Resource Guide for Managing Prisoner Civil Rights Litigation

with special emphasis on the Prison Litigation Reform Act

Federal Judicial Center
1996

Contents

Foreword

The Federal Judicial Center produced this *Resource Guide for Managing Prisoner Civil Rights Litigation* in response to numerous requests from federal court personnel to update our report *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* (rev. 1980). That report, produced by a Center committee chaired by Judge Ruggero J. Aldisert, recommended many practices that are now routine in most federal courts, such as a standard complaint form for all prisoner civil rights cases, increased use of magistrate judges to manage such cases, and use of pro se law clerks to screen the cases. In 1982, the Judicial Conference of the United States "urged the district courts to implement the procedures and the suggested forms" in the *Recommended Procedures* report.*

This guide builds on the earlier report while reflecting statutory changes and federal court experience in the sixteen years since it was published. The initial draft of the guide was the focus of a Center workshop on managing prisoner civil rights litigation in March 1995. We delayed final publication so that the guide could reference then-pending legislation, which was enacted in April 1996 as the Prison Litigation Reform Act (PLRA). The guide reports the requirements of the new law but retains descriptions of procedures used prior to enactment, for reasons explained in the Introduction.

Like the *Recommended Procedures* report, the guide offers suggestions on how courts can manage prisoner civil rights cases, including commentary on how they might adapt procedures to the requirements of the PLRA, which has had little judicial interpretation and contains some provisions that are ambiguous. Recommendations and suggestions are those of the Center's staff and federal court personnel who produced the guide. They include, from the Center, James Eaglin, Russell Wheeler, Judith McKenna, Marie Cordisco, Eric Lai, Julie Hong, Dipak Panigrahi, and Jeannette Summers. We received considerable assistance from U.S. Magistrate Judges Celeste F. Bremmer (S.D. Iowa), John Moulds (E.D. Cal.), Ila Jeanne Sensenich (W.D. Pa.), William Knox (W.D. Mo.), and David L. Piester (D. Neb.), as well as from three senior pro se law clerks (who are called "staff attorneys" in their districts): Kate Robinson Patt (S.D. Tex.), Kay Bartolo (S.D. Iowa), and Haven Gracey (E.D. Cal.). We also acknowledge assistance from Professor Ira Robbins of the Washington College of Law at The American University.

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* Report of the Proceedings of the Judicial Conference of the United States, March 1982, at 18.

Introduction

The overwhelming majority of prisoner cases, especially civil rights cases filed by state prisoners in federal district courts pursuant to 42 U.S.C. § 1983, are filed pro se and in forma pauperis (IFP).[1] Thus, an effective case-management plan for prisoner civil rights cases must focus on court practices for processing IFP suits. Because the majority of prisoner civil rights complaints are decided on the pleadings and disposed of without trial, most of the administrative burden this litigation imposes on the district courts results from the initial screening and pretrial processes.[2]

This guide was prepared as a resource for federal judges, pro se law clerks, and others in the courts who manage prisoner pro se litigation. It was designed to highlight critical case-management issues in prisoner civil rights litigation and promote the exchange of useful experiences and ideas. It is not an authoritative or complete statement on either the law or the procedure of prisoner civil rights litigation. Both law and procedure will evolve in response to the Prison Litigation Reform Act (PLRA), signed into law by the President on April 26, 1996.

The guide describes new provisions of law and how they are likely to affect widespread practices. Readers should be aware, however, that several parts of the PLRA are already being challenged and that other provisions may be the subject of legal challenges concerning, *inter alia*, the scope of their application and their constitutionality. This guide is in three parts:

- Part I summarizes the PLRA, particularly provisions that will affect the management of prisoner civil rights suits.
- Part II describes court-based procedures and approaches that courts have created for the overall management of prisoner civil rights cases, such as standard forms and assignments of tasks to specific personnel, and it describes how the PLRA may affect those procedures and approaches.
- Part III deals with specific case-management procedures and relevant law. It describes the legal requirements and management options that judges face as they handle prisoner civil rights petitions, and it describes how the PLRA may affect those requirements and options.

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1. "More than 95% of prisoner suits are filed *in forma pauperis*. With rare exceptions, all such cases are filed *pro se*." Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 420, 421 n.8 (1993) (citing William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 617 (1979) (data based on a study of prisoner civil rights cases filed in five federal district courts in 1975, 1976, and the first half of 1977)). Eisenberg reviewed prisoner civil rights filings in three federal district courts for 1991 and found that every case was filed pro se and that, with only one or two exceptions, every case was also filed in forma pauperis. Eisenberg, *supra*, at 421 n.8, 456.

2. Eisenberg's review of prisoner civil rights filings revealed the following trial rates: 2% in the Eastern District of Missouri, 0% in the Southern District of Illinois, and 10% in the Eastern District of Arkansas. Eisenberg, *supra* note 1, at 456–57.

Parts II and III describe law and procedures prior to the PLRA and any changes the PLRA seems to require. This dual treatment is provided because pre-PLRA procedures will, at the least, shape post-PLRA procedures. Furthermore, since various provisions of the PLRA are under judicial challenge, old procedures may persist.

I. PLRA Provisions

The Prison Litigation Reform Act of 1995[3] was passed as Title VIII of the statute making fiscal 1996 appropriations for the Departments of Commerce, Justice, and State; the judiciary; and related agencies. The text of the statute is presented in Appendix A, along with section 1915 of the U.S. Code as revised by the Act. The PLRA provisions amend 18 U.S.C. §§ 3624, 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1915, 1346(b); and 11 U.S.C. § 523(a). The Act adds provisions, including new sections 1915A and 1932, to title 28 of the U.S. Code and also generally changes the word "he" to "the prisoner."

PLRA provisions can be sorted into six basic categories:

- criteria for case screening and dismissal;
- requirements for achieving IFP status;
- provisions affecting the management of cases;
- limitations on relief;
- sanctions; and
- attorneys' fees.

This part of the guide provides a summary of most PLRA provisions. Part II and, more particularly, Part III provide analysis of the new provisions and describe pre-PLRA precedents and procedures relevant to implementing these changes.

The PLRA does not contain a provision specifying an effective date. It can be assumed that all provisions of the Act became effective upon the President's signing on April 26, 1996. The PLRA's applicability to cases filed before that date is a matter of legal interpretation to be decided by the courts. The provisions of section 802(b)(1) governing prospective relief, however, are expressly made applicable to all prospective relief entered before, on, or after enactment of the PLRA.

"Prisoner" is defined identically in 28 U.S.C. §§ 1915(h) and 1015A(c) and 42 U.S.C. § 1997e(h) as "any person subject to incarceration, detention, or admission in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."

A. Criteria for case screening and dismissal

Several PLRA provisions authorize or direct the court to refuse to accept, or to dismiss, cases because of particular characteristics.

3. Pub. L. No. 104-134, 110 Stat. 1321.

1. Prohibitions on filing

a. *Exhaustion*

Section 1997e(a) of title 42 of the U.S. Code prohibits any prisoner from bringing an action "until such administrative remedies as are available are exhausted." The PLRA deletes section 1997e's machinery for Department of Justice certification of penal institutions.[4]

b. *Physical injury requirement*

Section 1997e(e) of title 42 of the U.S. Code prohibits any prisoner from bringing an action for "mental or emotional injury suffered while in custody without a prior showing of physical injury." Section 1346(b)(2) of title 28 of the U.S. Code, part of the Federal Tort Claims Act, now contains a similar provision.[5]

c. *Three strikes*

Section 1915(g) of title 28 of the U.S. Code prohibits a prisoner from bringing an IFP action if the prisoner has had three or more actions in federal courts that were dismissed as frivolous or malicious, or for failing to state a claim on which relief can be granted or seeking monetary relief from a defendant immune from such relief, unless the prisoner is under imminent danger of serious physical injury.[6]

2. Mandatory review and dismissal

a. *Pre-docketing review*

Section 1915A of title 28 of the U.S. Code, a new section, directs the court to review prisoner complaints before docketing or soon thereafter to identify cognizable claims or dismiss the complaint or any portion of it if it is frivolous or malicious, fails to state a claim on which relief can be granted, or seeks monetary relief from a defendant immune from such relief.[7]

b. *Factors to be considered*

Section 1997e(c)(1) of title 42 of the U.S. Code directs the court to dismiss, on its own motion or otherwise, any section 1983 action with respect to prison conditions if the action is frivolous or malicious, fails to state a claim on which relief can be granted, or seeks monetary relief from a defendant immune from such relief. Section 1997e(c)(2) allows the court to dismiss a case on these grounds without first requiring exhaustion of administrative remedies.[8]

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4. *See infra* part III.D.
5. *See infra* part III.C.2.e.
6. *See infra* part III.A.1.
7. *See infra* part III.C.
8. *See infra* part III.C.

c. *Timing of dismissal*

Section 1915(e)(2) of title 28 of the U.S. Code directs the court to dismiss any case, at any time, if it finds that an IFP petitioner's allegations of poverty are untrue, or if the action fails to state a claim on which relief can be granted or seeks monetary relief from a defendant immune from such relief. Section 1997e(c)(2) of title 42 of the U.S. Code allows the court to dismiss a case on these grounds without first requiring exhaustion of administrative remedies.[9]

B. Requirements for achieving IFP status

1. Statement of assets

Section 1915(a) of title 28 of the U.S. Code now directs a prisoner seeking IFP status to include in the required affidavit "a statement of all assets such prisoner possesses" and "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."[10]

2. Filing fee

Section 1915(b) of title 28 of the U.S. Code requires prisoners who are granted IFP status to pay the filing fee, by a partial initial payment from any funds available and through monthly payments forwarded by the institution based on the balance in the prisoner's account. Section 1915(b)(4) allows a prisoner to bring an action even if the prisoner has no assets and no means by which to pay the initial filing fee.[11]

3. Payment of costs

Section 1915(f) of title 28 of the U.S. Code requires prisoners against whom judgment is entered to make full payment of any costs ordered, in the same method as Section 1915(b) directs them to pay the filing fee.[12]

C. Provisions affecting the management of cases

1. Waiver of defendant's right to reply

Section 1997e(g) of title 42 of the U.S. Code authorizes defendants to waive the right to reply to any prisoner action, specifies that such a waiver is not an admission of the complaint, and prohibits the court from granting relief unless there is a

9. *See infra* part III.C.
10. *See infra* part III.A.
11. *See infra* part III.A.
12. *See infra* part III.A.

reply. The section further authorizes the court to require the defendant to reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."[13]

2. Use of telecommunications technologies

Section 1997e(f) of title 42 of the U.S. Code directs, to the extent practicable, that prisoner action pretrial proceedings in which the prisoner may or should participate be conducted by telecommunications technologies that allow the prisoner to stay in the penal institution. It further authorizes hearings to be conducted in the institution, subject to institution officials' agreement, and directs the court, again to the extent practicable, to allow counsel to participate by telecommunications technology.[14]

D. Limitations on relief; sanctions

1. Types of relief courts may order

Amendments to 18 U.S.C. § 3626 make substantial changes in the type of relief courts may order, both prospective and otherwise. Section 802(b) of the PLRA provides that the amendments shall apply with respect to all prospective relief, whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.[15]

Among other things, the amendments to section 3626

- limit the prospective relief, including preliminary injunctive relief, that the court may grant;
- limit the court's authority to release or prohibit admission of prisoners, or require that three-judge courts issue such orders;
- add provisions speeding the termination of prospective relief orders; and
- limit and govern the court's authority to appoint special masters to conduct hearings and prepare findings of fact.

2. Revocation of unvested good-time credit

Section 1932 of title 28 of the U.S. Code authorizes the court, on its own motion or otherwise, to order revocation of the unvested good-time credit of any adult prisoner who brings any civil action if the court finds that the claim was filed for malicious purposes or solely to harass the other party, or that the prisoner presented false testimony or evidence.

3. Satisfaction of outstanding restitution orders

Sections 807 and 808 of the PLRA direct that any compensatory damages awarded to a prisoner as a result of an action against a penal institution shall first be used to satisfy any outstanding restitution orders against the prisoner and that

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13. *See infra* part III.F.
14. *See infra* part II.G.
15. *See infra* part III.F.7.

"reasonable efforts shall be made" to notify the victims of crimes who may be eligible to receive such restitution.

E. Attorneys' fees

Section 1997e(d) of title 42 of the U.S. Code prohibits the award of attorneys' fees in prisoner civil rights cases except where the fee was "directly and reasonably incurred in proving an actual violation" of the prisoner's rights protected by a statute authorizing fee awards and the fee amount was proportionate to the relief ordered or "directly and reasonably incurred in enforcing the relief." No award should be based on an hourly rate greater than 150% of the statutory Criminal Justice Act rate.[16]

The court is to apply a portion of any monetary award granted to a prisoner, up to 25%, to attorneys' fees awarded to the prisoner.[17]

16. *See infra* part III.F.7.e.
17. *See infra* part III.F.7.e.

II. Court-Based Procedures for Facilitating Effective Management of Prisoner Litigation

This part describes the following approaches and procedures that district courts have adopted to promote effective management of prisoner litigation:

- procedures for facilitating efficient filing of prisoner cases;
- court-based approaches for providing counsel to indigent prisoners;
- court-annexed mediation programs;
- litigation tracks for prisoner cases;
- case-assignment systems;
- efficient use of court personnel; and
- methods of reducing travel of prisoners to proceedings outside the penal institution.

A. Procedures for facilitating efficient filing of prisoner cases

1. Model forms and instructions

Districts have adopted, by local rule or general order, model forms and instructions to facilitate the efficient filing of prisoner civil rights complaints, and they have taken steps to ensure that their forms and instructions for filing cases are made available to prisoners seeking to file such cases.[18] Well-designed forms and instructions both assist the court and provide prisoners with important information about court rules and procedures governing the filing and prosecution of civil cases in the district.

The PLRA has no provisions governing model forms per se, but courts should review forms developed before the PLRA to ensure that they reflect the statute's procedural requirements (see sample forms in Appendix B).[19]

2. Informational handouts

Districts have also developed informational handouts for prisoners and other pro se litigants about

- standards to which pro se litigants are held in the district;
- risks and dangers of proceeding without an attorney;

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18. In other words, courts have done voluntarily in respect to prisoner civil rights cases what Rule 2(c) of the Rules Governing § 2254 Cases in the United States District Courts requires the clerk of court to do in respect to habeas corpus petitions: provide blank petition forms to all applicants upon request, free of charge.

19. *See also* Memorandum from Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts, to All Judges and Others (July 31, 1996) with attached Questions and Answers on the PLRA (containing examples of instructions, draft orders, forms, and letters) (July 31, 1996) (on file with the Administrative Office of the U.S. Courts).

- organizations and services in the district that provide legal assistance to prisoners and other pro se litigants seeking to file civil rights actions; and
- risks associated with frivolous filings and the availability of alternative forums.

The PLRA has no provisions governing informational handouts per se, but courts should review handouts developed before the PLRA to ensure that they reflect the statute's procedural requirements and advise prisoners that achieving IFP status does not relieve filers from the obligation to make partial payment of filing fees. (See Appendix C for sample applications to proceed IFP; Appendix D for sample complaints; and Appendix E for a sample notice of deficient pleading and a sample clerk's office post-complaint informational checklist.)

B. Court-based approaches for providing counsel to indigent prisoners

Whether the court should seek to provide counsel to any particular prisoner is obviously a case-by-case decision, influenced by pre-PLRA statutory provisions and judicial interpretations of them. This section presents those provisions and interpretations.

Apart from the controlling law in any particular case, district courts, in concert with local bars, have developed a variety of procedures to make it more likely that counsel will be available to assist indigent prisoners in pursuing civil rights complaints, at least in plausibly meritorious cases. The PLRA does not affect these procedures, but it places restrictions on the payment of attorneys' fees for representing indigent prisoners.

To ensure that the court will have the information needed to respond to a motion for appointment of counsel under section 1915(e)(1) (section 1915(d) prior to the PLRA), each district should adopt a standard application for appointment of counsel (see Appendix F for a sample form).

The following are some of the approaches developed by courts to encourage the availability of counsel; they are not necessarily directed at indigent prisoners per se.

1. Requiring pro bono legal service as a condition of membership in and admission to the bar

Some districts, like the Southern, Northern, and Central Districts of Illinois, have adopted local rules that mandate legal service to indigents as a condition of admission to and membership in the court's bar.[20] Such local rules are premised on the court's inherent authority and on provisions of the ABA's *Model Rules of Pro-*

20. *See, e.g.*, S.D. Ill. Loc. R. 1(g) (each attorney admitted to the bar has a duty each year to accept at least one pro bono case).

fessional Conduct, which call upon lawyers to become actively involved in providing pro bono services to indigents as a professional responsibility.[21]

2. Establishing volunteer panels of attorneys to provide legal services to indigent litigants

A number of districts have civil pro bono panels of attorneys who volunteer to represent prisoners and other indigent pro se litigants. The panels are composed of attorneys in good standing who have been admitted to the district's federal bar and representatives of law school clinical legal education programs.[22] In most districts, the panels are maintained by a committee of attorneys appointed by the court.

A judge who determines that counsel should be appointed to represent an indigent prisoner issues an order directing the clerk's office or the pro se law clerk to appoint an attorney from the panel to the case. The court then issues a notice to the appointed attorney setting forth the time period within which he or she must respond by entering an appearance or by withdrawing from the appointment (e.g., when the appointment poses a conflict of interest under Rule 1.7 of the ABA's *Model Rules of Professional Conduct*). The notice also states that there are no public funds available to cover the costs that will be incurred by the attorney. Most programs require the attorney to represent the indigent litigant throughout the proceedings in the district court, and a few require representation on appeal as well.

3. Using unappropriated funds to reimburse volunteer attorneys' expenses

Attorneys who are appointed on a voluntary basis to represent indigent litigants are responsible for advancing reasonable expenses, such as expert fees and the costs of telephone calls, mileage, copying, depositions, transcripts, and other discovery-related items in connection with the litigation. Although there is no statutory source of funding for such expenses, many districts use unappropriated court funds to reimburse volunteer attorneys for certain litigation-related expenses. Such funds include court library funds and interest on lawyers' trust accounts (IOLTA). Some districts, such as Nebraska and the Northern District of New York, have created federal practice funds, which are sustained by annual assessments ranging from $15 to $50 on all attorneys admitted to the district's bar. The Southern District of Florida has instituted a Volunteer Lawyers' Project to provide for payment of counsel and expenses in noncriminal indigent pro se litigation. Funding for the project is sustained by a voluntary $25 annual assessment on all members of the district's bar. The pro se law clerk of the Northern District of New York maintains a pro bono panel, and attorneys are appointed as counsel, standby counsel, or trial counsel. Out-of-pocket expenses are reimbursed from the

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21. Model Rules of Professional Conduct Rule 6.1 (a lawyer should aspire to at least fifty hours of pro bono publico legal services per year).

22. *See, e.g.*, D.D.C. Loc. R. 702.1; D. Conn. Loc. R. 29; S.D. Ind. Loc. R. 4.6; E.D. Mo. Loc. R. 38; W.D. Tenn. Loc. R. 2.

pro bono fund. The Committee on Indigent Litigation of the U.S. District Court for the District of Columbia has created a separate section 501(c)(3) nonprofit corporation to raise funds to assist appointed counsel in handling civil cases for indigent litigants.

4. Establishing education programs for lawyers

Courts can increase the pool of attorneys willing and able to represent prisoners and other indigents in civil cases by sponsoring advocacy training and continuing legal education programs for volunteers. Some districts have local rules to accomplish this.[23]

C. Court-annexed mediation programs

Most courts exempt prisoner cases and pro se cases from their alternative dispute resolution (ADR) programs. However, districts with court-annexed mediation programs should consider the opportunities these programs hold for providing assistance to indigent prisoners with civil rights claims. For example, the Northern District of California is considering creating a program with permanent staff, possibly law professors and students from law schools in the district, to serve as ombudsmen at prisons and to advise prisoners on civil rights and related issues.

D. Litigation tracks for prisoner cases

1. Tracks established under CJRA plans

Several districts have established a distinct track for prisoner cases under their Civil Justice Reform Act (CJRA) plans. Typically, these tracks involve issuing a standard scheduling order and setting deadlines for party joinder and discovery; some prescribe pretrial and trial procedures.

2. Need for flexibility

Although a relatively expedited track is appropriate for the bulk of prisoner civil rights litigation, there must be flexibility to screen out the few complex cases that arise in this area so that they can be placed on a special track. Typically, this determination will overlap substantially with the decision to seek counsel for the plaintiff.

E. Case-assignment systems

Courts vary in their assignment schemes for prisoner civil rights cases. Common approaches include the following:

- individual assignment to a judge as a standard civil case (e.g., random assignment);

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23. *See, e.g.*, D. Md. Loc. R., Reg. 6; E.D.N.Y. Loc. R. app. A; D.D.C. Loc. R. 702.1(a)(2); E.D. Mo. Loc. R. 38(C) (providing for a consulting committee to assist volunteer counsel).

- assignment to a judge paired with a magistrate judge;
- deferred assignment pending resolution of section 1915 issues;
- assignment of related cases or cases by the same plaintiff to the same judge or judge–magistrate judge pair; and
- a distinct track for prisoner cases under the district's CJRA plan and provision for screening complex cases using a standard scheduling order that sets deadlines for party joinder and discovery cutoff.

F. Efficient use of court personnel

Courts vary in their use of magistrate judges and pro se law clerks to help manage prisoner civil rights litigation. The PLRA has no provisions that bear directly on this subject.

1. Discretion to use magistrate judges

Magistrate judges play an important role in the district court's efforts to address the demands of its caseload. By statute, each district court has discretion to determine how best to use its magistrate judges. In exercising that discretion, the district court should view the position of magistrate judge as flexible in nature and tailor the role of the magistrate judge to the specific caseload needs of the district.

a. *District practices*

Each district court should decide whether managing prisoner litigation is the best use of magistrate judges' time, given their other responsibilities. Districts vary in the extent to which they use magistrate judges in managing prisoner civil rights cases. Some districts have local rules or general orders requiring that all prisoner civil rights cases be referred upon filing to a magistrate judge for determination of IFP status and for a preliminary review on the merits recommendation to the district judge.

b. *Dispositive versus nondispositive matters*

In deciding how best to use magistrate judges in managing prisoner civil rights cases, the district court should consider the implications of 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b) for the workload of the court. These provisions require de novo review of magistrate judges' decisions on dispositive matters.[24] Unless the parties have consented to submit their cause to a magistrate judge for final disposition, the magistrate judge must prepare a written report and a recommended disposition for the district judge. Any portion of the magistrate judge's report to which a party objects is then subject to a de novo review by the district judge. The de novo review entails some duplication of effort by the court.

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24. *See* McCarthy v. Bronson, 500 U.S. 136 (1991); Roberts v. Manson, 876 F.2d 670 (8th Cir. 1989); Gee v. Estes, 829 F.2d 1005 (10th Cir. 1987); Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985); Ford v. Estelle, 740 F.2d 374 (5th Cir. 1984).

In contrast, referral of nondispositive matters, such as discovery and other procedural motions, to the magistrate judge requires little or no further efforts on these matters by the district judge, since so few of the resulting determinations by magistrate judges are ever appealed. In addition, the district court should provide the parties with notice of the option to consent to submit their case to a magistrate judge at the time the case is conditionally filed. If the parties consent, the case can be reassigned to a magistrate judge, who can then rule on all motions without having to make a report and recommendation to the district court.

2. Use of pro se law clerks

Pro se law clerks perform important functions in assisting the district court in handling prisoner civil rights cases. Districts vary in the manner in which and extent to which they use pro se law clerks, and in the titles they give these attorneys. In some districts, pro se law clerks are called "staff attorneys."

a. *Identifying needs*

Districts that have pro se law clerks should examine whether they are entitled to any additional pro se law clerk positions based on their caseloads, needs, and the relevant policies established by the Judicial Conference of the United States. Districts that do not currently have a pro se law clerk should undertake a similar examination of their needs.

b. *Supervision*

Because pro se law clerks represent a limited resource for the court, each district should establish the most effective structure for supervising their efforts. As a matter of Judicial Conference policy, implemented by personnel administration rules, pro se law clerks are appointed and supervised by the chief district judge, although the chief judge may delegate that authority to another judge or to the clerk.[25] The supervision should bear some relationship to the roles of the district and magistrate judges in prisoner cases. If these cases are routinely referred to a magistrate judge, then it may be best to have the magistrate judge supervise the pro se law clerk.

c. *Functions*

Each court should consider the most effective reporting channel for pro se law clerks. In most districts, the pro se law clerk screens all prisoner civil rights complaints that are filed prior to service. He or she screens the complaint and makes the initial recommendation as to IFP status and fee. Pro se law clerks appear to function best when they have direct lines of communication to the district and magistrate judges who are assigned prisoner cases. To facilitate communication

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25. Reports of the Proceedings of the Judicial Conference of the United States, Sept. 1994, at 48, and Sept. 1995, at 90.

and an effective working relationship, some districts, such as the District of Nebraska, have the pro se law clerk work in the magistrate judge's chambers.

d. *Relationship to chambers law clerks*

The relationship of the pro se law clerk to the chambers law clerks of the judge assigned to the prisoner civil rights case should be made explicit. Certain aspects of prisoner cases, such as processing motions to dismiss and motions for summary judgment, dictate a close working relationship between the chambers law clerks and the pro se law clerk. Some districts rotate the pro se law clerk among their magistrate judges, so that the pro se law clerk acts as an additional chambers law clerk for a month in each magistrate judge's chambers.

