Chapter Four: What Happens After You File Your Suit

A. A SUMMARY OF WHAT YOU CAN EXPECT TO HAPPEN

Filing your suit is only the beginning. By itself, filing a summons and complaint does not accomplish anything. You must be prepared to do a lot of work after you file the complaint to achieve your goal. Throughout the suit, it will be your responsibility to keep your case moving forward, or nothing will happen. This chapter will explain what may happen after you file the complaint and how to keep your case moving.

Once you file, the court clerk will give you a civil action number. **You need to write this number in the case caption of all documents you file related to your case.** Next you will have to deal with a series of pretrial procedures.

Again, the PLRA has produced more roadblocks for prisoners. You will have to deal with the possibility of a "waiver of reply" and screening by the district court. Both of these issues are described in Section B.

If the defendants do reply, then within 20 days after he or she is served with your complaint, each defendant must submit either a **motion to dismiss**, a **motion for a more definite statement** (asking that you clarify some part of your complaint), a **motion for an extension of deadline**, or an **answer**. Each defendant must eventually submit an answer, unless the judge dismisses your complaint as to that defendant. The Answer admits or denies each fact you state and accepts or states a defense against each legal claim you make. See Rule 12, Federal Rules of Civil Procedure.

Each side can get more information from the other through "interrogatories," "depositions," and other forms of "pre-trial discovery." Each can submit additional declarations from people who have relevant information. Each side can file motions which ask the judge to issue various orders or to decide the case in its favor without a trial.

If the case goes to trial, there will be witnesses who will testify in court, and they will be cross-examined. Both sides may submit exhibits. If you request damages, you can have that issue decided by a jury.

Whichever side loses in the district court has a legal right to appeal to a United States Circuit Court of Appeals. The appeals court may **affirm** (agree with) or **reverse** (disagree with) the district court's decision or it may order the district court to hold a new trial. The side which loses on appeal can ask the U.S. Supreme Court to review the case, by filing a "petition for writ of certiorari." The Supreme Court does not have to consider the case, however, and it will not unless the case raises a very important legal issue.

HINT: Cases Before Magistrate Judges

Many prisoner complaints are given to "Magistrate Judges." A Magistrate Judge is a judicial officer who is like a Federal Judge. Their powers are limited in comparison to a District Court Judge, but they do much of the work in many prison cases.

Your District Court Judge can tell the Magistrate who he/she works with to decide certain things in your case, like a discovery issue, scheduling, or requests for extensions. If you don't like what the Magistrate says, you can write "objections" to the action within ten days and file them at the District Court. However, for decisions like these, it is very hard to get a Magistrate's decision changed.

A District Court Judge can also ask the Magistrate to do important things in your case, like hold a hearing or "propose findings." You can also file objections to these types of actions. You are more likely to get meaningful review by a District Court Judge on an issue of importance. Whether or not you file objections, the District Court Judge will read what the Magistrate has written, and then adopt, reject, or modify the Magistrate's findings.

The Handbook cannot describe all these procedures in detail and suggest strategy and tactics. But you can get a basic understanding of some of the procedures by reading some of the Federal Rules of Civil Procedure and this Handbook. Moreover, if your case goes to trial, the judge might appoint a lawyer to assist you.

This chapter of the Handbook will help you handle the key parts of pretrial procedure: the **Motion to Dismiss**; the **Motion for Summary Judgment**; and pre-trial discovery. It will also explain what to do if the court dismisses your complaint or grants the defendants summary judgment against you.

Remember that much of the success of your suit depends on your initiative. If you don't keep pushing, your suit can stall at any number of points. For example, if the defendants haven't submitted an Answer, a motion or some other legal paper after the time limits set by the Federal Rules of Civil Procedure,

submit a **Declaration for Entry of Default**. If you receive notice of entry of default, submit a **Motion for Judgment by Default**. Forms for the affidavit and the motion are in Appendix B. You probably can't win a judgment this way, but you can keep the case moving. The prison officials may just submit an Answer and then do nothing. If this happens, you should move ahead with pretrial discovery. Follow Part G of this chapter. This will probably bother them enough so that they will try harder to get out of the case. If they still hold back, move for summary judgment against them (Part D of this Chapter) or ask the court to set a date for a trial.

Keep trying at every point to get the court to appoint a lawyer for you. If you don't have a lawyer, don't be afraid to write the court clerk and prisoners' rights groups when you don't know what to do next. The worst thing is to let your suit die.

B. THE FIRST HURDLE: DISMISSAL BY THE COURT & WAIVER OF REPLY

Once you have filed your complaint, the court is required to "screen" it. This means the court looks at your complaint and decides, without giving you the chance to argue or explain anything, whether or not you have any chance of winning your case. The PLRA requires the Court to dismiss your complaint right then and there if it:

(1) is "frivolous or malicious,"
(2) fails to state a claim upon which relief may be granted, or
(3) seeks money damages from a defendant who is immune from money damages.

If the court decides that your complaint has any one of these problems, the court will dismiss it *"sua sponte,"* without the defendant even getting involved. "*Sua sponte*" means "on its own."

