1. Absent class certification, there is a great likelihood that the individuals' claims will be mooted before judgement. (See §VI.A. above.) This danger is increased in jail cases both by the temporariness of the plaintiffs' status and by the relative complexity of the cases, both as to liability and as to remedy. It takes longer to take a jail conditions case to judgement than it does a challenge to a welfare regulation. By contrast, cases finding class certification unnecessary generally involve the legality vel non of a statute, regulation, or clearly defined administrative policy.179/ Moreover, the danger of mootness persists even after a judgement on the merits, since in a challenge to "a series of conditions in the jail...obedience of [the] court's order with respect to future detainees would not be as automatic or as simple as the non-enforcement of a statute."180/ Jail litigation is notoriously productive of post-judgement controversies (see §X. below), and absent class certification there may be no party entitled to enforce or defend any relief that is ordered.181/

179/ Mitchell v. Johnston, 701 F.2d 337, 345 (5th Cir. 1983); Hurley v. Ward, 584 F.2d 609, 611-612 (2d Cir. 1978); Ruiz v. Blum, note 177 above.

180/ Lucas v. Wasser, 73 F.R.D. 361, 363 (S.D. N.Y. 1976).

181/ Lasky v. Quinlan, 558 F.2d 1133, 1137 (2d Cir. 1977).

2. To the extent that the "lack of necessity" argument is based on a presumption of official regularity,[182] that presumption is misplaced in jail and prison litigation. The cases are legion in which correctional officials have been found not to have complied with prior court decisions.[183] This general argument should be supported by any readily available and incontrovertible proof that the particular defendants opposing certification are in plain violation of applicable case law, statutes, or regulations.

3. The scope of available relief may be drastically reduced by the denial of class certification, either because a record restricted to the named plaintffs' claims does not support broad relief[184] or because relief that is de facto class-wide

---

[182] Numerous "lack of necessity" decisions are also based on an affirmative representation by the defendants that they will extend the benefits of an adverse decision to all members of the putative class. See Mitchell v. Johnston, note 179 above, at 345; McCoy v. Ithaca Housing Authority, 559 F.Supp. 1351, 1354 (N.D. N.Y. 1983) and cases cited.

[183] See, e.g., Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978); Inmates of Allegheny Co. Jail v. Wecht, 565 F.Supp. 1278 (W.D. Pa. 1983); Mobile County Jail Imates v. Purvis, 551 F.Supp. 92 (S.D. Ala. 1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982); 524 F.Supp. 1174 (1981), and 515 F.Supp. 1375 (1981); Benjamin v. Malcolm, 528 F.Supp. 924 (S.D. N.Y. 1981) and 495 F.Supp. 1357 (1980); Jones v. Wittenberg, 509 F.Supp. 653 (N.D. Ohio 1980); Powell v. Ward, 487 F.Supp. 917 (S.D. N.Y. 1980); Jordan v. Arnold, 472 F.Supp. 265 (M.D. Pa. 1979); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978); Hamilton v. Love, 358 F.Supp. 338 (E.D. Ark. 1973); McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978).

[184] See, e.g., Hurley v. Ward, 549 F.Supp. 174 (S.D. N.Y. 1982).

may violate due process if imposed without the notice procedures required in class actions.185/

4. The absence of notice to the class (see §VI.E. below) may prejudice counsel's ability to prepare a factual case. The fact of incarceration is a substantial barrier to the search for witnesses and information; the distribution of class notice informs potential witnesses of the lawsuit's pendency and counsel's identity so they may come forward. In a case where the credibility of witnesses and the pervasiveness of conditions are at issue, counsel's access to a wide range of testimony is essential.186/

D. If Certification Is Denied.

In some jail cases, district judges have denied or have failed to decide motions for class certification. Since class certification motions are not appealable until final judgement even if they amount to the "death knell" of the litigation,187/ unless you can persuade a court to certify the question for

---

185/ Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), cert. den., 102 S.Ct. 1773 (1982).

186/ Cf. Mitchell v. Johnston, note 179 above, at 345 (where notice was an essential part of relief, class certification necessary).

187/ Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). See also Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 481 (1978) (denial of class certification which "limits the scope of the relief that may ultimately be granted" is not appealable under 28 U.S.C. §1292(a)(1) as an order refusing an injunction).

appeal,[188] creative lawyering is required to protect your clients' interests. Our suggestions are as follows.

In every case, if the court cites any factual deficiency in your motion as a ground for denial, cure the defect if possible and renew the motion. The rules explicitly contemplate that class certification decisions "may be altered or amended before the decision on the merits"[189] "if, upon fuller development of the facts, the original determination appears unsound."[190]

If this tactic is not available or does not work, counsel has two broad strategic options: try to deal with the problem at the trial court level or try to get before an appellate court as quickly as possible. This choice is constrained by the nature of the named plaintiffs' claims.

If the named plaintiffs' claims are quickly mooted, counsel can inform the court of this fact or enter into a stipulation of mootness with defense counsel. This will permit an appeal of the class certification decision.[191] If counsel deems it preferable to remain in the district court in this situation, it will be necessary to conduct a "relay race" of motions to intervene new

---

188/ 28 U.S.C. §1292(b). See Coopers & Lybrand v. Livesay, note 187 above, at 475, n.27.

189/ Rule 23(c)(1), F.R.C.P.

190/ Rule 23(c)(1), F.R.C.P., Supplementary Note of Advisory Committee regarding this rule.

191/ United States Parole Commission v. Geraghty, 445 U.S. 388, 404 (1980).

plaintiffs.[192] While there is no theoretical barrier to proceeding this way, in practice it is likely to be complicated, expensive and time-consuming.

