Alternative Dispute Resolution Mechanisms for Prisoner Grievances

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR PRISONER GRIEVANCES

A Reference Manual for Averting Litigation

Submitted to the
National Institute of Corrections
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by
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FOREWORD

The dramatic increase in conditions of confinement actions brought in the Federal courts by state and local prisoners under 42 U.S.C. 1983 has been and continues to be of great concern to practitioners, policymakers, and others. The number of these cases filed in United States District Courts increased from 218 in 1966 to 17,687 in 1983. With state prison populations rapidly expanding, the potential for significant increases in the number of filings per year is very real. It is not only reasonable, but necessary, to seek alternatives to litigation to address prisoner complaints.

This manual has been designed to serve as a reference tool for correctional administrators. It focuses on the advantages and disadvantages of six alternative dispute resolution mechanisms now in place in various correctional systems. These mechanisms include inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies.

The manual: (1) describes the benefits that can be expected upon implementation of one or more of the mechanisms, (2) clarifies the structure of the alternatives and the procedures needed to adapt the general framework to particular institutions or systems, and (3) explains legal standards that will enable correctional administrators to differentiate between potentially meritorious prisoner claims and frivolous ones.

We hope that correctional administrators will find the information contained in this manual helpful to their planning efforts.

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PREFACE

Selection of the forum in which state prisoner grievances are resolved has been a fundamental problem since the U.S. Supreme Court recognized the constitutional right of inmates to challenge the conditions of their confinement. The courts provide an arena in which prisoners can sue for damages and injunctive relief when policies, practices, and specific actions fall short of constitutional standards. Although the federal courts are an appropriate forum in which to address questions of great magnitude, most of the nearly 20,000 cases annually coming into the federal court system focus on administrative problems that affect only an individual or a small group of inmates. The results of this litigation are usually unsatisfying for all parties, and most of the suits are dismissed without even a hearing on the merits. Moreover, such litigation draws down heavily on the scarce resources of judges, state attorneys general, correctional administrators and their staffs. States may even have to pay attorneys' fees and damage awards in cases that might have been resolved informally at minimal cost.

The use of alternative dispute resolution mechanisms is a possible way of averting much of this prisoner litigation. In September of 1982, Silbert, Feeley, and Associates, Inc., began collecting information on six basic dispute resolution mechanisms--inmate grievance procedures, ombudsmen, mediation, legal assistance, inmate councils, and external review bodies. The authors interviewed correctional officials and experts in correctional law, made site visits in eleven states, and reviewed the literature to produce a reference manual that highlights key policy issues in the search for alternatives to litigation. The manual includes:

... A statement of purpose (Chapter I).

... A discussion of the need for alternatives to litigation (Chapter II).

... A review of correctional law suggesting ways to recognize potentially meritorious grievances and preventing them from becoming lawsuits (Chapter III).

... A description of the basic structure, process and impact of six major alternative mechanisms, based on information gathered during the course of the project (Chapter IV).

... A reminder of the contextual factors that help to ensure successful implementation and operation of the mechanisms (Chapter V).

... A list of officials in key states who are knowledgeable about particular mechanisms that work effectively (Appendix).

... A list of reference material for further examination of this problem area (Bibliography).

Although the authors are responsible for the material included in this manual, we are indebted to the many men and women who gave of their time and energy to discuss grievance mechanisms with us. Wardens, inmate grievance program staffs, correctional administrators, assistant attorneys general, and officials in the U.S. Bureau of Prisons all helped to keep the project on course. The individuals listed in the Appendix were especially helpful.

We were particularly fortunate to have an advisory board composed of individuals with different perspectives on this topic: Charles Bethel, Director, Accord Associates; Renee Chotiner, Yale Law School Danbury Prison Project; James Harris, Connecticut Department of Corrections; and Michael Millemann, Associate Professor of Law, Maryland University School of Law. They helped us clarify the major issues and reviewed drafts of the final product. Professor Millemann also contributed extensively to the section on "Preventive Law."

Support from the National Institute of Corrections came in the form of financial resources, advice and encouragement. Initially, Judith Friedman, now at the Executive Office of the U.S. Attorneys, was project monitor. When she left NIC, Mary Lou Commiso assumed that responsibility. We are most grateful to them for their assistance in guiding the project to its conclusion.

Finally, we appreciate the research assistance of Patricia Kilkenny as well as the skillful work of Kathy E. Williams and Betty Seaver in the preparation of this manual.

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CHAPTER I

INTRODUCTION

The dramatic rise in conditions of confinement actions brought in the federal courts[1] by state and local prisoners under 42 U.S.C. 1983 has been of greatest concern to practitioners, scholars, and policymakers. Through such suits, prisoners request injunctive and compensatory relief against such claimed abuses as staff brutality, inadequate nutrition and medical care, theft of personal property, violence by other inmates, restrictions on religious freedom, interference with mail, and many others. The number of these cases filed in U.S. District Courts increased from 218 in 1966 to 17,687 in 1983. An additional 2,103 decisions were appealed in 1983 to the U.S. Circuit Courts of Appeals[2].

Recent Supreme Court decisions suggest some judicial limits on the extent to which courts will intervene in these cases[3]. With burgeoning prison populations, however, there is ample reason to consider the impact of such filings on the federal judiciary, state attorneys general, and correctional administrators.

The potential benefits of resolving prisoner grievances without resort to litigation are different for each group of participants--judges, government attorneys, prisoners, and correctional officials. The interests of administrators, however, often have been overlooked in the wealth of literature about alternative dispute resolution mechanisms. This manual focuses on the advantages and disadvantages of six alternative dispute resolution mechanisms now in place in various correctional systems. These mechanisms include: Inmate Grievance Procedures, Ombudsmen, Mediation, Inmate Councils, Legal Assistance, and External Review Bodies. Among the advantages associated with one or more of the alternatives are:

> ...Preventing complaints based on extremely questionable evidence from being pursued, by advising prisoners of the merits of grievances when initially expressed.
>
> ...Providing a prompt resolution through procedures less complex than litigation.
>
> ...Minimizing prisoner resentment when grievances are not acted upon in their favor, because the procedure is recognized as being fair, open, and legitimate.