At this point, the court might dismiss your lawsuit "with leave to amend." This is ok. It means you can file an "amended" (or changed) complaint that fixes whatever problem the court brings to your attention. If the court dismisses your lawsuit without saying anything about amending, you can ask the court for permission to fix your complaint by filing a "Motion to Amend." (See Appendix B) Some courts will allow this and others won't. A court should not deny a chance to amend, especially if the plaintiff is alleging a civil rights violation. *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991).

If you can't amend, you may want to quickly respond (within ten days if possible) with a **Motion for Reconsideration**. In this short motion, all you need to do is tell the court why they got it wrong, and cite a case or two that support your position. The next section of this Handbook will give you some advice on what kind of arguments you can make. If your complaint was dismissed by a Magistrate Judge, you can file "objections" to the Magistrate's recommendation. If neither of these two approaches work, you will have to appeal. Procedures for appealing are laid out in Section F of this chapter.

The other new hurdle created by the PLRA is something called a "**waiver of reply**." A defendant can file this waiver to get out of having to file an Answer or any of the other motions described later in this chapter. When a defendant does this, the court reviews your complaint to see if you have a "reasonable opportunity to prevail on the merits." If the court thinks you have a chance at winning your lawsuit, it will order the defendants to either file a Motion to Dismiss or an Answer. If the court does nothing for a few weeks, you can file a motion asking the court to order the defendants to reply.

C. HOW TO RESPOND TO A MOTION TO DISMISS YOUR COMPLAINT

If you get through the first hurdles, the next legal paper you receive from the prison officials will probably be their Motion to Dismiss your suit. They may give a number of reasons. One reason is sure to be that you did not "state a claim upon which relief can be granted," which means what you are complaining about does not violate the law.

The Motion to Dismiss is simply a formal written request that the judge deny your suit. It will come together with a Notice of Motion which sets a date, time, and place for a court hearing at which the defendants will ask the judge to rule on the motion. The Notice and the Motion may be combined in one legal paper.

Attached to the Motion and Notice will be a Memorandum of Law which gives the defendant's legal arguments for dismissing your suit. Usually you will have at least two or three weeks between the date when you receive the Motion and the Notice and the date of the hearing. During this time you should prepare and submit a memorandum of your own which answers the defendant's arguments. If you need more time, send the judge a letter explaining why you need more time. If you can, you should check the local rules to see if the

court has any specific requirements for time extensions. If you cannot find any information, just send the letter and send a copy to the prison officials' lawyer.

Chapter Six explains in more detail how to research and write this memo, so be sure to read it before you start working. After you read the suggestions in Chapter Six, you may want to try to read all of the cases that the defendants use in their memo. If you read these cases carefully, you may come to see that they are different in important ways from your case. You should point out these differences. You may also want to try to find cases the defendants have not used that may be more supportive of your position.

To support their Motion to Dismiss, the prison officials will make all kinds of arguments which have been dealt with in other parts of this Handbook. They may say you failed to exhaust administrative remedies (see Chapter Three, Section A), or that you cannot sue top prison officials who did not personally abuse you (see Chapter Two, Section F). They may claim you sued in the wrong court ("improper venue" – see Chapter Three, Section B) or that your papers weren't properly served on some of the defendants.

The prison officials will also argue against your constitutional claims. They will say that you failed to state a proper claim because the actions you describe do not deny due process or equal protection, are not cruel and unusual punishment, etc. Your memo has to respond to whatever arguments the government makes. Unfortunately, this requires quite a bit of legal research and writing. One thing you will have going for you is that in considering this motion the judge must assume that every fact you stated in your complaint is absolutely true. He or she must then ask whether, **accepting all those facts, there is any possibility that you should win your case on any theory**. If any combination of the facts stated in your complaint might qualify you for any form of court action under Section 1983, then the judge is legally required to deny the prison officials' motion to dismiss your complaint. This is a very helpful standard.

You may want to include in your memo some quotes from the Supreme Court, to make sure the court realizes just how good a standard it is. One good quote to include is from one prisoner's Section 1983 case called *Cruz v. Beto*, 405 U.S. 319, 322 (1972). In that case, the court stated that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." You may also want to remind the court that in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the Supreme Court said that in considering a motion to dismiss, a *pro se* complaint should be held to less strict standards than a motion drafted by a lawyer.

Because of this favorable standard, you should include in your memo anything the defendants say about the facts you stated in your complaint that you think is unfair or wrong. For example, if you stated in your complaint that you were "beaten severely" by two guards, and then the defendant says in his motion to dismiss that an "inadvertent push" doesn't amount to cruel and unusual punishment, you should tell the court in your memo that you did not allege an "inadvertent push," you alleged a severe beating, and that is what the court has to assume is true.

Send three copies of your memo to the court clerk (one to be returned to you) and one copy to each defendant's lawyer. Usually all the prison officials are represented by one lawyer from the office of the Attorney General of your state. The name and office address of that lawyer will be on the notice and motion.

You may receive a **Motion for Extension of Time** or a **Motion to Relate**. An extension (or "enlargement") gives the other side more time to turn in an answer or motion. One extension is usually automatic. If your situation is urgent, write the court to explain the urgency and ask that the prison officials not get another extension.