G. Methods of reducing travel of prisoners to proceedings outside the penal institution

Districts have developed a variety of means to conduct proceedings involving prisoners without removing the prisoner from the penal institution. Cooperation between the court and penal institutions is necessary to achieve effective travel-reduction plans.

Depending on the institution's proximity to the court, cooperative arrangements between the court and the penal institution may significantly reduce the time and cost involved in resolving prisoner complaints. When used for status and evidentiary hearings, such arrangements promote early intervention by the court and quick dispositions. The PLRA provides that, to the extent practicable in prisoner cases, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, videoconference, or other telecommunications technology without removing the prisoner from the facility in which he or she is confined.[26] The statute also authorizes hearings at prison facilities, subject to agreement with state officials.[27]

1. Arranging for space at institution

Some courts have arranged for the use of a room or office at the penal institution in which the prisoner is incarcerated to conduct status and evidentiary hearings. If such space is not available, arrangements may be made to conduct such hearings in a local county or city courthouse near the institution.

2. Attorney–client conferences at institution

In cases in which the plaintiff is represented by counsel, the court should make arrangements with the penal institution to facilitate attorney–client conferences. Such arrangements may require nothing more than asking the institution to set aside appropriate space for the conferences.

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26. 42 U.S.C. § 1997e(f)(1).
27. 42 U.S.C. § 1997e(f)(2).

3. Use of telephone conferences or videoconferences

Courts have also experimented with telephone and video hookups with prisons to allow the conduct of proceedings without bringing all participants to the courthouse. Telephone conferences or videoconferences can facilitate the effective management of prisoner cases by the court. If the complaint is not dismissed, the judge can conduct telephone conferences or videoconferences with the prisoner, defense counsel, and the pro se law clerk. The conferences should be recorded by a court reporter and can be used by the court to determine whether service of process will be waived by the defendant; to set a schedule for discovery, motions, and trial; and to address other discovery issues, such as depositions and document production.

The PLRA requires the use of telephone, videoconference, or other telecommunications technology, to the extent practicable, in any action brought with respect to prison conditions in pretrial proceedings requiring the prisoner plaintiff's participation.[28] Based on tests of videoconference technology in a small number of districts, the Judicial Conference, at its March 1996 meeting, endorsed videoconferences as a viable optional case-management tool in prisoner civil rights cases and authorized funding to expand the availability of the technology to courts meeting the criteria of the Conference's Committee on Court Administration and Case Management.[29]

4. Transportation arrangements

In prisoner cases, some transporting of prisoners to the court will be necessary, and thus the court should have in place arrangements for transporting petitioners and witnesses to and from the court when necessary. Often, the ability and funding to do so will be a function of the distance between the court and the penal institution, as well as other demands on the U.S. marshal. Arrangements may involve allocating responsibilities for recurring transportation and security between the court and the institution.

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28. 42 U.S.C. § 1997e(f)(1).

29. Memorandum from Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts, to All Judges and Others (March 14, 1996) (on file with the Administrative Office of the U.S. Courts). Courts that construct videoconference capabilities for prisoner hearings should consider videoconferences' related uses in providing two-way video contact for judicial, educational, and administrative purposes and take reasonable steps to install technology compatible with these purposes.

III. Case-Specific Procedures for Facilitating Effective Management of Prisoner Litigation

This part discusses procedures for the following decision points in managing a prisoner civil rights action:

- determining IFP status and the appropriate filing fee;
- ordering service of process;
- determining whether a claim or complaint should be dismissed;
- handling mandatory exhaustion of administrative remedies;
- determining whether and how to provide counsel;
- managing cases that survive the initial determination regarding frivolousness;
- determining sanctions to deter abusive prisoner litigation; and
- setting out appeal rights in final orders and IFP proceedings on appeal.

A. Procedures for determining IFP status and the appropriate filing fee

Prior to enactment of the PLRA, 28 U.S.C. § 1915(a) authorized the court to allow a prisoner to proceed IFP based on an affidavit that stated that the prisoner was "unable to pay" costs or give security for them and that described the action in question and why relief was justified. About half the district courts had local rules or informal procedures requiring IFP petitioners to pay some portion of the filing fee.[30] The pre-PLRA statute authorized, but did not require, the court to dismiss the case if the prisoner's allegation of poverty was untrue or the action was frivolous or malicious.

The PLRA makes fairly extensive changes to section 1915. First, regardless of a prisoner's ability to qualify for IFP status, as explained below, new section 1915(g) precludes granting such status to any prisoner who has had three prisoner actions dismissed in federal court as frivolous or malicious, or for failing to state a claim on which relief could be granted, unless the prisoner is in imminent and serious physical danger.

Second, the prisoner's affidavit must "include a statement of all assets such prisoner possesses."[31] In addition to the affidavit, the prisoner must file "a certified copy of the trust fund account statement . . . . for the prisoner for the 6-month period immediately preceding the filing of the complaint."[32]

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30. Marie Cordisco, *Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases*, FJC Directions, no. 9, at 25 (Federal Judicial Center, June 1996).

31. 28 U.S.C. § 1915(a)(1).

32. *Id.* § 1915(a)(2).

Third, the PLRA requires the court to collect some or all of the filing fee from IFP petitioners, and it prescribes a formula for doing so in installments.[33]

Fourth, the PLRA requires the court to dismiss the case, at any point, even if the prisoner has paid some or all of the filing fee, if the court finds that the prisoner's allegation of poverty is untrue or that the action is "frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief."[34]

This section discusses

- the effect of previous frivolous filings on IFP status;
- determining indigence; and
- assessing the filing fee.

1. Determining effect of previous frivolous filings on IFP status

New section 1915(g) precludes a prisoner from proceeding IFP, regardless of inability to pay, "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." This section only precludes a prisoner from proceeding IFP with subsequent actions. It does not preclude a prisoner from proceeding with any action brought after three dismissals under the circumstances described in the section if a prisoner prepays the filing fee and does not seek leave to proceed IFP in the new action.

The PLRA provides no mechanism for identifying prisoners who have three or more such dismissals in their records, and at this time it appears that no judicial or executive branch agency is in a position to develop such a mechanism. Note that the provision is not limited to dismissals in the court in which the prisoner is currently filing. Even before enactment of the PLRA, some courts required petitioners to list the number of such dismissals in their complaint, thus opening the possibility of a defense effort to show perjury by finding such dismissals (see sample forms in Appendix B). It is anticipated that section 1915(g) may be the subject of challenges concerning its constitutionality and the scope of its application, including retroactive application to claims dismissed prior to enactment of the PLRA.

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33. *Id.* § 1915(b)(1).

34. *Id.* § 1915(e)(2). Section 1915(e)(2), on sua sponte dismissals, is treated in greater length in part III.C.2 *infra*, but is referenced here because it is related to the court's determination of claims for IFP status.

2. Determining indigence

a. *Judicial standards for determining indigence*

(1) *PLRA provides procedures but no standards.* The court may grant IFP status unless it determines that the prisoner's allegation of poverty is untrue. The PLRA provides the procedure by which the court may invoke its discretion to grant IFP status; new section 1915(a)(1) directs the petitioner to submit an affidavit indicating that he or she is unable to pay the fees or to give security therefor, and section 1915(a)(2) requires additional documentation of the prisoner's assets. But neither the pre-PLRA statute nor the PLRA established criteria for determining indigence for IFP purposes. Thus, recourse to pre-PLRA case law may be helpful.

(a) *Complete destitution not required.* "Complete destitution" has not been a prerequisite for financial eligibility under section 1915(a).[35] Thus, a prisoner may not be required to choose between paying a filing fee and supporting himself or herself or a family.[36]

(b) *Factors to be considered.* In addition to gross income and assets, courts considered the applicant's "(1) marital status and number of dependents, (2) place of residence, (3) nature of employment, (4) earning potential even though unemployed, and (5) efforts to obtain employment."[37] These factors may be less applicable to incarcerated litigants, for whom the state provides the necessities of life: housing, food, clothing, and medical care. In evaluating prisoners' petitions for IFP status, courts have considered the prisoner's expenses,[38] whether the filing fee would require the prisoner's last dollar,[39] the balance in the prisoner's trust fund account,[40] and how many suits the prisoner has pending in federal court. The last factor may also be an indicator of whether the plaintiff filed the suit in good faith.[41]

(2) *Pre-PLRA considerations.* Prior to enactment of the PLRA, courts considering the amount in a prisoner's trust fund account developed various standards for how that amount should figure in the IFP determination. Some courts treated the prisoner's earnings while incarcerated differently from outside income.

Some pre-PLRA local rules impose an inflexible dollar limit on the funds a prisoner may possess and still be granted IFP status. For example, the District of

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35. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948) ("We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'")

36. Lumbert v. Illinois Dep't of Corrections, 827 F.2d 257, 260 (7th Cir. 1987). Robert S. Catz & Thad M. Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655, 664 (1978).

37. Catz & Guyer, *supra* note 36, at 664.

38. *In re* Epps, 888 F.2d 964, 968 (2d Cir. 1989).

39. Carter v. Telectron, Inc., 452 F. Supp. 939, 943 (S.D. Tex. 1976).

40. *In re* Epps, 888 F.2d at 967–68. Under the PLRA, courts must consider the balance in the prisoner's trust fund account, as noted earlier.

41. *Carter*, 452 F. Supp. at 999. *See also* Collier v. Tatum, 722 F.2d 653, 657 (11th Cir. 1983).

Arizona's Local Rule 3.2 provides that a prisoner who has more than $400 on deposit in a prison trust fund account must pay the full filing fee.[42] The courts of appeals have questioned such inflexible standards, finding them an undue restriction on the prisoner's access to the courts, at least when the balance of the prisoner's trust fund account was only slightly higher than the court's presumptive dollar limit.[43] Objections to these inflexible standards may have led to the development of partial filing fees based on a prisoner's current and past economic situation.

b. *Procedures for determining indigence*

(1) *Testing for sufficiency of affidavit required by new section 1915(a)(1)*

(a) *Forms.* Many districts find it useful to provide simple, understandable affidavit forms for a petitioner to submit with the IFP application.[44] Such forms usually require petitioners to itemize the amount and sources of their income, including Social Security payments, rents, interest, dividends, pensions, annuities or life insurance, gifts, and inheritances.[45] In addition, the petitioner usually must list other assets, such as real estate, stocks, bonds, notes, and automobiles, and must identify all dependents. PLRA procedures require such specific information, in addition to documentation from the penal institution. Some courts, such as the

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42. We conducted a Westlaw search in August 1996 and found eight district courts that had provisions in their local rules placing a dollar limit on a prisoner's ability to proceed IFP when bringing a claim pursuant to 42 U.S.C. § 1983. These districts, their applicable rules, and their dollar limits are as follows: D. Ariz., Loc. R. 3.2(c) ($400); S.D. Cal., Loc. R. 9.4(c) ($400); M.D. Fla. Loc. R. 4.14 ($120); D. Kan., Loc. R. 9.1 ($150); D.N.J., Loc. R. 29(c) ($200); D. Nev., Loc. R. 1-3 (set by court order); W.D. Okla., Loc. R. 4.3(c) ($200); and W.D. Mo. Loc. R. 9(3) ($1,200). Some of these districts also have procedures requiring prisoners to pay at least a partial filing fee in civil rights cases. *See infra* part III.A.3. As noted earlier, the PLRA requires an initial partial filing fee and monthly payments thereafter.

43. *See, e.g.*, Souder v. McGuire, 516 F.2d 820, 823–24 (3d Cir. 1975) (District established availability of more than $50 in prisoner's trust fund account as sufficient to deny indigence status. Court reversed a denial of indigence status where prisoner had $50.07 in his account supplemented by a $7.50 per week stipend.); *In re* Smith, 600 F.2d 714, 716 (8th Cir. 1979) (Court reversed a denial of IFP status where prisoner had $65.85 in his trust fund account, stating that the exercise of a court's discretion in determining "whether a petitioner qualifies as a pauper under section 1915 . . . should not be applied to deny access to the federal courts simply because of the plaintiff's ability to pay for small physical or material comforts.").

44. Zaun v. Dobbin, 628 F.2d 990, 992 n.2 (7th Cir. 1980) (The standardized financial affidavit form adopted by the Northern District of Illinois to be used by all persons seeking to proceed IFP under 28 U.S.C. § 1915, which requires the affiant to set forth "with certainty and particularity information relating to his marital status, residence, employment and income, property owned, cash on hand, and outstanding obligations" does not conflict with the affidavit requirements set forth in Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948)).

45. *See* Trygue Lie Bulled v. Pallavicini, No. 93-55792, 1994 WL 88759, at *3 (9th Cir. Mar. 16, 1994). *See also* Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Federal Judicial Center rev. 1980) at 93 (Sample Form: "Declaration in Support of Request to Proceed *In Forma Pauperis*").

District of Massachusetts, continue to require indigent petitioners to submit AO Form 240 (1/94), "Application to Proceed Without Prepayment of Fees and Affidavit," along with the complaint. Information presented on AO Form 240 is then used to determine whether the requirements of section 1915(a)(1) have been satisfied.

(b) *Establishing poverty.* Prior to enactment of the PLRA, it was held to be sufficient for the affidavit to state that because of poverty, the prisoner could not meet court costs and "still be able to 'provide himself and his dependents with the necessities of life,'"[46] as long as the prisoner stated the facts necessary to establish poverty "with some particularity, definiteness, and certainty."[47] The courts have inquired into a petitioner's financial status and have denied petitions for IFP status filed by individuals "unable, or unwilling, to verify [their] poverty."[48]

(2) *Inquiring behind the affidavit.* Even prior to enactment of the PLRA, some courts required prisoners to present more information than the statutorily required affidavit, but the PLRA now requires courts to check also for a trust fund account balance certification.[49]

(3) *Delegating the determination of indigence*

(a) *"Unable to pay" standard.* The task of initially determining whether a prisoner meets the "unable to pay" standard of new section 1915(a) may be delegated to a magistrate judge, a pro se law clerk, or other court personnel. At least prior to enactment of the PLRA, districts that considered trust fund accounts or other financial information beyond a simple declaration of poverty by the prisoner and districts that used a partial filing fee scale found it especially useful to delegate the determination to court staff. Under the PLRA, courts must scrutinize prisoners' financial status more closely, making delegation to court staff even more practical.

(b) *Role of magistrate judge.* Section 636(b)(1)(A) gives a U.S. magistrate judge the authority to "hear and determine" nondispositive pretrial matters without the consent of the parties. This authority includes granting leave to proceed

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46. Rowland v. California Men's Colony, 506 U.S. 194 (1993) (quoting Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948)).

47. United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981), *cert. denied*, 455 U.S. 958 (1982) (quoting Jefferson v. United States, 277 F.2d 723, 725 (9th Cir. 1960), *cert. denied*, 364 U.S. 896 (1960)). As noted, under the PLRA a prisoner must submit additional, specific documentation to establish poverty.

48. *Jefferson*, 277 F.2d at 725. *See also Rowland*, 506 U.S. at 194; *McQuade*, 647 F.2d at 940.

49. Note that this has been the practice in districts where the relevant court of appeals has either required or expressed a preference for the two-step procedure for granting IFP status. These courts have accepted a case for filing based solely on whether the affiant is economically eligible. For a listing of these circuits, see *supra* note 42. *See also infra* part III.A.3 for a discussion concerning whether, prior to enactment of the PLRA, the grant of IFP status was preferred as a one-step or two-step process. *See also* William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 649 (1979); Recommended Procedures, *supra* note 45, at 57.

IFP, but does not include authority to deny a petition to proceed IFP.[50] Denial of IFP status is a dispositive matter that requires the action of a district judge, but such action may be taken on the report and recommendations of a magistrate judge under 28 U.S.C. § 636(b)(1)(B).[51]

(4) *Making findings for denial of IFP status*

(a) *Statement of reasons.* It was not always clear under old section 1915(a) whether a court was required to make findings or give a statement of reasons for denying a petition to proceed IFP. The PLRA does not, by its terms, clarify this question. The PLRA mandates dismissal of the complaint when the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from the relief being sought. The PLRA is silent as to whether such a dismissal should be accompanied by a statement of reasons. Under case law prior to the PLRA, the denial of an application to proceed IFP was deemed an appealable determination,[52] and some courts of appeals required the district court to explain its decision that the petitioner failed to meet the requirements of old section 1915(a).[53] There is no reason to believe that the courts of appeals that required the district court to offer findings or a statement of reasons for denying an IFP petition under old section 1915(a) will not continue to do so under the amended provisions.

(b) *Appeal.* Under Federal Rule of Appellate Procedure 24(a), a party who did not proceed IFP in district court but who desires to do so on appeal must first make a motion to the trial judge. If the motion is granted, the party may file the appeal with IFP status without further approval from the court of appeals. If the district court denies the motion, the party may renew it in the court of appeals. Rule 24(a) requires that the party attach to the motion "a copy of the statement of

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50. *See* Woods v. Dahlberg, 894 F.2d 187, 187–88 (6th Cir. 1990).

51. Section 636(b)(1) provides a ten-day period for a party to file objections to the magistrate judge's report and recommendations.

52. Roberts v. U.S. Dist. Ct., 339 U.S. 844, 845 (1950) (per curiam) (denial of a motion to proceed IFP is appealable under 28 U.S.C. § 1291). The decision is reviewed under an abuse-of-discretion standard. *See, e.g.*, O'Loughlin v. Doe, 920 F.2d 614, 616 (9th Cir. 1990); Phipps v. King, 866 F.2d 824, 825 (6th Cir. 1988).

53. *See* Ginelli v. Los Angeles Fire Dep't, No. 94-55200, 1994 WL 693143 (9th Cir. Dec. 9, 1994) (where deficiency of showing of indigence not evident from facts in affidavit, order denying IFP application vacated and case remanded for an explanation of district court's conclusion); Alvarez v. INS, No. 94-1907, 1995 WL 49114 (6th Cir. Feb. 7, 1995) (vacating order denying IFP application solely on affidavit of indigence, because the district court did not state reasons for denial and its rationale was not apparent from the record. "[A] remand is necessary because it is not possible to determine whether the district court abused its discretion in denying the application."). *See also* Adesanya v. West America Bank, No. 90-15439, 1991 WL 138841 (9th Cir. July 26, 1991) (The district court abused its discretion by dismissing case with prejudice as a sanction before ruling on plaintiff's IFP request under section 1915(a). "The court should have made a finding as to indigence and, if it found . . . [plaintiff] was indigent, should have directed . . . service of process unless the complaint was frivolous.").

reasons given by the district court for its action."[54] In addition, if the party was granted leave to proceed IFP in the district court and desires to do so on appeal and if the district court denies the motion and certifies that the appeal would not be taken in good faith, Rule 24(a) requires that the district court "state in writing the reasons for such certification or finding."[55]

3. Assessing the filing fee

Under section 1915, prior to the PLRA and under the PLRA, the court may allow a prisoner to proceed IFP without prepayment of the filing fee. Prior to the PLRA, the court had the discretion of requiring such a petitioner to make partial payment of the filing fee as funds became available. The PLRA amends section 1915 to add section (b), which requires the court to assess and collect the filing fee as described below (see Appendix G for sample orders for payment of the filing fee).

It should be noted, however, that when there are insufficient funds in the prisoner's account to pay the filing fee, the Administrative Office of the U.S. Courts has indicated that "[t]he court's primary responsibility under this statute is to receive the funds provided by the prisoner or by prison agency officials. There is no duty on the part of the courts to attempt to collect these funds."[56] At least one district, Massachusetts, has developed an "Order on Application to Proceed Without Prepayment of Fees" that (1) specifies the amount of the initial partial filing fee, if any, and (2) directs the U.S. marshal to serve a "Notice for Payment of Prisoner Filing Fees" notifying the institution that has custody of the prisoner that a case has been filed in the district court and that the prisoner has a filing-fee assessment that is to be paid to the court.

a. *Initial partial filing fee*

An initial partial filing fee will be assessed, consisting of 20% of the greater of "(A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal."[57]

The PLRA specifies the time period for determining the average monthly balance but not that for determining the average monthly deposits. Statutory construction principles lead to a presumption that Congress intended no time limit; this would require courts to calculate the average monthly deposits during the entire period of incarceration. However, some courts have adopted a practice of cal-

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54. *See* Sills v. Bureau of Prisons, 761 F.2d 792, 795 (D.C. Cir. 1988) (The required statement of reasons under Fed. R. App. P. 24(a) must present more than simple conclusions.)

55. *See* further discussion of this point at *infra* part III.H.

56. Memorandum from Joseph J. Bobek, Assistant Director and Chief Financial Officer of the Administrative Office of the U.S. Courts, to All Appellate and District Court Clerks (June 5, 1996) (on file with the Administrative Office of the U.S. Courts).

57. 28 U.S.C. § 1915(b)(1).

culating average monthly deposits during the six-month period included in the IFP application, or the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the action.

b. *Monthly payments*

After the initial partial filing fee is paid as described above, the prisoner is required, by new section 1915(b)(2), to make monthly payments of 20% of the preceding month's income credited to the prisoner's account until the full filing fee has been paid. These monthly payments are to be forwarded to the court by the penal institution that has custody of the prisoner each time the prisoner's trust fund account contains more than $10.

It appears that the filing fee has to be collected, including any court-imposed installment payments, regardless of whether the complaint has been dismissed on one of the grounds enumerated in section 1915(e)(2)(B). A primary objective of the PLRA is to discourage frivolous or meritless complaints by prisoners. If the prisoner's obligation to pay the fee survives dismissal of the complaint, at least two objectives are met: (1) there is a disincentive for prisoners to file frivolous complaints; and (2) the overall purpose of filing fees to support the administrative cost of court operations is achieved.

c. *Effect of partial payment on determination of frivolousness or maliciousness*

Prior to the PLRA, the circuit courts differed in their reading of the effect of partial payment on the section 1915(d) determination of frivolousness or maliciousness.

(1) *Sua sponte dismissal.* Before enactment of the PLRA, several courts of appeals held that a district court could not sua sponte dismiss an action as frivolous under 28 U.S.C. § 1915(d) after the plaintiff paid a partial filing fee.[58] These courts reasoned that dismissal for frivolousness after payment of the partial fee was inconsistent with Federal Rule of Civil Procedure 4(a), which requires a summons to issue once a complaint is filed (a complaint is considered filed as soon as the plaintiff pays a filing fee),[59] and with Federal Rule of Civil Procedure 15(a), which requires that the plaintiff be given an opportunity to amend a complaint before sua sponte dismissal by the court.[60]

(2) *Section 1915 dismissal.* Several districts abandoned their partial-payment plans partly or wholly because of concern that these plans would limit their discretion under section 1915 to dismiss frivolous claims.[61] Note that the PLRA re-

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58. Butler v. Leen, 4 F.3d 772 (9th Cir. 1993); Clark v. Ocean Brand Tuna, 974 F.2d 48, 50 (6th Cir. 1992); Grissom v. Scott, 934 F.2d 656, 657 (5th Cir. 1991); Herrick v. Collins, 914 F.2d 228, 230 (11th Cir. 1990); *In re* Funkhouser, 873 F.2d 1076, 1077 (8th Cir. 1989); Bryan v. Johnson, 821 F.2d 455, 458 (7th Cir. 1987).

59. *See, e.g.*, Franklin v. State of Oregon, State Welfare Div., 662 F.2d 1337, 1340–41 (9th Cir. 1981).

60. *See, e.g.*, *Clark*, 974 F.2d at 50.

61. *See* Cordisco, *supra* note 30.

quires the officers of the court to "issue and serve all process, and perform all duties in such cases."[62] It remains to be seen whether this provision conflicts with Federal Rule of Civil Procedure 4(b).[63]

(3) *Opportunity to amend complaint.* Apart from the PLRA, once the fee is paid, the complaint is considered filed and the plaintiff acquires the same rights to procedural protection from early dismissal that fully paid litigants have. However, it remains an unsettled issue whether a sua sponte dismissal under section 1915 after payment of a partial filing fee or after collection of some, but not all, monthly payments under the PLRA violates Federal Rule of Civil Procedure 15(a), which gives the plaintiff an opportunity to amend the complaint once before dismissal.

(4) *Section 1915(d) dismissals.* Although in some circuits the district court could not dismiss an action under old section 1915(d) after payment of a partial filing fee, the court could still dismiss certain counts or defendants under section 1915(d) after payment but before service or amendment of the complaint.[64] The action survived even if some counts or defendants were dismissed for frivolousness.

(5) *Delaying receipt of partial filing fee.* Districts with partial-payment plans could avoid the timing problem with respect to dismissals under old section 1915(d) by structuring their IFP screening procedures so that the court did not actually receive the filing-fee payment until after it had determined whether the entire complaint was "frivolous" or "malicious."

(a) *Requiring fee after merits determination.* More specifically, if the court determined that the petitioner was financially eligible for IFP status, but that such status should be conditioned on receipt of a partial filing fee, the court could refrain from requiring that the fee be paid until after it had examined the merits of the complaint. If the entire complaint could be dismissed under old section 1915(d), the court could do so without requiring payment of the partial fee. If a section 1915(d) dismissal was not warranted, the court could order the petitioner to pay the partial filing fee and allow the case to proceed.

(b) *One-step procedure.* The deferred-payment approach was easily adaptable to the one-step screening procedure in which the court examined the merits of the claim before granting IFP status and allowing the complaint to be filed.

(c) *Two-step procedure.* The deferred-payment approach was also amenable to the two-step procedure wherein if the court found that a petitioner was financially eligible for IFP status under section 1915(a) but was able to pay a partial filing fee, IFP status could still be granted and the complaint filed before the court received the partial fee. However, the granting of IFP status would be a temporary

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62. 28 U.S.C. § 1915(d), *as amended by* Act of April 26, 1996.

