and state the amount received from each during the past months _____.

4. Do you have any cash or money in a checking or savings account? _____. If the answer is yes, state the total value owned. (C)

5. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (including ordinary household furnishings and clothing)? _____. If the answer is yes, state the total value owned. _____.

6. List the person(s) who are dependent on you for support, state your relationship to those person(s), and indicate how much you contribute toward their support at the present time. _____.

7. If you live in a rented apartment or other rented building, state how much you pay each month for rent. Do not include rent contributed by other people. _____. (D)

8. State any special financial circumstances which the court should consider in this application.

I understand that a false statement or answer to any questions in this declaration will subject me to the penalties of perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this _____ day of _____, 20 ____.

(your signature)

Date of Birth

Social Security Number

Explanation of Form:

In section (A), you can use a slightly shortened version of the caption you used for your complaint. You only need to list the first plaintiff and defendant by name. The rest are included by the phrase “et al.” which means “and others.” However, be aware that if there is more than one plaintiff in your lawsuit, each plaintiff needs to file his or her own declaration and application.

In section (B), if you have never been employed, just say that. If you have a job in prison, state that.

In section (C), you should include any money you have in a prison account.

Some of these questions may sound weird, or not apply to you -- section (D) for example. However, answer them anyway. Like for question 7, just state that you do not live in an apartment.

Although the judge does not have to let you sue *in forma pauperis*, he or she almost always will if you show you are poor and your suit has some real legal basis. You do not need to be absolutely broke. Section 1915(b)(1) of Title 28 directs the judge to compare the monthly deposits and the average balance for your prison account. He or she will figure that you can initially pay twenty percent of the larger of these numbers. If this is less than \$150, then Section 1915(b)(2) states that you must pay twenty percent of the monthly deposits to your account until the \$150 is paid. If the court decides you are not poor or your suit is entirely “frivolous,” it will return your legal papers and you will have to find a way to pay the full amount.

Another initial expense in filing your lawsuit is personal delivery of legal papers to each defendant, which can be done for a fee by the U.S. Marshal's office or a professional process server. Personal delivery of legal papers, called "service of process," is required under most circumstances, according to Rule 4 of the Federal Rules of Civil Procedure. One of the advantages to gaining *in forma pauperis* status is that Rule 4(c) of the Federal Rules of Civil Procedure directs that your complaint will be served quickly and without cost by the U.S. Marshal's Service. There are other potential benefits to gaining *in forma pauperis* status. You may avoid having to pay witness fees for depositions and at trial. If you appeal, you may not have to pay the costs of preparing transcripts. In addition, some courts have used Section 1915 to appoint a lawyer to represent a prisoner in a Section 1983 suit and even to pay the lawyer's expenses. This is discussed in Part 3 of this section.

Unfortunately, *in forma pauperis* status affects only a very small part of the expense of your lawsuit. It will not pay for postage or for making photocopies, and it will not cover the costs of "pre-trial discovery" (see Chapter Four, Part G), though you may be able to recover these expenses from the defendants if you win. Appointed counsel recovered such expenses in *Armstrong v. Davis*, 318 F.3d 965 (9th Cir. 2003).

- **Tip:** If you ask for *in forma pauperis* status at the start of your suit, your legal papers will not be served on the defendants – and so your suit will not begin – until the court decides whether you can sue *in forma pauperis*.

While most districts grant *in forma pauperis* status quickly and routinely, some districts have a reputation for a great deal of delay. This is a serious problem. If you discover that your district has long delays, or your motion to proceed *in forma pauperis* is denied, you could try one of the following methods.

- (1) If you can raise the money, pay the \$150 filing fee yourself, and have someone outside the prison serve your papers for free. Rule 4(c)(2) of the Federal Rules of Civil Procedure allows service by any person older than 18 who is not a party to the lawsuit.
- (2) Alternatively, you can ask the defendants to waive service under Federal Rule of Civil Procedure 4(d) by mailing them a Request for Waiver of Service. You can find the forms for this request in the Federal Rules of Civil Procedure Appendix of Forms, Form 1A and 1B (You can find the Appendix of forms at the end of the Federal Rules). Make sure you copy both the Notice

of Lawsuit and Request for Waiver of Service of Summons and the actual Waiver of Service of Summons. You should be sure to include a copy of your complaint, a stamped envelope or other pre-paid means to return the waiver, and an extra copy of the request. If the defendant does not agree with your request to waive service, then you may later be able to recover the costs of personal service by a professional process server or a marshal.