A Motion to Relate tries to combine your suit with others which the court is already considering. Check out what the other suit is about, who is bringing it, and what judge is considering it. This could be a good or bad thing for you, depending on the situation. If you think you'd be better off having your suit separate, submit an affidavit or memorandum in opposition to the motion. Say clearly how your suit is different and why it would be unfair to join your suit with the other one. For example, the facts might get confused.

Ordinarily, after the parties exchange memos, they both appear before the judge to argue for their interpretation of the law. However, when dealing with a case filed by a prisoner, most judges decide motions based only on the papers you send in, not on argument in person. In the rare case that a judge does want to hear argument, many federal courts now use telephone and video hook-ups, or hold the hearing at the prison. It is quite hard to get a court to order prison administrators to bring you to court, because the PLRA requires that courts use these new techniques "to the extent practicable."

If the judge does decide to dismiss your complaint, he or she must send you a decision stating the grounds for his or her action. In most jurisdictions, prisoners are entitled to "an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment." *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir 1970); *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir. 1965). Under Rule 15(a), you have an absolute right to amend your complaint once before the defendants file an Answer. In the Ninth Circuit, prisoners also have a right to amend the complaint even if it is not the first time, to overcome any problems with it, unless it is absolutely clear that the problems can't be fixed. *Potter v. McCall*, 433 F.2d 1087 (9th Cir. 1970). Part F of this chapter explains what else you can do if the court dismisses your complaint.

- **Note**: If you defeat the prison officials' motion to dismiss your complaint, ask again for appointed counsel. Follow the procedure in Chapter Three, Section C. The judge is more likely to appoint a lawyer for you at this stage of your case.

D. MOTION FOR SUMMARY JUDGMENT

At some point, the prison officials will probably submit a Motion for Summary Judgment. Be sure to read about the rules and procedure for summary judgment in Rule 56 of the Federal Rules of Civil Procedure. Defendants can ask for summary judgment along with their Motion to Dismiss your complaint or at some later time. You can also move for summary judgment. Your motion will be discussed separately at the end of this section.

1. The Legal Standard

"Summary Judgment" means the judge decides your case without a trial. Through summary judgment, a court can throw out part or all of your case. To win on summary judgment, the prison officials have to prove to the judge "**there is no genuine issue as to any material fact and that [defendants] are entitled to judgment as a matter of law**." Fed. R. Civ. P. 56(c). This means that there is no point in holding a trial because both you and the defendant(s) agree about all the important facts and the Judge should use those facts to decide him- or herself that the defendant(s) should win.

This test is very different from the test which is applied in a Motion to Dismiss your complaint. When the judge receives a Motion to Dismiss, he or she is supposed to look only at your complaint. His or her question is: could you have a right to judgment in your favor if you could prove in court everything you say in your complaint? When the judge receives a motion for summary judgment, however, he or she looks at all the legal papers that have been sent in by both sides and asks: is there is any real disagreement about the important facts in the case?

The first part of this test that is important to understand is what is meant by "**a genuine issue**." Just saying that something happened one way, when the prison says it happened another way, is not enough, you need to have some proof that it happened the way you describe. Sworn statements (affidavits or declarations), photographs, and copies of letters or documents count as proof because you or the prison officials could introduce them as evidence if there were a trial in your case. An "unverified" Complaint or Answer is not proof of any facts. It only says what facts you or the prison officials are going to prove. If you "verify" your complaint, however, then it counts the same as a declaration. See Chapter Three, Section C for more on verification.

If prison officials give the judge evidence that important statements in your complaint are not true, and you do not give the judge any evidence (such as your sworn statement) that those statements are true, then there is no real dispute about the facts. The judge will end your case by awarding summary judgment to the prison officials.

On the other hand, if you do give the judge some evidence that supports your version of the important facts, then there is a real dispute. The prison officials are not entitled to summary judgment and your case should go to trial.

For example, if you sue certain guards who you say locked you up illegally, the guards could submit affidavits swearing they didn't do it and then move for summary judgment. Their affidavit would carry more weight in court than a simple denial of your charges in their answer to your complaint. If you do not present evidence supporting your version of what happened, the guards' motion might be granted. But if you present a sworn affidavit from yourself or a witness who saw it happen, the guards' motion for summary judgment should be denied.

The second important part of the test is that the "genuine issue" explained above must be about a "**material fact**." A "material fact" is a fact that is so important to your law suit that it could determine whether you win or lose. If the prison officials can show that there is no genuine dispute as to just one,

single material fact, then the court may grant them summary judgment. To know whether a fact is material, you have to know what courts consider when they rule on your type of case.