...Alerting officials to problem areas so they may be remedied before both costly lawsuits are filed and the situation becomes any worse.

The purpose of this reference manual is to describe the structure, process, and impact of the six dispute resolution mechanisms found most frequently in American correctional systems. Site visits to several states, communications with program directors, and a review of the literature document experience with these alternatives. The information gathered from the various users and presented in this manual should assist correctional administrators in three ways:

...First, by describing the benefits that can be expected upon implementation of one or more of the mechanisms.

...Second, by clarifying the structure of the alternatives and the procedures needed to adapt the general framework to particular institutions or systems.

...Third, by explaining legal standards that will enable correctional administrators to differentiate between potentially meritorious claims and weak or frivolous ones .

The manual is designed to be used as a reference tool by those charged with maintaining humane, just, and secure correctional institutions at both the state and local levels. Well-managed institutions are probably the best way to avert litigation. When prisoners express complaints, however, correctional administrators must have the ability to distinguish the frivolous from the potentially meritorious. They must also have the ability to utilize dispute resolution techniques that can resolve problems quickly, fairly and efficiently.

Averting litigation does not mean denying prisoners access to the courts. That right, of course, is protected by the U.S. Constitution. Moreover, litigation is generally recognized as an important factor in the history of correctional reform. Some correctional administrators welcome responsible lawsuits that heighten public and legislative awareness of the need for change.[4] The vast majority of inmate complaints, however, are capable of resolution without judicial intervention. The dispute resolution mechanisms discussed should be viewed as alternatives that may be more effective for both prisoners and correctional staff than the more traditional action of filing a suit in federal court.

Notes

1. In most states, prisoners generally file complaints involving the conditions of their confinement in the federal courts. However, cases can be and are filed in state courts as well. For the purpose of simplifying this report, reference will be made only to the more common practice of federal court filings.

2. Administrative Office of the U.S. Courts, Annual Report (Washington, DC: Government Printing Office, 1982).

3. Bell v. Wolfish, 99 S. Ct. 1861 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981). For recent ideas on streamlining procedures for handling prisoner cases, see Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Washington, DC: Federal Judicial Center, 1980), pp. 31-43.

4. See, e.g., Rhodes v. Chapman, 452 U.S. at 360-361 (1981), Brennan, J. concurring.

CHAPTER II

THE NEED FOR ALTERNATIVES TO LITIGATION

Since the 1964 decision of the U.S. Supreme Court in Cooper v. Pate holding that prisoners in state and local institutions are entitled to the protections of the Civil Rights Act of 1871, the judiciary has become a major factor in overseeing correctional institutions and their administration.[1] In that case the Court ruled that prisoners could sue wardens under 42 U.S.C. §1983, which imposes civil liability on persons who deprive others of their constitutional rights--thus ending the court's traditional "hands-off" policy toward conditions in correctional facilities. Thereupon followed opinions that recognized increased constitutional protections for inmates with regard to a broad range of aspects of prison life.[2]

In an era that saw the rise of the prisoners' rights movement, demands by Black Muslim inmates for religious freedom, and the 1971 uprising at Attica, the federal judiciary became the focus of legal actions. As noted by Jacobs, that movement was a "broadscale effort to redefine the status (moral, political, as well as legal) of prisoners in a democratic society."[3] Assisting the movement were lawyers who became specialists in prisoners' rights litigation. Organizations such as the American Civil Liberties Union's National Prison Project, the National Association for the Advancement of Colored People's Legal Defense Fund, and the Southern Poverty Law Center represented prisoners in cases that would have a wide impact on correctional systems and on the expansion of the rights of inmates. There was also a general extension of legal assistance to inmates through legal services programs and similar organizations. The Supreme Court decisions upholding the activities of "jailhouse lawyers" and requiring that prisoners have access to law libraries and legal services further contributed to the rise in litigation. These forces both expanded the legal rights of inmates and created a climate that encouraged courts to implement these rights fully.

Because approximately 93 percent of American prisoners are in state and local, rather than federal, institutions, and because historically conditions in the former institutions have been harsher, the great bulk of litigation has focused on state correctional practices. Inmates in state institutions have used habeas corpus and the Civil Rights Act of 1871 as the two procedural vehicles to challenge the constitutionality of state prison practices in the federal courts.

Following Cooper v. Pate, the vast majority of inmate litigation has been brought pursuant to 42 U.S.C. §1983. Habeas corpus is technically an "extraordinary writ," apart from the appellate process, and is the route traditionally used to secure release from illegal incarceration. Release is almost never granted, however, and the procedure has proved ineffective as a

means of challenging conditions of confinement. For example, during one recent four-year period, 3,702 federal habeas petitions were filed by inmates, but only five resulted in discharges.[4] Under some circumstances, habeas also may be used to attack and to remedy conditions of confinement but not to sue for money damages.

This chapter has two purposes. The first is to point out the disadvantages and limitations of litigation as a method for resolving prisoner grievances. The second is to suggest that a variety of dispute resolution mechanisms may be more appropriate to the resolution of certain of these grievances and may thus serve to avert litigation.

Litigation and the Resolution of Prisoner Disputes

Of the thousands of prisoner conditions of confinement suits filed each year, a very high proportion are deemed "frivolous" by the judiciary and are dismissed for failure to state legitimate claims.[5] Among the remainder, only a very few are decided in ways that have an impact extending beyond the individual litigant. It is true that there have been landmark cases that have brought major reforms to correctional institutions, but the number pales when one considers the overall scope of prisoner-initiated litigation.