The Problem of Three Strikes:

The "three strikes provision" of the PLRA states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C.A. § 1915(g). This provision means that if you have had three complaints or appeals dismissed as "frivolous," "malicious," or "failing to state a claim," you cannot proceed *in forma pauperis* unless you can show you are in imminent danger of serious injury. **This means you will have to pay the entire filing fee up front, or your case will be dismissed.**

The PLRA is very specific about what dismissals count as strikes: dismissals for **frivolousness**, **maliciousness**, or **failure to state a claim**. A case dismissed on some other ground is not a strike. A summary judgment is not a strike. A partial dismissal – an order that throws out some claims, but lets the rest of the case go forward – is not a strike. A case that you voluntarily withdraw will usually not be considered a strike. A dismissal is not a strike if it is impossible to tell what the basis for the dismissal was. Only federal court dismissals count as strikes and dismissal in a habeas corpus action is not a strike.

What counts as a "strike?"

Dismissals for:

- **frivolousness,**
- **maliciousness,**
- **failure to state a claim.**

The courts have not yet determined if a second strike is counted if a case is re-filed, than dismissed a second time. Dismissals may be strikes even if they were not *in forma pauperis* cases. Cases filed or dismissed before the PLRA was enacted have also been counted as strikes. Dismissals will not count against you until you have exhausted or waived all your appeals. At that point, if the court dismisses your case as “frivolous, malicious, or failing to state a claim upon which relief may be granted,” you will receive a strike.

The Three Strikes Provision does not apply when a prisoner is in “imminent danger of serious physical injury.” To meet this requirement, the injury does not need to be so serious as to be an Eighth Amendment violation. The risk of future injury is enough to invoke the imminent danger exception.

In conclusion, the Three Strikes Provision means you will need to think more carefully about whether any litigation you may bring is well-founded and really worth it. Once you are given a third strike, you will have to pay the entire filing fee of \$150 up front before you can file a new lawsuit.

3. Request For Appointment Of Counsel

The *in forma pauperis* law, 28 U.S.C. § 1915(e)(1), allows a U.S. District Judge to “request an attorney to represent any person unable to afford counsel.” On the basis of this law, district judges have appointed lawyers for prisoners who filed Section 1983 suits on their own behalf. Generally, when deciding whether or not to appoint a lawyer for you, the court will consider:

- How well can you present your own case?
- How complicated are the legal issues?
- Does the case require investigation that you will not be able to do because of your imprisonment?
- Will credibility (whether or not a witness is telling the truth) be important, so that a lawyer will need to conduct cross-examination?
- Will expert testimony be needed?
- Can you afford to hire a lawyer on your own?

These factors are listed in *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3rd Cir. 2002).

Unfortunately, appointment is usually at the “discretion” of the judge, which means that if a judge doesn’t want to appoint you counsel, he or she doesn’t have to. On the other hand, there have been a few rare cases in which a court held that a judge abused this discretion. In *Hendricks v. Coughlin*, 114 F.3d 390 (2d

PLRA Tip: Revocation of Earned Release Credit

This is another provision of the PLRA that you should also consider before deciding to file a lawsuit. If you are confined in a federal correctional facility, any civil action you bring may put you at risk of losing your earned good time credit.

A court can take away your earned good time credit if they decide that:

- a) The claim was filed for a malicious purpose;
- b) The claim was filed solely to harass the party against which it was filed; or
- c) You testify falsely or otherwise knowingly present false evidence or information to the court.

Cir. 1997), a U.S. Court of Appeals found that the district court had abused its discretion in refusing to appoint counsel for a prisoner in a Section 1983 case. In *Parham v. Johnson*, 126 F.3d 454, 461 (3d Cir. 1997), another Court of Appeals said that “where a plaintiff’s case appears to have merit and most of the aforementioned factors have been met, courts should make every attempt to obtain counsel.” In general, whether you will be appointed counsel has a lot to do with how strong your case looks to a judge. If the judge thinks your case has no merit, he or she will not want to appoint counsel.