If mootness is not an immediate problem, because of the named plaintiffs' prospects of longer confinement or because there are damage claims still pending, the option in the district court is to attempt to litigate the case as if the class had been certified and to renew the class motion repeatedly based on any resulting problems such as defendants' refusal to comply with broad discovery demands or counsel's lack of sufficient inmate contact because of the failure to post notice of the lawsuit. The object of this procedure is to demonstrate that class certification is, indeed, "necessary" if counsel is to pursue the relief sought in the complaint. To get to an appellate court, file a motion for a preliminary injunction on some severable aspect of the case that can be quickly prepared, and if the injunction is denied, you may appeal the denial as of right [193] and may also request the court of appeals to consider the class certification question under its discretionary pendent jurisdiction.[194]

Which of these strategies to adopt should depend in large measure on exactly what the problem is in the district court.

---

[192] See Cruz v. Hauck, 627 F.2d 710, 718-19 (5th Cir. 1980).

[193] 28 U.S.C. §1292(a)(1).

[194] Marcera v. Chinlund, 595 F.2d 1231, 1236 n.8 (2d Cir. 1979); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164, 166 n.2 (7th Cir. 1976).

There are a few judges who are implacably hostile to class actions or to their use by prisoners. If you are before one of these judges, further education or cajolery in the district court is probably a waste of time. Moreover, you are more likely to convince an apellate court to find an abuse of discretion[195/] if the trial judge is someone with a well-known bias. You should therefore research the district judge's prior record of class certification decisions and the court of appeals' treatment of that judge's decisions before deciding on a strategy.

E. Notice.

Notice to the class of the pendency of a class action is required only in actions certified under Rule 23(b)(3), the provision most frequently used for class damage claims.[196/] However, the district court has discretion to order notice and to prescribe the form and manner of the notice in all class actions.[197/] Counsel should without fail request that notice be given to the class. The best time and place to make this request is in the motion for class certification.

195/ Class certification decisions are generally reviewed under the "abuse of discretion" standard. Califano v. Yamasaki, 442 U.S. 682, 703 (1979).

196/ Rule 23(c)(2), F.R.C.P.

197/ Rule 23(d)(2), F.R.C.P.; Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 812 (5th Cir. 1982); E.E.O.C. v. General Telephone Co. of Northwest, 599 F.2d 322, 333 (9th Cir. 1979), aff'd, 446 U.S. 318 (1980). See 7A Wright & Miller, Federal Practice & Procedure §1786 (1972).

Notice to the class serves the basic principle of fairness that people should know about things that may affect their interests. More important to counsel, notice is an essential tool for effective litigation. Notice ensures that every member of the class has the opportunity to receive accurate information about the lawsuit and about the means of contacting plaintiffs' attorneys. The contacts with the inmate population that an adequate notice procedure will generate should provide a broad enough base of information so that counsel will learn of the full range of legal claims that should be pressed on behalf of the class, have access to a sufficient amount of eyewitness evidence to prove those claims, and be able to form an accurate impression of life inside the jail so as to judge the credibility of witnesses who come forward. Moreover, notice -- a procedure which the court directs the defendants to perform or permit -- shows the inmate population at an early stage in the lawsuit that the jail staff is not all-powerful even inside the jail. This is an important message to be conveyed to the staff as well as to the inmates.

Notice can take various forms. In a closed institution, a basic form of notice which should be sought in all cases is posting in common areas such as day rooms, bathrooms, mess halls, etc., where all inmates will have an opportunity to see it. Notices should remain posted through the pendency of the lawsuit, and continued posting should be verified by asking clients if the notices are still up and by looking for them on tours or visits to the jail. Counsel may also request that each inmate be given a copy of the notice individually at the beginning of the case, and even that each inmate entering the facility be given a notice

upon arrival. In a jail, it is practical for such mass notice to be given out by institutional staff, saving the enormous postage costs that accrue from personal notice in other kinds of litigation.

An effective notice should be simply written so that inmates with little education can understand it. It should contain the name of the case, the name of the court and the judge before whom the case is pending, a simple statement of who the class members are and what the complaint alleges, an explanation of the relief sought and of the right to intervene personally in the action, and the names and addresses of counsel. If plaintiffs are seeking only declaratory and injunctive relief, the notice should make it clear that damages are not being sought, so as to avoid the possibility of barring class members' damage claims through the operation of res judicata.198/

198/ Res judicata and collateral estoppel questions arising from class actions are too esoteric for extended discussion here. However, several well-reasoned opinions suggest that, at a minimum, if the class notice says that particular claims or issues will not be litigated, the class action judgement will not preclude them. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982); Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978). See also Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976). But see Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979); International Prisoners' Union v. Rizzo, 356 F.Supp. 806 (E.D. Pa. 1973). On the other hand, it is possible that a class action victory may collaterally estop the defendants in a subsequent action by an individual class member. Bogard v. Cook, 586 F.2d at 409; Williams v. Bennett, 689 F.2d 1370, 1381-82 (11th Cir. 1982) cert. den. sub nom. Bennett v. Williams, 104 S.Ct. 335 (1983). See generally Bodensteiner, "Application of Preclusion Principles to Section 1983 Damage Actions after a Successful Class Action for Equitable Relief," 16 Clearinghouse Review 977 (March 1983).

The court has discretion under Rule 23(d) to issue appropriate orders, including further notice orders, for the conduct of litigation. Counsel might, for example, seek an order that the jail post notice that counsel will be present at a designated time to interview class members who so request.