63. *Id.*

64. *See, e.g.*, Butler v. Leen, 4 F.3d 772, 772 (9th Cir. 1993) ("We hold only that the district court should not have dismissed this action before service of process.").

and provisional filing conditioned on the court's decision to dismiss the case under old section 1915(d) before requiring the partial fee to be paid.[65]

B. Procedures for ordering service of process

1. Absence of procedural protections in the PLRA

The PLRA articulates no procedural protections before dismissal of a complaint for frivolousness, maliciousness, failure to state a claim upon which relief may be granted, or seeking monetary damages against a defendant who is immune from such relief.[66]

2. Absence of direction to the court in the PLRA

Under the PLRA, there is no direction to the court concerning dismissal of a complaint for frivolousness, maliciousness, failure to state a claim upon which relief may be granted, or seeking monetary damages against a defendant who is immune from such relief before service of process.[67] The PLRA requires the court to dismiss a complaint on one of the enumerated grounds at any time during the litigation, presumably including before service of process.[68]

3. Time requirements

New section 1915(d) incorporates old section 1915(c)'s requirement that officers of the court, such as U.S. marshals, issue and serve all process in IFP cases. Federal Rule of Civil Procedure 4(m) requires the plaintiff to serve the summons and complaint on the defendant within 120 days after the complaint was filed or else the action will be dismissed without prejudice, unless the plaintiff can show "good cause" why timely service was not effected. Because a prisoner litigant relies on a U.S. marshal for service, the issue of when that reliance may constitute good cause for failing to comply with the 120-day time limit of Rule 4(m) has arisen.

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65. This practice of not requiring the actual payment of the partial filing fee to the court until the merits of the petitioner's complaint have been examined was used by the U.S. District Court for the District of Nevada. Earlier, the District of Nevada had required payment of the fee before it conducted a review of the merits under section 1915(d). Later, if the entire complaint warranted dismissal under section 1915(d), the court refunded the prisoner the amount he or she had paid as a partial filing fee, granted the prisoner full IFP status, and then dismissed the complaint under section 1915(d). However, the district stopped this later practice after a decision by the Ninth Circuit held that once the prisoner pays the fee and it is received by the court (even if the court refunds the fee at a later time), the case must proceed as a normal civil action. *See* Klein v. Elliot, No. 94-15574, 1994 WL 659081 (9th Cir. Nov. 22, 1994).

66. 28 U.S.C. §§ 1915(e)(2), 1915A(b).

67. 28 U.S.C. §§ 1915(e)(2), 1915A(b).

68. 28 U.S.C. §§ 1915(e)(2)(b), 1915A(a), (b).

4. Service in IFP cases

If at filing the prisoner is unable to pay the full filing fee, the court can grant the prisoner IFP status and the U.S. marshal can then make service of process on his or her behalf (see Appendix H for sample orders directing service by the U.S. marshal). If a plaintiff pays the district court filing fee and gives the clerk a summons for each defendant in the proper form, issuance and service of process is required.[69] Federal Rule of Civil Procedure 4(b) requires the clerk to issue a summons for service on the defendant if the plaintiff gives the clerk the summons in proper form. IFP plaintiffs are not responsible for service of process.[70] The court can dismiss an IFP action without following these procedures only when the court lacks subject-matter jurisdiction.[71]

5. Service when full filing fee is paid

Even if the prisoner pays the full filing fee, it appears that under new section 1915(d) the court can still grant the prisoner leave to proceed IFP, thereby permitting service of process by the U.S. marshal without the prisoner having to pay and arrange for service.

6. Procedures under old section 1915(a)

When a plaintiff proceeded IFP under old section 1915(a), the district court could dismiss the complaint for lack of subject-matter jurisdiction without issuance of process. That section authorized a district court to dismiss an IFP action for frivolousness or maliciousness, but it did not define any procedural protections required before such a dismissal. The difficult issue treated inconsistently by the courts was whether an IFP complaint over which the court had subject-matter jurisdiction could be dismissed as frivolous under old section 1915(d) without issuance of process.[72] The majority of circuits that addressed the question of dismissal without service of process under old section 1915 allowed dismissal of frivolous cases before issuance of process.[73]

In *Puett v. Blandford*,[74] the Ninth Circuit adopted the reasoning of two other circuits that had considered the issue of dismissal for failure to effect service under

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69. *See* Fed. R. Civ. P. 4(b).

70. Fed. R. Civ. P. 4(c)(2).

71. Fed. R. Civ. P. 12(h)(3).

72. *See* Franklin v. Cupp, 745 F.2d 1221, 1226 n.4 (9th Cir. 1984) (lists cases decided by the Ninth Circuit that were inconsistent as to whether dismissal under section 1915(d) as originally enacted required prior procedural protections).

73. *See, e.g.*, Ali v. Higgs, 892 F.2d 438 (5th Cir. 1990), *cert. denied*, 441 U.S. 966 (1979); Phillips v. Mashburn, 746 F.2d 782, 784 (11th Cir. 1984). *But see* Lewis v. New York, 547 F.2d 4, 5 (2d Cir. 1976); Bayron v. Trudeau, 702 F.2d 43, 45 (2d Cir. 1983) (holding that it was an error to dismiss under section 1915(d) before service of process); Martin-Trigona v. Stewart, 691 F.2d 856, 857 (8th Cir. 1982) (per curiam); Collins v. Cundy, 603 F.2d 825, 827–28 (10th Cir. 1979) (per curiam); Boyce v. Alizaduh, 595 F.2d 948, 950 (4th Cir. 1979).

74. 912 F.2d 270, 274–75 (9th Cir. 1990).

old section 1915(c)[75] and held that "an incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. marshal for service of the summons and complaint, and having provided the necessary information to help effectuate service, plaintiff should not be penalized by having his or her action dismissed for failure to effect service where the U.S. marshal or the court clerk has failed to perform the duties required of each of them under 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure." Finding that failure to obtain proof of service was not due to the plaintiff's neglect, the court stated that a local rule that did not require the marshal to effect personal service after having failed at mail service cannot be read to "impinge on the rights of pro se plaintiffs proceeding in forma pauperis to adequate assistance by the U.S. marshal in the service of a summons and complaint" and that adequate assistance entails the court's enforcement of a more effective method of service (personal service), especially since it is specifically required under the Federal Rules of Evidence.[76]

C. Procedures for determining whether a claim or complaint should be dismissed

Experience with prisoner civil rights litigation has revealed that, even under the most liberal standards, much of this litigation is frivolous or otherwise appropriate for dismissal. This section discusses

- how districts have allocated responsibility for the initial review of prisoner IFP complaints;
- the PLRA's four mandates for dismissal; and
- procedures for determining dismissal.

Pre-PLRA law authorized, but did not mandate, dismissal of prisoner civil rights suits. The PLRA has several sections that mandate dismissal based on judicial determinations.[77] Before describing the statutory grounds for dismissal, however, it is worth noting the fairly well-established position that courts should construe pleadings more liberally for pro se parties than for represented parties.[78] This rule helps ensure that meritorious positions are recognized and that the litigant is afforded an opportunity to appear and be heard. The claims of pro se parties

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75. Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987) (The plaintiff should not be penalized for failure of U.S. Marshals Service to properly effect service if such failure was not plaintiff's fault. Dismissal of plaintiff's action was upheld in this case because he did not request that the marshal properly serve the appropriate defendant when he was aware that the marshal's attempts at service by mail had failed.); Romandette v. Weetabix Co., 807 F.2d 309, 311–12 (2d Cir. 1986) (dismissal was improper because plaintiff exhibited good cause for failure to meet the 120-day limit for effecting service).

76. *Puett*, 912 F.2d at 276. *See* Fed. R. Civ. P. 4(e) (amended 1993).

77. The next section, D, treats the PLRA section that precludes courts from accepting filings from prisoners who have not exhausted administrative remedies.

78. *See* Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (pleadings of pro se litigants should be held to less stringent standards than those drafted by lawyers). *See also* Hughes v. Rowe, 449 U.S. 5, 9 (1980).

should be given adequate consideration even if such parties fail to comply with technical procedural requirements and formalities.[79]

1. Initial decision maker

Districts vary in how they allocate responsibility for the initial review of IFP complaints under section 1915, depending on their staffing (whether they have pro se law clerks) and on their priorities for their magistrate judges. In some districts, district judges review IFP complaints. In other districts, they share this responsibility with magistrate judges. Still other courts divide the responsibility of reviewing IFP complaints between the chambers clerks and pro se law clerks. (See Appendix H for sample initial orders regarding prisoner IFP applications.)

Districts with pro se law clerks often have them make the initial determination of whether an IFP complaint should be dismissed pursuant to section 1915. Pro se law clerks, because they concentrate on prisoner civil rights and habeas corpus cases, quickly become experts not only on the substantive law but also at deciphering often illegible handwriting, identifying the prisoner's claims, and determining the actual relief the prisoner seeks.

2. Standards for determining whether to dismiss

The PLRA created three new U.S. Code subsections that provide grounds for dismissal of a complaint:

- *28 U.S.C. § 1915(e)(2).* Section 804 of the PLRA amended 28 U.S.C. § 1915(d), part of the section governing IFP petitions, and redesignated it as section 1915(e). Under new section 1915(e)(2), the court must dismiss a complaint at any time, even though part or all of the filing fee has been paid, if the court determines the existence of a statutory ground for dismissal.
- *28 U.S.C. § 1915A*. Section 805 of the PLRA inserts section 1915A, a new section on screening prisoner civil rights actions, after section 1915. Section 1915A(a) directs the court to conduct an initial review of a civil action by a prisoner seeking relief from a governmental entity or employee, before docketing if possible, or, in any event, as soon as practicable after docketing, and to identify cognizable claims or dismiss the complaint, or parts thereof, on the grounds listed. Although placed next to the IFP statute, the language of section 1915A does not restrict screening to prisoner

79. *See* Kelley v. Secretary, U.S. Dept. of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (leniency with respect to mere formalities should be extended to a pro se party, but a court may not similarly take a liberal view of jurisdictional requirements and set a different rule for pro se litigants); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988) (courts have a duty to ensure that pro se litigants do not lose the right to a hearing on the merits of a claim as a result of ignorance of technical procedural requirements). *See also* Brown v. Frey, 806 F.2d 801, 804 (8th Cir. 1986).

complaints brought IFP, nor does it restrict screening to prisoner actions challenging the conditions of confinement.

- *42 U.S.C. § 1997e*. The PLRA substantially revises old section 1997e, which is now entitled "Suits by Prisoners." Under 42 U.S.C. § 1997e (c)(1), a court must, on its own motion or on motion of a party, dismiss a prisoner action challenging conditions of confinement under federal law if the court determines the action meets a ground for dismissal.

The grounds for dismissal are as follows:

- "the allegation of poverty is untrue";
- the action or complaint "is frivolous or malicious";
- the action or complaint "fails to state a claim on which relief may be granted"; and
- the action or complaint "seeks monetary relief from a defendant who is immune from such relief."

In addition, new subsection 1997e(e), although titled "Limitation on Recovery," prohibits a prisoner from bringing a "federal civil action . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury."

The following discussion describes the grounds for dismissal and how the courts treated similar grounds in pre-PLRA cases.

a. *Allegation of poverty is untrue*

This ground is found only in the IFP statute, that is, at 28 U.S.C. § 1915(e)(2)(A). The language of section 1915(e)(2) does not, on its face, limit dismissals to prisoner cases challenging the conditions of confinement.

Although amended sections 1915(a) and (b) provide that prisoners who cannot afford to prepay the filing fee must pay a portion of the filing fee as an initial payment, the PLRA does not specify a cutoff for determining indigence.[80]

b. *Action or complaint is "frivolous" or "malicious"*

This ground is found in the IFP statute (at 28 U.S.C. § 1915(e)(2)(B)(i)), in the new section entitled "Screening" (at 28 U.S.C. § 1915A(b)(1)), and in the "Suits by Prisoners" section (at 42 U.S.C. § 1997e(c)(1)).

Because none of the sections define "frivolous" or "malicious," pre-PLRA case law may provide guidance as to the meaning of the terms, which were found in old section 1915(d). "Maliciousness" is seldom used as an independent ground for dismissing prisoner pro se cases. Typically, a finding of maliciousness is tantamount to a finding of many prior instances of frivolousness. Thus, courts have found that a suit is properly dismissed as malicious where a plaintiff has already engaged in a multitude of identical or closely similar suits and the issues have already been determined.[81]

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80. For more on prisoners applying to proceed IFP, *see supra* part I.B.

81. *See, e.g., In re* Tyler, 677 F. Supp. 1410 (D. Neb. 1987), *aff'd*, 839 F.2d 1290 (8th Cir. 1988); Daye v. Bounds, 509 F.2d 66 (4th Cir.), *cert. denied*, 421 U.S. 1002 (1975); *see also* Cooper

Although there is little case-law discussion of what constitutes "malicious" litigation by a prisoner proceeding IFP, many cases have discussed the proper definition of "frivolous" in the section 1915 context. A complaint is frivolous for purposes of the section 1915 decision if the complaint lacks an arguable basis either in law or in fact. Thus, many complaints are dismissed for one or both of two broad reasons: the facts alleged are essentially "fanciful" or "delusional," or the facts alleged do not amount to a legally cognizable claim.

(1) *Dismissal as factually baseless.* Where the allegations in a complaint are of a delusional nature (e.g., cosmic rays being directed at the plaintiff's head) or clearly baseless, the court may dismiss the complaint under section 1915.[82] However, it is important to distinguish between delusional litigants and delusional claims. Delusional or otherwise disturbed prisoners are as likely as—if not more likely than—other prisoners to be subjected to treatment that amounts to a constitutional violation. Moreover, they may be less able to obtain counsel, even of the jailhouse variety. Thus, it is important to look to the nature of the claim, rather than the claimant alone.[83]

(2) *Dismissal as legally meritless.* A complaint may also be dismissed where it is "based on an indisputably meritless legal theory."[84] For example, courts have allowed dismissal of complaints on review under old section 1915(d) where it was undeniable that the defendant was immune from suit or where the claim alleged the infringement of a right that did not exist.

Because the section 1915(e) review is intended to foster a system that treats paying and nonpaying litigants alike, a claim that is arguable should survive the review, even if it is likely to be ultimately unsuccessful against a motion for summary judgment or at trial.[85]

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v. Delo, 997 F.2d 376, 377 (8th Cir. 1993) (allowing dismissal of a complaint that was duplicative of a complaint previously dismissed as frivolous); Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993) (holding that prisoner's IFP civil rights action was "malicious" and subject to dismissal where it duplicated allegations in pending action in another district court); Aziz v. Burrows, 796 F.2d 1158 (8th Cir. 1992) (allowing dismissal under former section 1915(d) of duplicative but meritorious complaint).

82. Watson v. Caton, 984 F.2d 537, 539 (1st Cir. 1993). For an example of such allegations, see Pusch v. Social Sec. Admin., 811 F. Supp. 383 (C.D. Ill. 1993) (among other claims against many defendants, plaintiff accused the *State Journal Register*, a newspaper, of failing to spread the word regarding her status as the "third party of the Holy Trinity" and of her purported crucifixion in Los Angeles).

83. *See* Fratus v. Deland, 49 F.3d 673 (10th Cir. 1995); Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992) (prisoner's delusional behavior during telephonic evidentiary hearing not sufficient basis for dismissal where allegations themselves were not "fantastic or delusional").

84. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (citing Neitzke v. Williams, 490 U.S. 319, 327 (1989)). For more on claims against immune defendants, see part III.C.2.d.

85. Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 512, 515 (11th Cir. 1991).

c. *Action or complaint "fails to state a claim on which relief may be granted"*

This ground is found in the IFP statute (at 28 U.S.C. § 1915(e)(2)(B)(ii)), in the new section entitled "Screening" (at 28 U.S.C. § 1915A(b)(1)), and in the "Suits by Prisoners" section (at 42 U.S.C. § 1997e(c)(1)).

Before enactment of the PLRA, courts could not automatically dismiss as frivolous complaints that failed to state a claim.[86] In *Neitzke*, the Supreme Court ruled that old section 1915(d)'s standard for "frivolous or malicious" was not coterminous with the standard for dismissing a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.[87] That is, a complaint filed IFP that failed to state a claim sufficient to survive a motion to dismiss under Rule 12(b)(6) was not automatically frivolous under old section 1915(d). Precedents that permitted dismissal under old section 1915(d) for claims in which the plaintiff's "realistic chance of ultimate success is slight" probably did not survive the Court's decisions in *Neitzke* and in *Denton v. Hernandez*.[88] Under the new code sections added by the PLRA, courts must dismiss for failure to state a claim at any time. Therefore, dismissal at a later stage of the proceedings under Federal Rule of Civil Procedure 12(b)(6) remains an appropriate means of dismissal.

A complaint is not subject to dismissal 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."[89] The pro se plaintiff's complaint must be construed liberally under this standard.[90] Nevertheless, it may be dismissed if supported only by vague and conclusory allegations.[91]

d. *Action or complaint "seeks monetary relief from a defendant who is immune from such relief"*

This ground is found in the IFP statute (at 28 U.S.C. § 1915(e)(2)(B)(iii)), in the new section entitled "Screening" (at 28 U.S.C. § 1915A(b)(2)), and in the "Suits by Prisoners" section (at 42 U.S.C. § 1997e(c)(1)).

Before enactment of the PLRA, some courts allowed complaints to proceed against those who were immune from money damages because the immunity defense could be waived. Other courts dismissed similar complaints on initial review.[92] Under section 1915(e)(2), the court must dismiss a claim for money damages at any time it determines a defendant is immune from such a claim.

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86. *See Neitzke*, 490 U.S. at 319.

87. *Id*. at 322.

88. 504 U.S. 25 (1992). *See, e.g.*, Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993).

89. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

90. Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaint held to "less stringent standards than formal pleadings drafted by lawyers").

91. Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992).

92. *See* Yellen v. Cooper, 828 F.2d 1471, 1475–76 (10th Cir. 1987).

The PLRA does not distinguish between absolute immunity and qualified immunity, nor does it address pleading requirements for prisoners who sue defendants that are immune from monetary relief. Absolute immunity is a more readily identifiable ground for dismissal on initial review than qualified immunity, which may require factual development before a court can make a determination on immunity. Because section 1915(e)(2) directs courts to dismiss defendants immune from damages at any time, however, courts still may dismiss immune defendants after the initial review stage, for example, on a motion under Rule 12(b)(6) or Rule 56.

e. *Prior showing of physical injury*

The IFP statute was amended to limit recovery by any prisoner for mental or emotional injury suffered while in custody to instances in which there has been a prior showing of physical injury. Technically, this amendment is not a grounds for dismissal. It, nonetheless, limits the kind of claim that a prisoner can file under the IFP statute.

3. Procedure for determining dismissal

a. *Timing*

Before enactment of the PLRA, courts differed about the appropriate time to make the determination under old section 1915(d).[93] Section 1915(e)(2) directs courts to dismiss a claim at any time they determine one of the four grounds for dismissal is present. Section 1915A(a) contemplates dismissal at the initial review stage based on the three grounds it lists. Section 1997e(c) provides for dismissal based on the three grounds it lists, on a motion by either the court or a party after the prisoner has exhausted administrative remedies; but if the claim on its face requires dismissal, the court may dismiss it without the exhaustion of administrative remedies.

b. *Dismissal of a case on pleadings alone*

Prisoner pro se complaints can be difficult to decipher and, like other pro se pleadings, they must be construed with some liberality. Before enactment of the PLRA, although courts had broad discretion in determining whether to dismiss IFP complaints as frivolous, they had to have information sufficient to allow them to exercise that discretion. The PLRA does not change that discretion, at least with regard to frivolousness and maliciousness. Thus, it is generally inappropriate for a court to dismiss an inadequate pleading by a pro se plaintiff merely because the court cannot determine from the face of the pleading whether the complaint has merit. Instead, the court should inquire into the basis of the action to determine whether a complaint that appears to be meritless might be amended to raise a nonfrivolous or otherwise arguably meritorious claim.

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93. *See supra* part III.A.1–2.

Although courts have great discretion in how to make this inquiry, use of one or another of the techniques discussed below is often helpful and sometimes required.[94]

c. *Development of a record on which to determine whether to dismiss*

In considering dismissal of a prisoner's action under the provisions of section 1915(e)(2), 1915A(b), or 1997d(c), a court may consult its own records and take judicial notice of previous actions by the same prisoner. Pre-PLRA holdings recognized that many frivolous actions by the same litigant may indicate an abuse of the IFP procedure.[95] The PLRA has gone further, adding 28 U.S.C. § 1915(g), which states that a prisoner may not bring a complaint IFP if the prisoner has had three or more complaints dismissed as frivolous or malicious, or for failure to state a claim on which relief may be granted, "unless the prisoner is under imminent danger of serious physical injury."

In addition, courts have several options for gathering other information necessary to the determination. The PLRA probably does not affect the availability of these options.

(1) *Hearing to explore the factual basis of the claim (*Spears *hearing).* In many courts, information about the basis of an inartfully drawn complaint is gathered in a hearing, typically conducted by a magistrate judge. The hearing, called a "*Spears* hearing" after the case *Spears v. McCotter*,[96] is "in the manner of a motion for more definite statement." That is, it is not intended to resolve matters in dispute, but to determine whether a prisoner who has filed an inadequate pleading can allege facts sufficient to make out a colorable claim. However, the hearing can also provide an opportunity to encourage informal resolution of the matter by the parties and therefore obviate the need for a judicial disposition.[97]

In some instances *Spears* hearings are best conducted at the penal institution, but they may also be held telephonically.[98] As discussed in part II.G *supra*, the PLRA also encourages hearings by videoconference or other telecommunications technology. In many districts, hearings are held before (or contemporaneously with) any response from the state. However, in some districts that use both

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94. *See, e.g.*, Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994) (where section 1983 complaint's legal basis was not "indisputably meritless" and facts alleged were not "fantastic or delusional," district court abused its discretion by dismissing complaint without using either a hearing or a questionnaire to determine whether prisoner could have presented a nonfrivolous claim).

95. Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976); Van Meter v. Morgan, 518 F.2d 366 (8th Cir.), *cert. denied*, 423 U.S. 896 (1975).

96. 766 F.2d 179 (5th Cir. 1985).

97. The *Spears* hearing approach has been recognized by the Supreme Court and adopted by many courts. *See, e.g.*, Neitzke v. Williams, 490 U.S. 319 (1989); Reeves v. Collins, 27 F.3d 174 (5th Cir. 1994); Eason v. Thaler, 14 F.3d 8 (5th Cir. 1994); Perryman v. Bless, No. 86-5528, 1987 WL 36958, at *1 (6th Cir. April 24, 1987). For a discussion of the scope and purposes of a *Spears* hearing, see Wilson v. Barrientos, 926 F.2d 480 (5th Cir. 1991).

98. Gee v. Estes, 829 F.2d 1005 (10th Cir. 1987).

Martinez reports (described below) and *Spears* hearings, such as the Southern and Middle Districts of Alabama, the hearings are generally held after the court receives the *Martinez* reports from the defendants.

(2) *Questionnaires directed to prisoner plaintiffs* (Watson *questionnaires*). Some courts use questionnaires to obtain the sort of information obtained in a *Spears* hearing.[99] Like the *Spears* hearing, these questionnaires are intended to "bring into focus the factual and legal bases of prisoners' claims."[100] Several circuits have implicitly or explicitly recognized questionnaires directed to incarcerated litigants as an appropriate means by which district courts can gather information.

(3) *Report by institutional defendant* (Martinez *report*). Many courts have found it useful to require the penal institution to supply preliminary information about a prisoner's complaint and the surrounding circumstances. Under this procedure, the penal institution (usually a defendant in the action) is ordered to investigate the plaintiff's claims, report on the investigation, and supply standard information before the matter proceeds. The report should be accompanied by copies of all relevant documents, including medical reports if relevant. Although the responsibility to prepare a report must remain with the party ordered to do so (typically prison officials), the respondent may in some instances wish to incorporate the findings of other agencies or organizations.[101] (Appendix I contains sample forms that direct a defendant to investigate the allegations of the complaint and report to the court by a specified date.) These reports are sometimes called *Martinez* reports, after the case in which the U.S. Court of Appeals for the Tenth Circuit approved their use.[102] As with *Spears* hearings, some courts permit the report of the institutional defendant to be made telephonically in appropriate cases.

By ordering a defendant to file a *Martinez* report early in the litigation, the court can in some cases save time and effort—either that required to dispose of frivolous cases on motion or that required to deal formally with a problem the penal institution might be able and willing to address informally. Even reports that did not support a dismissal under old section 1915(d) were useful in a later stage of the litigation. However, there are limits to how a court can use a *Martinez* report.

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99. *See, e.g.*, Watson v. Ault, 525 F.2d 886 (5th Cir. 1976).

100. *Id*. at 892.

101. *See, e.g.*, Worley v. Sharp, 759 F.2d 786, 787 (10th Cir. 1985) (prison officials were free to incorporate information from health department in *Martinez* report, but duty to prepare report was nondelegable).

102. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). The *Martinez* procedure is further explained in Gee v. Estes, 829 F.2d 1005 (10th Cir. 1987).

4. Need for statement of reasons to support dismissal

Unless the basis for dismissal is evident on the face of the complaint, it is good practice, and sometimes required, to state the grounds for dismissal clearly on the record.[103]

D. Mandatory exhaustion of administrative remedies

The PLRA creates major changes in 42 U.S.C. § 1997e. Old section 1997e authorized the court to stay a prisoner's suit for 180 days while the prisoner exhausted administrative remedies, but only if the U.S. Attorney General had certified, or the court had determined, that the administrative remedies were in compliance with "minimum acceptable standards" that the Attorney General was to promulgate, based on guidelines in section 1997e.