The best procedure is to request appointment of counsel at the same time you request *in forma pauperis* status. **If you can get this an appointment of counsel form from the district court, use that form.** If there is no form for this request in the *pro se* packet, use the following form:

IN THE UNITED STATES	
DISTRICT COURT FOR THE	(A)
_____.	
-----X	
<i>Names of all the people</i>	:
<i>bringing the suit,</i>	:
Plaintiff,	:
	: MOTION FOR
v.	: APPOINTMENT OF
	: COUNSEL
<i>Names of all the people</i>	:
<i>the suit is against,</i>	: Civil Action No. ___
individually and in their	:
official capacities,	:
Defendants	:

:

-----x

Pursuant to 28 U.S.C. § 1915(e)(1) plaintiff (or plaintiffs) moves for an order appointing counsel to represent him in this case. In support of this motion, plaintiff states:

1. Plaintiff is unable to afford counsel. He has requested leave to proceed in forma pauperis.
2. Plaintiff's imprisonment will greatly limit his ability to litigate. The issues involved in this case are complex, and will require significant research and investigation. Plaintiff has limited access to the law library and limited knowledge of the law. (A)
3. A trial in this case will likely involve conflicting testimony, and counsel would better enable plaintiff to present evidence and cross examine witnesses.
4. Plaintiff has made repeated efforts to obtain a lawyer. Attached to this motion are _____ . (B)

WHEREFORE, plaintiffs request that the court appoint _____, a member of the _____ Bar, as counsel in this case. (C)

Date

Signature, print name below

Address

Explanation of Form:

You can include any facts in this motion that you think will help convince the court that you need a lawyer. For example, in section (A) you could add that you are in administrative segregation, that your prison doesn't have a law library, or that it takes weeks to get a book.

In part (B) you need to describe the evidence that you will attach to show that you have tried to get a lawyer. Copies of letters lawyers have sent you, or you have sent them, should be enough.

Only ask for a specific lawyer in part (C) if there is a lawyer who you know and trust. If you do have a relationship like this, list the lawyer's name, and the

state where he or she is admitted to practice law. If the judge decides to appoint a lawyer for you, he or she does not have to appoint the one you suggest, but this may well be the easiest and most convenient thing for the judge to do. And it is obviously very important that the lawyer appointed for you be someone you can trust, who is clearly on your side.

If the court denies your request at that time, or simply ignores it, be sure to renew your request after the court has denied the prison officials' motion to dismiss your complaint and their motion for summary judgement. These motions are explained in Chapter Four, Sections B and C. The court may be more willing to appoint counsel after it has ruled that you have a serious case. To renew your motion, use the same form as above.

4. Declarations

At the beginning of or during your case, you may also want to submit declarations. A "declaration" is a sworn statement of facts written by someone with personal knowledge of those facts, which is submitted to the court in a certain form. If your suit has several plaintiffs, each of you should make out a separate statement of the details of all the facts that plaintiff knows. This statement does not need to be "notarized." Just put at the bottom: "I declare under penalty of perjury that the foregoing is true and correct. Executed on (date) at (city and state)." Then sign. This can also be called a "declaration under penalty of perjury." It is acceptable in any federal court and most state courts. The following is an example of what your declaration should look like:

In the United States District Court
For the _____
-----x

Name of first plaintiff :
in the case, et al., :
Plaintiffs, :
:
v. : DECLARATION
OF :
: [*Name of person*
Names of first defendant : *making*
declaration]
in the case, et al., : Civil Action No.

Defendants :
-----x

[*Full name of prisoner or other person making the statement*] hereby declares:

WRITE STATEMENT HERE

I declare under penalty of perjury that the foregoing is true and correct. Executed at (*city and state*) on (*date*).

Signature.

The declaration is in the name, and signed by, the person who knows the relevant facts. This could be anyone: it does not have to be from you or another plaintiff. It is helpful to submit declarations from other people who were witnesses to events that you describe in your complaint or who know facts that you need to prove. These declarations may be important when prison officials move for summary judgment against you. Summary judgment is explained in Chapter Four, Section D.