Counsel may also wish to provide notice directly to class members of important events in the litigation without applying to the court. Ideally, counsel should be able to deliver copies of a notice to the jail for distribution. If defendants are not cooperative, counsel may have to resort to the mail. A current list of jail inmates should be obtainable through discovery for addressing purposes. Courts have been firm in protecting this type of communication.[199/]

F. Settlement or Dismissal.

Rule 23(e) provides, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This requirement, an incident of the court's obligation to protect the interests of absent class members, may apply to lawsuits

---

199/ For a discussion of the appropriateness of such communications and the narrow limits within which a court can restrict them, see Gulf Oil v. Bernard, 452 U.S. 89, (1981). See also Williams v. United States District Court, 658 F.2d 430 (6th Cir. 1981); Coles v. Marsh, 560 F.2d 186 (3d Cir. 1977); Peoples v. Wainwright, 325 F.Supp. 402 (M.D. Fla. 1971)

containing class allegations even if the class has not actually been certified when the named parties attempt to end the litigation.[200]

The proponents of a settlement are required to persuade the court that a settlement is fair, reasonable, and adequate.[201] In making this determination, the court must consider such factors as the strength of the plaintiffs' case weighed against the proffered relief; the possibility of collusion in reaching a settlement; the reaction of class members; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery completed.[202] However, the approval of a settlement should not become the trial on the merits that settlement is intended to avoid.[203]

Notice of settlement can be given in the same way as notice of the pendency of an action. However, it is preferable, if the

---

[200] Simer v. Rios, 661 F.2d 655, 664-65 (7th Cir. 1981); 3B Moore's Federal Practice ¶ 23.50 (1982).

[201] Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983); Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983); Costello v. Wainwright, 489 F.Supp. 1100, 1101 (M.D. Fla. 1980).

[202] Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); 3B Moore's Federal Practice ¶23.80 [4] (1982).

[203] Walsh v. Great Atlantic & Pacific Tea Co., Inc., 96 F.R.D. 632, 642 (D. N.J. 1983).

court can be persuaded, to permit counsel to meet personally with groups of interested inmates.[204] Often, counsel's personal explanation will go further than a written legal document in persuading class members that a proffered settlement is as good as or better than the likely result of a trial on the merits. Moreover, in our experience, counsel will invariably hear something unexpected in these meetings, often something that requires changes in the settlement or other action.

While it may seem strange to talk about further modifications after a settlement has been reached, the period between initial agreement and court approval may be a fruitful period for more negotiations, at least as to issues which are not completely new to the discussions and which would not impose major new problems or costs on the defendants. This is especially true if the support of the court can be enlisted. Judges are displaying an increasing willingness to scrutinize individual provisions of settlements and to demand changes rather than simply to approve or disapprove the settlement as a whole.[204a] At this stage of the litigation, with so much committed to the agreement, defendants are likely to be flexible in order to preserve what has been accomplished.

---

[204] See Costello v. Wainwright, 489 F.Supp. 1100, 1101 (M.D. Fla. 1980); see also Watson v. Ray, 90 F.R.D. 143 (S.D. Iowa 1981) (judge met with inmate group).

[204a] See, e.g., Reid v. State of New York, 570 F.Supp. 1003 (S.D. N.Y. 1983); Morales v. Turman, 569 F.Supp. 332 (E.D. Tex. 1983); Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983) ("If the court determines that the decree is problematic, it should form the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation.").

SECTION VII. DISCOVERY

Discovery in jail cases often presents special problems because of some jails' unsophisticated administrative practices. In addition, many local government attorneys are unfamiliar with complex federal civil rights litigation and with jail operations; they may also lack the time and support staff to prepare proper and timely answers to comprehensive discovery demands.

For these reasons, the lawyerly impulse to begin discovery by filing interrogatories and requests for documents and to follow up by taking depositions about the responses may be counter-productive. Large-scale discovery requests may go unanswered for long periods or be answered incompletely or erroneously because of the ineptitude, ignorance or recalcitrance of counsel or other persons involved in preparing the answers. Baseless claims of privilege may be raised by lawyers unfamiliar with federal practice or unwilling to do the work involved in answering large-scale discovery demands. While plaintiffs will usually win motions to compel discovery in these situations, discovery disputes may take months to resolve, during which time the case will remain bogged down and counsel's credibility and contacts with the jail population will be eroded.

It is probably better to begin depositions immediately, without waiting for answers to written and documentary discovery. The early depositions should be of persons with broad knowledge and authority within the jail. This tactic may preclude asking the deponents about documents produced later in

the case. However, this may be a small loss if the jail is one where written procedures and record-keeping have not caught on yet. Also, proceeding immediately with depositions has the advantage of providing some useful information at the outset, establishing the lawsuit's presence more firmly in the defendants' minds, and opening valuable face-to-face contact with jail authorities. It also permits counsel to ask about the existence of written policies and procedures and about record-keeping practices, which should make subsequent written and documentary discovery more focused and effective. Technical objections and claims of privilege are less likely to be asserted in the give-and-take of an oral deposition; there, the path of least resistance for a lazy adversary is to let the witness answer rather than to object.205/

A productive middle course is to serve a subpoena duces tecum in connection with the notice of deposition.206/ In some cases, this may result in documents being assembled by the deponent or under the deponent's supervision and not by a less knowledgeable secretary or clerk. Documents are more likely to be produced

---

205/ In federal court, deposition costs may be reduced by using tape recorders rather than stenographers. Rule 30(b)(4), F.R.C.P. In our experience, these savings may be consumed by the necessity to correct the many errors that inevitably appear in a transcript made from a tape. If it is clear that you will need a written transcript, it is preferable to use a stenographer in the first instance. In some cases, the need for a transcript may be obviated by turning the significant information obtained into requests for admissions. Requests for admissions are discussed later in this section and in §IX.B. below.

206/ See Rules 30(b)(5),(6), and 34, F.R.C.P.

quickly using this procedure, and the deponent can be questioned about them; if they are not initially produced as requested, defendants can hardly object to a continuance for this purpose, and counsel will get two cracks at the witness. This device does have limitations. A subpoena duces tecum should not be too extensive; if it is, the deponent may be unable to comply by the deposition date, or counsel will be unable to sort and study the documents quickly enough to use them at the deposition.