For example, in the case *Boomer v. Lanigan*, No. 00 Civ 5540 (DLC), 2002 WL 31413804 (S.D.N.Y. Oct. 25, 2002), a pretrial detainee who suffered from a medical condition called epilepsy sued the prison officials and doctors under several legal theories, one of which was excessive force. The prison officials moved for summary judgement on all of the claims. As you know from Chapter Two, Section C, to win on an excessive force claim, a prisoner has to show that a prison official (1) caused him a serious harm and (2) did it maliciously, or *without justification*. Facts that could prove or disprove either of these two elements are material facts. Boomer's complaint stated that the prison officials used excessive force when they used a chemical spray against him, for no reason, while he was having a seizure. Unfortunately for Boomer, the prison officials produced, as evidence to support their motion for summary judgment, a video tape of the interaction, which showed that the guard only sprayed Boomer after he had repeatedly failed to follow an order. Boomer didn't submit any evidence to show a reason why he shouldn't have had to follow the order. If Boomer was unable to follow the order due to his condition, than sending the court a declaration stating this might have helped his motion. Instead, because the prison officials presented undisputed evidence that the spray was used with *justification*, the court held that Boomer failed to show a genuine dispute as to that material fact, and granted summary judgment for the prison officials on that claim.

When the judge considers a motion for summary judgment, he or she is supposed to view the evidence submitted by both sides "in the light most favorable to the party opposing the motion." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 160 (1970); *see also Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001). This just means that as the "opposing party" you are supposed to be given the benefit of the doubt if the meaning of a fact could be interpreted in two different ways.

2. What to do if you have trouble getting declarations

When the prison officials move for summary judgment, check to be sure you have submitted all the declarations and other materials that support your version of the facts. It may be difficult for you to get declarations, especially from prisoners who have been transferred to other prisons or placed in isolation. Tell the judge why you can't get these declarations and indicate what you think the declarations would say if you could get them.

Under Rule 56(f) of the Federal Rules of Civil Procedure, the judge can deny the prison officials' motion for summary judgment because you cannot get the declarations you need. If the judge doesn't deny the motion for summary judgment under Rule 56(f), you should ask him or her to grant you a "continuance" (more time) until you have a chance to get the declarations you need. This means the judge puts off ruling on the motion. Some courts have been very supportive of the fact that prisoners may need extra time to get declarations. *Harris v. Pate*, 440 F.2d 315, 318 (7th Cir. 1971).

The judge also has the power under Rule 56(f) to "make such other order as may be just." This could include an order to prison officials to let you interview witnesses or write to prisoners in other prisons. It could also include an order that prison officials bring you to court to let you testify on your own behalf. *Hudson v. Hardy*, 412 F.2d 1091, 1095 (D.C. Cir 1968). However, remember from Section C of this chapter that the PLRA makes it harder to physically get into court.

Besides getting all your declarations and telling the judge about the declarations you can't get, you should also prepare a memorandum which summarizes your evidence and explains how it supports each point that you need to prove. Check Chapter Two for the requirements of Section 1983. Be sure to repeat the major cases which support your argument that the prison officials violated your federal constitutional rights.

3. Summary Judgment in Your Favor

You also have a right to move for summary judgment in your favor. You may want to do this in a "test case" where everyone agrees that the prison is following a particular policy and the only question for the court is whether that policy is legal.

For example, suppose your complaint says that you were forced to let prison officials draw your blood to get your DNA and put it in a DNA database. The prison officials admit they are doing this, but deny that it is illegal. You may move for summary judgment on your behalf. Since the facts are agreed on, the judge should grant you a summary judgment if he or she agrees with your interpretation of the law. On the other hand, if your suit is about brutality or prison conditions or denial of medical care, you usually will want to go to trial since what actually happened is bound to be the

major issue.

- **Note:** If you defeat the prison officials' Motion for Summary Judgment, be sure to renew your request for appointment of counsel. Follow the procedure outlined in Chapter Three, Section C. The judge is much more likely to appoint a lawyer for you at this stage of your case.

E. THE PROBLEM OF MOOTNESS

One argument that prison officials often raise, either in their Motion to Dismiss or later on, is that you have no legal basis for continuing your suit because your case has become "moot." This is only a problem if you are asking for injunctive relief, rather than money damages. A case is moot if after you have filed a suit the prison stopped doing what you complained about, or released you on parole or transferred you to a different prison. The prison officials will try and have your case dismissed as moot because there is no longer anything the court can order the prison to do that would affect you. For example, say you sue the prison for injunctive relief for failure to provide medical care for your diabetes, and you ask the court that the prison be ordered to provide you with adequate medical care in the future. If, after you file your complaint, the prison starts to provide you with medical care, than the prison can argue that your case is moot, because the only remedy you asked for from the court has already been given to you by the prison.

The good news is that the defendants will have the burden of proving that the case is really moot. This is a heavy burden, since they must show that there is no reasonable expectation that the alleged violations of your rights will happen again. There are four additional arguments you can make to defeat the government's efforts to get your case dismissed on this theory:

(1) If you have asked for money damages your suit can never be moot. You have a right to get money for injuries you suffered in the past, as long as you sue within the period allowed by the statute of limitations for that type of injury. This does not just apply to physical harm: if you have been denied your constitutional rights it is an "injury" for which you might be able to get money damages. For more on damages, read Chapter Two, Section E.