You can submit declarations from plaintiffs or other people along with your complaint. Each declaration is an “exhibit” in support of the complaint and each exhibit has its own letter – “Exhibit A,” “Exhibit B,” etc. You can also submit letters from prison officials, copies of rules, and any other relevant document as lettered exhibits. You can refer to these exhibits when you state the facts of your case in your complaint. You do not have to submit declarations or other evidence when you file a complaint. But considering how frequently judges dismiss or discredit prisoner complaints, if you have strong support for your facts, it may be in your best interests to show the court right away.

You can also submit declarations later in your suit. You can submit declarations any time you get them. In some situations, which will be explained later in this Handbook, you are required to submit declarations from yourself and other plaintiffs.

D. HOW TO FILE YOUR LEGAL PAPERS

As explained above, it is very important to request the Local Rules from the district you plan to file in, because different courts require different numbers of copies, and may have different rules about filing. You should follow the local rules whenever possible. In general, though, you will need to send the original of each document and one copy for each defendant to the Clerk of the Court for the United States District Court for your district. Include two extra copies – one for the judge and one for the clerk to endorse (showing when and where it was filed) and return to you as your

IMPORTANCE OF DECLARATIONS:

It is always helpful to submit declarations. You can submit them **anytime** you get them. If there are people who were witnesses to events that you describe in your complaint, or who know facts that you need to prove, ask them to fill out and sign a declaration. It will help strengthen your suit in general, and can stop prison officials from getting a “summary judgment” against you.

official copy. The court will have a marshal deliver a copy to each defendant, unless you ask that someone else be appointed to deliver them.

Be sure to keep your own copy of everything you send the court, in case your papers are lost in the mail or misplaced in the clerk’s office. If you cannot make photocopies, make copies by hand.

E. GETTING IMMEDIATE HELP FROM THE COURT.

Ordinarily a federal lawsuit goes on for months or even years before the court reaches any decision. But you may need help from the court long before that. A U.S. District Judge has the power to order prison officials to stop doing certain things while the judge is considering your suit. The judge can do this by issuing a Temporary Restraining Order (TRO) and / or a Preliminary Injunction.

1. When You Can Get Immediate Help

Chapter Two, Section D explains when you are eligible for an injunction. By way of review, to get any kind of injunction, you must show

- 1) an ongoing, illegal practice by the defendant, and
- 2) that money damages will not fix your injury.

A “preliminary injunction” is an order from the judge that addresses your concerns during the period after you file your complaint, but before you have a trial. Federal Rules of Civil Procedure Rule 65(a) sets out the requirements for a preliminary injunction.

On top of fulfilling the two requirements above, you must also show that:

- 3) Without the court’s help you are likely to suffer irreparable harm;
- 4) You are likely to succeed at trial;

- 5) You will suffer more if the injunction is denied than the defendant will suffer if it is granted;
AND
- 6) A preliminary injunction will serve the public interest.

A preliminary injunction requires a hearing, at which the defendants have a chance to tell their side of the story to the Judge.

The other option is a “**temporary restraining order**,” also called a “**TRO**.” It is explained in Federal Rules of Civil Procedure Rule 65(b). A TRO is very difficult to get, especially for prisoners. It is only available in an emergency, when you can show that waiting for a preliminary injunction hearing will cause you immediate and irreparable injury, loss, or damage.

If you are confused about whether you are eligible for any kind of injunction, you should review Chapter Two, Section D. If you decide to go ahead and try to get a preliminary injunction or a TRO, you will need to follow the instructions below.

2. How to Apply for Immediate Help

If you think you meet all the tests for immediate help from the court, submit a “Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction.” This is one legal paper, and looks like this:

In the United States District Court
For the _____
-----x
Name of first plaintiff :
in the case, et al., : ORDER TO
SHOW
Plaintiffs, : CAUSE FOR A
PRELIMINARY :
v. : INJUNCTION
AND : A TEMPORARY
Names of first defendant : RESTRAINING
in the case, et al., : ORDER
Defendants : Civil Action No.