Sometimes defendants will respond to a large or complex request for documents by suggesting that counsel come to the jail and inspect and copy whatever he or she wants. Such offers are usually made to save defendants or their lawyer work, but they should be accepted with alacrity. Even if it is inconvenient and unpleasant to go to the jail for this purpose, the alternative -- demanding formal production in counsel's office -- will probably be more inconvenient and unpleasant in the long run, for the following reason. A request for documents will usually be written in general terms without knowledge of how defendants organize and label their documents; it will be served on an attorney who probably knows even less about the jail's records than plaintiff's counsel; then it will be forwarded to jail personnel who are unaccustomed to interpreting legal documents and who probably have a pretty haphazard record-keeping system to begin with. Going to the jail, looking at the records, and asking questions about the records will put you in a much better position to get a prompt and complete response than will demanding delivery to your office. Even if you ultimately do

demand such production, a visit to the jail will permit you to revise your request in a way that the defendants and their lawyer can understand easily (e.g., "Produce all the green sheets since January 1, 1980" instead of "Produce all documents reporting, summarizing, or commenting on physical altercations between inmates or between inmates and jail personnel, or on injuries sustained in said altercations, since January 1, 1980.").

Another discovery device which should be used, and used early, is the tour with experts, obtained through a request for entry upon land pursuant to Rule 34 of the Federal Rules of Civil Procedure. (See §IV.B.3. above for additional discussion of tours.) There is no substitute for an actual view of the jail, both for understanding its problems and for bolstering the credibility of your expert witness. This is especially true in a case where physical conditions are at issue. Tours with experts have other advantages as well. They provide face-to-face contact with jail personnel; they demonstrate to jail personnel that there are respected corrections professionals who sympathize with the litigation; and the mere presence of plaintiffs' lawyers in the jail enhances their credibility with both inmates and staff.

Requests for admissions[207/] may also be extremely useful in jail litigation. They have the advantage that if they are not timely answered, they are deemed admitted, and if they are objected to, an explanation of the reasons must be provided. Their utility will be greatest later in the litigation, after

---

207/ See Rule 36, F.R.C.P. Also see §IX below.

counsel has obtained enough information to draft admissions completely and accurately. Often, requests for admissions can readily be converted into proposed findings of fact or used in support of motions for summary judgement or preliminary relief, and they should be drafted with these purposes in mind. Requests for admissions are also useful for establishing the authenticity of documents.[207a/]

The topics of discovery will obviously be determined by the claims raised in the complaint. However, there are some basic approaches, supplemental to a basic inquiry into the facts, that can be used in connection with most if not all jail conditions issues.

1. Ask the defendants what efforts they have made to remedy or improve the situation -- for example, requests for more staff or money. Answers to these questions may lead to (or even constitute) virtual concessions of liability and to clearer conceptions on counsel's part of the remedial options. If the people running the jail have requested something similar to what plaintiffs' counsel wants, the Bell v. Wolfish principle of "deference" to prison officials' judgement may be turned to support judgement for the plaintiffs. (See §IX.C.1. below for further discussion of deference.) Often there is no better plaintiffs' witness than a frustrated jail administrator; asking

---

207a/ The foregoing discussion is based on a general understanding of the Federal Rules of Civil Procedure governing discovery. Be aware that many district courts have supplemented these rules with local ones.

the defendants about their attempts to improve the jail may lay the groundwork for a tacit alliance between plaintiffs' counsel and the jail administration against a recalcitrant funding source. This tactic may be especially fruitful with medical, dental and psychiatric staff. Also, you should determine if the case is likely to be defended by a claim of improved conditions. (See §VIII.B. below for further discussion of the improved conditions defense and related discovery issues.)

2. Orient your questions around your proposed remedies and ways they could be implemented. Changing the emphasis from "how bad" to "how to" may make the witness less defensive, convince the witness you are not necessarily the enemy, elicit more useful information than a confrontational type of examination, and shift the focus from security concerns to staffing, funding and plant issues. Asking a jailor "Why don't you have contact visits?" is likely to elicit an answer about the dangers of contraband; asking "What would you need in order to operate a secure contact visiting program?" may lead you to more tractable questions about numbers of officers and post-visit search procedures. Your experts may be able to suggest types of questions about remedy that should be asked.

3. Use relevant correctional standards in questioning jail officials.[208/] While it is true that these standards do

---

208/ See Appendix II for a list of and where to obtain correctional and other relevant standards.

not establish constitutional requirements,[209] defendants' responses to them may be helpful in several ways. In the worst case -- a jail official who is completely ignorant of the standards of his or her profession -- you can argue that the official's views are entitled to less deference because of his or her lack of expertise.[210] If the witness can be persuaded to agree with a standard which the jail does not meet, it will be difficult thereafter for the witness to defend existing practices on security grounds; again, you may be able to shift the ground from security concerns to staffing and funding. If the witness does not agree with a standard, probing the reasons for this rejection of a professional consensus may help you argue that the jail's practices constitute an "exaggerated response" to security concerns. When the standard is one pertaining to health and physical safety, areas in which "deliberate indifference" is the constitutional standard, ask the witness what he or she thinks the purpose of the standard is, whether the jail practice is equally protective of health or safety, and if not, why a different method was chosen. This may set up an argument that "deliberate indifference caused an easier and less efficacious

---

209/ Bell v. Wolfish, 441 U.S. 520, 543-44 n.27 (1979). Standards may be given more weight by state courts, especially if they are promulgated or endorsed by state agencies. See, e.g., De Lancie v. Superior Court, note 28 above (state prison regulations); In re Inmates of Riverside Co. Jail v. Clark, note 27 above (state jail regulations).