(2) A violation of your rights is not moot just because it is over if it is "capable of repetition, but evading review." In other words, the court will not keep you from suing in a situation where the illegal action would almost always end before the case could get to court. Imagine that a prisoner wants to sue to force the prison to improve conditions in administrative segregation. By the time the prisoner actually gets into court, however, he has been moved back to general population. This case should not be dismissed as moot because it is "capable of repetition," meaning he could get put in administrative segregation again, and it "evades review" because he might never stay in segregation long enough to get to trial. To meet this test, the condition must be reasonably likely to recur. Most courts have not applied this exception when a prisoner is transferred to another prison, since it is only "possible" and not "likely" that he will be transferred back. *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002). Transfer may not moot your case however, if the department or officials whom you sued are also in charge of the new prison. *Scott v. District of Columbia*, 139 F.3d 940, 942 (D.C. Cir. 1998)

(3) If you get a lawyer and file a "class action" suit on behalf of all the prisoners who are in your situation and the class is certified, your suit will not be moot as long as the prison continues to violate the rights of anyone in your class. If you are paroled or transferred, the court can still help the other members of your class. Part H of Chapter Two discusses class action lawsuits. Remember that you generally can't bring a class action without an attorney.

(4) If any negative entries have been put in your prison records because of your suit or the actions you are suing about, you can avoid mootness by asking the court to order the prison officials to remove (or "expunge") these entries from your records. The federal courts have held that a case is not moot if it could still cause you some related injury. An entry which could reduce your chances for parole could count as a related injury. *Sibron v. New York*, 392 U.S. 40, 55 (1968).

F. WHAT TO DO IF YOUR COMPLAINT IS DISMISSED OR THE DEFENDANTS WIN ON SUMMARY JUDGMENT

The sad truth of the matter is that prisoners file thousands of Section 1983 cases every year, and the vast majority of these are dismissed at one of the three stages described in sections B, C, & D above. This may happen to you even if you have a valid claim, and a good argument. It may happen even if you work very hard on your papers, and follow every suggestion in this Handbook perfectly. The important thing to remember is that you don't have to give up right away. You can chose to keep fighting. You have already learned how to file an amended complaint, the next few pages tell what else you can do if your case is

dismissed or the court grants summary judgment in favor of the defendants.

1. Motion to Alter of Amend the Judgment

Your first option is to file a Motion to Alter or Amend the Judgment under Federal Rules of Civil Procedure Rule 59(e). This motion must be filed within ten days after entry of judgment, so you will have to move quickly. Follow the form in Appendix B. Include a legal memorandum that cites the cases from your circuit.

Follow the same procedure if the court dismisses your complaint without giving you an opportunity to amend it to "overcome the deficiency." Also follow this procedure if the court grants a summary judgment to the defendants before you had enough time to submit your declarations. Cite the cases discussed in Section D of this chapter and submit any declarations you have been able to get since you were notified of the summary judgment.

2. How to Appeal the Decision of the District Court

If you lose your motion to alter the judgment, you can appeal to the U.S. Court of Appeals for your district. You begin your appeal by filing a Notice of Appeal with the clerk of the district court whose decision you want to appeal. Follow the form in Appendix B. If you moved to alter under Rule 59(e), file your notice within 30 days after the court denied your motion. Otherwise file your notice within 30 days of the day the order or judgment was entered by the district court.

The appeals process is governed by the Federal Rules of Appellate Procedure. These 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. also gives summaries of important court decisions which interpret the Federal Rules of Appellate Procedure. (Chapter Six explains how to use the U.S.C.A. and other law books.) Some of the books listed in Appendix E give more information on the appeals process.

If you sued *in forma pauperis*, you can appeal *in forma pauperis*, unless the district court finds that your appeal is not taken "in good faith." If the district court decides this, you have to send to the Appeals Court *in forma pauperis* papers like those you sent to the district court, except that you should explain the basis of your appeal. Submit these papers within 30 days after you are notified that the district court ruled that your appeal was not in good faith.

Soon after you receive a notice that your appeal has been transferred to the Court of Appeals, submit another Motion for Appointment of Counsel. Use the form in Chapter 3, Section C for requesting counsel from the district court, but change the name of the court and state the basis of your appeal. If you have to submit new *in forma pauperis* papers, send them together with the motion for counsel.

Along with your Motion for Appointment of Counsel, submit a Memorandum of Law which presents all your arguments for why the appeals court should reverse the decision of the district court. If the appeals court thinks your appeal has merit, it usually will appoint a lawyer for you. Otherwise you may get a summary dismissal of your appeal.

G. PRE-TRIAL DISCOVERY

On the other hand, if you have made it past the defendant's motions for dismissal and / or summary judgment, then there is a better chance that the court will appoint an attorney to assist you. If so, you can use this section of the Handbook to understand what your lawyer is doing, to help him or her do it better and to figure out what you want him or her to do. If you do not have a lawyer, this section will help you get through the next stage on your own – but what you will be able to do will be more limited.

The Importance of "Discovery"

• Uncover factual information about the events that gave rise to your case.

• Learn about how prisons in general, and your prison in particular, operate, as long as it is somehow related to your case.

• Put the defendants on the defensive by making them spend time and money answering *your* questions.