It is generally recognized that many prisoners have legitimate claims that must be heard. Yet, correctional specialists, judges, and even some lawyers who have represented prisoners are now raising questions about the suitability of litigation as the sole means of resolving these claims.[6] Litigation is cumbersome, costly, and often ineffective because, except for class-action and isolated individual grievances, many suits resemble matters settled in small claims courts. As noted by Chief Justice Warren E. Burger, the courtroom is an overly complex forum for the resolution of many of these claims: "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges."[7]

Although most suits filed by prisoners under the provisions of Section 1983 are dismissed prior to trial, the rest must be litigated or settled. Correctional officials know that this may cause them to expend considerable time and resources in litigation, expose them to personal liability[8], and erode their leadership. Cases that survive summary judgment often require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial, "managing" the press and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is disproportionate to the amounts involved. In more complicated suits, particularly those filed as class actions, the resources

expended by attorneys general may be great, and there is the risk that federal intervention will result in the appointment of a special master to supervise aspects of institutional administration. Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.

From the perspective of the prisoner, litigation is rarely an effective route to a satisfying outcome. Of the 500 cases naming a correctional official as the defendant filed over a two-year period in the U.S. District Court in Baltimore, for example, 95 percent were filed without benefit of counsel. They averaged nine months to resolve, and 95 percent were disposed of by summary judgment or motions to dismiss on behalf of the defendants.[9] Thus, although some inmates may achieve some expressive value by forcing the legal system to respond to their complaints, few inmates realize any substantial benefits.

Prisoners Generally Lack Representation

Most prisoner actions are filed without the assistance of counsel. Although prisons now have law libraries, "jailhouse lawyers," and in some cases even professional legal assistance programs, the courts receive large numbers of complaints that are "crude, opaque, verbose, exasperating, frequently disrespectful, sometimes trivial, and often without factual or legal merit."[10] Where attorneys do enter cases on behalf of inmates, it is usually in class action lawsuits, such as those challenging double celling, overcrowding or a totality of deleterious conditions, rather than cases raising individual claims.

Because the cases of individual prisoners tend to be filed pro se and in forma pauperis, they are subject to screening in many jurisdictions to determine if they are frivolous or malicious. In some courts, clerks evaluate the complaints and often recommend dismissal before they are even docketed. In others, all pro se complaints are docketed, but most are quickly dismissed either after a perfunctory motion to dismiss or motion for summary judgment. Even if the defense motions are not successful, the cases may languish because the inmates lack the legal skills necessary to press their complaints. As a result of these processes, few actions filed by prisoners receive significant review.

In 1982, 91 percent of the cases terminated by the courts ended at screening or after issue was joined but before pretrial conference.[11] One reaction of some correctional officials to these data might be that there is nothing to worry about because few suits ever come to trial. It must be remembered, however, that significant judicial, legal, and correctional resources are expended during the pretrial period. Cases must be placed on the

court calendar and considered by the judge; attorneys general must prepare responses and briefs; and wardens, staff, or other officials may be required to collect evidence, give depositions and make court appearances to answer plaintiffs' motions. Inmates may well become disillusioned with the judicial system and become a problem to correctional administrators on learning that their complaints, in which they have invested considerable emotional and practical resources, have been dismissed as being without merit. Perhaps more important, meritorious claims and grievous wrongs may go unnoticed because they never receive an effective airing in court.

Constitutional Standards Are Difficult to Meet

By far the greatest number of cases filed by prisoners under §1983 are classified as "constitutional torts."[12] These cases charge that the individual prisoner has received unconstitutional treatment by a correctional official and that money damages should be awarded. The constitutional standards in such cases are elusive because the federal judiciary has been ambiguous in many areas as to the nature of the conduct that is illegal. Where the courts have set out criteria, requirements like "willful negligence" and "deliberate indifference" are difficult to prove. In medical care cases, for example, the state usually is able to present records that show a history of treatment for a given health problem. The plaintiff's case thereby fails to satisfy the Supreme Court's basic criteria, and thus there is no remedy under 42 U.S.C. §1983. Because of the plaintiff's difficulty in satisfying the burden of proof in medical and other tort cases, the great majority are disposed of by summary judgment motions and motions to dismiss.

The Impact of Successful Suits

Although the prisoners' rights movement has achieved court-ordered reforms in some state correctional systems, successful suits under §1983 often have little impact on the individual plaintiff. In some instances, inmates whose cases survive screening and motions to dismiss may have been transferred to other institutions or released on parole by the time their cases come to trial. Even when a case is successful, implementing decrees may have to run the bureaucratic gauntlet before compensation is rendered, or the services of a special master may be necessary to bring about court-ordered reforms. Masters often find that the "decree implementation process is impeded by the parties' disagreement over what specific changes the order requires and whether those changes can be accomplished by the defendants."[13]

Correctional administrators naturally are not happy that an outside master has been appointed to oversee their work, and this intervention may cause tensions with the staff. Because court decrees are not always models of clarity, there may be disagreement between administrators and the master as to the

court's requirements. Rather than give correctional officials discretion to implement changes to fit the special conditions of the institution, the master may go back to the court for further instructions. The implementation process thus can be time consuming and vexing.

Litigation: The Best Route?

Most observers agree that prisoners have grievances that must be addressed. As the Supreme Court has indicated, the nature of prison life creates situations that for a private citizen might be insignificant but that for an inmate are weighty.[14] Certainly, the conditions examined by the courts with regard to such correctional systems as those in Arkansas, Louisiana, and Baltimore called for attention.[15] But the ability of prisoners to sue under §1983 also has produced myriad cases that have taken up resources of the judiciary, state attorneys general, and correctional administrators without having notably served the practical needs of the plaintiffs by changing prison conditions, policies, and practices.[16]

The proliferation of inmate lawsuits also has become a concern of officials in light of the impact of the adversary system on the correctional environment. An institution whose prisoners have successfully sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems.[17] The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems. Finally, meritorious inmate claims may go unnoticed in the crush of litigation, resulting in further erosion of the inmates' faith in the law and social institutions.