The PLRA amended section 1997e(b) to eliminate the requirement that the Attorney General provide minimum acceptable standards for development and implementation of administrative remedies. New section 1997e(b) essentially is a redesignation of old section 1997e(d). New section 1997e(b) continues the old statute's provision that the failure of a state to adopt or adhere to an administrative grievance procedure is not a basis for an action under section 1997a (allowing the Attorney General to bring a cause of action challenging the conditions of penal institutions in certain circumstances) or under section 1997c (allowing the Attorney General to intervene in certain actions challenging conditions of confinement). The PLRA also amended 42 U.S.C. § 1997e(c) to eliminate the requirement that the Attorney General develop a procedure for prompt review and certification of grievance procedures at jails and other penal institutions of states and political subdivisions of states.

1. Court's discretion to stay an action pending administrative exhaustion

Section 1997e(a) now provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." The court no longer has the option to stay actions while prisoners exhaust such remedies, and there is no longer any requirement that either the Attorney General certify or the court find that those administrative remedies are acceptable.

Neither the new version nor the old version of the statute defines exhaustion. Under old section 1997e, courts held that to meet the exhaustion requirement, the prisoner had to exhaust all levels of administrative remedy that were available

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103. Cases discussing dismissal under old section 1915(d) include Moore v. Mabus, 976 F.2d 268 (5th Cir. 1992) (finding need for adequate record development and adequate statement of dismissal); Phipps v. King, 866 F.2d 824 (6th Cir. 1988) (same); Ely v. United States Postal Serv., 1987 U.S. App. LEXIS 9452 (D.C. Cir. June 30, 1987) (stressing importance of a clear statement of reasons); Levoy v. Mills, 788 F.2d 1437 (10th Cir. 1986) (same). *But see* Sills v. Bureau of Prisons, 761 F.2d 792 (D.C. Cir. 1985) (excusing the lack of an explanation where the basis for dismissal is evident on the face of the complaint).

within the 180-day continuance period provided under the section.[104] In addition, a penal institution may have been deemed to have waived the exhaustion requirement by, for example, dismissing without further review the prisoner's administrative complaint.[105] (See Appendix J for a sample findings and recommendations report by a U.S. magistrate judge dismissing a case for failure to exhaust administrative remedies.)

It remains to be determined whether a prisoner must exhaust administrative remedies when the particular relief sought in the federal action is unavailable under the administrative remedy.

Section 1915(e)(2) does not specify that a court must dismiss a complaint, despite collection of the filing fee, when a prisoner fails to exhaust administrative remedies before attempting to bring a federal action challenging conditions of confinement. Therefore, it appears that if a court determines that a prisoner cannot bring a cause of action because of the prisoner's failure to exhaust administrative remedies, the prisoner will not be charged the filing fee. A dismissal under section 1997e, likewise, appears not to count against the prisoner in the future for purposes of section 1915(g).

2. Impact of dismissal on filing fee requirement is unclear

Amended section 1997e(c)(2) further provides that if a claim, on its face, meets any of the above-mentioned grounds for dismissal, the court may dismiss it without requiring exhaustion of administrative remedies. The statute does not specify whether such a dismissal requires the prisoner to pay the filing fee. It is likely, however, that such a dismissal would count against the prisoner in the future for purposes of section 1915(g).

3. Pro se law clerk's role and administrative remedies available

The pro se law clerk can play a major role in handling exhaustion questions. First, to determine the available administrative remedies, the pro se law clerk should consult the state statutes and regulations applicable to the prisoner litigant. In addition, the pro se law clerk should require the prisoner petitioner to indicate whether he or she is aware of the grievance procedures in place at the penal institution. The prisoner petitioner can also be asked whether he or she used the procedures and if so, to what extent. If the prisoner petitioner did not use the grievance procedures, some effort should be made to determine why. The prisoner might indicate, for example, that he or she is under imminent danger of serious physical injury, thereby invoking the exception to the prohibition on filing three or more claims that were dismissed as frivolous, malicious, or failing to state a claim upon which relief could be granted.

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104. Lewis v. Meyer, 815 F.2d 43 (7th Cir. 1987); Maulick v. Central Classification Bd., 659 F. Supp. 24 (E.D. Va. 1986).

105. Robinson v. Young, 674 F. Supp. 1356 (W.D. Wis. 1987).

To determine the available administrative remedies, courts should consult the state statutes and regulations applicable to the prisoner litigant.

E. Procedures for determining whether and how to provide counsel

Unlike criminal defendants, prisoners and indigents filing civil actions have no constitutional right to counsel. It is therefore within the broad discretion of the court to determine whether and how to appoint counsel in prisoner civil rights cases. However, the exercise of the court's discretion should be guided and informed by a number of statutory and case-law-derived factors. Courts should also consider the implications of any court-based programs for providing legal services to prisoners, as discussed in part II.B *supra*.

This section discusses

- statutory authority;
- factors to consider in the exercise of discretion to request representation of the plaintiff; and
- discretion to refuse to request counsel to represent the plaintiff.

1. Statutory authority

Section 1915(e)(1) of title 28 of the U.S. Code now provides that the "court may request an attorney to represent any person unable to afford counsel." This language is not significantly different from that of old section 1915(d), and thus pre-PLRA case law can provide guidance in interpreting the court's options and obligations. The court has the discretion to ask an attorney to represent an indigent prisoner, but generally cannot compel the attorney to do so. The U.S. Supreme Court has held that old section 1915(d) authorizes the court to request, but not require, attorneys to represent indigent civil litigants.[106]

2. Factors to consider in exercise of discretion to request representation of plaintiff

a. *Non–case-related factors*

In deciding whether to grant a motion for appointment of counsel, the court should bear in mind that there are no federal funds available for payment of attorneys' fees in cases in which an attorney accepts the request to serve under section 1915(e)(1). An attorney who accepts the court's request under section 1915(e)(1) to represent an indigent prisoner in a civil case must do so on an unpaid, or pro bono, basis. There is the possibility in section 1983 cases and other civil rights cases that attorneys' fees may be awarded under 42 U.S.C. § 1988 if the prisoner prevails. There is the additional possibility that attorneys' fees may be recovered if a contingency-fee arrangement exists and the plaintiff prevails.

The PLRA makes substantial changes to the attorneys' fee provisions of 42 U.S.C. § 1988 for prisoner cases, imposing significant limitations on an award of

106. Mallard v. United States Dist. Ct., 490 U.S. 296 (1989).

attorneys' fees in such cases. Under the Act, attorneys' fees shall not be awarded unless the fees were directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under 42 U.S.C. § 1988 *and* the fees are proportionately related to court-ordered relief for the violation or were directly and reasonably incurred in enforcing relief ordered for the violation.[107] The Act also limits the hourly rate in these cases to a maximum of 150% of the hourly rate established under 18 U.S.C. § 3006A for payment of court-appointed counsel. A prisoner can enter into an agreement to pay greater attorneys' fees, but the greater fees must be paid by the prisoner rather than by the defendant. Finally, the Act provides that when a prisoner is awarded monetary damages, a portion of the judgment not exceeding 25% shall be applied to satisfy an award of attorneys' fees against the defendant and that "[i]f the award of attorneys' fees is not greater than 150% of the judgment, the excess shall be paid by the defendant."

Some districts have established programs to help attorneys meet out-of-pocket expenses entailed in such representation.[108] Also, new section 1915(c), like old section 1915(b), provides for certain expenses, such as those for printing the record on appeal or preparing a transcript of a proceeding before a magistrate judge, to be paid by the Director of the Administrative Office, once a prisoner has paid the partial filing fee.

b. *Case-related factors*

(1) *Advantages of appointing counsel.* Although courts were generally reluctant to appoint counsel in most indigent prisoner civil rights cases under old section 1915(d), the district court may, in the exercise of sound discretion, make such appointments. In exercising its discretion, the court should recognize that there are advantages to having all parties in a civil action represented by counsel. Among the advantages are an increased chance that justice between the parties will be achieved and a likely decrease in the expenditure of the court's time and effort.

(2) *Old section 1915(d) considerations.* The most common factor considered by courts when determining whether to appoint counsel under old section 1915(d) was whether the plaintiff's claim appeared to have sufficient merit to survive a motion for dismissal or summary judgment. Although some courts treated this determination as a basic factual one that varied from case to case, relevant precedent suggests that it is best made on the basis of both the factual and legal sufficiency of the complaint. If the court finds that the claim lacks sufficient merit to warrant appointment of counsel, it may deny the motion and direct the plaintiff to proceed pro se.

In order for the court to appoint counsel under old section 1915(d), a number of circuits required the court to find also that exceptional circumstances existed in the case. Exceptional circumstances and the existence of those circum-

107. 42 U.S.C. § 1997e(d).

108. *See supra* part II.B.3.

stances turn on the type of case, its complexity, and the abilities of the plaintiff. Exceptional circumstances have been held to include such nonexclusive factors as the nature of and complexity of the factual issues raised in the claim; the plaintiff's apparent physical and intellectual abilities to investigate the issues and prosecute the action without counsel; whether the law to be applied is complex or unsettled; the financial resources of the plaintiff; and whether the plaintiff has made a diligent good-faith, but unsuccessful, effort to secure counsel.[109]

The issue of whether exceptional circumstances were present to permit the court to appoint counsel almost always arose in cases in which the indigent plaintiff appealed the district court's denial of the motion for appointment of counsel under old section 1915(d). In such cases, the appellate courts examined the lower court's refusal to appoint counsel in terms of whether the denial constituted an abuse of discretion.

3. Discretion to refuse to request counsel to represent plaintiff

a. *Abuse of discretion*

Courts of appeals held that a district court's failure or refusal to appoint counsel for indigent civil rights plaintiffs under old section 1915(d) could constitute an abuse of discretion. Generally, the courts held that the denial of counsel would not be deemed an abuse of discretion unless it resulted in a fundamental unfairness impinging on the due process rights of the plaintiff.[110] It was an abuse of discretion for the district court to refuse to appoint counsel for a prisoner because the court did not recognize its authority to make such appointments under old section 1915. Courts should recognize that most prisoners lack the resources, knowledge, and experience necessary to find an attorney who will represent them without charge.[111]

Some circuits imposed an obligation on the district court to appoint counsel even in the absence of funds to pay attorneys for representing indigent prisoners under old section 1915(d). Both the Ninth Circuit and the Tenth Circuit held that indigent litigants are presumptively incapable of prosecuting civil rights cases, and a denial of a request for appointment of counsel is therefore inherently preju-

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109. Tabron v. Grace, 6 F.3d 147 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994) (where the court found there was nothing to suggest that appointment of counsel was permissible only in some limited set of circumstances.); Farmer v. Hass, 990 F.2d 319 (7th Cir. 1993) (criticizing *Maclin's* multifactorial test), *cert. denied*, 114 S. Ct. 438 (1993); Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992); Terrell v. Brewer, 935 F.2d 1015 (9th Cir. 1991); Long v. Shillinger, 927 F.2d 525 (10th Cir. 1991); DesRosiers v. Moran, 949 F.2d 15 (1st Cir. 1991); Cooper v. Sargenti Co., 877 F.2d 170 (2d Cir. 1989); Jackson v. Dallas Police Dep't, 811 F.2d 260 (5th Cir. 1986); Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981).

110. *See* McCarthy v. Weinberg, 753 F.2d 836 (10th Cir. 1985); *Maclin*, 650 F.2d at 887.

111. *See* McDonald v. Head Crim. Ct. Supervisor Officer, 850 F.2d 121 (2d Cir. 1988); McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982). The principal holding of these cases is that the court must support its refusal with a statement of substantial reasons. For further discussion, see *supra* part II.B.

dicial.[112] However, the court's obligation to appoint counsel under section 1915 does not authorize it to require or compel an unwilling attorney to represent an indigent litigant in a civil case.[113]

b. *Findings needed to support denial of motion*

Under old section 1915(d), the courts of appeals held that it was necessary for the district court to make findings to support a denial of a motion for appointment of counsel. If the court denies a motion for appointment of counsel, it must state its reasons on the record for review by the court of appeals; otherwise, it is an abuse of discretion.[114] The district court has the discretion to deny a motion for appointment of counsel whenever it finds that the indigent litigant

- has failed to state a factually or legally valid claim on which relief can be granted;
- has not demonstrated exceptional circumstances that would support appointment of counsel in his or her case;
- has claims based on facts that are straightforward and largely undisputed, and none of the claims present difficult or complex factual issues;
- faces no significant difficulties in investigating his or her case; or
- does not exhibit or allege any physical or mental difficulties that would prevent him or her from adequately preparing or presenting his or her case.

The court has the discretion to deny the motion for appointment of counsel after a finding of the unavailability of counsel. The court has no absolute duty to appoint counsel in response to a request. The disposition of a request for appointment of counsel is reviewed for abuse of discretion.[115]

c. *Appointment of volunteer advisory counsel*

For some cases, it may be appropriate for the court to consider alternatives, such as appointment of volunteer advisory counsel. The court may decide that the nature and circumstances of the indigent plaintiff's case are such that the interests of justice would be best served by providing the plaintiff with limited access to counsel. If the court appoints an attorney who will serve as volunteer advisory counsel to the plaintiff, it will reduce the attorney's obligations while ensuring that the plaintiff's efforts to prosecute his or her civil rights claim are guided by some measure of legal expertise.

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112. Bradshaw v. Zoological Soc'y of San Diego, 662 F.2d 1301 (9th Cir. 1981), *later proceeding*, Bradshaw v. U.S. Dist. Ct., 742 F.2d 515 (9th Cir. 1984); Castner v. Colorado Springs Cablevision, 979 F.2d 1417 (10th Cir. 1992).

113. Mallard v. United States Dist. Ct., 490 U.S. 296, 297 (1989).

114. Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987).

115. Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991).

F. Procedures for managing cases that survive the initial determination regarding frivolousness

Once the court has determined that a case may have sufficient merit to warrant granting IFP status, and occasionally the appointment of counsel, basic case-management principles come into play. To be useful in prisoner litigation, general case-management principles must be tailored to the special circumstances and restrictions of such litigation. This section discusses some of the approaches districts have developed to handle prisoner cases fairly and efficiently.

By and large, the PLRA does not appear to limit case-management procedures devised prior to its passage. However, the Act has stricter requirements for the appointment of special masters and places limitations on the relief to be granted.

This section discusses

- alternative means of resolving the complaint;
- the defendant's obligation to reply;
- proceedings after the *Martinez* report, including renewed consideration of dismissal under section 1915(e)(2) and motions under Rule 56 or Rule 12(b)(6);
- Rule 16 conferences;
- discovery by and from the plaintiff;
- trial; and
- remedies and relief.

1. Alternative means of resolving the complaint

The general applicability of the court's ADR procedures to prisoner pro se litigation is a court-wide decision (see part II.C *supra*). However, particular situations in prisoner litigation call for creativity in solving problems without a judicial resolution.

a. *Use of mediators*

Mediators can be effective in making prompt, informal investigations of the facts with a view to identifying the problem and finding a resolution. They are particularly useful when it appears that the condition in the penal institution is temporary, easily remedied, or easily investigated, or when they can make clear to the prisoner that complaints such as "bad food" do not usually amount to constitutional violations and might be better addressed outside conventional litigation channels.

b. *Use of volunteer masters*

Volunteer masters have been effective in investigating prisoner complaints and attempting to mediate them, and in investigating the facts and making a report to the court that can inform further proceedings.

c. *Use of special masters*

Special masters appointed under Federal Rule of Civil Procedure 53 have been most useful in major prison litigation involving many complainants or complex factual issues, such as prison construction requirements. However, courts should use special masters sparingly when the costs, which the parties may be unable to bear, outweigh the benefits of proceeding quickly to a judicial resolution.

Several PLRA provisions concern appointment, compensation, and duties of special masters in cases involving prison conditions, all of which are contained in amendments to 18 U.S.C. § 3626.[116] Section 3626(f)(1)(A) authorizes the court to appoint a special master "who shall be disinterested and objective and who will give due regard to the public safety to conduct hearings on the record and prepare proposed findings of fact." Section 3626(g)(8) defines special master as "any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court." Section 3626(f)(1)(B) directs that appointment of a special master during the remedial phase of prison conditions litigation be accompanied by a finding that "the remedial phase will be sufficiently complex to warrant the appointment."

Section 3626(f)(2) directs the court, on a determination that appointment of a special master is necessary, to request from each party a list of not more than five candidates and to give each party the opportunity to remove up to three candidates from the other party's list. The court chooses the master from the remaining candidates. Section 3626(f)(3) authorizes an interlocutory appeal from an order appointing a special master, on the ground of partiality.

Section 3626(f)(4) limits compensation for a special master to "an hourly rate not greater than the hourly rate under 18 U.S.C. § 3006A for court-appointed counsel, plus costs reasonably incurred by the special master." Such compensation and costs are to be paid with federal judiciary monies.

Section 3626(f)(5) directs the court to review the appointment of a special master every six months to determine whether the special master's services continue to be required.

Finally, section 3626(f)(6) imposes four limitations on the special masters appointed. The special master (1) may be authorized to conduct hearings and make proposed findings of fact, which must be made on the record; (2) shall not make any findings or communications ex parte; (3) may assist in the development of remedial plans; and (4) may be removed at any time, but the appointment must end at the termination of relief.

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116. Civil action with respect to prison conditions is defined as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2).

d. *Settlement options should be explored*

Even when the complaint has proceeded to trial, settlement of prisoner civil rights suits, like that of other civil cases, is a possibility that should be explored. Some judges have had success with telephone settlement conferences, particularly where the claimed damages are minimal and the prisoner can achieve satisfaction with little financial outlay by the state. However, other judges report that state penal institutions are unwilling to cooperate with most settlement efforts because they are afraid it will simply invite more complaints against the penal institution.

2. Defendant's obligation to reply

New section 1997e(g) provides that any defendant may waive the right to reply to any prisoner action, and that "[n]o relief shall be granted to the plaintiff unless a reply has been filed." The statute further provides that "[t]he court may require any defendant to reply to a complaint . . . if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

Most courts are making the finding stated in the statute and ordering defendants to reply to the complaint in an initial review order or an order for service of process, or both. Since the new standards for screening prisoner complaints require the court to determine at the outset that the complaint contains a claim that would survive a motion under Federal Rule of Civil Procedure 12(b)(6), the finding of a reasonable opportunity to prevail on the merits appears proper based on a determination that the complaint contains at least one such claim.[117]

3. Proceedings after the *Martinez* report

a. *Renewed consideration of dismissal under section 1915(e)(2) if appropriate*

Although *Martinez* reports are filed by the defendant (sometimes attached to an answer), once the plaintiff has had an opportunity to respond and has not disputed the description of the prison's policies and procedures, some courts treat these reports as attachments to the complaint.[118] In theory, this characterization could allow the court to revisit the initial section 1915(e)(2) determination and act on the plaintiff's "complaint" alone. Indeed, the court is required to dismiss the complaint under new section 1915(e)(2) later in the proceeding if it determines that the allegation of poverty is untrue; or that the action is frivolous or malicious, or fails to state a claim on which relief may be granted; or that the plaintiff seeks monetary relief against a defendant who is immune from such relief. However, unless the report demonstrates that the allegation of poverty is false, the better course may be to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 56, if appropriate.[119]

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117. *See* Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 512, 517 (11th Cir. 1991).

118. *See, e.g.,* Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991).

119. It is important to note that under new 28 U.S.C. § 1915(g), a dismissal for failure to state a claim is included as a "strike" against a prisoner's future ability to bring civil litigation IFP.

b. *Motions under Rule 12(b)(6) or Rule 56*

As discussed in part III.C.2 *supra*, new section 1915A(b) requires courts to screen all prisoner complaints to determine, *inter alia*, whether the claims raised therein are frivolous or malicious, or whether the case fails to state a claim on which relief may be granted, and it requires courts to dismiss the complaint or any portion thereof that does not meet the statutory requirements. Nothing in the statute expressly precludes a defense motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and claims that are not determined to be frivolous or malicious pursuant to new section 1915(e) may nonetheless be the proper subjects of defense motions to dismiss or for summary judgment.

It is critical that the prisoner receive notice of the meaning of the motion and the consequences of not responding. Several courts have held that pro se litigants are entitled to specific notification of the consequences of failing to respond properly to a motion for summary judgment.[120] Courts adopting such a rule generally have explained that a pro se litigant (particularly a prisoner) served with a summary judgment motion may be unaware that a response is necessary. Without specific notification, the pro se litigant might believe that the motion can be addressed at trial. Thus, the court ought to provide the pro se litigant with information concerning the type of response that is required and the consequences of failing to provide such a response. Such notice can be incorporated in standard forms, but the language should be clear and unambiguous (see Appendix H-5 for an example).

(1) *Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).* A complaint is not subject to dismissal under Federal Rule of Civil Procedure 12(b)(6)'s standard "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."[121] The pro se plaintiff's complaint must be construed liberally under this standard.[122] Nevertheless, it may be dismissed if supported only by vague and conclusory allegations.[123]

(2) *Motions for summary judgment under Federal Rule of Civil Procedure 56.* Under Federal Rule of Civil Procedure 56(c), a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine is-

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See supra part III.A.1.

120. *See, e.g.*, Arreola v. Mangaong, 65 F.3d 801, 802 (9th Cir. 1995) (per curiam) (court must provide pro se prisoners with notice of the requirements for summary judgment before having it entered against them). *See also* Timms v. Frank, 953 F.2d 281, 285 (7th Cir. 1992); Klingele v. Eikenberry, 849 F.2d 409, 411–12 (9th Cir. 1988); United States v. One Colt Python .357 Caliber Revolver, 845 F.2d. 287, 289 (11th Cir. 1988); Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639 (2d Cir. 1988); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985); Ham v. Smith, 653 F.2d 628, 630 (D.C. Cir. 1981); Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975).

121. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

122. Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaint held to "less stringent standards than formal pleadings drafted by lawyers").

123. Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992).

sue as to any material fact and that the moving party is entitled to judgment as a matter of law." Again, notice to the party adversely affected (typically the prisoner pro se litigant) is critical.[124]

c. *Use of* Martinez *reports in motions practice*

In both Rule 12(b)(6) and Rule 56 contexts, it is critical that the prisoner be given notice and an opportunity to respond.[125] The court may consider the contents of a *Martinez* report in disposing of the case. At least some courts consider the report a document outside the pleadings. Thus, under Rule 12(c), a motion for judgment on the pleadings must be converted to a motion for summary judgment.[126]

Although a *Martinez* report should function as an aid to the court in determining whether an inartfully drawn pro se complaint has some possible legal basis, it cannot by itself support the resolution of material factual issues.[127] It has also been held that in making the Rule 12(b)(6) determination as to whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted, a court may not look to the *Martinez* report, or to any other pleading outside the complaint itself, to refute facts specifically pled by a plaintiff or to resolve factual disputes.[128]

However, once the plaintiff has had an opportunity to respond to the report and note errors, the report may become part of the case file as an attachment to a responsive pleading, such as a Rule 12(b)(6) motion to dismiss for failure to state a claim or a Rule 56 motion for summary judgment. Thus, with proper procedures, the discovery phase and the motions phase of the case may be completed at about the same time.

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124. *See, e.g.*, *id.* at 1521 (applying to the pro se prisoner context the language of Torres v. First State Bank of Sierra County, 550 F.2d 1255, 1257 (10th Cir. 1977), that the Rule 56(c) provisions for notice and an opportunity to respond with affidavits are mandatory, and that "[n]oncompliance therewith deprives the court of authority to grant summary judgment." For further discussion see Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule,* 35 Fordham L. Rev. 1109 (1987).

125. The new provisions of 28 U.S.C §§ 1915(e)(2) and 1915A do not contain any specific requirement for notice prior to dismissal for failure to state a claim under those sections.

126. Ketchum v. Cruz, 961 F.2d 916, 919 (10th Cir. 1992) (it was plain error to dismiss mental patient's civil rights complaint on the pleadings after a *Martinez* report without giving plaintiff notice that defendant's motion to dismiss was being converted to a summary judgment motion).

127. *Northington*, 973 F.2d at 1521 (on summary judgment, *Martinez* report is treated as an affidavit, and the court is not authorized to accept its fact findings if the prisoner has presented conflicting evidence) (citing Gee v. Estes, 829 F.2d 1005, 1007 (10th Cir. 1987), and Collins v. Cundy, 603 F.2d 824, 825 (10th Cir. 1979)).

128. Swoboda v. Dubach, 992 F.2d 286, 290 (10th Cir. 1993) (citing Reed v. Dunham, 893 F.2d 285, 287 n.2 (10th Cir. 1990)); Sampley v. Ruettgers, 704 F.2d 491, 493 n.3 (10th Cir. 1983).