The next major activity in your suit will be "**pre-trial discovery**." Rules 26-37 of the Federal Rules of Civil Procedure explain "discovery" tools that either party in a lawsuit can use to get important information and materials from the other party before the case goes to trial. Discovery is very important, because it is a way for you to get the information you will need to win your case. If you don't have a lawyer at this stage, you will need to spend a lot of time thinking about what facts you will need to prove at trial, and coming up with a plan about how to find out that information. The Southern Poverty Law

Center's litigation guide for prisoners, *Protecting Your Health & Safety,* has a very helpful chapter on developing discovery strategies. You will find information on ordering that book in Appendix E.

In most cases, the first step in the discovery process is called a "Rule 26(f) Meeting." The Federal Rules of Civil Procedure require that the plaintiffs and the defendants get together to talk about the case, the possibility of settlement (when you come to an agreement with the defendants that ends your case before trial), arrange for some exchange of information, and create a discovery plan or schedule. You need to read your district court's rules, however, because many courts do not require this meeting for *pro se* inmates. If you don't need to have a Rule 26(f) meeting, you can start right in on discovery requests.

1. Discovery Tools

There are four main discovery tools: **depositions**, **interrogatories**, **production,** and **inspection**. (You can also request an examination by an outside doctor, under Rule 35). This Handbook gives you only a brief introduction to these techniques. The details of how they work are in the Federal Rules of Civil Procedure.

A "**deposition**" is a very valuable discovery tool. You meet with a defendant or a potential witness, that person's lawyer, and maybe a stenographer. You or your lawyer ask questions which the "deponent" (the defendant or witness you are deposing) answers under oath. Because the witness is under oath, he or she can be prosecuted for perjury if he or she lies. The questions and answers are tape-recorded or taken down by the stenographer. A deposition is very much like testimony at a trial. In fact, you can use what was said at a deposition in a trial if the person who gave the deposition either (1) is a party (plaintiff or defendant), (2) says something at the trial which contradicts the deposition, or (3) can't testify at the trial. Despite these benefits, you should BEWARE: a deposition is very hard to arrange from in prison, because it can be expensive, and it involves a lot of people.

"Interrogatories" are written questions which must be answered in writing under oath. Under Fed.R.Civ.P. 33, you can send up to 25 questions to each of the other parties to the suit. A person who is just a witness, and not a party, cannot be made to answer interrogatories, though he or she can voluntarily answer questions in an affidavit. To get an affidavit from someone in another prison, you may need a court order. You can use the following example to write interrogatories of your own.

In the United States District Court
For the ____________________

--x	
Name of first plaintiff	:
in the case, et al.,	: PLAINITFF'S
Plaintiffs,	: FIRST SET OF
	: INTERROGA-
v.	: TORIES TO
	: DEFENDANTS
Names of first defendant	:
in the case, et al.,	: Civil Action No. __
Defendants	:
--x	

In accordance with Rule 33 of the Federal Rules of Civil Procedure, Plaintiff requests that Defendant [*Defendant's name*] answer the following interrogatories under oath, and that the answers be signed by the person making them and be served on plaintiffs within 30 days of service of these interrogatories.

If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions.

These interrogatories shall be deemed continuing, so as to require supplemental answers as new and different information materializes.

[*List your questions here…and be creative and as detailed as possible.*]

If you have a guard brutality case, you may want to ask questions about how long the specific guard has worked at the prison, where he is assigned, what his duties are, what he remembers of the incident, what he wrote about the incident in any reports, whether he has ever been disciplined, etc.

It is also a good idea to take the opportunity to try to find out who else might be a helpful witness. You could ask the defendant to:

- State the name and address or otherwise identify and locate any person who, to you or your attorney's knowledge, claims to know of facts relevant to the conduct described in these interrogatories.

You can also ask for documents. For example, you could include the following as a question:

- Identify and attach a copy of any and all documents relating to prison medical center staff training and education.

or

- Identify and attach a copy of any and all documents showing who was on duty in cell block B at 9 p.m. the night of August 18, 2003.

At the end of your questions, you should date and sign the page and type your full name and address below your signature.

The third discovery tool is "**Production.**" If you want to read and copy documents (letters, photos, rules etc.) that the prison officials have, ask for production of those items under Rule 34 of the Federal Rules of Civil Procedure. You can look at Form 24 in the Federal Rules of Civil Procedure Appendix of Forms, or you can use the following form:

In the United States District Court
For the ____________________

---x

Name of first plaintiff	:
in the case, et al.,	: PLAINITFF'S
Plaintiffs,	: FIRST REQUEST
	: FOR PRODUCTION
v.	: OF DOCUMENTS
	:
Names of first defendant	:
in the case, et al.,	: Civil Action No. __
Defendants	:

---x

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff requests that Defendants [*put defendants' full names here*] produce for inspection and copying the following documents:

[List the documents you want here, some examples follow]
1. The complete prison records of all Plaintiffs
2. All written statements, originals or copies, identifiable as reports about the incident on August 18, 2003, made by prison and civilian employees or the Department of Corrections and prisoner witnesses.
3. Any and all medical records of Plaintiff from the time of his incarceration in Fishkill Correctional Institution through and including the date of your response to this request.
4. Any and all rules, regulations, and policies of the New York Department of Corrections about treatment of prisoners with diabetes.