It is apparent that there is a pronounced need for non-court mechanisms that can help to resolve prisoner grievances. Such mechanisms must be applicable to the large group of cases that may be called "administrative": the generally non-frivolous and potentially meritorious complaints of individual inmates. These include cases, for example, in which prisoners request prosthetics, changes in mail or visiting procedures, compensation for lost personal property, transfer of an officer, a special diet, or restoration of good time. To serve as an effective alternative to litigation, non-court mechanisms must:

...encourage the prompt and thorough investigation of complaints;

...provide the grievant with a reasoned response;

...allow for review of the decision;

...provide for implementation even if a finding favors the inmate; and

...deter non-meritorious cases from proceeding.

These criteria are demanding, particularly when the dispute resolution mechanisms must function within the constraints and organizational context of a correctional facility. Given the mission of such an institution, the mechanisms must have the support of prisoners, staff, and administrators. Even in the best-managed facilities, certain prisoners will believe that they are being denied their rights, and it is neither possible nor desirable to deny access to the courts to those who have bona fide legal issues to raise. Likewise, there are staff members who view implementation of a decision favorable to an inmate as "giving in to the cons." Wardens and other administrators caught in this dilemma need to be able to discourage frivolous cases from being filed, to resolve meritorious cases prior to their being filed, and to resolve the meritorious cases that come to their attention after filing with as little resort to the judicial process as possible.

Alternatives to Litigation

Six kinds of dispute resolution mechanisms have been incorporated into the correctional systems of various states. These include inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies. Some have been used for many years; some are more recent, often having been borrowed from other disciplines. Although all these alternatives have equitable resolution as their goal, their approaches may differ. All, for example, are designed to solve problems before the inmate feels compelled to file litigation; legal assistance and mediation may also be used after the judicial process has been invoked.

With passage in 1980 of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §1997, Congress lent its support to "encouraging the development and implementation of administrative mechanisms for the resolution of prisoner grievances within institutions." The U.S. Attorney General was given the responsibility of establishing standards for such mechanisms in all non- federal correctional facilities and setting up procedures to certify that the grievance processes meet the standards. If the alternative mechanisms of a correctional system are certified, the federal judge may remand for 90 days cases that have not gone through the administrative remedy, and only after exhaustion of this process during that period may the case be returned to court. Thus far, mechanisms in the correctional system of Virginia and the maximum security prison of Wyoming have been certified. Other states have filed plans with the U.S. Department of Justice seeking certification of their mechanisms.

The minimum standards set by the Attorney General for certification under CRIPA require that the mechanism be available to all inmates in an institution. It must apply to a broad range

of complaints regarding policies and conditions within the jurisdiction of the facility or agency, and to incidents occurring within the institution that affect the inmates and employees personally. With regard to the operation of the procedure, six elements are mandatory:

> ...Initiation. The institution may require an inmate to attempt informal resolution before filing a grievance.
>
> ...Participation. Inmates and employees shall be provided a role in the operation of the mechanism so as to provide credibility. At a minimum, this includes an advisory role in the disposition of grievances concerning general policies and practices, and in the review of the effectiveness of the procedure.
>
> ...Investigation. No employee who appears to be involved in the matter at issue shall participate in resolution of the grievance.
>
> ...Reasoned, written response. At each level of decision and review, the inmate shall receive a written response stating the reason for the decision.
>
> ...Fixed time limits. Response shall be made within fixed time limits and the entire process completed within 90 days.
>
> ...Review. The grievant shall be entitled to review by a person or entity not under the institution's supervision or control.[18]

Conclusion

Dispute resolution mechanisms can serve to advance the goal of averting litigation by handling complaints promptly, fairly and effectively. In the past, grievance mechanisms were instituted in many correctional facilities primarily to prevent disturbances. It has now been recognized that in the era of prisoner litigation, these alternative mechanisms are valuable ways to solve problems without the massive expenditure of correctional and judicial resources. More important, the mechanisms serve the essential function of ensuring that *bona fide* complaints are recognized and addressed.

Notes

1. Cooper v. Pate, 278 U.S. 546 (1964).

2. The stage for Cooper v. Pate was set in Monroe v. Pape, 365 U.S. 167 (1961), in which the Court said that 42 U.S.C. 1983 applied to police officers who had acted illegally, and in Robinson v. California, 370 U.S. 660 (1962), in which the cruel and unusual punishment clause of the Eighth Amendment was made applicable to the states through the Fourteenth Amendment. See: Daryl R. Fair, "Judicial Strategies in Prison Litigation," in Criminal Corrections: Ideals and Realities, ed. Jameson W. Doig (Lexington, MA: Lexington Books, 1983), p. 155.

3. James B. Jacobs, New Perspectives on Prisons and Imprisonment (Ithaca: Cornell University Press, 1983), p. 35; Alvin J. Bronstein, "Prisoners' Rights: A History," in Legal Rights of Prisoners, ed. Geoffrey P. Alpert (Beverly Hills, CA: Sage Publishing Company, 1980), p. 19.

4. Candace McCoy, "The Impact of Section 1983 Litigation on Policymaking in Corrections," 45 Federal Probation 21 (December 1981).

5. William Bennett Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts," 92 Harvard Law Review 610 (1979), at p. 611; comments of U.S. District Judge Carl Rubin at Symposium on Mediation of Prisoner Grievances, American Bar Association, Washington, D.C., 7 November 1981.

6. See, for example: Michael J. Keating, Jr., Improved Grievance Procedures (Washington, DC: BASICS, American Bar Association, 1976).

7. Warren E. Burger, "Chief Justice Burger Issues Yearend Report," American Bar Association Journal 62 (1976):190.

8. During the course of this project, several correctional officials raised the issue of individual liability in prisoner civil rights cases. Frequently, wardens, administrators, and others indicated that this situation was one of great concern because of the potential devasting economic impact on their lives. Although §1983 says nothing about such liability, judicial decisions have suggested that prison officials have qualified immunity. See Procunier v. Navarette, 434 U.S. 555 (1978).