4. Rule 16 conferences

Federal Rule of Civil Procedure 16 indicates that courts may direct unrepresented parties to appear for a conference before trial, but many districts have exempted prisoner civil rights cases, or even all pro se cases, from their Rule 16 requirements. Depending on local conditions, Rule 16 conferences can be useful even in prisoner civil rights cases, particularly to identify and narrow issues. Although courts will not want to increase the incentive for prisoners to file complaints by holding conferences at the courthouse, many of the purposes of a Rule 16 conference can be achieved without the prisoner's appearance at court.

a. *Alternative procedures for holding Rule 16 conferences in prisoner civil rights cases*

Telephone conferences, which are increasingly being used in other civil litigation, can be useful tools for scheduling and status conferences in prisoner civil rights cases. In addition, telephone conferences conducted by a judge provide personal attention that is sufficient in some cases to satisfy a prisoner that someone outside the prison is paying attention and has some power to rectify prison conditions. As noted in part II.G *supra*, the PLRA urges, to the extent practicable, that courts use telecommunications technology for pretrial proceedings in prisoner cases so that the prisoner is not removed from the prison facility, and it encourages courts to hold hearings at prison facilities, with telecommunications links to other parties, subject to the agreement of state officials.

b. *Obtaining information from the prisoner*

Using standardized complaint forms in prisoner cases serves the purposes of discovery.[129] A typical standardized complaint form asks the prisoner to state exactly what happened, what forms the basis of the constitutional violation, and so forth. However, the prisoner's responses may not provide sufficient information to allow the court to make a reasoned threshold determination. A questionnaire directed to the prisoner can help ascertain the specifics of the complaint.

c. *Issuing a scheduling order that sets deadlines*

Federal Rule of Civil Procedure 16(b) requires the court to issue a scheduling order, regardless of whether a pretrial conference is held. There is an exception for "categories of actions exempted by district rule as inappropriate." In a case involving a pro se prisoner, however, this order can be very important. Pro se litigants are generally unfamiliar with court rules and procedures and the need for deadlines, and, therefore, the order should clearly set out the possible consequences if the deadlines are not followed.[130]

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129. *See supra* part II.A.

130. Prior to enactment of the PLRA, courts also ordered the state to address the issue of whether the institution's grievance procedures, if not certified by the Attorney General, were "otherwise fair and effective." *See supra* part III.D.1.

5. Discovery by and from the plaintiff

a. *Determining whether discovery is necessary*

In most instances, if a court uses a *Martinez* report or other preliminary investigation tool, there is sufficient information to make a decision on the case at the threshold level. That is, many complaints, even if fully explained and supported, do not rise to the level of a constitutional violation and therefore are not cognizable. In some instances, however, a plaintiff may make a claim that is insufficient as a matter of law (e.g., it does not allege personal involvement) but might become sufficient with additional discovery.[131] Some courts require prisoners to apply to the court for leave to take additional discovery.

b. *Selecting adequate and least disruptive means*

When a deposition is required, courts should permit the least disruptive discovery method adequate to the task. Just as a questionnaire may be used to obtain information from the plaintiff, a deposition using written questions might be more suitable for discovery from the defendant than a live deposition conducted by an unrepresented litigant.

c. *Ensuring continuous court control to avoid abuse*

Cases that appear likely to require discovery beyond what the court's automatic procedures require for prisoner civil rights litigation may be best supervised by a magistrate judge. Regardless of who takes control, however, close supervision by the court is necessary to avoid abuses.[132] Although monetary discovery sanctions are not always appropriate or effective in IFP cases, other discovery sanctions are available under Federal Rule of Civil Procedure Rule 37.[133] For example, where a plaintiff refuses to participate in the discovery process and defies a court order to do so, dismissal of the complaint may be appropriate.[134] Although the behavior of pro se litigants may be judged more leniently than that of represented litigants, the factors to be considered in the decision whether to dismiss the complaint for both types of litigants are essentially the same:

- the public's interest in expeditious resolution of litigation;

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131. *See, e.g.*, Murphy v. Kellar, 950 F.2d 290 (5th Cir. 1992) (where prisoner complained of assault by incompletely identified guards and inmates, it was error to dismiss the complaint as frivolous without allowing discovery to determine whether alleged attackers could have been properly identified through discovery).

132. *See infra* part II.F.

133. However, when monetary sanctions are in order, they are generally limited to attorneys' fees and reasonable expenses. Jackson v. Carl, No. 91-16344, 1992 WL 212168 (9th Cir. Sept. 1, 1992).

134. Willner v. Univ. of Kansas, 848 F.2d 1023, 1030 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989) (upholding dismissal under Rule 37 where nonprisoner pro se plaintiff failed, despite warning, to submit supplemental answers to interrogatories); Sere v. Bd. of Trustees of the Univ. of Illinois, 852 F.2d 285, 289–90 (7th Cir. 1988); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam).

- the court's need to manage its dockets;
- the public policy favoring disposition of cases on the merits;
- the risk of prejudice to the party seeking sanctions; and
- the availability of less drastic sanctions.[135]

However, it was held that a plaintiff who appeared for his deposition but refused to answer questions was not subject to sanctions under Rule 37 because the word "appear" in the rule is to be construed strictly.[136] If the litigant appears but refuses to cooperate, the court must first enter an order that, if violated, will subject the litigant to sanctions.

The sanction of dismissal is an extreme remedy and should not be imposed if lesser sanctions will suffice. Thus, in most prisoner civil rights litigation, the decision will come down to the last factor—whether there are less drastic sanctions that will remedy the problem or that, as a matter of fairness, ought to be tried first. Because monetary sanctions are often unavailing, preclusion of evidence may be called for rather than dismissal. This may turn an otherwise viable case into a summary judgment case. As a last resort, however, dismissal as a sanction is appropriate.[137]

While the district court has great discretion in this area, subject to review for clear error of judgment, its discretion is narrower when the sanction is dismissal than when other sanctions are used. For dismissal to be appropriate, the party's noncompliance must reflect "willfulness, fault, or bad faith."[138] Such noncompliance may be found in "disobedient conduct not shown to be outside the control of the litigant."[139]

6. Trial

Some judges conclude that it is most efficient to appoint counsel in any prisoner pro se civil rights case that proceeds to trial if counsel can be found and the prisoner consents. However, if the prisoner is to handle the trial alone, the court needs to provide guidance and be patient. As in the early stages of this sort of litigation, explanatory brochures and sample documents can be useful in educating pro se litigants. Pretrial requirements, such as the preparation of a pretrial order, can be daunting for an unrepresented party. Trial judges should explain the purpose of the pretrial order and provide explicit guidance, preferably forms, to en-

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135. Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990) (applied to prisoner case in Morris v. Martin, No. 93-15086, WL 364345 (9th Cir. Sept. 16, 1993)).

136. Estrada v. Rowland, 69 F.3d 405 (9th Cir. 1995); SEC v. Research Automation Corp., 521 F.2d 585, 589 (2d Cir. 1975).

137. *See* Woods v. Davis, No. 92-15804, 1993 WL 43841 (9th Cir. Feb. 22, 1993) (district court properly dismissed complaint as a sanction for plaintiff's refusal to be deposed despite court's Rule 30(a) order giving leave for defendant to depose him; monetary sanctions would have been a "hollow gesture," and prisoner appeared "more desirous of litigating for its own sake rather than achieving the relief sought").

138. *See* Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1339 (9th Cir. 1985).

139. Henry v. Gill Indus., Inc. 983 F.2d 943, 946 (9th Cir. 1993).

courage the satisfactory completion of the task. For example, forms can be provided requiring the prisoner to specify witnesses and exhibits. In addition, they can set out the special procedures relevant to prisoners, such as how to obtain the presence of witnesses.

7. Remedies and relief

The PLRA contains several provisions governing relief in prisoner cases, primarily through amendments to 18 U.S.C. § 3626. The provisions governing prospective relief are made applicable by the statute to all prospective relief entered before, on, or after April 26, 1996, the date of enactment of the PLRA.[140]

a. *Discretion to grant prospective relief*

Prospective relief in prison conditions cases must extend "no further than necessary to correct the violation of the federal right of a particular plaintiff or plaintiffs."[141] To grant or approve prospective relief, the court must find that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right.[142] In addition, "[t]he court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[143] The court may not order prospective relief that requires or permits a government official to exceed his or her authority under state or local law unless (1) federal law permits the relief to be ordered in violation of state law; (2) the relief is necessary to correct the violation of a federal right; and (3) no other relief will correct the violation of the federal right.[144] Courts are not authorized by this statute to order the construction of prisons or the raising of taxes.[145]

Consent decrees shall not be entered or approved unless they comply with section 3626(a)'s limitations on relief.[146] The limitations do not apply to private settlement agreements if the terms of such agreements are not subject to court enforcement other than reinstatement of the action.[147]

Prospective relief in prison conditions cases is terminable on the motion of any party or intervenor either two years after the date the court granted or approved the relief, one year after the date the court entered an order denying the termination of prospective relief, or, for orders issued before enactment of the PLRA, two years after the date of enactment.[148] In addition, a defendant or inter-

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140. *See* section 802(b)(1).
141. 18 U.S.C. § 3626(a)(1)(A).
142. *Id.*
143. *Id.*
144. *Id*. § 3626(a)(1)(B).
145. *Id*. § 3626(a)(1)(C).
146. *Id*. § 3626(c)(1).
147. *Id.* § 3626(c)(2).
148. *Id*. § 3626(b)(1).

venor is entitled to immediate termination of prospective relief ordered if the court is unable to find that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means to correct the violation.[149] The court must make those findings in writing based on the record.[150]

Any prospective relief that is the subject of a pending motion to terminate is automatically stayed during the period beginning either on the 30th day after a motion is made under section 3626(b)(1) or (b)(2) or on the 180th day after a motion is made pursuant to any other provision of law.[151] The stay ends the date the court enters a final order ruling on the motion.[152]

b. *Discretion to grant preliminary injunctive relief*

Preliminary injunctive relief in prison conditions cases is governed by the same standards as those for prospective relief.[153] In addition, preliminary injunctions in prison conditions cases must automatically expire ninety days after the date they are entered unless the court makes the findings necessary for a final order and enters the final order before the expiration of the ninety-day period.[154]

c. *Discretion to enter prisoner release orders*

Prisoner release orders are defined as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison."[155] Prisoner release orders may only be entered by a three-judge court in accordance with 28 U.S.C. § 2284.[156] The three-judge court must be requested to enter the prisoner release order by the plaintiff seeking the order, and may be requested to do so sua sponte by a judge presiding over a prison conditions case.[157] Any state or local official or governmental entity involved in the appropriation of funds for construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from or not admitted to a prison as a result of a prisoner release order are granted standing to oppose issuance of, and to seek termination of, prisoner release orders, and to intervene in any proceeding related to such relief.[158]

No prisoner release order shall be entered unless a court has previously ordered less intrusive relief that has failed to remedy the deprivation of the federal

149. *Id*. § 3626(b)(2).
150. *Id*. § 3626(b)(3).
151. *Id*. § 3626(e)(2)(A).
152. *Id*. § 3626(e)(2)(B).
153. *Id*. § 3626(a)(2).
154. *Id.* § 3626(a)(2).
155. *Id.* § 3626(g)(4).
156. *Id.* § 3626(a)(3)(B).
157. *Id*. § 3626(a)(3)(C)–(D).
158. *Id*. § 3626(a)(3)(F).

right sought to be remedied through the prisoner release order and the defendant has had a reasonable amount of time to comply with the previous court orders.[159] In addition, the three-judge court must find that crowding is the primary cause of the violation of a federal right; and that no other relief will remedy the violation of the federal right.[160]

Section 1997e of title 42 of the U.S. Code, as amended, sets out a number of other limitations on the relief that can be granted by the district court.

d. *Compensatory damages*

Compensatory damages awarded to a prisoner in connection with a civil action brought against any federal, state, or local jail, prison, or correctional facility are to be applied directly to the payment of any outstanding restitution orders against the prisoner.[161] Any monies remaining after full payment of all outstanding restitution orders are to be forwarded to the prisoner.[162] In addition, prior to paying any compensatory damages, the court must make reasonable efforts to notify the prisoner's crime victims concerning the pending payment.[163]

e. *Attorneys' fees*

New 42 U.S.C. § 1997e(d)(B)(i) requires that up to 25% of any monetary judgment awarded to a prisoner be applied to an attorneys' fee award against the defendant in that action. The statute further provides that "[i]f the award of attorneys' fees is not greater than 150% of the judgment, the excess shall be paid by the defendant." The statute is silent concerning cases in which the attorneys' fee award is greater than 150% of the judgment, although it also requires that the amount of the attorneys' fees be "proportionately related" to court-ordered relief.

G. Determining sanctions to deter abusive prisoner litigation

As noted earlier, by creating 28 U.S.C. § 1915(g), the PLRA precludes prisoners from proceeding IFP if they have filed three previous complaints that were dismissed as frivolous or malicious, or for failing to state a claim upon which relief could be granted. Other mechanisms for deterring abusive litigation have been developed by the courts and are described in this section.

As a general rule, any person appearing pro se should be expected to comply with the district's local rules and the federal rules of procedure.[164] Otherwise, par-

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159. *Id*. § 3626(a)(3)(A).

160. *Id*. § 3626(a)(3)(E).

161. PLRA § 807.

162. *Id.*

163. *Id.* at § 808.

164. *See, e.g.*, Lockhart v. Sullivan, 925 F.2d 214, 216 n.1 (7th Cir. 1991); Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989); Farnsworth v. City of Kansas City, Mo., 863 F.2d 33, 34 (8th Cir. 1988), *cert. denied*, 493 U.S. 820 (1989); Kelley v. Secretary, U.S. Dept. of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987); Carter v. Commissioner of Internal Revenue, 784 F.2d

ties appearing without legal counsel might be placed in a better position than those represented by counsel.

As discussed earlier, the civil rules that address the problems of frivolous filings and discovery abuse in individual cases are fully applicable to prisoner civil rights cases, although their effectiveness may be limited in cases in which the prisoner's poverty makes economic sanctions an incomplete remedy. It is within the inherent powers of the court to impose appropriate restrictions on abusive IFP litigation.[165] However, certain principles and procedures must be observed.

The purpose of sanctions is to discourage frivolous litigation and to relieve defendants of unjustified expenses.[166] Litigants proceeding IFP are not automatically exempted from sanctions merely by virtue of their poverty, and courts should not necessarily fail to consider whether sanctions are warranted merely because the litigant is proceeding pro se or IFP. Indeed, at least one court of appeals has held that when a defendant files a motion for sanctions against a pro se plaintiff under Rule 11, the district court must determine whether sanctionable behavior occurred and is not free simply to decline "to impose sanctions on a pro se plaintiff."[167]

1. Warning of possible sanctions

Before imposing sanctions, particularly one as severe as dismissal, courts must give pro se litigants sufficient warning of the possible consequences of their behavior.[168]

2. Severity of sanction

Courts have several options for sanctioning repetitive or malicious litigants. Generally, the least restrictive sanction adequate under the circumstances should be imposed.[169] However, for repeat litigants, courts may consider similar conduct in other litigation in determining what level of sanction is appropriate. And it is not necessarily an abuse of discretion to dismiss a complaint even if some less severe sanction remains untried if the litigant is clearly on notice of the possible result.[170]

1006, 1008 (9th Cir. 1986); Brown v. Frey, 806 F.2d 801, 804 (8th Cir. 1986); Birl v. Estelle, 660 F.2d 592 (5th Cir. 1981) (merely proceeding pro se does not automatically entitle prisoner to extension of jurisdictional filing requirement, or resolution of "excusable neglect" issue in his favor).

165. *See In re* McDonald, 489 U.S. 180 (1989).

166. Roche v. Adkins, No. 92-3321, 1993 WL 262009 (7th Cir. May 14, 1993).

167. Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994).

168. *Farnsworth*, 863 F.2d at 34; Sere v. Board of Trustees of Univ. of Illinois, 852 F.2d 285 (7th Cir. 1988); Prince v. Poulos, 876 F.2d 30 (5th Cir. 1989); Spiller v. U.S.V. Lab., Inc., 842 F.2d 535 (1st Cir. 1988).

169. Outley v. New York, 837 F.2d 587 (2d Cir. 1988).

170. *Spiller,* 842 F.2d at 537.

3. Escalation of sanctions

When the least severe sanction does not cure the abusive litigant's behavior, the court may need to increase the severity, continuing to warn the litigant of the likely consequences of the behavior.[171]

4. Type of sanction

a. *Monetary sanctions*

Although the majority of pro se litigants (and, by definition, all litigants properly proceeding IFP) have few assets that would make an award of monetary sanctions worthwhile to their opponents, such sanctions can still be an appropriate way to try to modify abusive litigants' behavior. Like a partial filing fee, monetary sanctions can make it less likely that a prisoner will pursue worthless claims or engage in truly abusive litigation. However, the prisoner's ability to pay must be considered in determining the sanction.[172]

b. *Access restrictions*

Although prisoners have a fundamental right to bring meritorious claims, some restrictions on access to the courts have been upheld as reasonable responses to abusive litigation, and new section 1915(g) presents a clear restriction on access to IFP filing by prisoners with three or more previous filings that were frivolous or malicious, or failed to state a claim upon which relief could be granted. Courts planning to impose access restrictions should ensure that the prisoner to be restricted has notice of and an opportunity to respond to the restriction, and that access to the courts to maintain proper claims is not entirely foreclosed. The following sorts of access restrictions have been upheld in various situations.

(1) *Barring filing of some claims without prefiling review by the court*. Some of the courts of appeals have recognized the authority of the district court to bar prisoners who have filed numerous complaints in the past from filing a new complaint unless that complaint has been reviewed by the court.[173]

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171. *See, e.g.*, Navarro v. Cohan, 856 F.2d 141, 142 (11th Cir. 1988) (upholding dismissal where district court warned litigant, issued show cause order, and imposed fine before dismissing complaint, noting "[a]lthough the district court noted dismissal was a last resort, it was time for the last resort").

172. *In re* Kunstler, 914 F.2d 505, 524 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991). *See also* Dodd Ins. Services, Inc. v. Royal Ins. Co. of America, 935 F.2d 1152 (10th Cir. 1991); Miltier v. Downes, 935 F.2d 660 (4th Cir. 1991).

173. *In re* Burnley, 988 F.2d 1, 3–4 (4th Cir. 1992) (district court could impose prefiling review requirement on litigant); Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 512, 518 (11th Cir. 1991); Chipps v. U.S. Dist. Ct. for the Middle Dist. of Pa., 882 F.2d 72, 73 (3d Cir. 1989); *In re* Davis, 878 F.2d 211 (7th Cir. 1989) (litigant who had filed thirty-one actions over forty-month period, most of them frivolous or duplicative, could be required to submit proposed complaints to a committee of judges before commencing another suit); Flint v. Haynes, 651 F.2d 970, 974 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) (approving prefiling review of complaints brought by prisoners with a history of litigiousness) (dictum). *See also In re* Martin-Trigona, 9 F.3d

(2) *Barring filing of any additional pro se complaints without leave of court.*[174] However, requiring a prisoner to obtain the permission of the chief judge before filing another complaint has been held to be too stringent a sanction where less severe sanctions were not exhausted and where the petitioner's "abusive" practices were far less egregious than those of other litigants not similarly sanctioned.[175]

(3) *Barring pro se filing of certain kinds of claims.*[176] Generally, courts are freer to constrain future filings relating to the same essential claims or factual situations than to issue blanket orders forbidding all pro se claims.

(4) *Barring filing of more than a certain number of IFP complaints.* At least one court of appeals has limited a litigious prisoner to a specified maximum number of filings per year.[177]

(5) *Barring filing of claims other than specific kinds, such as those containing specific allegations of physical harm or threats.*[178] Although courts have wide discretion to fashion remedies to deal with abusive or repetitive litigation, they cannot foreclose the right of access entirely by constructing blanket orders that close the courthouse doors.[179]

c. *Nonmonetary sanctions short of access restrictions*

Although judges have designed creative sanctions for attorneys and represented parties, particularly under Rule 11, nonmonetary sanctions are usually inappropriate for nonlawyer litigants.[180]

The PLRA authorizes the court to revoke the earned good-time credit under 18 U.S.C. § 3624(b) of a prisoner who brings a civil action if the court finds that

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226 (2d Cir. 1993) (court of appeals can require litigants to seek leave to appeal by motion to a single judge).

174. *See* Ketchum v. Cruz, 961 F.2d 916, 921 (10th Cir. 1992) (approving restrictions on mental patient's pro se access to court where court's order precisely indicated how plaintiff could obtain leave to file actions pro se if necessary); Tripati v. Beaman, 878 F.2d 351 (10th Cir. 1989) (approving restrictions on litigants with a documented history of vexatious, abusive actions, so long as restraining court publishes guidelines about what plaintiff must do to obtain the court's permission to file an action).

175. Mendoza v. Lynaugh, 989 F.2d 191, 194 (5th Cir. 1993). And even vexatious litigants should not be broadly refused IFP status prospectively. *Cofield*, 936 F.2d at 517.

176. *See, e.g., In re* McDonald, 489 U.S. 180 (1989) (per curiam) (directing Supreme Court clerk not to accept further IFP petitions for extraordinary writs from petitioner who had made seventy-three filings with the Court in approximately eighteen years, including nineteen for extraordinary relief; not precluding petitioner from filing IFP requests for other relief).

177. *Franklin v. Murphy*, 745 F.2d 1221, 1231–32 (9th Cir. 1984) (prisoner limited to six IFP filings per year).

178. Green v. White, 616 F.2d 1054, 1055 (8th Cir. 1980). *See also* Abdullah v. Gatto, 773 F.2d 487 (2d Cir. 1985) (per curiam) (district court can deny IFP applications for cases except those in which prisoner challenges his or her conviction or the terms of his or her imprisonment).

179. *Cofield*, 936 F.2d at 517. *See* Procup v. Strickland, 792 F.2d 1069, 1074 (11th Cir. 1986) (en banc) (per curiam) (excessive to foreclose a litigant, even a litigious one, from filing complaints without counsel, because that effectively "foreclosed . . . any access to the court").

180. Becker v. Dougherty, 145 F.R.D. 441, 443 n.4 (E.D. Mich. 1993).

(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testified falsely or otherwise knowingly presented false evidence or information to the court.[181] Several states have passed similar statutes.[182]

H. Appeal rights in final orders and IFP proceedings on appeal

1. Final orders and appeal rights

It is generally a good idea to set out in the final order a statement regarding the prisoner's right to appeal. This statement need not be elaborate or encouraging; it should be enough to notify the prisoner of the right to appeal, the applicability of Federal Rules of Appellate Procedure 3 and 4, and the necessity of moving for any extension of time during the second thirty-day period.[183]

2. Proceeding IFP on appeal

Under amended section 1915(a)(2) and (b), prisoners seeking to bring an appeal IFP must pay the $105 filing fee under the same procedure specified in sections 1915(a) and (b) for paying the $120 filing fee for the complaint.[184] Similarly, the appeal must be dismissed if it meets the grounds listed in section 1915(e)(2) or section 1915(g).[185]

The PLRA does not provide a method for coordinating the appeal fee payments between the district court and the court of appeals. One circuit, in a recent decision, outlined the following procedure.[186]

a. *Prisoner proceeded IFP in district court*

If the prisoner proceeded IFP in the district court and the status was not revoked, the court of appeals will ask the district court to indicate within twenty-one days whether the appeal is taken in good faith under 28 U.S.C. § 1915(a)(3). If the court of appeals receives no response within twenty-one days, it will assume that IFP status is not revoked.

If IFP status is not revoked, the court of appeals will require the prisoner to file an affidavit of poverty as required by subsection 1915(a)(1), along with a certified copy of the prison trust fund account for the preceding six months.

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181. 28 U.S.C. § 1932.

182. *See, e.g.,* Tex. Gov't Code Ann. § 498.0045 (West 1996); Iowa Code Ann. § 610A.3. (West 1996).

183. *See* Wilder v. Chairman of the Central Classification Bd., 926 F.2d 367, 371 (4th Cir. 1991), *cert. denied*, 502 U.S. 832 (1991). *See also* United States ex rel. Leonard v. O'Leary, 788 F.2d 1238, 1240 (7th Cir. 1986); Pryor v. Marshall, 711 F.2d 63, 65 n.4 (6th Cir. 1983); Mayfield v. U.S. Parole Comm'n, 647 F.2d 1053, 1055 n.5 (10th Cir. 1981).

184. *See supra* part III.A.3.

185. *See supra* part III.C.

186. Leonard v. Lacy, 65 U.S.L.W. 2124 (2d Cir. 1996).

b. *Calculation and payment of filing fee on appeal*

If IFP status is revoked or the prisoner never had IFP status in the district court and moves to proceed IFP on appeal, the court of appeals must take steps to ensure compliance with the PLRA's fee requirement before reviewing the appeal for frivolousness.

Before the court of appeals considers IFP status, the prisoner is required to submit a signed authorization for the prison to (1) provide a certified copy of his or her prison trust fund account covering the preceding six months; and (2) calculate and disburse funds from the account in amounts specified by 28 U.S.C. § 1915(b). If the court of appeals then denies in forma pauperis status, the prisoner will have already been directed to pay the full fee to the district court and to show cause why the appeal should not be dismissed as frivolous under 28 U.S.C. § 1915(e)(2). The fees are then debited from the prisoner's account regardless of the outcome of the appeal.

Upon receipt of the prisoner's authorization, the appeal is processed in the normal fashion and may be dismissed if it is determined to be frivolous. The clerk's office is required to inform the prison having custody of the prisoner the amount of fees that are to be disbursed and the court to which payments are to be made. It then becomes the obligation of the prison to send to the court the initial partial filing fee and the follow-up monthly payments until the entire $105 has been paid. Failure of the agency to remit any of the required payment will not adversely affect the prisoner's appeal.