210/ See Beckett v. Powers, 494 F.Supp. 364, 367 (W.D. Wis. 1980) (deference is due only when "the practice reflects an informed judgement of prison administrators") (emphasis in original).

[method] to be consciously chosen...."211/ (See §IX.C. below for additional discussion of the deliberate indifference standard.)

Depositions of expert witnesses are not favored under the Federal Rules of Civil Procedure, which provide that normally, discovery as to experts who will be called at trial is limited to interrogatories seeking the identity of witnesses and the subject matter and substance of the testimony to be given. Further discovery, and any discovery as to experts who will not testify, generally requires leave of court. A party seeking discovery may be required to pay the expert.212/ Despite the rules, in many jurisdictions it is common practice for the parties to depose each other's experts by agreement. This can be advantageous in a jail case not only for the usual reasons of assisting in trial preparation but also to let the defendants know early on what they are up against. Depositions of your experts may be useful tools in persuading defendants to settle.

Counsel should bear in mind the possibility that jail personnel may be presented by defendants as expert witnesses. Their credentials and their opinions should be explored in

---

211/ Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974), quoted with approval in Estelle v. Gamble, 429 U.S. 97, 104 n.10 (1976).

212/ Rule 26(b)(4), F.R.C.P.

depositions.[213] If defendants' counsel objects to and prevents answers to questions eliciting opinions, plaintiff's counsel may either pursue the matter through a motion to compel discovery or may seek a stipulation that the witness will not offer his or her opinion at trial.

---

[213] The restrictions of Rule 26(b)(4) do not limit inquiry into the opinions of parties or their agents who may also be experts. Rodriguez v. Hrinda, 56 F.R.D. 11 (W.D. Pa. 1972); Broadway & 96th St. Realty Co. v. Loew's Inc., 21 F.R.D 347, 360 (S.D. N.Y. 1958).

SECTION VIII. DEFENSES IN JAIL CASES

Jail officials typically raise a number of defenses to conditions lawsuits besides the usual defenses that the plaintiffs' allegations are not true or do not state a claim. These defenses often speak to the reluctance of federal judges to intervene in the affairs of local institutions.

Some of these defenses may usually be dismissed out of hand. Plaintiffs' failure to exhaust administrative remedies is not a defense under §1983 except under the restricted circumstances set forth in the Civil Rights of Institutionalized Persons Act.[214] Exhaustion of administrative remedies may be

---

214/ Patsy v. Board of Regents of State of Florida, ___ U.S. ___, 102 S.Ct. 2557 (1982). The Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997(e)(1976 ed., Supp. IV) provides that if a state creates "plain, speedy, and effective" administrative remedies which are certified as acceptable by the United State Attorney General, or which a court finds meets the Attorney General's standards, the court may stay the action for 90 days if so doing would be "appropriate" and "in the interests of justice." These provisions will seldom apply to substantial challenges to jail conditions because, so far, no jail officials have successfully obtained certification and, in any case, it is a rare administrative remedy that will make available the scope of relief typically sought in a §1983 jail case.

required in a state court suit pursuant to state law. Similarly, plaintiffs in a jail conditions case are not required to exhaust state judicial remedies.[215]

The Eleventh Amendment immunity of states against federal lawsuits generally does not protect local governments,[216] nor does it usually bar federal lawsuits involving state activity as long as the named defendants are individual state officials and not the state or its agencies.[217] The doctrine of federal court

---

[215] Monroe v. Pape, 365 U.S. 167, 183 (1961). Judicial exhaustion is required only in cases which seek the immediate or earlier release of inmates and are therefore deemed to fall within the "heart of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 498 (1973). In cases challenging jail conditions in which release has been contemplated solely as a means of ensuring constitutional conditions, this requirement has not been deemed to apply. See Duran v. Elrod, 713 F.2d 292, 297-98 (7th Cir. 1983); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975); Inmates of the Allegheny County Jail v. Wecht, Civil Action No. 76-743, Memorandum Opinion and Order, (W.D. Pa., Oct. 10, 1983); Benjamin v. Malcolm, 75 Civ. 3073, Proposed [sic] Order (S.D. N.Y., Oct. 31, 1983), enforcing 564 F. Supp. 668 (S.D. N.Y. 1983). Vazquez v. Gray, 523 F.Supp. 1359, 1366 (S.D. N.Y. 1981); Anderson v. Redman, 429 F.Supp. 1105, 1127-28 (D. Del. 1977); Padgett v. Stein, 406 F.Supp. 287, 303 (M.D. Pa. 1975).

[216] See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280-81 (1977).

[217] Compare Milliken v. Bradley, 433 U.S. 267, 289 (1977) (federal court injunction against state officials requiring prospective expenditures upheld) with Alabama v. Pugh, 438 U.S. 781 (1978) (federal suit barred against state itself). The Supreme Court has recently held that the Eleventh Amendment's prohibition does bar federal lawsuits against state officials based on state law claims. Pennhurst State School and Hospital v. Halderman, note 40a above. This holding may extend to local officials and governments when their activities are funded by the state. Id. at 4164, n.34. (See §§ II.A. and II.C., above, for additional comment on this subject.)

abstention is also rarely applicable, being reserved for those exceptional circumstances where a state court determination of state law might moot or alter a constitutional question, where difficult state law questions or a complex state regulatory scheme are involved, or where a pending state law enforcement action is pending.[218] These considerations rarely exist in a jail or prison conditions case and abstention is routinely rejected in them.[219] "Good faith" is also not a defense to an injunctive lawsuit under §1983.[220]

A. Lack of Funding Defense.

Defendants may claim that they should not be held liable because they do not have sufficient funds to make the improvements demanded by plaintiffs. However, it is well established that "[i]nadequate resources of finances can never be an excuse for depriving detainees of their constitutional

---

218/ Colorado River Water Conservation District v. United States, 424 U.S. 813-17 (1976); Chancery Clerk of Chickasaw County, Miss. v. Wallace, 646 F.2d 151 (5th Cir. 1981).