-----x

Upon the complaint, the supporting affidavits of plaintiffs, and the memorandum of law submitted herewith, it is:

ORDERED that defendants [*names of defendants against who you are seeking a preliminary injunction*] show cause in room _____ of

the United States Courthouse, [*address*] on the ____ day of ____, 20__, at ____ o’clock, why a preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from [*state the actions you want the permanent injunction to cover*].

IT IS FURTHER ORDERED that effective immediately, and pending the hearing and determination of this order to show cause, the defendants [*names of defendants against whom you want temporary relief*] and each of their officers, agents, employers, and all persons acting in concert or participation with them, are restrained from [*state the actions you want the TRO to cover*].

IT IS FURTHER ORDERED that the order to show cause, and all other papers attached to this application, be served on the aforesaid Plaintiffs by [*date*].

[*Leave blank for the Judge’s signature*]

Dated: [*leave blank*]
United States District Judge

Explanation of Form:

If you only want a preliminary injunction, and not a TRO, do not use the parts of this sample order that are highlighted. You will notice that you are supposed to leave some blanks in this document. That is because it is an order that the Judge will sign, and you are just writing a draft for the Judge to make it easier. He or she will fill in all the important information and times and places.

The most difficult part of the document is where you have to fill in the actions you want a preliminary injunction and / or a TRO about. You should limit what you ask for in the TRO to the things that the prison officials have to stop doing immediately. Include in your request for a preliminary injunction everything you want the court to order the prison staff to stop doing while the court is considering your case.

You will need to give or send a copy of this paper to all the defendants, along with the following supporting documents.

- Prepare a declaration which states how you tried to notify the defendant that you’re applying for a TRO and also states in detail exactly what “immediate and irreparable injury, loss or damage will result” if the court

does not sign your TRO. (The quote is from Rule 65 of the Federal Rules of Civil Procedure, which governs TROs and preliminary injunctions.) A court will often consider an ongoing violation of your constitutional rights to be “irreparable injury.” Submit your declaration and your “TRO and Order to Show Cause” together with your summons, complaint and *in forma pauperis* papers.

- You also need to submit a short “memorandum of law”. A memorandum of law is a document in which you cite legal cases, and argue that your situation should be compared to or distinguished from these cases. For this, you will need to do legal research and writing, explained in Chapter Six. You will want to find cases similar to yours in which prisoners got TROs or preliminary injunctions. Cite a few cases that show that the officials’ actions (or failures to act) are unconstitutional. Also explain how you meet the tests for temporary relief. If possible, show how your situation is like some other case where a TRO was issued.

If the judge signs your TRO and Order to Show Cause, the prison staff will be restrained for at least 10 days. They will have to submit legal papers to show why the court should not issue a preliminary injunction that will be in force through the suit. You will be sent a copy of their legal papers and get a chance to respond to them.

The judge should consider the legal papers submitted by both sides. He or she is not supposed to meet with lawyers representing prison officials unless he or she appoints a lawyer for you or orders prison officials to bring you to court to argue your own case. The proper procedure for judicial rulings when prisoners do not have lawyers is discussed more fully in Chapter Four.

Under Rule 65(c) of the Federal Rules of Civil Procedure, a plaintiff who requests a TRO or a preliminary injunction is supposed to put up money as “security” to repay the defendants for any damages they suffer if it later turns out that they were “wrongfully enjoined or restrained.” This is a matter for the judge’s discretion, which means he or she will look at the circumstances and decide whether or not you should have to pay. Thus, some judges will not make people who file *in forma pauperis* pay. In *Miller v. Carlson*, 768 F. Supp. 1331, 1340 (N.D. Cal 1991), for example, the plaintiffs were poor people who received AFDC (Aid for Families with Dependant Children) so the judge did not make them pay security.

Remember: Political pressure and media publicity may be as important as your suit itself, and they may help you win your suit. Send copies of your legal papers to prison groups, legislators, other public officials, newspapers, radio, TV, etc. Enclose a brief note explaining what your suit is about and why it is important. A prisoner has a constitutional right to correspond and meet with representatives of the media. See Chapter Five, Section A.

Look for more decisions in your circuit, and cite those cases in your Memo of Law and ask the court to not require security from you.