Appendix A. Outline of the Prison Litigation Reform Act of 1995 (PLRA), Text of the PLRA, and Text of 28 U.S.C. § 1915 As Amended by the PLRA

Appendix A-1
Outline of the Prison Litigation Reform Act of 1995

Sec. 801: Short Title

Sec. 802: Appropriate Remedies for Prison Conditions (*Amends 18 U.S.C. § 3626*)

(a) In General (specifies amendment of 18 U.S.C. § 3626)

- (a) Requirements for Relief
  - (1) Prospective Relief
  - (2) Preliminary Injunctive Relief
  - (3) Prisoner Release Order
- (b) Termination of Relief
  - (1) Termination of Prospective Relief
  - (2) Immediate Termination of Prospective Relief
  - (3) Limitation (findings necessary for relief)
  - (4) Termination or Modification of Relief
- (c) Settlements
  - (1) Consent Decrees
  - (2) Private Settlement Agreements
- (d) State Law Remedies
- (e) Procedure for Motions Affecting Prospective Relief
  - (1) Generally
  - (2) Automatic Stay
- (f) Special Masters
  - (1) In General
  - (2) Appointment
  - (3) Interlocutory Appeal
  - (4) Compensation
  - (5) Regular Review of Appointment
  - (6) Limitations on Powers and Duties
- (g) Definitions
  - (1) Consent Decree
  - (2) Civil Action with Respect to Prison Conditions
  - (3) Prisoner
  - (4) Prisoner Release Order

(5) Prison

(6) Private Settlement Agreement

(7) Prospective Relief

(8) Special Master

(9) Relief

(b) Application of Amendment

(1) In General (retroactive application)

(2) Technical Amendment

(c) Clerical Amendment

Sec. 803: Amendments to Civil Rights of Institutionalized Persons Act (*Amends 42 U.S.C. § 1997a et seq.*)

Subparagraphs (a), (b), (c), (e), and (f) make minor amendments to the language of 42 U.S.C. §§ 1997a–c, f, and h.

Subparagraph (d), "Suits by Prisoners," amends section 1997e as follows:

Sec. 7. Suits by Prisoners

(a) Applicability of Administrative Remedies

(b) Failure of State to Adopt or Adhere to Administrative Grievance Procedure

(c) Dismissal

(d) Attorney's Fees

(e) Limitation on Recovery

(f) Hearings

(g) Waiver of Reply

(h) Definition of "Prisoner"

Sec. 804: Proceedings In Forma Pauperis (*Amends 28 U.S.C. § 1915 and 11 U.S.C. § 523(a)*)

(Text of new 28 U.S.C. § 1915 is provided in Appendix A-3 *infra.*)

Adds (f), (g), and (h) to section 1915.

Adds (17) to 11 U.S.C. § 523(a), providing that bankruptcy does not allow a debtor to avoid payment of filing fees.

Sec. 805: Judicial Screening (*Amends 28 U.S.C. Chapter 123*)

Adds section 1915A.

Sec. 806: Federal Tort Claims (*Amends 28 U.S.C. § 1346(b)*)

Changes (b) to (b)(1) and adds (b)(2), requiring a showing of physical injury before a convicted felon sues a federal officer for mental or emotional injury.

Sec. 807: Payment of Damage Award in Satisfaction of Pending Restitution Orders (*Does not specify amendment of existing statute*)

Sec. 808: Notice to Crime Victims of Pending Damage Award (*Does not specify amendment of existing statute*)

Sec. 809: Earned Release Credit or Good Time Credit Revocation (*Amends 28 U.S.C. Chapter 123 and 18 U.S.C. § 3624(b)*)

Adds section 1932 to 28 U.S.C., entitled "Revocation of earned release credit."

Changes language of 18 U.S.C. § 3624(b) regarding earned good-time credit for federal prisoners.

Sec. 810: Severability (*Does not specify amendment of existing statute*)

Appendix A-2
Text of the PLRA

PL 104–134, April 26, 1996, 110 Stat 1321

104th Congress—Second Session

April 26, 1996

OMNIBUS CONSOLIDATED RESCISSIONS AND APPROPRIATIONS ACT OF 1996

An Act making appropriations for fiscal year 1996 to make a further down payment toward a balanced budget, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE VIII—PRISON LITIGATION REFORM

SEC. 801. SHORT TITLE.

This title may be cited as the "Prison Litigation Reform Act of 1995."

SEC. 802. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.—Section 3626 of title 18, United States Code, is amended to read as follows:

"§ 3626. Appropriate remedies with respect to prison conditions

"(a)REQUIREMENTS FOR RELIEF.—

"(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

"(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—

"(i) Federal law permits such relief to be ordered in violation of State or local law;

"(ii) the relief is necessary to correct the violation of a Federal right; and

"(iii) no other relief will correct the violation of the Federal right.

"(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

"(2) PRELIMINARY INJUNCTIVE RELIEF.—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

"(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless—

"(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

"(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

"(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

"(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

"(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

"(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

"(i) crowding is the primary cause of the violation of a Federal right; and

"(ii) no other relief will remedy the violation of the Federal right.

"(F) Any State or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

"(b) TERMINATION OF RELIEF.—

"(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor—

"(i) 2 years after the date the court granted or approved the prospective relief;

"(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

"(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

"(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

"(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

"(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

"(4) TERMINATION OR MODIFICATION OF RELIEF.—Nothing in this section shall prevent any party or intervenor from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

"(c) SETTLEMENTS.—

"(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

"(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

"(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

"(d) STATE LAW REMEDIES.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

"(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

"(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

"(2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

"(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

"(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

"(B) ending on the date the court enters a final order ruling on the motion.

"(f) SPECIAL MASTERS.—

"(1) IN GENERAL.—(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

"(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

"(2) APPOINTMENT.—(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

"(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

"(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

"(3) INTERLOCUTORY APPEAL.—Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

"(4) COMPENSATION.—The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

"(5) REGULAR REVIEW OF APPOINTMENT.—In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) LIMITATIONS ON POWERS AND DUTIES.—A special master appointed under this subsection—

"(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

"(B) shall not make any findings or communications ex parte;

"(C) may be authorized by a court to assist in the development of remedial plans; and

"(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

"(2) the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

"(3) the term 'prisoner' means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

"(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

"(6) the term 'private settlement agreement' means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

"(7) the term 'prospective relief' means all relief other than compensatory monetary damages;

"(8) the term 'special master' means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

"(9) the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.".

(b) APPLICATION OF AMENDMENT.—

(1) IN GENERAL.—Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

(2) TECHNICAL AMENDMENT.—Subsections (b) and (d) of section 20409 of the Violent Crime Control and Law Enforcement Act of 1994 are repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter C of chapter 229 of title 18, United States Code, is amended to read as follows:

"3626. Appropriate remedies with respect to prison conditions.".

SEC. 803. AMENDMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) INITIATION OF CIVIL ACTIONS.—Section 3(c) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997a(c)) (referred to in this section as the "Act") is amended to read as follows:

"(c) The Attorney General shall personally sign any complaint filed pursuant to this section.".

(b) CERTIFICATION REQUIREMENTS.—Section 4 of the Act (42 U.S.C. 1997b) is amended—

(1) in subsection (a)—

(A) by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by striking "his" and inserting "the Attorney General's"; and

(2) by amending subsection (b) to read as follows:

"(b) The Attorney General shall personally sign any certification made pursuant to this section."

(c) INTERVENTION IN ACTIONS.—Section 5 of the Act (42 U.S.C. 1997c) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by amending paragraph (2) to read as follows:

"(2) The Attorney General shall personally sign any certification made pursuant to this section."; and

(2) by amending subsection (c) to read as follows:

"(c) The Attorney General shall personally sign any motion to intervene made pursuant to this section.".

(d) SUITS BY PRISONERS.—Section 7 of the Act (42 U.S.C. 1997e) is amended to read as follows:

"SEC. 7. SUITS BY PRISONERS.

"(a) APPLICABILITY OF ADMINISTRATIVE REMEDIES.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

"(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE.—The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.

"(c) DISMISSAL.—(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

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

"(d) ATTORNEY'S FEES.—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—

"(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

"(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

"(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

"(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

"(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

"(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

"(e) LIMITATION ON RECOVERY.—No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

"(f) HEARINGS.—(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

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

"(g) WAIVER OF REPLY.—(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

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

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

(e) REPORT TO CONGRESS.—Section 8 of the Act (42 U.S.C. 1997f) is amended by striking "his report" and inserting "the report".

(f) NOTICE TO FEDERAL DEPARTMENTS.—Section 10 of the Act (42 U.S.C. 1997h) is amended—

(1) by striking "his action" and inserting "the action"; and

(2) by striking "he is satisfied" and inserting "the Attorney General is satisfied".

SEC. 804. PROCEEDINGS IN FORMA PAUPERIS.

(a) FILING FEES.—Section 1915 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "(a) Any" and inserting "(a)(1) Subject to subsection (b), any";

(B) by striking "and costs";

(C) by striking "makes affidavit" and inserting "submits an affidavit that includes a statement of all assets such prisoner possesses";

(D) by striking "such costs" and inserting "such fees";

(E) by striking "he" each place it appears and inserting "the person";

(F) by adding immediately after paragraph (1), the following new paragraph:

> "(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."; and

(G) by striking "An appeal" and inserting "(3) An appeal";

(2) by redesignating subsections (b), (c), (d), and (e) as subsections (c), (d), (e), and (f), respectively;

(3) by inserting after subsection (a) the following new subsection:

"(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

"(A) the average monthly deposits to the prisoner's account; or

"(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

"(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

"(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

"(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.";

(4) in subsection (c), as redesignated by paragraph (2), by striking "subsection (a) of this section" and inserting "subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b)"; and

(5) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) The court may request an attorney to represent any person unable to afford counsel.

"(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

"(A) the allegation of poverty is untrue; or

"(B) the action or appeal—

"(i) is frivolous or malicious;

"(ii) fails to state a claim on which relief may be granted; or

"(iii) seeks monetary relief against a defendant who is immune from such relief.".

(b) EXCEPTION TO DISCHARGE OF DEBT IN BANKRUPTCY PROCEEDING.—Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (16), by striking the period at the end and inserting "; or "; and

(2) by adding at the end the following new paragraph:

"(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28.".

(c) COSTS.—Section 1915(f) of title 28, United States Code (as redesignated by subsection (a)(2)), is amended—

(1) by striking "(f) Judgment" and inserting "(f)(1) Judgment";

(2) by striking "cases" and inserting "proceedings"; and

(3) by adding at the end the following new paragraph:

> "(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.
>
> "(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).
>
> "(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.".

(d) SUCCESSIVE CLAIMS.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

> "(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section 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."

(e) DEFINITION.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

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

SEC. 805. JUDICIAL SCREENING.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by inserting after section 1915 the following new section:

"§ 1915A. Screening

"(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

"(b) GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

> "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

"(2) seeks monetary relief from a defendant who is immune from such relief.

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

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1915 the following new item:

"1915A. Screening.".

SEC. 806. FEDERAL TORT CLAIMS.

Section 1346(b) of title 28, United States Code, is amended—

(1) by striking "(b)"and inserting "(b)(1)"; and

(2) by adding at the end the following:

"(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.".

SEC. 807. PAYMENT OF DAMAGE AWARD IN SATISFACTION OF PENDING RESTITUTION ORDERS.

Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

SEC. 808. NOTICE TO CRIME VICTIMS OF PENDING DAMAGE AWARD.

Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of any such compensatory damages.

SEC. 809. EARNED RELEASE CREDIT OR GOOD TIME CREDIT REVOCATION.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1932. Revocation of earned release credit

"In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that—

"(1) the claim was filed for a malicious purpose;

"(2) the claim was filed solely to harass the party against which it was filed; or

"(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court."

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1931 the following:

"1932. Revocation of earned release credit.".

(c) AMENDMENT OF SECTION 3624 OF TITLE 18.—Section 3624(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the first sentence;

(B) in the second sentence—

(i) by striking "A prisoner" and inserting "Subject to paragraph (2), a prisoner";

(ii) by striking "for a crime of violence,"; and

(iii) by striking "such";

(C) in the third sentence, by striking "If the Bureau" and inserting "Subject to paragraph (2), if the Bureau";

(D) by striking the fourth sentence and inserting the following: "In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree."; and

(E) in the sixth sentence, by striking "Credit for the last" and inserting "Subject to paragraph (2), credit for the last"; and

(2) by amending paragraph (2) to read as follows:

"(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.".

SEC. 810. SEVERABILITY.

If any provision of this title, an amendment made by this title, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this title, the amendments made by this title, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Appendix A-3
Text of 28 U.S.C. § 1915 as Amended by the PLRA

(a) *(1) Subject to subsection (b), a* ~~A~~any court of the United States may authorize the commencement, prosecution, or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees ~~and costs~~ or security therefor, by a person who ~~makes affidavit~~ *submits an affidavit that includes a statement of all assets such prisoner possesses* that ~~he~~ *the person* is unable to pay such ~~costs~~ *fees* or give security therefor. Such affidavit shall state the nature of the action, defense, or appeal and affiant's belief that ~~he~~ *the person* is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1)Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

~~(b)~~ *(c)* Upon filing of an affidavit in accordance with subsections (a) ~~of this section~~ *and (b) and the prepayment of any partial filing fee as may be required under subsection (b*), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 363(b) of

this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 363(b) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

~~(c)~~ *(d)* The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

~~(d)~~ *(e) (1)* The court may request an attorney to represent any ~~such~~ person unable to ~~employ~~ afford counsel ~~and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious~~.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

~~(e)~~ *(f) (1)* Judgment may be rendered for costs at the conclusion of the suit or action as in other ~~cases~~ *proceedings*, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the costs of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more 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.

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

Appendix B. Sample Forms Provided to Prisoners Seeking to File a Complaint Pursuant to 42 U.S.C. § 1983 or 28 U.S.C. § 1915 in the U.S. District Courts

Appendix B-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

INSTRUCTIONS FOR FILING
A COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

CIVIL RIGHTS SUIT: Pursuant to Title 42 U.S.C. § 1983, a civil rights suit is an action against a person who has acted under color of state law (as a state official or employee) to deprive a person of rights secured by the Constitution or laws of the United States. Civil rights suits filed by inmates generally involve conditions of confinement. Claims as to legality or duration of confinement must be brought in a petition for writ of habeas corpus.

NOTE:
Proofread your complaint after completing the forms to ensure compliance with all instructions.

Your complaint can be brought in this Court only if at least one of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim you have unless the claims are all related to the same incident or issue.

CIVIL RIGHTS COMPLAINT FORMS:
The court will provide a form, COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, to be used either as the initial complaint or as an additional questionnaire to supplement the initial complaint. The packet of civil rights forms available includes the following: (1) Instructions for Filing a Complaint for Violation of Civil Rights, (2) Complaint Forms, (3) Application to Proceed In Forma Pauperis, and (4) Trust Account Release Form for use by inmates confined in the Texas Department of Corrections (T.D.C.).

FILING THE COMPLAINT:
To start a civil rights action, you should submit one original copy, one courtesy copy, plus one copy of the complaint for each defendant you name. For example, if you are naming two defendants, you would submit to the Clerk:

a. the original complaint for filing;
b. two copies for the defendants (one for each defendant); and
c. one additional copy (courtesy copy), for a total of four forms. You should keep one additional copy of the complaint for your records.

Each complaint form submitted must be verified. Verification may be accomplished by declaration pursuant to Title 28 U.S.C. § 1746 or notarization. The complaint forms have a verification statement printed at the bottom of page 4. By verification, you are attesting to the truthfulness of your allegations and contents of your complaint.

All complaint forms and copies should be identical. All information should be identical. Forms from other districts should not be submitted.

Do not write on the back of the complaint forms. If you need more space, use additional sheets of paper. Your complaint and all other pleadings/documents must be legibly handwritten or mechanically reproduced. With regard to any attachments, exhibits, or motions submitted with the complaint, please provide sufficient copies for each required copy of the complaint. These may be handwritten or mechanically reproduced. The Clerk does not provide copies unless a fee of $0.50 per page is paid.

TITLE OF THE ACTION:
In the initial complaint, "the title of the action: (_____, Plaintiff v. _____, Defendant)" should include the names of all parties. *See* Rule 10(a), Federal Rules of Civil Procedure.

DEFENDANTS:
You should provide the Clerk with the complete name and address of each defendant. If the first name is unknown, provide an initial. Otherwise, the Clerk cannot prepare summons for issuance of service of process by the Marshal. *See* Rule 4(j) of the Federal Rules of Civil Procedure.

STATEMENT OF CLAIM:
You are required to give facts regarding your grievance. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

FILING FEE/FILING IN FORMA PAUPERIS:
The filing fee of $120.00 should be paid by check or money order payable to the U.S. District Clerk. In addition, the U.S. Marshal may require you to pay the cost of serving the complaint on each defendant. The service fee of $3.00 per defendant should be submitted by separate check or money order payable to the U.S. Marshal. Both fees should be submitted to the Clerk with the complaint.

NOTE: If you are not incarcerated at the time of filing and you are paying the filing fee, it is your responsibility, not the U.S. Marshal's, to serve the defendant(s) with summons and complaint. The summons, however, must be under

seal of the Clerk. Instructions for service when you are not incarcerated and are paying the filing fee may be obtained from the Clerk.

If you are unable to pay the filing fee and service costs of this action, you may petition the Court to proceed in forma pauperis. An Application to Proceed In Forma Pauperis is enclosed in this packet. The application must be verified pursuant to Title 28 U.S.C. § 1746. A verification statement is provided on the reverse of the Application.

RELEASE FORM:
If you are confined at T.D.C., you must also complete a Release Form, which is required by T.D.C. before trust account information is released.

RULE 11, FED. R. CIV. P.:
This rule states that only the signature of a pro se party or parties on pleadings will be acceptable to the Court.

INSTRUCTIONS WHEN MORE THAN ONE PLAINTIFF:
If you and any other plaintiff(s) have the same claims, events, and/or defendants to be stated in your complaint, these should be combined into the same complaint so that one case can be filed. Only if you have different claims, events, and/or defendants should separate complaints be submitted.

Each plaintiff must verify each complaint form by declaration pursuant to Title 28 U.S.C. § 1746 or by separate notarizations. By verification, each plaintiff is attesting to the truthfulness of all allegations and contents of his complaint.

Each plaintiff will be required to provide an Application to Proceed In Forma Pauperis if the $120.00 filing fee is not paid.

Each plaintiff confined at T.D.C. must submit a Release Form when the filing fee is not paid.

When the complaint forms are completed, mail them to the Clerk of the U.S. District Court, Houston Division, P.O. Box 61010, Houston, Texas 77208. After your complaint is filed, a "Notification of Filing" will be sent to you. It will inform you of the civil action number (case number), judge and magistrate judge assigned to your case.

FILING INSTRUMENTS AFTER SERVICE HAS BEEN ISSUED:
You must serve the defendant(s) or defense counsel with a copy of every pleading, letter, or other document submitted for consideration by the Court. The original of all documents filed with the Clerk should have a proper "Certificate of Service."

The following certificate should appear following the plaintiff's signature at the end of each instrument.

CERTIFICATE

I, _____ (name) _____, do hereby certify that a true and correct copy of the foregoing _____ (name of instrument) _____ has been served upon the defendant(s) by placing same in the U.S. Mail, addressed to _____ (name and address of defendant(s) or counsel), on (date) day of _____ (month) _____, __ (year) __.

_____ (your signature) _____

Any pleading or other document submitted to the Clerk for filing which does not bear a proper Certificate of Service may be returned to the submitting party. All instruments (pleading, letters, motions or other documents) pertaining to this case must be signed by all plaintiffs and must state the civil action number (case number).

IMPORTANT INFORMATION:

1. IF YOU DO NOT KEEP THE COURT ADVISED OF YOUR CURRENT ADDRESS, YOUR CASE MAY BE DISMISSED FOR WANT OF PROSECUTION.

2. Request for any type of relief must be in the form of a proper motion, filed in a pending case. Please note that if you submit a letter requesting relief, it will not be treated as a proper motion.

3. It is improper to communicate directly with Judges or Magistrate Judges concerning matters which are or may become a subject in their Court.

4. It is improper for the Clerk, Judges, or Magistrate Judges to give legal advice to litigants.

5. All documents and correspondence submitted to the Clerk should be on letter-size paper (8 1/2 by 11 inches). Please do not use legal-size (8 1/2 by 14 inches) paper.

Appendix B-2

INSTRUCTIONS

You should use this packet if:

1. You are a prisoner; and
2. You believe your federal constitutional rights have been violated; and
3. You wish to file a complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Iowa; and
4. You do not have a licensed attorney to help you with your complaint.

Section 1983 or Habeas Corpus?

Sometimes prisoners do not know if they should file a section 1983 action or a habeas corpus action. Both section 1983 and the writ of habeas corpus can help people who have been deprived of federal constitutional rights. However, if you want the court to release you from custody or shorten your sentence, you should file a habeas corpus action (the court cannot do this for you in a section 1983 action). In a habeas corpus action, you must ask the STATE courts to help you before you ask the FEDERAL court's help. This is not required for a section 1983 action, unless you lost good time.

Do NOT use this section 1983 form to apply for a writ of habeas corpus. A separate form is available for that purpose. The clerk of court can send you a copy upon request, or one should be available in the law library of your institution.

The Right Court and the Right Defendants

Your complaint can be filed in the United States District Court for the Southern District of Iowa only if one or more of the defendants is located in the Southern District, or if the facts of your complaint took place in this district.

A defendant in a section 1983 action must be a person who acted "under color of" state law. This generally means that the person is either a state employee or someone else who acted for the state or under some power given to him/her by the state. (This is not a complete statement of the law on this subject, but is intended only as guidance.)

In order for the warden or some other supervisory official to be a proper defendant, you must have some proof that such person either (1) personally did some act that harmed you, or (2) harmed you by personally failing to do something he/she should have done, or (3) authorized (in words or otherwise) someone else's conduct which harmed you, or (4) was aware of someone else's conduct which harmed you, and went along with that conduct in some way.

It is important that you give the full and correct name and work address, if known, of each person you name as a defendant, so that each of them can be notified of your complaint.

IMPORTANT NOTICE

Do NOT include exhibits with the complaint at this point. Any exhibits submitted with this complaint will be returned to you. Your complaint will NOT be considered by the court unless you have followed these instructions and those on the forms themselves.

Filling Out the Forms

These forms may be filled out by hand or by typewriter. Handwriting must be clear and readable. Please do not use fancy lettering. If your writing is hard to read, print. Every question on the forms must be answered, even if your answer is "none," "don't know," etc.

Your complaint will be more effective if you (1) state your claim briefly, and (2) only tell the court about claims you truly believe are important. Stick to the facts (who, what, when, where, why, how). Always include dates, times, places, and names. The complaint should not contain legal arguments or case citations.

If you need more space to answer a question, use the back side of this form or an extra blank page. However, if you keep your answer to the point, extra space should not be needed.

You must personally sign the complaint. If there is more than one plaintiff, each person must sign. You may not sign for them.

Additional Claims

If, in addition to your section 1983 claim, you have other claims against one or more of the defendants that do not involve violations of constitutional rights, you may state those claims on a separate sheet of paper and attach it to the complaint form. Write the heading "Additional Claims" at the top of the sheet. If you know the name or number of a statute that you think applies to your additional claim, you may state it, but it is not essential. The court will determine whether any of these claims can be decided in federal court. Do not include any habeas corpus claims with the complaint. Those claims should be filed on the habeas corpus form available from your institutional library or the clerk of court.

Other Instructions

There is a fee of $120.00 for filing your complaint. You will also be required to pay the cost of notifying each defendant of your complaint. This is usually done by certified mail, which is not expensive. If you feel you cannot pay the filing fee and service costs, please read the instructions titled "Information About Fees" and submit Forms "B" and "C" as instructed.

Read the attached "Important Notice to Prisoners Filing an Action Under 42 U.S.C. § 1983." On April 26, 1996, the President signed into law the Prison Litigation Reform Act, which makes a number of changes affecting section 1983 lawsuits by inmates.

Mail your packet to the clerk of court at the address below. With this complaint you must send a money order for $120.00 or a completed and signed Application to Proceed In Forma Pauperis (Form B) and Certificate of Inmate Account & Assets (Form C).

Clerk, U.S. District Court
P.O. Box 9344
Des Moines, IA 50306-9344

You must notify the clerk at the above address if your address changes. This includes a transfer to another institution or release. If you don't, your case might be dismissed.

Appendix B-3

IMPORTANT NOTICE TO PRISONERS FILING AN ACTION UNDER 42 U.S.C. § 1983

On April 26, 1996, the President signed into law the Prison Litigation Reform Act. This Act makes a number of changes affecting section 1983 lawsuits by inmates. You should be aware of the following aspects of the new law:

WHO THE LAW AFFECTS

The law applies to prisoners. Prisoners are persons incarcerated or detained in a facility who have been accused of, convicted of, sentenced for, or adjudicated delinquent for violations of (1) criminal law, or (2) the terms and conditions of parole, probation, pretrial release, or diversionary program.

EXHAUSTION

You may not bring an action challenging prison conditions under section 1983 or any other federal law until you have exhausted available administrative remedies, including any grievance system.

FILING

When you bring a civil action or file an appeal, you must pay the full amount of the filing fee ($120 for civil actions) if you have money to pay it. If you cannot pay the full fee at the time of filing, you must apply to proceed in forma pauperis.

1. To file an application to proceed in forma pauperis, you must submit (1) an affidavit that includes a statement of all assets you possess, and (2) a certified copy of your prisoner account statement for the past six months, obtained from the appropriate official at your institution. That official also must calculate the initial partial filing fee using the formula described in #2 below, and include it with the certified copy of your prisoner account statement.

2. After receiving your complaint the court will assess and collect an initial partial filing fee of the greater of the following:

   (a) 20% of the average monthly deposits to your prisoner account for the past six months; or

   (b) 20% of the average monthly balance in your prisoner account for the past six months.

If, however, you have no assets and no means to pay the initial partial fee, you will not be prohibited from bringing an in forma pauperis action. *See* 28 U.S.C. § 1915(b)(4). Any money you later receive will be collected as described in #3 below.