219/ Ramos v. Lamm, 639 F.2d 559, 563-64 (10th Cir. 1980); Grubbs v. Bradley, 552 F.Supp. 1052, 1056-57 (M.D. Tenn. 1982); Capps v. Atiyeh, 559 F.Supp. 894 (D. Ore. 1982); Robert E. v. Lane, 530 F.Supp. 930 (N.D. Ill. 1981); Lucas v. Wasser, 425 F.Supp. 955, 957-61 (S.D. N.Y. 1976); Cudnik v. Kreiger, 392 F.Supp. 305, 308-09 (N.D. Ohio 1974); Jones v. Wittenberg, 323 F.Supp. 93, 98 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Contra, Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980); Bergstrom v. Ricketts, 495 F.Supp. 210 (D. Colo. 1980).

220/ National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975).

rights,"[221] although fiscal considerations may play a role in determining the scope and form of relief after liability is found.[222] (See §X.B. below for discussion of defendants' failure to provide funding after a judgement.)

B. Improved Conditions Defense.

Frequently, defendants too seek to avoid a direct confrontation, either over the federal courts' powers or over an adverse judgement by claiming that conditions have improved sufficiently by the time of decision that no judicial intervention is warranted.

---

[221] Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975). Accord, Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) and cases cited; Nicholson v. Choctaw County, Ala., 498 F.Supp. 295, 311 (S.D. Ala. 1980); Feliciano v. Barcelo, 497 F.Supp. 14, 36 (D. P.R. 1979); Benjamin v. Malcolm, 495 F.Supp. 1357, 1363 (S.D. N.Y. 1980) and cases cited. See also Watson v. City of Memphis, 373 U.S. 526, 537 (1963) ("...it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them."). As one court observed, permitting cost considerations to influence the determination of constitutionality "would lead to this perverse result: the worse the conditions existing in a facility and the more costly the expenditures required to correct such conditions, the less likely that such conditions could be unconstitutional." Jordan v. Wolke, 460 F.Supp. 1080, 1088 (E.D. Wis. 1978), rev'd on other grds., 615 F.2d 749 (7th Cir. 1980).

[222] LaReau v. Manson, 651 F.2d 96, 104 (2d Cir. 1981); Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981); Dawson v. Kendrick, 527 F.Supp. 1252, 1283 (S.D. W.Va. 1981); Heitman v. Gabriel, 524 F.Supp. 622, 624 (W.D. Mo. 1981); McMurry v. Phelps, 533 F.Supp. 742, 769 (W.D. La. 1982). Lack of resources may be defense to a damage action against an individual, see Williams v. Bennett, 689 F.2d 1370, 1387-88 (11th Cir. 1982), cert. den. sub nom., Bennett v. Williams, 104 S.Ct. 335 (1983). However, if the local government itself is sued, underfunding will not be a defense and may in fact help prove liability. See §II.C.2. above.

Sometimes this defense is expressed in terms of mootness. However, it is clear that the voluntary cessation of unlawful conduct after a lawsuit is filed does not moot the case, since without a court order, the defendant remains free to resume the unlawful conduct.223/ Even the construction of a new jail may not moot a case where there is a danger that the new one will be operated in an unlawful manner.224/

The argument may also be phrased in terms of the court's discretion in granting injunctive relief; even though the merits should be decided based on conditions at the time the complaint was filed,225/ the scope of relief may be more closely tied to conditions at the time of decision.226/

In responding to the "improved conditions" defense you should be prepared to argue that it was only the lawsuit that prompted the improvements and that conditions are likely to deteriorate again unless the court enters an order. You should be conscious from the outset of the possibility of improved conditions and be careful to preserve evidence of the conditions at the time the

---

223/ City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) and cases cited; Jones v. Diamond, 636 F.2d 1364, 1375 (5th Cir. 1981) (en banc).

224/ Jones v. Diamond, id.; Jones v. Wittenberg, 73 F.R.D. 82, 84 (N.D. Ohio 1976).

225/ Martino v. Carey, 563 F.Supp. 984, 987-88 (D. Ore. 1983); Owens-El v. Robinson, 442 F.Supp. 1368, 1374 (W.D. Pa. 1978). Contra, Lovell v. Brennan, 506 F.Supp. 672 (D. Me. 1983), appeal pending in First Circuit.

226/ City of Mesquite v. Aladdin's Castle, Inc., note 223 above, at 289; Campbell v. McGruder, 580 F.2d 521, at 542-43 (D.C. Cir. 1978).

complaint was filed; for this purpose, it can be very important to maintain contact with the original named plaintiffs even if they have been released. In discovery, inquire into the timing and motivation of improvements, and demand documentary proof if defendants claim that improvements were planned before the lawsuit. Also call the court's attention to any evidence showing that improvements will be transitory without an injunction: for example, rising population, budget cuts, or physical dilapidation that cannot be permanently repaired.227/ Your expert witnesses may be extremely valuable in assessing the likely permanence of purported reforms.

C. Future Improvements Defense.

A variation of the "improved conditions" defense is the promise of future improvements. Sometimes the promised improvements consist of a completely new jail. Again the argument is likely to be couched in terms either of mootness or of equitable restraint.

Plaintiffs' counsel should respond to the "future improvements" defense in several ways: test the credibility of the promises, try to get them embodied (with a schedule) in a court order, and attempt to get involved (with your expert witnesses), either as critic or as negotiator, in planning the improvements. Perhaps most important to your clients, counsel should also insist on substantial interim relief for those presently incarcerated.