9. Roger A. Hanson, William L. Reynolds and Kathy Shuart, Evaluation of the Maryland Prisoner Mediation Project, First Year Report (New Haven, CT: Silbert, Feeley and Associates, Inc., 1983).

10. Memorandum, Judge James E. Doyle, W.D. Wis., to Chief Justice of the United States and the Judicial Conference of the United States, 4 March 1975, quoted in Turner, "When Prisoners Sue," p. 617, n. 46.

11. U.S. Administrative Office of the Courts, Annual Report.

12. Candace McCoy, "Actionability of Negligence Under Section 1983 and the Eighth Amendment," 127 University of Pennsylvania Law Review 533 (1978).

13. "'Mastering' Intervention in Prisons," 88 Yale Law Journal 1070 (1979); M. Kay Harris and Dudley P. Spiller, Jr., After Decision Implementation of Judicial Decrees in Correctional Settings (Washington, DC: Government Printing Office, 1977).

14. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

15. Harris and Spiller, Jr., After Decision Implementation of Judicial Decrees in Correctional Settings.

16. For example, it is estimated that in Virginia the cost to the state in time spent obtaining affidavits, taking depositions, and organizing witnesses is between $1,200 and $1,500 a case, even though over 90 percent of cases do not get past a motion for summary judgment. Interview with James Sisk, Manager, Ombudsman Services Unit, Richmond, VA, 18 January 1983.

17. Jerome Skolnick, Justice Without Trial (New York: John Wiley and Sons, 1966), p. 44.

18. "Minimum Standards for Inmate Grievance Procedures," 46 Federal Register 48186 (1 October 1981).

CHAPTER III

LEGAL ISSUES

The best way to avert potentially meritorious litigation, even class actions that challenge system-wide policies and practices, is to identify and resolve legitimate complaints before they turn into lawsuits. Once a case that states a colorable legal claim has actually been filed in court, the stakes may increase dramatically for all parties. Attorneys will enter the case, often at considerable governmental expense. Investigation, depositions and discovery may involve not only lawyers, but also correctional administrators and line staff. Moreover, court orders may establish precedents that go beyond the scope of the inmate's initial complaint. What may have begun as a relatively small individual grievance could conceivably result in a decision mandating extensive and expensive system-wide change.

The process of identifying and resolving legitimate complaints requires both a mechanism for responding to these complaints and knowledge of the law of inmates' rights. The purpose of this chapter is to provide a general overview of the fundamental legal issues most frequently raised by inmate grievances to aid correctional administrators in differentiating between meritorious claims and weak or frivolous ones. The cases cited should be viewed as illustrations, not comprehensive statements of the state of the law.[1] For a fuller treatment of these complex issues, the reader should refer to the following sources, some of which are updated by annual supplements:

Prisoners' Rights Source Book, Michele G. Hermann, Marilyn G. Haft and Ira P. Robbins, eds., Clark Boardman Company (New York, 1973, 1980) (two volumes).

Rights of Prisoners, James G. Gobert and Neil P. Cohen, Shepard's McGraw-Hill, Inc. (Colorado Springs, 1981)

Legal Rights of Prisoners, Geoffrey P. Alpert, ed., Sage Publications (Beverly Hills, CA, 1980).

Compendium Of The Law On Prisoners' Rights, Ila J. Sensenich, Federal Judicial Center, Superintendent of Documents, (Washington, DC, 1979).

The Legal Aspects of Prisons and Jails, P.D. Clute, Charles C. Thomas, Publisher (Springfield, IL, 1980).

Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, Federal Judicial Center (Washington, DC, 1980).

Prisoner's Rights: Treatment of Prisoners and Post Conviction Remedies:Cases and Materials, Hillel

Hoffman, Matthew Bender (New York, 1976); Supplement (1981).

The Law of Criminal Correction, Sol Rubin, West Pub. Co. (St. Paul, 1973).

Law of Corrections and Prisoners' Rights in a Nutshell, (2nd ed.), Sheldon Krantz, West Pub. Co. (St. Paul, 1983).

Rights of the Imprisoned: Cases, Materials and Directions, Richard G. Singer and William P. Statsky, Bobbs-Merrill (Indianapolis, 1974).

Although these documents are instructive, for specific guidance on particular legal problems, the correctional administrator should seek the help of in-house legal counsel, the attorney general's office, or other legal official charged with representing the department's interests. The administrator should therefore develop a good working relationship with the department's attorney and establish channels of communication that will facilitate the rendering of legal opinions when needed. In South Carolina, for example, the Inmate Grievance Program is located within the office of the Legal Advisor to the Department of Corrections, and administrators faced with unusual grievances are frequently able to resolve them after conferring with departmental attorneys. At the Federal Correctional Institution at Danbury, Connecticut, a staff paralegal position was created to work with the warden on inmate grievances. Consultation with a lawyer on every grievance is not possible, however, and the administrator will have to evaluate the legal merits of a great many complaints without the assistance of counsel.

Administrators therefore should have a general understanding of the four potential sources of legal rights of persons confined in correctional institutions. These include the U.S. Constitution, the constitution of the state in which the institution is located, federal laws and regulations, and state laws and regulations. Most correctional litigation has involved rights claimed under the provisions of the U.S. Constitution. The protections of most state constitutions generally parallel those of the U.S. Constitution but sometimes confer other rights. Over and above these constitutional minima, legislatures are free to grant additional rights to inmates and to authorize corrections departments to promulgate regulations that give these rights substance. Federal statutory and regulatory law generally affects only federal correctional institutions, although certain statutes, such as the Civil Rights of Institutionalized Person Act (CRIPA) may give state inmates additional legal protections.