3. After paying this initial partial fee, you must pay 20% of each future month's income received in your prisoner account. The agency having custody of

you will send these payments to the clerk of court when your prisoner account has more than $10 in it, until the full filing fee is paid. *See* 28 U.S.C. § 1915(b). The full fee will be collected even if the court dismisses the case because it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks money damages against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2). The filing fee debt is not dischargeable in bankruptcy.

DISMISSAL

The court must dismiss your case at any time if it determines that:

1. Your allegation of poverty is untrue; or
2. Your case is:
   (a) frivolous, or
   (b) malicious, or
   (c) fails to state a claim on which relief may be granted, or
   (d) seeks money from a defendant who is immune from such relief.

Even if your case is dismissed for one of the above reasons, you are still responsible for paying any unpaid portion of the filing fee.

THREE-DISMISSAL RULE

If you have, three or more times in the past, while incarcerated, brought a civil action or appeal in federal court that was dismissed because it was (1) frivolous, or (2) malicious, or (3) failed to state a claim upon which relief may be granted, you cannot bring a new civil action or appeal a judgment in a civil action in forma pauperis. The only exception to this is if you are in "imminent danger of serious physical injury." *See* 28 U.S.C. § 1915(g).

If you are not proceeding in forma pauperis, you may file a new civil action or appeal even if you have three or more of these dismissals.

Regardless of whether you proceed in forma pauperis in a civil case, if your case is dismissed as frivolous, malicious, or for failure to state a claim at any time, the dismissal will count against you for purposes of the three-dismissal rule if you seek to bring a case in forma pauperis in the future.

COMPENSATORY DAMAGES

If your case is allowed to proceed and you are awarded compensatory damages against a correctional facility or an official or agent of a correctional facility, the damages award will first be used to satisfy any outstanding restitution orders pending.

Before payment of any compensatory damages, reasonable attempts will be made to notify the victims of the crime for which you were convicted concerning payment of such damages. The restitution orders must be fully paid before any part of the award goes to you.

ATTORNEY FEES

If you were granted appointment of counsel and you won attorney fees from the defendant, a portion of your award (but not more than 25% of it) will be used to pay the attorney fees.

INFORMATION ABOUT FEES

If you feel you cannot prepay the $120.00 filing fee for your section 1983 action, you should fill out Form B—Request To Proceed In Forma Pauperis and Declaration in Support Thereof. If there is more than one plaintiff, each one must fill out a separate Form B. The completed form(s) should be signed and returned to the Clerk of Court with your Form A complaint.

If you have funds in your prison account, you will be assessed an initial partial filing fee of 20% of the average monthly deposits to your prisoner account or 20% of the average monthly balance of your prisoner account for the past six months, whichever is greater. After paying this initial partial fee, you must pay 20% of each future month's income to your prisoner account. The agency having custody of you shall send these payments to the clerk of court when your prisoner account has more than $10 in it, until the full filing fee is paid. *See* 28 U.S.C. § 1915(b). The full fee will be collected even if the court dismisses your case because it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks money damages against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2). If, however, you have no assets and no means to pay the initial partial fee, you will not be prohibited from bringing an in forma pauperis action. *See* 28 U.S.C. § 1915(b)(4). Any money you later receive will be collected in the manner described above.

You must also submit a certified copy of your prison account statement (Form C) for the previous six months and the initial partial filing fee calculation, obtained from the appropriate official at your correctional facility.

IMPORTANT NOTES

1. Your complaint will not be considered by the court unless you have followed these instructions and those on the forms themselves.
2. You MUST notify the clerk of court if your address changes. This includes transfers between institutions or release. Your case may be dismissed if we cannot contact you by mail.

Appendix B-4

INFORMATION TO PRISONERS SEEKING LEAVE TO PROCEED WITH A CIVIL ACTION IN FEDERAL COURT IN FORMA PAUPERIS PURSUANT TO 28 U.S.C. § 1915

In accordance with 1996 amendments to the in forma pauperis (IFP) statute, as a prisoner you will be obligated to pay the full filing fee of $120.00 for a civil action or $105.00 for an appeal.

If you have the money to pay the filing fee, you should send a cashier's check or money order to the court with your complaint or notice of appeal and your IFP application. If you do not have enough money to pay the full filing fee when your action is filed, you can file the action without prepaying the filing fee. However, the court will assess an initial partial filing fee at the time your action is filed. The initial partial filing fee will be equal to 20% of the average monthly deposits to your prison or jail account for the six months immediately preceding the filing of the lawsuit, or 20% of the average monthly balance in your prison or jail account for that same six-month period, whichever is greater. The court will order the agency that has custody of you to take that initial partial filing fee out of your prison or jail account as soon as funds are available and to forward the money to the court.

After the initial partial filing fee has been paid, you will owe the balance of the filing fee. Until the amount of the filing fee is paid in full, each month you will owe 20% of your preceding month's income toward the balance. The agency that has custody of you will collect that money and send payments to the court any time the amount in the account exceeds $10.00.

In order to proceed with an action in forma pauperis, you must complete the attached form and return it to the court with your complaint. You must have a prison or jail official complete the Certification section on the back of the form and attach to the form a certified copy of your prison or jail account statement for the last six months. If you submit an incomplete form or do not submit a prison or jail account statement with the form, your request to proceed in forma pauperis will be denied.

Regardless of whether some or all of the filing fee has been paid, the court is required to screen your complaint and to dismiss the complaint if (1) your allegation of poverty is untrue; (2) the action is frivolous or malicious; (3) your complaint does not state a claim on which relief can be granted; or (4) you sue a defendant for money damages and that defendant is immune from liability for money damages.

If you file more than three actions or appeals while you are a prisoner which are dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, then you will be prohibited from bringing any other actions in forma pauperis unless you are in imminent danger of serious physical injury.

Appendix C. Sample Applications to Proceed IFP in Prisoner Civil Rights Cases in the U.S. District Courts

Appendix C-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

	§	
	§	APPLICATION TO PROCEED
	§	IN FORMA PAUPERIS,
	§	SUPPORTING
	§	DOCUMENTATION AND
	§	ORDER FOR SUITS BY
	§	PRISONERS
v.	§	
	§	Case No:

I, _____, am the

(check appropriate box)

_____ petitioner/plaintiff _____ movant (filing 28 U.S.C. § 2255 motion)

_____ respondent/defendant

_____ _____
(other)

in this case. In support of my request to proceed without being required to prepay fees or costs, I state that because of my poverty, I am unable to pay the costs of the proceeding, and that I believe I am entitled to relief. The nature of my action and the issues are briefly stated as follows:

In further support of this application, I answer the following questions:

1. Have you ever before brought an action or appeal in a federal court while you were incarcerated or detained? ____ Yes ____ No

   If so, how many times?

   Were any of the actions or appeals dismissed because they were frivolous, malicious, or failed to state a claim upon which relief may be granted?

   _____ Yes _____ No

   If so, how many of them?

2. Are you presently employed? ____ Yes ____ No
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (List both gross and net salary.)
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

3. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or other 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 other sources? ____ Yes ____ No

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

4. Do you own any cash, or do you have money in prison accounts or in checking or savings accounts? ____ Yes ____ No

   For prisoner accounts, state the present balance and the amount of all deposits over the past six months.

   For accounts at other financial institutions, state the present balance and the amount of deposits over the past six months.

5. Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? ____ Yes ____ No

   If the answer is "yes," describe the property and state its approximate value.

6. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

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

Executed on _____ _____
(Date) (Signature of applicant)

CERTIFICATE

(NOTE: If you are incarcerated, this portion must be completed by an authorized officer of your institution. Failure to complete this form will delay processing of your application.)

I certify that on _____, 19____, the applicant named herein has the sum of $_____ on account to his (her) credit at the institution where he (she) is confined. I further certify that during the past six months the applicant's average monthly balance was $_____. I further certify that during the past six months the applicant's account received $_____. I attach a true and correct copy of the record of the deposits into the inmate trust account for the past 6 months.

_____
(Name of Authorized Officer of Institution)

_____
(Title)

Appendix C-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Plaintiff

vs.

Defendant

APPLICATION TO PROCEED IN FORMA PAUPERIS BY A PRISONER

CASE NUMBER:

I, _____, declare that I am the plaintiff in the above-entitled proceeding; that, in support of my request to proceed without prepayment of fees under 28 U.S.C. § 1915, I declare that I am unable to pay the fees for these proceedings or give security therefor and that I am entitled to the relief sought in the complaint.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated: o Yes o No (If "No" DO NOT USE THIS FORM.)

   If "Yes" state the place of your incarceration: _____

   Have the institution fill out the Certificate portion of this application and attach a certified copy of your prison trust account statement showing transactions for the past six months.

2. Are you currently employed? o Yes o No
   a. If the answer is "Yes" state the amount of your pay.
   b. If the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period, and the name and address of your last employer.

3. In the past twelve months have you received any money from any of the following sources?

   a. Business, profession or other self-employment o Yes o No

   b. Rent payments, interest or dividends o Yes o No

   c. Pensions, annuities or life insurance payments o Yes o No

   d. Disability or workers' compensation payments o Yes o No

   e. Gifts or inheritances o Yes o No

   f. Any other sources o Yes o No

   If the answer to any of the above is "Yes" describe by that item each source of money and state the amount received *and* what you expect you will continue to receive. Please attach an additional sheet if necessary.

4. Do you have cash or checking or savings accounts? o Yes o No

   If "Yes" state the total amount:

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or other valuable property? o Yes o No

   If "Yes" describe the property and state its value:

6. Do you have any other assets? o Yes o No

   If "Yes" list the asset(s) and state the value of each asset listed.

7. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support:

I hereby authorize the agency having custody of me to collect from my trust account and forward to the Clerk of the United States District Court payments in accordance with 28 U.S.C. § 1915(b)(2).

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

_____ _____

DATE SIGNATURE OF APPLICANT

CERTIFICATE
(To be completed by the institution of incarceration)

I certify that the applicant named herein has the sum of $_____ on account to his/her credit at _____ (name of institution). I further certify that during the past six months the applicant's average monthly balance was $_____. I further certify that during the past six months the average of monthly deposits to the applicant's account was $_____.

(Please attach a certified copy of the applicant's trust account statement showing transactions for the past six months.)

_____ _____
DATE SIGNATURE OF AUTHORIZED OFFICER

Appendix D. Sample Complaints for Prisoners Filing Under 42 U.S.C. § 1983 in the U.S. District Courts

Appendix D-1

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

_____ _____
(Name of Plaintiff) (Case Number)

_____
(Address of Plaintiff)
_____

vs. COMPLAINT

_____

_____

_____
(Names of Defendants)

I. Previous Lawsuits

A. Have you brought any other lawsuits while a prisoner? o Yes o No

B. If your answer to A is yes, how many? _____ Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper using the same outline.)

1. Parties to this previous lawsuit:

Plaintiff _____

_____

Defendants _____

_____

2. Court (if Federal Court, give name of District; if State Court, give name of County)

   _____

3. Docket Number _____
4. Name of judge to whom case was assigned _____
5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)

   _____

6. Approximate date of filing lawsuit _____
7. Approximate date of disposition _____

II. Exhaustion of Administrative Remedies

A. Is there a grievance procedure available at your institution?

o Yes o No

B. Have you filed a grievance concerning the facts relating to this complaint?

o Yes o No

If your answer is no, explain why not _____

_____

C. Is the grievance process completed? o Yes o No

III. Defendants

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item B for the names, positions and places of employment of any additional defendants.)

A. Defendant _____ is employed as _____ at _____

B. Additional defendants _____
_____
_____
_____
_____
_____

IV. Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

V. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

Signed this _____ day of _____, 19_____.

_____
(Signature of Plaintiff)

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

_____ _____
(Date) (Signature of Plaintiff)

Appendix D-2

A COMPLAINT UNDER THE CIVIL RIGHTS ACT,
42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

_____ _____
_____ Inmate (DOC) Number
_____ (for mailing purposes)
_____
(Enter above the full name of each
plaintiff in this action.)

VERSUS

_____
_____
_____
_____
(Enter above the full name of each
defendant in this action.)

Instructions for Filing Complaint by Prisoners
Under the Civil Rights Act, 42 U.S.C. § 1983

This packet includes two copies of a complaint form and one copy of the pauper affidavit.

IF YOU ARE A PARISH PRISONER, you must file an original and one copy of your complaint for each defendant you name. For example, if you name two defendants, you must file the original and two copies of the complaint. You should also keep an additional copy of the complaint for your own records.

IF YOU ARE A DOC PRISONER, you must file an original and one copy of your complaint. If the defendants are still employed by the Department of Corrections, only one service copy is needed. Otherwise you must supply a copy of the complaint and the service address for *each* defendant no longer employed by the Department of Corrections.

All copies of the complaint must be identical to the original.

The names of *all parties* must be listed in the caption and in part III of the complaint *in exactly the same way.*

In order for this complaint to be filed, it must be accompanied by the filing fee of $120.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis. For this purpose, a pauper affidavit is included in this packet. You must sign the affidavit and obtain the signature of an authorized officer certifying the amount of money in your inmate account.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS. ALSO, DO NOT INCLUDE EXHIBITS.

When you have completed these forms, mail the original and copies to the Clerk of the United States District Court for the Middle District of Louisiana, P.O. Box 2630, Baton Rouge, LA 70821.

I. Previous lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

o Yes o No

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

   Plaintiff(s):

   _____

   _____

   Defendant(s):

   _____

   _____

2. Court (if federal court, name the district; if state court, name the parish):

   _____

   _____

3. Docket number: _____

4. Name of judge to whom case was assigned: _____

   _____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?):

   _____

   _____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. Place of present confinement _____

_____

A. Is there a prisoner grievance procedure in this institution?

   o Yes o No

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

   o Yes o No

C. If your answer is YES:

   1. Identify the administrative grievance procedure number(s) in which the claims raised in this complaint were addressed. _____

      _____

   2. What steps did you take?

   3. What was the result?

D. If your answer is NO, explain why not:

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of plaintiff _____

Address _____

In Item B below, place the full name of the defendant in the first blank, his or her official position in the second blank, and his or her place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants.

B. Defendant

_____

is employed as _____

at _____

C. Additional defendants: _____

_____

_____

_____

_____

_____

IV. Statement of Claim

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. *Do not give any legal arguments or cite any cases or statutes*. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. Attach no exhibits.

Signed this _____ day of _____, 19_____.

_____

_____

_____

_____
Signature(s) of plaintiff(s)

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

Executed on _____

_____

_____

_____

_____
Signature(s) of plaintiff(s)

NOTICE TO PLAINTIFF(S)

The failure of a pro se litigant to keep the court apprised of an address change may be considered cause for dismissal.

Appendix E. Sample Notice of Deficient Pleading and Sample Clerk's Office Post-Complaint Checklist Sent to Prisoner Litigants

Appendix E-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. H-
	*	
Defendant.	*	

NOTICE OF DEFICIENT PLEADING

To correct the deficient pleading within 30 days of the date of this notice, the plaintiff must file these:

_____ The complete names of all defendants, or as much of the names as is known, and any identifying information (such as gender, race, approximate age), and a complete address for each. Label your response "Complete Names."

_____ _____ copies of the complaint.

_____ An application to proceed in forma pauperis or a fee of $120.00.

_____ An amended complaint containing all claims, which will replace all earlier complaints.

_____ Other:

If the plaintiff fails to comply on time, the court may dismiss this case for want of prosecution. Fed. R. Civ. P. 41(b).

Dated _____, 1996, at Houston, Texas.

_____, CLERK
By:
_____
Deputy Clerk

Appendix E-2
Clerk's Office Post-Complaint Checklist Sent to Prisoner Litigants

To:

Re: CIVIL ACTION _____; or

Date:

From: _____, CLERK
UNITED STATES DISTRICT COURT, P.O. BOX 61010, Houston, Texas 77208.

_____ The Clerk has filed your papers.

_____ Your inquiry has been received. When any action is taken in your case, the court will notify you. Because of the court's heavy caseload, disposition time cannot be predicted.

_____ You may not communicate directly with judges or their law clerks about matters that are or may be pending before the court. The court can only grant relief through a motion in a case in this court.

_____ When directed by the court, the Clerk will issue summons, and when directed by the court, the Marshal will prepare the forms for service.

_____ The court will issue writs of habeas corpus ad testificandum when it determines the time for the testimony is near.

_____ Copies of court documents are $0.29 per page. Tell the Clerk the papers you need copied. The Clerk will tell you the number of pages. Payment is required before copies are sent. Check or money order payable to "Alco."

_____ The court has furnished the Local Rules to the institutional library or writ room. Other copies of the Local Rules may be obtained upon payment of $0.50 per page, or $31.00 in advance.

_____ The address for the _____ District of _____ Division, is:

_____ Other:

_____, Clerk

By: _____
DEPUTY CLERK

Appendix F. Sample Application for Appointment of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF_____

Plaintiff

v. Case No.

Defendant

APPLICATION FOR APPOINTMENT OF COUNSEL

I hereby request that the Court appoint an attorney to represent me in the above captioned action.

I o have o have not contacted attorneys in the private and public sectors about handling my claim. The attorneys I have contacted are listed below:

Correspondence I have received from the attorneys listed above is attached.

The reasons I believe I should be appointed counsel pro bono are as follows:

I declare under penalty of perjury that the information given above is true and correct.

_____ _____

Date Plaintiff

Appendix G. Sample Orders Directing Payment of Filing Fee by Prisoner Litigant

Appendix G-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Plaintiff,	§	
v.	§	CIVIL ACTION H-
Defendant.	§	

ORDER FOR PAYMENT OF INMATE FILING FEE

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, is obligated to pay the statutory filing fee of $120.00 for this action. Plaintiff has been assessed an initial partial filing fee of $(amount) for this action pursuant to 28 U.S.C. § 1915(b)(1). Upon payment of that initial partial filing fee, plaintiff will be obligated to make monthly payments in the amount of 20% of the preceding month's income credited to plaintiff's trust account. The Texas Department of Criminal Justice–Institutional Division (TDCJ–ID) is required to send to the Clerk the initial partial filing fee and thereafter to post payments from plaintiff's prison trust account each time the amount in the account exceeds $10.00 until the statutory fee of $120.00 is paid in full. 28 U.S.C. § 1915(b)(2).

It is therefore ORDERED that:

1. The Director of the TDCJ–ID or his or her designee shall collect from plaintiff's prison trust account an initial partial filing fee in the amount of $(amount) and shall forward the amount to the Clerk. Said payment shall be clearly identified by the name and number assigned to this action.

2. Thereafter, the Director of the TDCJ–ID or his or her designee shall collect from plaintiff's prison trust account the $(amount) balance of the filing fee and shall forward it to the Clerk in accordance with 28 U.S.C. § 1915(b)(2). The payment shall be clearly identified by the name and number assigned to this action.

3. The Clerk is directed to mail a copy of this order to _____, TDCJ Access to Courts Administrator, P.O. Box _____.

4. The Clerk is directed to mail a copy of this order to _____, Assistant Attorney General, P.O. Box _____.

The Clerk will provide copies to the parties.

SIGNED at Houston, Texas, on this _____ day of _____, 19____.

_____
UNITED STATES MAGISTRATE JUDGE

Appendix G-2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, NO. CIV S-

vs.

Defendants.

_____/ ORDER FOR PAYMENT OF INMATE FILING FEE

THE PRESIDENT OF THE UNITED STATES OF AMERICA
To: The Director of the California Department of Corrections, 1515 S Street, Sacramento California 95814:
GREETINGS

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, is obligated to pay the statutory filing fee of $120.00 for this action. Plaintiff has been assessed an initial partial filing fee of $[amount] for this action pursuant to 28 U.S.C. § 1915(b)(1). Upon payment of that initial partial filing fee, plaintiff will be obligated to make monthly payments in the amount of 20% of the preceding month's income credited to plaintiff's trust account. The California Department of Corrections is required to send to the Clerk of the Court the initial partial filing fee and thereafter payments from plaintiff's prison trust account each time the amount in the account exceeds $10.00, until the statutory filing fee of $120.00 is paid in full. 28 U.S.C. § 1915(b)(2).

Good cause appearing therefore, IT IS HEREBY ORDERED that:

1. The Director of the California Department of Corrections or his or her designee shall collect from plaintiff's prison trust account an initial partial filing fee in the amount of $[amount] and shall forward the amount to the Clerk of the Court. Said payment shall be clearly identified by the name and number assigned to this action.

2. Thereafter, the Director of the California Department of Corrections or his or her designee shall collect from plaintiff's prison trust account the $[amount] balance of the filing fee and shall forward payments to the Clerk of the Court in accordance with 28 U.S.C. § 1915(b)(2).The payments shall be clearly identified by the name and number assigned to this action.

3. The Clerk of the Court is directed to serve a copy of this order on _____, Director, California Department of Corrections, _____.

4. The Clerk of the Court is directed to serve a copy of this order on _____, Supervising Deputy Attorney General.

DATED:

_____
UNITED STATES MAGISTRATE JUDGE

Appendix G-3

NOTICE OF COLLECTION OF FILING FEE

You are hereby given notice that _____, an inmate at your facility has filed the following civil lawsuit in the United States District Court for the Southern District of Iowa, _____ v. _____, Civ. No. 4- ___-CV-___. The inmate was granted *in forma pauperis* status pursuant to 28 U.S.C. § 1915(b), which requires partial payments of the initial filing fee. Based on prisoner account information, the court has assessed an initial partial filing fee of $_____, which the inmate must pay now to the clerk of court.

After payment of the initial partial fee, the prisoner shall be required to make monthly payments of 20% of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

If the inmate currently does not have sufficient funds to pay the initial partial filing fee, you must monitor the account and send payments to the clerk of court according to the system provided in section 1915(b)(2).

Please make the appropriate arrangements to have these fees deducted and sent to the court as required under the statute.

_____

U.S. District Court Clerk
Southern District of Iowa

Appendix H. Sample Initial Orders Responding to Prisoner IFP Applications

Appendix H-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	§	
	§	
Plaintiff,	§	
	§	
	§	CIVIL ACTION H-
v.	§	
	§	
	§	
Defendant.	§	

INITIAL ORDER

The plaintiff, a prisoner proceeding pro se, filed this civil rights complaint under 42 U.S.C. § 1983. The plaintiff claims indigence and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915(a).

When a plaintiff seeks to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), the court may dismiss the pauper's case if satisfied that it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e). A case may be dismissed for being frivolous if the claim has no realistic chance of ultimate success or has no arguable basis in law and fact. *See Pugh v. Parish of St. Tammany,* 875 F.2d 436, 438 (5th Cir. 1989); *Booker v. Koonce,* 2 F.3d 114 (5th Cir. 1993). The determination whether an action is dismissible under these grounds may be made prior to service of process. Therefore, such claims are dismissible sua sponte prior to service under 28 U.S.C. § 1915(d). *Ali v. Higgs,* 892 F.2d 438 (5th Cir. 1990).

The facts of this case have not been sufficiently developed to enable the court to determine whether this action should proceed and service of process should be ordered, or whether it is dismissible. The plaintiff may be requested to furnish a more definite statement of facts (*see, e.g., Watson v. Ault,* 525 F.2d 886, 893 (5th Cir. 1976)), and, in addition, a hearing under *Spears v. McCotter,* 766 F.2d 179 (5th Cir. 1985), may be necessary to further clarify the factual underpinnings of the claims. *Cay v. Estelle,* 789 F.2d 318 (5th Cir. 1986).

Accordingly, the plaintiff's complaint shall be filed and the application to proceed in forma pauperis is GRANTED. Plaintiff will be assessed an initial partial filing fee and will be required to pay the statutory filing fee of $120.00. 28 U.S.C.

§ 1915(b)(1) and (2). An initial partial filing fee of $(amount) is ASSESSED by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of 20% of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's trust account exceeds $10.00 until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

Further proceedings are stayed until the court makes the appropriate determination under 28 U.S.C. § 1915(d). *See, e.g., Mitchell v. Sheriff Dept., Lubbock County,* 995 F.2d 60 (5th Cir. 1993). The plaintiff shall file no motions and shall conduct no discovery until authorized by the court. Any motion filed or discovery initiated or conducted in violation of this order will be stricken.

Parties are reminded of the requirements of Fed. R. Civ. P. 11; plaintiff in particular is advised that, though he or she proceeds pro se, this is a civil action in which a signature on pleadings is a declaration that the allegations in the pleadings are true, to the best of plaintiff's knowledge. If the allegations are not true, plaintiff may be subject to sanctions including, but not limited to (1) automatic striking of the pleading or other document; (2) dismissal of the action; (3) an order to pay to the other party the reasonable expenses incurred because of the pleading or other document, including attorney's fees; and (4) monetary fines.

The Clerk will provide copies to the parties.

SIGNED at Houston, Texas, on this _____ day of _____, 19___.

_____

UNITED STATES MAGISTRATE JUDGE

Appendix H-2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

	*	NO.
	*	
Plaintiff,	*	INITIAL REVIEW
	*	ORDER
	*	
vs.	*	
	*	
	*	
	*	
Defendant.	*	

The court has received a pro se complaint submitted by an inmate of the _____ Penitentiary. The complaint is brought under 42 U.S.C. § 1983, and jurisdiction is predicated on 28 U.S.C. § 1343. Plaintiff seeks leave to proceed in forma pauperis. The court received this complaint on May 8, 1996.

On April 26, 1996, the President signed into law the Prison Litigation Reform Act. This Act makes a number of changes which affect inmates filing section 1983 lawsuits.