227/ See Campbell v. McGruder, id. at 541-42.

In practice, the "future improvements" defense often does not stand up to close examination, either because the defendants do not actually have any concrete plans or because they are incapable of acting on their plans in any timely fashion. The best attack on this defense is intensive discovery; demand to know exactly what the defendants propose to do, when they propose to do it, whom they will hire to do the work, where they will get the money, etc. In many cases, the vagueness and insubstantiality of their claims will be revealed; in most other cases, pinning defendants down to particular time commitments will help demonstrate the need for judicial relief when the proclaimed deadlines pass and the improvements are not in place. The latter demonstration may be particularly helpful where defendants intend to open a new jail; counsel should try to show that, like any other major construction project, the new facility is likely to be long delayed[228/] and the court must deal meanwhile with conditions in the old jail. Interim relief regarding an old jail is available even when a new one is

---

228/ See Duran v. Elrod, 713 F.2d 292, 296 n.2 (7th Cir. 1983); Palmigiano v. Garrahy, 443 F.Supp. 956, 978 (D. R.I. 1977); Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1295 (M.D. Pa. 1983).

planned;229/ its scope may depend on how much doubt plaintiffs' counsel can cast on the plausibility of defendants' plans and schedules.

Discovery as to planned improvements should be retrospective as well as prospective. Defendants' claims may well be based on plans and proposals which have been floating around without action for years and which have been dusted off solely in order to ward off judicial intervention. This is particularly true of large budget items like new facilities. Showing the court that the defendants have a history of not acting on their own remedial schemes may provide powerful evidence of the need for an injunction.230/

When defendants promise future improvements, timing may become the major issue in the lawsuit. Defendants may seek long adjournments of the trial or of substantive motions, or even a stay of discovery, pending making improvements, completing plans, etc. Counsel should strenuously oppose such delays unless defendants are willing to sign a consent decree committing them to make constitutionally acceptable changes by dates certain. As a minimum fallback position defendants should be required to

---

229/ Martinez Rodriguez v. Jimenez, 409 F.Supp. 582, 595 (D. P.R. 1976), stay den., 537 F.2d 1 (1st Cir. 1976); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 689 (D. Mass. 1973); Hamilton v. Love, 328 F.Supp. 1182, 1190 (E.D. Ark. 1971). See also Duran v. Elrod, 713 F.2d 292, 295-98 (7th Cir. 1983) (release pursuant to prior judgment ordered even though new construction had been approved).

230/ See, e.g., Ramos v. Lamm, 485 F.Supp. 122, 133 (D. Colo. 1979); Palmigiano v. Garrahy, 443 F.Supp. 956, 978 (D. R.I. 1977).

submit frequent and regular reports on their progress. If defendants are not willing to do this, that fact in itself should cast doubt on their bona fides. Moreover, even if defendants are proceeding in good faith, experience suggests that results are actually forthcoming more readily when there is an impending court deadline.231/ Defendants' minds tend to wander to other priorities during long adjournments. For these reasons, a motion for a preliminary injunction is often a productive tactic in jail cases. It is a means of putting serious pressure on the defendants much earlier than a date for trial. Moreover, in the worst case -- a judge who prefers to do nothing indefinitely in hopes that the defendants' actions will someday make the case go away — the denial of a preliminary injunction will create the option of an immediate appeal. (See §II.B.3. above on preliminary relief.)

Where defendants are willing to make improvements, it may be possible for plaintiffs' counsel to have substantial impact on their plans, either by threatening further litigation about them or by convincing defendants that plaintiffs' counsel may have access to helpful resources and insights. If defendants are not immediately receptive to plaintiffs' counsel's involvement, discovery may provide a means of breaking the ice. Counsel should try to find out who is involved in planning and executing any changes or construction; depositions of those persons may

---

231/ See Campbell v. McGruder, 580 F.2d 521, 541 (D.C. Cir. 1978).

prove highly educational for the deponents if defendants have not done their homework (e.g., "Mr. Architect, are you aware of Standard X of the National Sheriffs Association which calls for Y?"). Ideally, counsel should emerge from a case where a new jail is planned with a judgement concerning present conditions in the old jail and a consent judgement governing conditions in the jail to be built.232/

D. Damage Case Defenses.

Defendants often rely on official immunity defenses in damage cases. Absolute immunities of various types are discussed in §II above. Most officials are, however, entitled only to "qualified immunity," under which they are liable if they "knew or should have known" that they were violating the plaintiff's right because they were violating "clearly established constitutional or statutory rights of which a reasonable person would have known" at the time the acts were committed.233/ Qualified immunity may be defeated if defendants violated a statute, a judgement against them, or the holding of a previously decided

---

232/ Some courts are reluctant to enter orders concerning facilities which do not yet exist. See Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978). For this reason, dealing with future construction through negotiation (backed up with the threat of a new lawsuit when the new facility opens) is preferable. Counsel should also consider structuring the class certification in such a way that the definition of the class is not irrevocably tied to a particular physical structure.

233/ Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 2738 (1982). Formerly, officials could be held liable for malicious acts whether or not they violated clearly established rights; however, the court in Harlow ruled that a showing of malice would no longer defeat qualified immunity.

case binding in their jurisdiction.[234] Some courts have held that qualified immunity is defeated if defendants violated their own regulations[235] or an established constitutional standard even if there is no prior case involving identical facts.[236]

Defendants have the burden of pleading qualified immunity; it is waived if not pled.[237] Most courts hold that defendants also have the burden of proving it.[238] Immunity can be raised on a motion for summary judgement.[239]

234/ Harlow v. Fitzgerald, note 233 above, at 2739; Procunier v. Navarette, 434 U.S. 555 (1977); Scott v. Plante, 691 F.2d 634 (3rd Cir. 1982); Williams v. Treen, 671 F.2d 892 (5th Cir. 1982); Williams v. Bennett, 689 F.2d 1370, 1385-86 (11th Cir. 1982); Powell v. Ward, 643 F.2d 924, 934 n.13 (2d Cir. 1981); Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981); Bryant v. McGinnis, 463 F.Supp. 373 (W.D. N.Y. 1978); Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978).