The Constitution of the United States

The vast majority of litigation brought by state prisoners is based on the Civil Rights Act of 1871 and involves allegations

of the deprivation of one or more rights guaranteed by the U.S. Constitution. With thousands of constitutional claims filed annually, spawning reams of legal opinions, one often loses sight of the fact that the constitutional rights applicable to inmates are essentially summarized in a handful of phrases contained within just four of the amendments to the United States Constitution:

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....
>
> AMENDMENT VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> AMENDMENT XIV. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutional rights of persons living in the United States are not completely lost upon conviction of crime or sentence to a prison. Indeed, the Eighth Amendment's prohibitions against cruel and unusual punishment and excessive fines are applicable virtually exclusively to convicts. The courts have emphasized, however, that some of these rights may be abridged when they are outweighed by legitimate governmental interests and when the restriction imposed is no greater than necessary to accomplish these limited objectives. The three specific interests that the courts have recognized as justifying some abridgement of the constitutional rights of prisoners are the maintenance of institutional order, the maintenance of institutional security, and the rehabilitation of inmates.[2] Whether these interests are implicated in a given situation and whether the proposed restriction is greater than necessary to preserve them are questions of fact that must be determined on a case-by-case basis. Thus, the development of a body of correctional law essentially has been based on efforts to balance these legitimate interests against the specific rights enumerated by the Constitution.

The First Amendment. Generally speaking, the First Amendment guarantees that inmates retain their right to express themselves on issues that concern them and to practice their own religions,

although this right is limited by the reasonable exercise of precautions necessary for the maintenance of institutional order and security.[3] Most of the litigation to date has focused on claimed rights concerning correspondence, communication, assembly, visitation and religion, although there have been some cases relating to access to the press.

The burden is on the inmate to prove that exercise of the claimed right does not present a danger or that the institution's response to security concerns is exaggerated.[4] Courts routinely have deferred to corrections officials in their attempts to regulate communications within the institution, visitation, and receipt of mail and publications.[5] If a less restrictive alternative is available, however, a given practice may be struck down. Thus, for example, a rule prohibiting nude photographs of wives and girlfriends has been found unconstitutional. Because it was not the receipt of such photographs that would disrupt institutional order, but rather the fact that other inmates might be aroused by their display, the Court felt that a rule which prevented inmates from displaying their photographs in their cells would have been preferable.[6] Similarly, a court struck down the practice of punishing inmates for writing inflammatory political tracts because officials could have merely confiscated the material.[7] The administrator who cannot reasonably link a particular restriction to a legitimate institutional purpose should look for ways to resolve the grievance before it gets to court. Similarly, if there is a less restrictive way to accomplish a legitimate curtailment of the right of expression, its implementation may enable the administrator to avert a potentially meritorious lawsuit.

Petitions based on claimed denials of freedom of religion have formed a large portion of the First Amendment filings under §1983. Inmates have fared somewhat better with such claims than with alleged denials of freedom of speech or expression. In balancing an inmate's desire to practice a religious belief with the needs of the institution, the administrator first must ask whether the inmate is sincere in the belief and whether the purported "religion" is in fact a religion at all. These are often difficult determinations to make. Even if both questions are answered affirmatively, however, the religious practice still must be balanced against the recognized legitimate institutional interests in order, security and rehabilitation.

Moreover, policies that favor certain conventional religions over other, less traditional beliefs, may also run afoul of both the First Amendment's guarantee of religious freedom and the Fourteenth Amendment's prohibition against denial of equal protection of the laws. As examples, inmates have been held to have the right to be served meals consistent with the dietary laws of their religions,[8] the right to correspond with religious leaders and to receive and possess religious literature,[9] the right to wear beards, if part of a religious belief,[10] and the right to assemble for religious services.[11] Predicting what a

court will do in any given situation is difficult, of course, but the administrator can go a long way toward preventing costly litigation over these issues by making a common-sense analysis of the apparent sincerity of the inmate's belief, the authenticity of the religion and the extent to which the particular practice truly conflicts with the institution's interest in order, security and rehabilitation.

The Fourth Amendment. Inmates entering correctional institutions surrender most of their Fourth Amendment protections. Intrusions on privacy which, in the society of free men and women, clearly would violate the ban against "unreasonable searches and seizures," often can be justified in terms of the institution's interest in security and order, and courts generally have been loathe to confer a very extensive right to privacy on inmates[12]. Body searches have been harder for corrections officials to defend than cell searches, but even a cell search will be found unconstitutional if it is the pretext for damaging or destroying inmate property[13]. On the other hand, body cavity searches have been upheld when part of a clear-cut policy demonstrably related to an identifiable legitimate institutional need,[14] but not when intentionally humiliating or degrading.[15]

To illustrate the fine balance needed to justify an intrusion on the right to privacy, some courts have ruled that staff members of one sex may not supervise inmates of the opposite sex during bathing, use of the toilet, and strip searches.[16] In these cases, the inconvenience of requiring staff members of the same sex as the inmate was held not to constitute a legimate institutional reason justifying the intrusion. On the other hand, the practice of allowing female guards to "pat down" male prisoners, excluding the genital area, has been upheld.[17] In that case, the decree of the intrusion was outweighed by the institution's staffing interests. These cases illustrate the difficulty of balancing the degree of the intrusion against the institution's needs and the requirement that administrators must respond to each complaint individually.