The provisions of 28 U.S.C. § 1915, the "in forma pauperis" statute, have changed substantially. Under the new law, a prisoner cannot bring a new civil action or appeal a judgment in a civil action in forma pauperis if he or she has three or more times in the past, while incarcerated, brought a civil action or appeal in federal court that was dismissed because it was frivolous, malicious, or failed to state a claim upon which relief may be granted. The only exception to this is if the prisoner is in "imminent danger of serious physical injury." *See* 28 U.S.C. § 1915(g). A prisoner who is not proceeding in forma pauperis may file a new civil action or appeal even if that prisoner has three or more dismissals described in section 1915(g).

Regardless of whether a prisoner proceeds in forma pauperis in a civil case, if at any time the prisoner's case is dismissed as frivolous or malicious, or for failure to state a claim, the dismissal will count against the prisoner for purposes of the three-dismissal rule in 28 U.S.C. § 1915(g).

While incarcerated, plaintiff has filed at least three civil actions that have been dismissed as frivolous. *See* _____ *v.* _____, 4-94-cv-90001 (dismissed 12/19/94); _____ *v.* _____, 4-94-cv-90002 (dismissed 9/22/94); _____ *v.* _____ 4-92-cv-90009 (dismissed 6/4/92). Therefore, plaintiff may not file another civil action in forma pauperis while incarcerated unless he (or she) is in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Plaintiff's complaint does not meet that standard.

Leave to proceed in forma pauperis is denied. Plaintiff's complaint shall be filed for the purpose of making a record, and shall be dismissed pursuant to the three-dismissal rule of 28 U.S.C. § 1915(g).

IT IS SO ORDERED.

Dated this _____ day of _____, 1996.

_____

DISTRICT JUDGE,
SOUTHERN DISTRICT OF IOWA

Appendix H-3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV S-

v.

Defendants. ORDER

_____/

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by section 1915(a). Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

Pursuant to 28 U.S.C. § 1915(b)(1), enacted April 26, 1996, plaintiff is required to pay the statutory filing fee of $120.00 for this action.[1] Plaintiff has been without funds for six months and is currently without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments of 20% of the preceding month's income credited to plaintiff's prison trust account. These payments shall be collected and forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's trust account exceeds $10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

The complaint states a cognizable claim for relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action.

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's request for leave to proceed in forma pauperis is granted.

2. Plaintiff is obligated to pay the statutory filing fee of $120.00 for this action. The fee shall be collected and paid in accordance with this court's order to the Director of the California Department of Corrections filed concurrently herewith.

1. The statutory filing fee for all civil actions except applications for writs of habeas corpus is $120.00. *See* 28 U.S.C. § 1914(a).

3. Service is appropriate for the following defendants: _____
_____.

4. The Clerk of the Court shall send plaintiff [#] USM-285 forms, one summons, an instruction sheet, and a copy of the complaint filed [date].

5. Within thirty days from the date of this order, plaintiff shall complete the attached Notice of Submission of Documents and submit the completed Notice to the court with the following documents:

a. One completed summons;
b. One completed USM-285 form for each defendant listed in number 3 above; and
c. [# plus 1 for USM] copies of the endorsed complaint filed [date].

6. Plaintiff need not attempt service on defendants and need not request waiver of service. Upon receipt of the above-described documents, the court will direct the United States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4 without payment of costs.

7. The Clerk of the Court is directed to send _____, Supervising Deputy Attorney General, a copy of plaintiff's complaint and a copy of the instant order.

DATED:

_____
UNITED STATES MAGISTRATE JUDGE

Appendix H-4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV S-

v.

Defendants. ORDER

_____/

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

Pursuant to 28 U.S.C. § 1915(b)(1), enacted April 26, 1996, plaintiff is required to pay the statutory filing fee of $120.00 for this action.[1] Plaintiff has been without funds for six months and is currently without funds. Accordingly the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments of 20% of the preceding month's income credited to plaintiff's prison trust account. These payments shall be collected and forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account exceeds $10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227–28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the

1. The statutory filing fee for all civil actions except applications for writs of habeas corpus is $120.00. 28 U.S.C. § 1914(a).

factual contentions are clearly baseless. *Neitzke,* 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona,* 885 F.2d 639, 640 (9th Cir. 1989); *Franklin,* 745 F.2d at 1227.

A complaint, or portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass'n,* 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question (*Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976)), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969).

The court finds the allegations in plaintiff's complaint so vague and conclusory that it is unable to determine whether the current action is frivolous or fails to state a claim for relief. The court has determined that the complaint does not contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev. Agency,* 733 F.2d 646, 649 (9th Cir. l984). Plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support plaintiff's claim. *Id.* Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. *See Ellis v. Cassidy,* 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed deprivation. *Rizzo v. Goode,* 423 U.S. 362 (1976); *May v. Enomoto,* 633 F. 2d 164, 167 (9th Cir. 1980); *Johnson v. Duffy,* 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil rights violations are not sufficient. *See Ivey v. Board of Regents,* 673 F.2d 266, 268 (9th Cir. 1982).

In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to make plaintiff's amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleadings. This is because, as a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay,* 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an original com-

plaint, each claim and the involvement of each defendant must be sufficiently alleged.

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's request for leave to proceed in forma pauperis is granted.

2. Plaintiff is obligated to pay the statutory filing fee of $120.00 for this action. The fee shall be collected and paid in accordance with this court's order to the Director of the California Department of Corrections filed concurrently herewith.

3. Plaintiff's complaint is dismissed; and

4. Plaintiff is granted thirty days from the date of service of this order to file an amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number assigned this case and must be labeled "Amended Complaint"; plaintiff must file an original and two copies of the amended complaint; failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

DATED:

_____

UNITED STATES MAGISTRATE JUDGE

Appendix H-5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV S-

v.

ORDER AND ORDER
DIRECTING SERVICE BY THE
Defendants. UNITED STATES MARSHAL
_____/ WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. The court previously ordered plaintiff to provide information for service of process on form USM-285, sufficient copies of the complaint for service, and a notice of compliance. Plaintiff has filed the required papers. Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward the instructions for service of process, the completed summons, copies of the complaint and copies of this order to the United States Marshal.

2. Within ten days from the date of this order, the United States Marshal is directed to notify defendants [names] of the commencement of this action and to request a waiver of service in accordance with the provisions of Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c).

3. The United States Marshal is directed to retain the sealed summons and a copy of the complaint for future use.

4. The United States Marshal shall file returned waivers of service as well as any requests for waivers of service that are returned as undelivered as soon as they are received.

5. If a waiver of service is not returned by a defendant within sixty days of the date of mailing the request for waiver, the United States Marshal shall:

a. Personally serve process and a copy of this order upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C. § 566(c) and shall command all necessary assistance from the California Department of Corrections (CDC) to execute this order. The United States Marshal shall maintain the confidentiality of all information provided by the CDC pursuant to this order.

b. Within ten days after personal service is effected, the United States Marshal shall file the return of service for the defendant, along with any attempts to secure a waiver of service of process and of the costs subsequently incurred in effecting service on said defendant. Said costs shall be enumerated on the USM-

285 form and shall include the costs incurred by the U.S. Marshal's Service for photocopying additional copies of the summons and complaint and for preparing new USM-285 forms, if required. Costs of service will be taxed against the personally served defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

6. Defendants shall reply to the complaint within the time provided by the applicable provisions of Fed. R. Civ. P. 12(a).

7. Unless otherwise ordered, all motions to dismiss, motions for summary judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59, and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 110 shall be briefed pursuant to Local Rule 230(m). Failure to oppose such a motion timely may be deemed a waiver of opposition to the motion. Opposition to all other motions need be filed only as directed by the court.

8. Pursuant to *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following requirements for opposing a motion for summary judgment made by defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment in favor of defendant without trial. The defendant's motion will set forth the facts that defendant contends are not reasonably subject to dispute and that entitle defendant to judgment. To oppose the motion, plaintiff must show proof of his or her claims. Plaintiff may do this in one or more of the following ways: Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may also serve and file one or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's claims; the persons who sign the affidavit or declaration must have personal knowledge of the facts stated. Plaintiff may also rely upon written records, but plaintiff must prove that the records are what plaintiff claims they are. Plaintiff may also rely upon all or any part of the transcript of one or more depositions, answers to interrogatories, or admissions obtained in this proceeding. If there is some good reason why such facts are not available to plaintiff when required to oppose such a motion, the court will consider a request to postpone considering defendant's motion. If plaintiff does not serve and file a request to postpone consideration of defendant's motion or written opposition to the motion, the court may consider the failure to act as a waiver of opposition to defendant's motion.

9. A motion supported by affidavits or declarations that are unsigned will be stricken.

10. Each party shall keep the court apprised of a current address at all times while the action is pending. Any change of address must be reported promptly to the court in a separate document captioned for this case and entitled "Notice of Change of Address." A notice of change of address must be properly served on other parties. Pursuant to Local Rule 182(d), service of documents at the record

address of a party is fully effective. Failure to apprise the court of a change of address may result in the imposition of sanctions, which may include dismissal of the action.

11. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of Court.

12. The failure of any party to comply with this order, the Federal Rules of Civil Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but not limited to, dismissal of the action or entry of default.

DATED:

_____

UNITED STATES MAGISTRATE JUDGE

Appendix H-6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV S-

v.

Defendants. ORDER

_____/

Plaintiff, a state prisoner proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983, together with a request for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Plaintiff has not, however, filed a certified copy of his (her) prison trust account statement for the six-month period immediately preceding the filing of the complaint. *See* 28 U.S.C. § 1915(a)(2). Plaintiff will be provided the opportunity to submit the certified copy in support of his (her) request to proceed in forma pauperis.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff shall submit, within twenty days of the date of this order, a certified copy of his (her) prison trust account statement for the six-month period immediately preceding the filing of the complaint. Plaintiff's failure to comply with this order will result in a recommendation that this action be dismissed.

DATED:

_____
UNITED STATES MAGISTRATE JUDGE

Appendix H-7

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

	*	NO.
Plaintiff,	*	
	*	
v.	*	
	*	
	*	
	*	PRE-INITIAL REVIEW ORDER
Defendant.	*	

The court has received a pro se complaint submitted by an inmate of the _____ Penitentiary. The complaint is brought under 42 U.S.C. § 1983, and jurisdiction is predicated on 28 U.S.C. § 1343. The court received this complaint on _____.

On April 26, 1996, the President signed into law the Prison Litigation Reform Act. This Act makes a number of changes which affect inmates filing section 1983 lawsuits.

The provisions of 28 U.S.C. § 1915(d), the "in forma pauperis" statute, have changed substantially. Under the new law, when a prisoner brings a civil action or files an appeal in forma pauperis while incarcerated, the prisoner must pay the full amount of the filing fee ($120 for civil actions) if the prisoner has money to pay it. The court will assess and collect an initial partial filing fee of 20% of the average monthly deposits to the prisoner's account or 20% of the average monthly balance of the prisoner's account for the past six months, whichever is greater. After paying this initial partial fee, the prisoner must pay 20% of each future month's income to the prisoner's account. The agency having custody of the prisoner shall send these payments to the clerk of court when the prisoner's account has more than $10 in it, until the full filing fee is paid. *See* 28 U.S.C. § 1915(b). The full fee will be collected even if the court dismisses the case because it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks money damages against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2). If, however, the prisoner has no assets and no means to pay the initial partial fee, the prisoner will not be prohibited from bringing an in forma pauperis action. *See* 28 U.S.C. § 1915(b)(4). Any money the prisoner later receives will be collected in the manner described above.

Under the new law, the prisoner must submit (1) an affidavit that includes a statement of all assets possessed, and (2) a certified copy of the prisoner's account statement for the past six months, obtained from the appropriate official at the institution. The court requires that the appropriate prison official also calculate the initial partial filing fee using the formula described above, and attach it to the certified copy of the prisoner's account statement.

The new law also provides that a prisoner cannot bring a new civil action or appeal a judgment in a civil action in forma pauperis if he or she has on three or more times in the past, while incarcerated, brought a civil action or appeal in federal court that was dismissed because it was frivolous, malicious, or failed to state a claim upon which relief may be granted. The only exception to this is if the prisoner is in "imminent danger of serious physical injury." *See* 28 U.S.C. § 1915(g). A prisoner who is not proceeding in forma pauperis may file a new civil action or appeal even if that prisoner has three or more dismissals described in section 1915(g).

Regardless of whether a prisoner proceeds in forma pauperis in a civil case, if the prisoner's case is dismissed as frivolous or malicious, or for failure to state a claim at any time, the dismissal will count against the prisoner for purposes of the three-dismissal rule in 28 U.S.C. § 1915(g).

Under the new law, a prisoner may not bring an action challenging prison conditions under section 1983 or any other federal law until the prisoner has exhausted available administrative remedies, including any grievance system.

Also under the Act, if a prisoner's case is allowed to proceed and the prisoner is awarded compensatory damages against a correctional facility or an official or agent of a correctional facility, the damages award will first be used to satisfy any outstanding restitution orders pending. Before payment of any compensatory damages, reasonable attempts will be made to notify the victims of the crime for which the prisoner was convicted concerning payment of such damages. The restitution orders must be fully paid before any part of the award goes to the plaintiff.

Because of these changes in the law, the court will give plaintiff an opportunity to voluntarily dismiss the complaint pursuant to Fed. R. Civ. P. 41(a)(1). Such a voluntary dismissal will not be considered a complaint dismissed as frivolous or malicious, or for failure to state a claim. In other words, it will not count as a dismissal which may later subject plaintiff to the three-dismissal rule under section 1915(g).

IT IS ORDERED that the plaintiff must notify the court within 20 days of the date of this order of whether plaintiff intends to proceed with the case or dismiss the case voluntarily. If plaintiff chooses not to voluntarily dismiss, plaintiff must submit a certified copy of the prisoner's account information for the past six months and the initial filing fee calculation from the appropriate prison official. If the court receives no timely response or the required account information, plaintiff's case will be dismissed.

The clerk of court shall file the complaint for the purpose of making a record. Dated this ____ day of _____, 1996.

_____
JUDGE
Southern District of Iowa

Appendix H-8

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

	*	NO.
Plaintiff,	*	(Control No.)
	*	
	*	
v.	*	INITIAL REVIEW ORDERS
	*	
	*	
Defendants.	*	

The court has before it for initial review a pro se complaint submitted by an inmate of the _____ Penitentiary. The complaint is brought under 42 U.S.C. § 1983, and jurisdiction is predicated on 28 U.S.C. § 1343. Plaintiff seeks injunctive and declaratory relief and damages. Plaintiff requests leave to proceed in forma pauperis.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48 (1988). A pro se complaint in a proceeding in forma pauperis must be construed liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam). However, it can be dismissed on initial review if the claim is malicious or frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e). A claim is "frivolous" if it "lacks an arguable basis in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325 (1989).

AMEND

The court cannot fairly judge plaintiff's claim on the facts alleged. Plaintiff must amend to _____. Failure to so amend will result in dismissal of the complaint for failure to prosecute and not complying with a court order. *See* Fed. R. Civ. P. 41(b).

Plaintiff's request to proceed in forma pauperis is GRANTED. IT IS ORDERED that the complaint be filed. IT IS FURTHER ORDERED that plaintiff amend his complaint on or before _____. IT IS FURTHER ORDERED that plaintiff pay to the clerk of court the initial partial filing fee of $_____, on or before _____. See 28 U.S.C. § 1915(b). The remainder of the fee owed shall be paid to the clerk of court from the prisoner's

account in accordance with 28 U.S.C. § 1915(b). A notice of this obligation shall be sent to the appropriate prison officials.

Service of process is withheld until further order of the court.

DISMISS

Plaintiff's claim thus "lacks an arguable basis in law" (*Neitzke*, 490 U.S. at 325) and must be dismissed.

Plaintiff's request for permission to proceed in forma pauperis is GRANTED. IT IS ORDERED that the complaint be filed for the purpose of making a record. IT IS FURTHER ORDERED that plaintiff pay to the clerk of court the initial partial filing fee of $_____, on or before _____. See 28 U.S.C. § 1915(b). The remainder of the fee owed shall be paid to the clerk of court from the prisoner's account in accordance with 28 U.S.C. § 1915(b). A notice of this obligation shall be sent to the appropriate prison officials.

IT IS FURTHER ORDERED that the complaint be DISMISSED without prejudice. *See* 28 U.S.C. § 1915A(b). This dismissal, and any appeal of this order if dismissed as frivolous, will count against the plaintiff for purposes of the three-dismissal rule in 28 U.S.C. § 1915(g).

GO FORWARD

Permission to proceed in forma pauperis is GRANTED. IT IS ORDERED that the complaint be filed. IT IS FURTHER ORDERED that plaintiff pay to the clerk of court the initial partial filing fee of $_____, on or before _____. See 28 U.S.C. § 1915(b). The remainder of the fee owed shall be paid to the clerk of court from the prisoner's account in accordance with 28 U.S.C. § 1915(b). A notice of this obligation shall be sent to the appropriate prison officials.

IT IS FURTHER ORDERED that service of process issue by mail to defendants and to the Attorney General of the State of Iowa. The Attorney General is directed to notify this court immediately if he lacks the consent of defendants to appear generally on their behalf and submit to the jurisdiction of the court. Because the court has found that the plaintiff has a reasonable opportunity to prevail on the merits, the defendant(s) is (are) required to reply to this complaint within 40 days.

Appendix I. Sample Orders Requiring Penal Institution Defendant to Prepare and File Special Report with U.S. District Court

Appendix I-1
Order Requiring Defendant to Prepare and File Special Report

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

Plaintiff

v. Case No.

Defendant

ORDER

It appearing to the Court that a Complaint has been filed by a person serving a custodial sentence in an institution of the State of _____ claiming a violation of civil rights under 42 U.S.C § 1983; and

It appearing that proper and effective judicial processing of the claim cannot be achieved without additional information from officials responsible for the operation of the appropriate custodial institution;

IT IS THEREFORE ORDERED:

1. The answer to the complaint, including the report herein, shall be filed no later than _____ days from the date hereof.
2. No answer or motions addressed to the complaint shall be filed until the steps set forth in this Order shall have been taken and completed.
3. Officials responsible for the operation of the appropriate custodial institution are directed to undertake a review of the subject matter of the complaint
   (a) to ascertain the facts and circumstances;
   (b) to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint; and

(c) to determine whether other like complaints, whether pending in this Court or elsewhere, are related to this complaint and should be taken up and considered together.

4. In the conduct of the review, a written report shall be compiled and filed with the Court. Authorization is granted to interview all witnesses, including the plaintiff and appropriate officers of the institution. The report shall contain the sworn statements of all persons having knowledge of the subject matter of the complaint. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report. Where the plaintiff's claim or the defendant's defenses relate to or involve the application of administrative rules, regulations, or guidelines, the written report shall include copies of all such applicable administrative rules, regulations, or guidelines. *All defenses, including immunity defenses, must be set forth in the written report or such defenses may be waived.*

5. All reports made in the course of the review shall be attached to and filed with defendant's answer to the complaint.

6. The answer shall restate in separate paragraphs the allegations of the complaint. Each restated paragraph shall be followed by defendant's answer thereto.

7. A copy of this Order shall be transmitted to the plaintiff by the Clerk forthwith.

_____ _____

Date

United States District Judge or
United States Magistrate Judge

Appendix I-2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	§	
	§	
Plaintiff,	§	
	§	
	§	CIVIL ACTION H-
v.	§	
	§	
	§	
Defendant.	§	

ORDER FOR SPECIAL REPORT

This pro se plaintiff, an inmate of the Texas state prison, filed his civil rights complaint under 42 U.S.C. § 1983 to allege that a monitor was placed in his head in 1984 by officials of Harris County, Texas, in collusion with a professor at Texas Southern University. The court has ordered the plaintiff to file a more definite statement of facts in an effort to ascertain the factual and legal basis of this complaint; although the plaintiff has complied, it appears that his ability to make effective use of written instruments is limited.

Because a *Spears*[1] hearing could be extraordinarily difficult in this case, the court instead ORDERS a special report from the warden of the _____ where Plaintiff _____ is currently confined. The report should contain the following information:

1. Copies of the plaintiff's medical, psychiatric, and psychological records;

2. A brief description of the plaintiff's custody classification, status, and work assignment, if any;

3. A brief history of the plaintiff's disciplinary history. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978); *Cay v. Estelle*, 789 F.2d 318, 323 n.4 (5th Cir. 1986); *Parker v. Carpenter*, 978 F.2d 190, 191 n.2 (5th Cir. 1992).

The Clerk is directed to provide a copy of this Order, the complaint (Instrument #1), and the instrument entered as a Letter, dated and filed on the correspondence side of the file to Warden _____, P.O. Box _____. The Clerk is further

1. Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985); Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986).

directed to provide a copy of this Order to the Office of the Attorney General, ATTN: _____, P.O. Box _____. Warden _____ is requested to comply with this Order no later than _____, 1996.

It is further ORDERED that the Plaintiff's motions for appointment of counsel (Instruments #7 and #8) are DENIED at this time. The court will, sua sponte, appoint counsel at a later time if necessary.

The Clerk will provide a copy to the parties.

Signed at Houston, Texas, on _____, 1996.

_____
UNITED STATES DISTRICT JUDGE

Appendix I-3

ORDER FOR SPECIAL REPORT

This pro se plaintiff, a death row inmate of the Texas state prison, filed his (her) civil rights complaint under 42 U.S.C. § 1983 to allege _____.

The court may scrutinize the complaints of litigants who proceed in forma pauperis, as this plaintiff does. The court ordered him (her) to file a more definite statement as part of its scrutiny, and has determined that a hearing under *Spears v. McCotter,* 766 F.2d 179 (5th Cir. 1985), and *Cay v. Estelle,* 789 F.2d 318 (5th Cir. 1986), would be helpful in this case. However, a hearing would be extraordinarily difficult because of the extremely restricted custody status of this inmate. Therefore the court instead ORDERS a special report from the defendant, to contain the following information: _____
_____

The defendant is further ORDERED to file copies of policies, procedures, or other records pertinent to the issues in this cause. *See Martinez v. Aaron,* 570 F.2d 317 (10th Cir. 1978); *Cay,* 789 F.2d at 323 n.4 (5th Cir. 1986); *Parker v. Carpenter,* 978 F.2d 190, 191 n.2 (5th Cir. 1992).

The defendant is further ORDERED to comply with this Order no later than _____.

Appendix J. Sample U.S. Magistrate Judge's Report of Findings and Recommendations Regarding Prisoner Civil Rights Complaint, and Sample Order of Dismissal by U.S. District Court Judge

Appendix J-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV S-

v.

Defendants. FINDINGS & RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. It appears that administrative remedies may be available to address plaintiff's claim(s). *See* Cal. Code Regs. tit. 15, §§ 3084.1–3084.7. Plaintiff is required to exhaust those administrative remedies before bringing a federal civil rights action. 42 U.S.C. § 1997e(a). A prison inmate in California can satisfy the exhaustion requirement by following the applicable procedures set forth in §§ 3084.1–3084.7 of Title 15 of the California Code of Regulations.

After reviewing the complaint filed in this action, the court finds that plaintiff has failed to exhaust administrative remedies. Good cause appearing, IT IS HEREBY RECOMMENDED that this action be dismissed for failure to exhaust administrative remedies.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, plaintiff may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED:

_____
UNITED STATES MAGISTRATE JUDGE

Appendix J-2

ORDER OF DISMISSAL

Plaintiff brings this civil rights action under 42 U.S.C. § 1983. The plaintiff is presently in the custody of the _____. He (she) claims constitutional deprivations concerning prison conditions.

The Civil Rights of Institutionalized Persons Act of 1980, as amended, provides that no action under 42 U.S.C. § 1983 shall be brought by a prisoner concerning prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e. The _____, in which plaintiff is incarcerated, provides a prisoner grievance procedure. Tex. Gov't Code Ann. § 501.008 (West 1995). Plaintiff has not exhausted his (her) available administrative remedies. (Complaint, p. 2, ¶ II. B.)

Texas' two-year period of limitations may cause the plaintiff's civil rights claims to prescribe. (The Texas period of limitations for personal injury actions is two years. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a), § 16.001. *See also Henson-El v. Rogers*, 923 F.2d 51 (5th Cir. 1991) (per curiam), *cert. denied*, 111 S. Ct. 2863 (1991).) Therefore, in order to protect the plaintiff's right to proceed on his (her) civil rights claims after having exhausted his (her) administrative remedies, the court will order the suspension of the period of limitations, provided that the plaintiff will file a grievance or otherwise initiate administrative remedies within twenty (20) days of the date of this order; and provided further, that after exhaustion of his (her) administrative remedies, the plaintiff will file, if necessary, his (her) civil rights action within thirty (30) days of the final resolution of his (her) administrative remedies. *See Rodriguez v. Holmes*, 963 F.2d 799 (5th Cir. 1992).

Accordingly, it is ORDERED that:

1. The plaintiff is GRANTED leave to proceed in forma pauperis under 28 U.S.C. § 1915.

2. This cause of action be DISMISSED without prejudice to filing a new civil action after fully and properly exhausting all available administrative remedies on his (her) claims under the grievance procedures provided by the institution in which he (she) is incarcerated.

3. The period of limitations on the plaintiff's claims is suspended provided that the plaintiff file a grievance or otherwise initiate administrative remedies within twenty (20) days of the date of this order; and provided further, that after exhaustion of his (her) administrative remedies, the plaintiff will file, if necessary, his (her) new civil rights action under a new civil action number within thirty (30) days of the final resolution of his (her) administrative remedies.

The Clerk will provide a copy of this order to the plaintiff, and will provide a copy of the complaint and this order to _____, Inmate Litigation Coordinator, Attorney General's Office, P.O. Box _____ _____.

The Clerk will provide copies to the parties.

SIGNED at Houston, Texas, this _____ day of _____, 19___

_____
UNITED STATES DISTRICT JUDGE

The Federal Judicial Center

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