Dated: ______________

Signed:______________

You can also get **inspection** of tangible things (clothing, weapons, etc.) and a chance to "inspect and copy, test or sample" them. And you have a right to enter property under the defendants' control – such as a prison cell, exercise yard or cafeteria, to examine, measure, and photograph it.

You can use any combination of these techniques at the same time or one after the other. If you have new questions or requests, you can go back to a defendant for additional discovery. And, of course, you can also use informal investigation to find out important information. You can talk to other prisoners and guards about what is going on. Or, you can use state Freedom of Information Laws to request prison policies and information. Each state has different rules about what information is available to the public. Of course, prison officials may use various tactics to interfere with your investigation. Try to be creative in dealing with these problems, and, if necessary, you may want to write a letter to the judge explaining the problem.

2. What You Can See and Ask About

The Federal Rules put very few limits on the kind of information and materials you can get through discovery and the number of requests you can make. Under Federal Rule of Civil Procedure 26(b)(1) you have a legal right to anything which is in any way "relevant to the subject matter involved in the pending action," including anything relevant to any defense offered by the prison officials, so long as your requests do not impose "undue burden or expense." "Relevant to the subject matter" means somehow related to what you are suing about. "Undue burden or expense" means that your request would cost the prison a lot of money, and wouldn't be very helpful to you.

You can demand information that the rules of evidence would not allow you to use at a trial, so long as the information "appears reasonably calculated to lead to the discovery of admissible evidence." This just means that the information could possibly help you to find other information that you could use at trial. You have a right to know "the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity of persons having knowledge of any discoverable material." Rule 26(b)(1).

The people you are suing must give you all the information that is available to them. If you sue a top official, discovery includes what his subordinates know and the information in records available to him. This

could possibly even include information that is only held by a party's attorney, if you can't get that information any other way. *Hickman v. Taylor*, 329 U.S. 495 (1947). Defendants may try to get out of having to comply with your requests by arguing that they are "unduly burdensome or expensive." However, as one Judge explained, "the federal courts reject out of hand claims of burdensomeness which are not supported by a specific, detailed showing, usually by affidavit, of why weighing the need for discovery against the burden it will impose permits the conclusion that the court should not permit it." *Natural Resources Defense Council v. Curtis*, 189 F.R.D. 4, *13 (D.D.C. 1999). In other words, **the defendants can't avoid discovery by just stating it will be too difficult**. They have to really prove it.

Even when defendants can show that producing the requested information would be very expensive and difficult, the court may not let them off the hook if the information is truly essential for your lawsuit. For example, in *Alexander v. Rizzo*, 50 F.R.D. 374 (E.D. Pa. 1970), the court ordered a police department to compile information requested by plaintiffs in a Section 1983 suit even though the police claimed it would require "hundreds of employees to spend many years of man hours." The burden and expense involved was not "undue" because the information was essential to the suit and could not be obtained any other way.

You may not be able to discover material that is protected by a special legal "privilege," such as the attorney-client privilege. A "privilege" is a rule that protects a certain type of information from discovery. There are several types of privileges, including the attorney-client privilege, attorney work product privilege, the husband-wife privilege, etc. Explaining all these privileges is too complicated for us to attempt here. However, it is important for you to know that prison officials cannot avoid discovery of relevant information merely by claiming it is "confidential." *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489 (D. Kan. 2001). Instead, a party who asserts a legal privilege against disclosing information has the burden of identifying the specific privilege at issue, and proving that the particular information is in fact privileged. Information which would be considered "confidential" under state law may still have to be disclosed if, after examining it privately ("*in camera*"), the judge decides it is very important for your suit. *King v. Conde*, 121 F.R.D. 180, 190 (E.D.N.Y. Jun. 15, 1988). If the material is confidential, the judge may keep you from showing the information to anyone else or using it for any purposes other than your suit.

BEWARE: Although interrogatories are fairly cheap, other forms of discovery require money. If you request production of documents, you have to pay to get copies of the documents the prison produces. If the court lets you tape record depositions instead of hiring a certified court reporter (Federal Rules of Civil Procedure, Rule 30(b)(2)), you still need a typed transcript of the entire tape if you want to use any of it at the trial of your suit. Discovery expenses are included in the costs you will be awarded if you win, but federal courts generally refuse to advance money for discovery. You will have to find some other way to pay for copying and transcription.

3. Some Basic Steps

Usually, in a prison suit, you start with production and interrogatories and then move to depositions. The documents you get in response to a motion for production can lead you to other useful documents, potential witnesses, and people you might want to depose. Some of the kinds of documents that have been obtained from prison officials include: policy statements, prison rules and manuals, minutes of staff meetings, files about an individual prisoner (provided he signs a written release), and incident reports filed by prison staff.

You can use interrogatories to discover what kinds of records and documents the prison has, where they are kept, and who has them. This information will help you prepare a request for production. Only people you have named as defendants can be required to produce their documents and records. Wardens, associate wardens, and corrections department officials have control over all prison records. If your suit is only against guards or other lower-level staff, however, you may have to set up a deposition of the official in charge of the records you need and ask the court clerk to issue a "subpoena" which orders the official to bring those records with him to the deposition. See Rule 45(d) of the Federal Rules of Civil Procedure.