The Eighth Amendment. The Eighth Amendment, as applied to the states through the Fourteenth, specifically limits the extent to which states can punish convicts, proscribing excessive fines and those punishments that are "cruel and unusual." There is no question that the Eighth Amendment is meant to apply, almost exclusively, to inmates serving sentences. It is the interpretation of this amendment, and the determination of whether specific conditions and practices meet its standards, that have provided the courts with some of their most intriguing issues.[18]

Judicial attempts to give substance to the words "cruel and unusual" have used such phrases as "depriv[ations] ... of the minimal civilized measure of life's necessities"[19] and "wanton and unnecessary infliction of pain...grossly disproportionate to the severity of the crime warranting imprisonment."[20] Since the Supreme Court's decision in Rhodes v. Chapman, several lower

courts have held that the Eighth Amendment requires the provision of "basic human needs," including "adequate food, clothing, shelter, sanitation, medical care and personal safety."[21] The Court has repeatedly recognized "evolving standards of decency," rather than the standards in vogue at the time of the passage of the Eighth Amendment, in determining constitutionality.[22]

Individual inmates have claimed a wide variety of institutional conditions and practices to be violative of the Eighth Amendment. Although most such petitions are summarily dismissed, courts have upheld Eighth Amendment challenges to such conditions and practices as:

> ...deliberate indifference to medical needs, as distinguished from mere negligence or malpractice;[23]
>
> ...assaults on inmates by prison personnel, including the use of more force than is necessary to subdue a prisoner;[24]
>
> ...deliberate failure to protect against foreseeable assaults by fellow inmates, including confinement of inmates where violence is commonplace;[25]
>
> ...specific instances of overcrowded conditions that shock the conscience;[26]
>
> ...denial or extreme limitation of opportunities for physical exercise;[27]
>
> ...diet which is nutritionally inadequate, as distinguished from merely monotonous;[28]
>
> ...infliction of corporal punishment;[29]
>
> ...unreasonably lengthy solitary confinement, such as 30 days or longer[30]

Yet, the majority of the challenged conditions that have been examined by the courts continue to pass constitutional muster. The courts repeatedly have made clear that the Constitution sets very minimal standards. Many conditions and practices that judges may find personally repugnant will not be found to violate the Constitution and will be permitted to continue, unless legislators and corrections departments themselves take steps to change them. "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[31]

The Fourteenth Amendment. A sentence to a penal institution obviously deprives an individual of personal liberty.[32] The

statutes and regulations of many states, however, provide inmates with certain protections regarding parole release,[33] intra-prison transfers,[34] transfers to administrative or disciplinary segregation,[35] and disciplinary hearings.[36] The courts have held that such statutes confer "liberty interests" on inmates that are independent of the liberty lost upon incarceration. Because inmates are expressly given these rights, they cannot be taken from them without following procedures that afford them due process of law.[37] The requirements of due process in such cases may be minimal, however. For example, the Supreme Court has held that certain statutory provisions concerning administrative segregation created a "liberty interest," but that due process required only some notice of the reason for the transfer, an opportunity to present the inmate's views to the responsible official within a reasonable time, and "some sort of periodic review."[38]

The Fourteenth Amendment also prohibits states from denying inmates the equal protection of the laws. Thus, institutional conditions or practices that discriminate against inmates on impermissible bases such as race, religion, sex or age have been held unconstitutional. Since 1968, courts consistently have struck down policies of racial segregation in prisons, permitting temporary separation of the races only where violence is demonstrably imminent.[39] Equal protection claims also have been combined successfully with other substantive constitutional claims, especially those relating to denial of religious freedoms to members of minority religions.[40]

The Supreme Court has ruled that inmates have a "meaningful right of access" to the courts guaranteed by the Constitution of the United States. Based on this right, courts have held that institutions:

> ...may not tamper with inmate mail directed to the courts, even though under certain circumstances other kinds of mail may be inspected to prevent a potential breach of security;[41]
>
> ...may not interfere with the inmate's relationship with legal counsel, including "jailhouse lawyers" who are themselves prisoners;[42]
>
> ...may not deny reasonable access by prisoners to decent legal libraries.[43]

The Supreme Court has not made clear, however, precisely where in the Constitution this right of access to the courts is found. Majority opinions have spoken of the right as "fundamental" but have not pointed to a particular article or amendment. The right may have Fourteenth Amendment underpinnings, but dissenting opinions have stressed the lack of language in that or any other constitutional provision that deals directly with the issue.[44]

Nevertheless, the right seems firmly established, and administrators should be aware that conditions or practices that have the effect of interfering with an inmate's access to the courts, lawyers, law books and materials necessary to the proper preparation of court papers are likely to be challenged.

State Constitutions

The state courts are empowered to declare correctional conditions and practices unconstitutional on the bases of violations of either state or federal constitutions, but most inmates choose to file their claims in federal courts. Inmates perceive that their petitions will receive better attention from federal judges, and the procedural vehicles for filing such claims usually are more readily available and easier to follow. Although most state constitutions will not confer upon inmates any greater rights than those granted by the U.S. Constitution, others may, and the administrator should be aware of any state constitutional rights of inmates that have been recognized by the courts. California and Oregon, for example, are two states in which state constitutional provisions increasingly are cited as the bases for state court claims challenging conditions of confinement.[45]

State Statutes and Regulations

State legislatures are free to grant specific rights to inmates over and above those conferred by either the state or the federal constitution. As indicated above, some of these have been held to create "liberty interests" that cannot be denied without due process of law. Some states also have enacted "right-to-treatment" legislation[46] or other statutes that charge correctional officials with particular duties. Prisoners may bring state tort claims against officials who fail to fulfill their statutory duties and obligations. If successful, the inmate may be entitled to collect monetary damages or to receive injunctive relief against the responsible officials.[47] The correctional administrator therefore must be aware of all legislative enactments and regulations that prescribe official responsibilities or duties, which, upon any failure to perform, could form the basis of a cause of action by an inmate.

Federal Statutes

Just as state statutes and regulations may create a "liberty interest" for state prisoners, so federal laws and regulations may create similar interests for federal prisoners. In addition, recent federal legislation may prove to have a strong impact on state correctional systems. The Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997, permits the U.S. Attorney General to sue state institutions that subject inmates to

egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm...pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities....

Preventive Law

Once a corrections administrator understands the sources and scope of correctional law and the costs of litigating both major, system-wide cases and individual lawsuits, the immediate question becomes: What reasonably can be done to prevent such lawsuits? What are the techniques of prevention in addition to the development of the specialized non-litigation dispute resolution mechanisms discussed elsewhere in this manual?