Interrogatories are also good for statistics which are not in routine documents but which prison officials can compile in response to your questions. Examples are the size of cells, the number and titles of books in the library, and data on prisoner classification, work release, and punishments. If your suit is based on brutality or misbehavior by particular prison employees, you can also use interrogatories to check out their background and work history, including suits

or reprimands for misbehavior. If you are suing top officials for acts by their subordinates, you should find out how responsibilities relevant to your case are assigned within the prison and the Corrections Department and how, if at all, these responsibilities were fulfilled in your case.

4. Some Practical Considerations

Interrogatories have two big drawbacks: (1) you can use them only against people you have named as defendants; and (2) those people have lots of time to think out their answers and go over them with their lawyers. As a result, interrogatories are not good for pressing officials into letting slip important information they're trying to hide. You won't catch them giving an embarrassing off-the-cuff explanation of prison practices or making some other blunder that you can use against them.

Depositions are much better for this purpose. You can use them against anyone. The deponent can't know the questions in advance and must answer them right away. Regular depositions, however, are much less practical than interrogatories for a prisoner suing *pro se.* Judges are unlikely to order the authorities to set up a deposition within the prison or allow you to conduct one outside. If you have no lawyer, you might try a "Deposition Upon Written Questions" (Fed. R. Civ. P. Rule 31). You submit your questions in advance, as with interrogatories, but the witness does not send back written answers. He has to answer in his own words, under oath, before a stenographer who writes down his answers. Although the witness will still have time to prepare in advance, at least he won't be able to submit answers written for him by a Deputy Attorney General.

5. Procedure

The procedure for getting interrogatories and production is fairly simple. Just send your questions and your requests for production to the Deputy Attorney General who is the lawyer for the prison officials. Send separate requests and questions for each defendant.

The prison officials must respond within 30 days unless the court or the parties agree otherwise. The officials may ask the judge for a "protective order" which blocks some of your questions or requests because they are irrelevant, privileged, or impose "undue burden or expense." They have to submit a motion which then proceeds like the motion to dismiss, with opportunity for legal memos and a court hearing. See Part C of this chapter.

The prison officials may also refuse to answer questions or requests which are not covered by a protective order. Then you need to submit a Motion for an Order Compelling Discovery. In this motion, you indicate what they refused and why you need it. Use the following example:

In the United States District Court
For the ____________________

--x	
Name of first plaintiff	:
in the case, et al.,	: MOTION FOR
Plaintiffs,	: AN ORDER
	: COMPELLING
v.	: DISCOVERY
	:
Names of first defendant	: Civil Action No. __
in the case, et al.,	:
Defendants	:
--x	

Plaintiffs move this court for an order pursuant to Rule 37(a) of the Federal Rules of Civil Procedure compelling Defendants [*list defendants who failed to fully answer interrogatories*] to answer fully interrogatories number [*list unanswered questions*], copies of which are attached hereto. Plaintiffs submitted these interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure on [*date*] but have not yet received the answers.

[*OR*]

Plaintiffs move this court for an order pursuant to Rule 37(a) of the Federal Rules of Civil Procedure compelling Defendants [*list defendant who did not produce documents*] to produce for inspection and copying the following documents: [*list requested documents that were not produced*]. Plaintiffs submitted a written request for these documents, pursuant to Rule 34 of the Federal Rules of Civil Procedure on [*date*] but have not yet received the documents.

Plaintiffs also move for an order pursuant to Rule 37(a)(4) requiring the aforesaid Defendants to pay Plaintiffs the sum of $___ as reasonable expenses in obtaining this order, on the ground that the Defendants' refusal to answer the interrogatories [*or produce the documents*] had no substantial justification.

Dated:______________

Signed:_______________
Type name and address

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6. Their Discovery of Your Information and Material

Prison officials can use discovery against you. They will try to intimidate and scare you and get you to say things they can use against you. You must answer the questions unless the answers are privileged. If you don't have an attorney, then the privilege that it is most important for you to know about is the 5th Amendment **right against self-incrimination**. You can refuse to answer a question in a deposition or an interrogatory if it might amount to admitting that you have committed a crime for which you could face charges.

In general, try to keep cool and say as little as you can. If they ask to depose you, then ask the judge to put off the deposition until after he or she reconsiders your request for appointed counsel. See if the judge will at least appoint a lawyer to represent you at the deposition. You may want to tell the judge that you're afraid you might be asked to say things which could be used against you in a criminal prosecution. Under Rule 30(a), a prisoner can be deposed "only by leave of the court on such terms as the court prescribes."

Warn your witnesses that the Attorney General's office probably will depose them once you've revealed their identities. You must be notified in advance of any deposition scheduled in your case. You or your lawyer are entitled to be present, to advise and consult with your witness, and ask him or her questions that become part of the official record of the deposition. The witness has a right to talk with you or your lawyer beforehand and also to refuse to talk about your suit outside the deposition with anyone from the prison or the Attorney General's office.