There are, we believe, several important techniques of prevention. They have one thing in common: carefully planned and implemented collaboration between corrections administrators and their lawyers, whether they be "house counsel" or assistant attorneys general. Put simply, the best immunization against major corrections litigation is establishment of a strong and ongoing attorney-client relationship before, not after, the major lawsuit is filed.

It is a rare corrections system that does not require its officers to participate in pre-employment or continuing education programs. State lawyers should help design and teach a legal curriculum that communicates effectively the complicated body of corrections law that defines the responsibilities, as well as the potential liability, of corrections officers and administrators.

A standard text and a most useful methodology for teaching corrections law to correctional officers has been developed by the National Street Law Institute, an outgrowth of a Georgetown Law Center program started in 1971. Some variation of this model program should be implemented in all corrections systems if corrections officers and administrators are to be protected from the increasing risk of personal liability and if existing law is to be effectively implemented.

The provision by corrections lawyers of an ongoing legal education program for corrections officials should have many beneficial consequences. First, corrections officials--from line staff through top administrators--will gain an understanding of the basic rights and responsibilities of inmates. Much system-wide litigation is generated, in part, because inmate rights that have been established by the courts simply were not communicated to line officers. A face-to-face legal educational program will allow corrections lawyers to assure that this essential communication occurs.

Second, there is an informal and valuable policy and practice "review" that occurs between corrections lawyers and corrections officials at legal training sessions. Such sessions may be the only opportunity for corrections officers--particularly line staff--to ask basic legal questions about outdated policies and practices that, if not modified, will generate litigation. These sessions may provide the only opportunity that corrections lawyers will have, before litigation is filed, to learn about and review ongoing problems that tend to breed litigation. Thus, these in-house sessions can serve as an "early warning" device to detect and resolve problems that lead to major lawsuits.

A comprehensive legal education program is also the first step in implementing correctional decisions that are binding on corrections officials in a specific jurisdiction. In a number of recent cases, inmates have received substantial awards of monetary damages against prison officials who acted in disregard of applicable law.[48] Although prison officials are protected by the "good faith" immunity doctrine in federal damage actions if they act without malice, the implicit principle of many of these damage actions is that prison officials will be held accountable for the enforcement of binding law whether or not they, in fact, were personally aware of all details of the binding decision.

Indeed, this implicit principle was made explicit in one case in which the judge said:

> It would obviously be desirable for [the correctional official held to be liable] to be advised regularly by counsel on the development in prison law. The record in this case does not reveal whether he had the benefit of briefings of this kind. It does, however, reveal circumstances which would cause a prudent man in Superintendent Anderson's position to seek counsel about plaintiff's right and to execute his responsibilities in a manner consistent with the advice he surely would have received. Accordingly, I hold that he has failed to establish an official immunity defense with respect to this portion of plaintiff's due process claim.[49]

Prison officials should not have to ask in order to be informed about decisions that are binding on them. It is the responsibility of corrections lawyers systematically to inform them of such decisions. But, in implementing binding corrections decisions, corrections officials should be as certain as possible that they have the best attention and advice of busy corrections lawyers. For example, the assistance of state corrections lawyers is usually essential to assure that legal principles get translated into correctional practice. Corrections officials and lawyers, working together, should actively monitor each final

court decision to assure that legal principles get translated, first, into correctional policy and, second, into correctional practice. Where binding decisions have fiscal implications, the lawyers and officials should review annual budgets to make certain that the necessary sums are appropriated to enforce these decisions. To avoid further "compliance" litigation, corrections officials and lawyers must be just as zealous within government in their advocacy for adequate funding for legally required programs as they are when they defend themselves in court.

In addition, where management or information deficiencies contribute to the non-enforcement of judicial decisions, corrections lawyers should be asked to help identify and resolve these problems. The management problems that frustrate the implementation of overcrowding decrees provide an example of the need for collaboration between corrections lawyers and officials. Such management issues may appear mundane: Is the corrections classification system functioning adequately? Is there a reliable mechanism that assures that all inmates are being credited with the correct amount of good time? Do parole practices contribute unnecessarily to overcrowding by "holding" eligible inmates for lengthy periods after parole hearings have been held while marginally useful information about them slowly makes its way to the parole board? These issues may not be as exciting as cross-examining plaintiffs' expert witnesses in overcrowding cases. If, however, careful attention is paid to them by lawyers and officials working together, implementation of an overcrowding decree may be made less difficult to accomplish.

The above list is by no means an exclusive catalog of the techniques of "preventive law." Reviewing regulations for legal sufficiency, drafting commercial documents, and proposing necessary legislation have been the "bread-and- butter" techniques of preventive law for years. More important than emphasizing any one technique is the acceptance by corrections officials and lawyers of the vital importance of the preventive law function. It is an indispensable means for both keeping corrections clients out of trouble and helping ensure that the law of corrections is enforced.

Conclusion

It is clearly in the interest of the institution and its staff to resolve legitimate complaints short of litigation. Moreover, an inmate whose complaint lacks merit may be encouraged not to pursue the case in court if corrections officials can provide a reasonable explanation of the law applicable to the particular grievance.

By asking a few basic question, properly trained corrections officers can make a rough but reasonable judgment as to whether a particular grievance may have constitutional legal merit. The administrator should encourage staff, especially those involved in the grievance process, to acquire a basic understanding of the

law of prisoners' rights, for these individuals often are in the best position to resolve a grievance before it festers into a lawsuit. When in doubt, the administrator should consult with legal counsel. In general, administrators and their attorneys should develop strong collaborative relationships.

When confronted with an inmate complaint, the corrections administrator should ask:

...Has the inmate made a claim that implicates a right guaranteed by either a constitution (state or federal) or a statute or regulation (state or federal)?

...Has such a right in fact been violated or abridged?

...Can the abridgement of the right be justified by a legitimate institutional interest in order, security or rehabilitation?

...Are there ways of protecting those legitimate interests adequately while minimizing the abridgement of the claimed right?

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