235/ McCray v. Burrell, 622 F.2d 705 (4th Cir. 1980); Strachan v. Ashe, 548 F.Supp. 1193, 1205 (D. Mass. 1982); O'Connor v. Keller, 510 F.Supp. 1359 (D. Md. 1981).

236/ Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980); Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1980); Little v. Walker, 552 F.2d 193, 198 (7th Cir. 1977); Masjid Muhammad-D.C.C. v. Keve, 479 F.Supp. 1311, 1326 (D. Del. 1979); Picha v. Wielgos, 410 F.Supp. 1214, 1219 (N.D. Ill. 1976); Landman v. Royster, 354 F.Supp. 1292, 1318 (E.D. Va. 1973). But see Picariello v. Carlson, 491 F.Supp. 1020 (M.D. Pa. 1980).

237/ Gomez v. Toledo, 446 U.S. 635 (1980); Boyd v. Carroll, 624 F.2d 730 (5th Cir. 1980); Perkins v. Cross, 562 F.Supp. 85 (E.D. Ark. 1983).

238/ Alexander v. Alexander, 706 F.2d 751 (6th Cir. 1983); Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983); Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir. 1982); Williams v. Treen, 671 F.2d 892 (1982); Dehorty v. New Castle County Council, 560 F.Supp. 889 (D. Del. 1983); Contra Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982).

239/ Harlow v. Fitzgerald, note 233 above, at 2739.

Qualified immunity has often been referrred to as "good faith immunity." It is preferable to use the term "qualified immunity" because the words "good faith" seem to focus on the subjective motivation of the defendant, which is not properly an issue and which may distract from the more technical question of what the defendant "knew or should have known." Courts using the "good faith" terminology have sometimes reached results seemingly inconsistent with the qualified immunity doctrine.240/

The other major defense in §1983 damage cases is usually a claim that higher-ranking or supervisory defendants are not liable because they were not personally involved in the claimed deprivation of rights. Strictly speaking, this is not really a defense but part of plaintiff's case on which plaintiff bears the burden of proof. However, as a practical matter, the scope of particular defendants' liability is generally raised defensively on motions to dismiss or for summary judgement filed by the defendants, as well as at trial. (See §II.C.1. for further discussion of personal involvement.)

240/ See, e.g., Giles v. City of Prattville, 556 F.Supp. 612 (M.D. Ala. 1983).

SECTION IX. PROVING THE CASE

Trying a complex jail case presents two major challenges for counsel: making it real and making sense out of it. The trier of fact must come away from the trial with some idea of what it is like to be subjected to the conditions and practices that exist at the jail. He or she must also be provided with the means to write a favorable decision that will stand up on appeal.

A. Making It Real.

There are three basic ways of bringing a jail conditions case to life: testimony, photographs, and a tour by the court.

Eyewitness testimony as to jail conditions will mostly come from three sources: present and former inmates, your experts who have toured the jail, and employees or officials of the jail. (See §IV for a discussion of expert testimony.) Occasionally there will be other witnesses, such as health or fire inspectors or persons involved in religious or social programs who are permitted to enter the jail. Most eyewitness testimony usually will be provided by inmates.[241]

Jail and prison inmates have some limitations as witnesses because most will be subject to attacks on their

---

[241] Prisoners' parents, spouses and children can be powerful witnesses as to visiting conditions, problems with mail and telephone communications, and in some cases their observation of physical injuries of inmates who have been assaulted. Even if their testimony is somewhat cumulative, it can be very helpful to have corroboration of prisoners' testimony by persons not viewed by the trier of fact as criminals. Contacts with these persons can be made either through information provided by prisoners or by approaching them in the visitors' waiting area or outside the visitors' entrance. In our experience, they are rarely reluctant to talk about problems at the jail.

credibility.[242] However, in our experience, with adequate preparation and selection their testimony can be more credible and compelling than that of jail employees. We suggest the following rules of thumb in preparing your eyewitness case.

1) Select a variety of witnesses. While an obvious professional criminal or young tough may not be credible viewed in isolation, his or her testimony may be very credible if it is substantially consistent with that of other witnesses. Look for a balance according to race, sex, age, criminal record, physical size, demeanor and attitude. Don't spend a lot of time looking for the one perfect witness, and even if you find one (the straight-A college student picked up for drunken driving, etc.), don't cut back on other inmate testimony. Also, don't write off witnesses who are not very smart or not very articulate. Sometimes these persons can be the most powerful witnesses; their obvious inability to fabricate or embellish may make their accounts all the more stark and compelling. (A judge may even wonder what someone with very limited mental abilities is doing in jail in the first place.)

---

[242] Counsel may be able to have witnesses' criminal records excluded from evidence pursuant to Rule 609(a), F.R.Ev., although there is dispute as to whether this provision applies to civil cases. Compare Howard v. Gonzales, 648 F.2d 352, 358-59 (5th Cir. 1981) with Garnett v. Kepner, 541 F.Supp. 241, 244-45 (M.D. Pa. 1982). Rule 403, F.R.C.P., may also permit the exclusion of criminal convictions. Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978). Whether it is worthwhile to seek their exclusion in a nonjury case is questionable.

Even if a criminal record is allowed in, counsel can seek to reduce its impact by immediately placing the record before the trier of fact and putting it in the best light possible to the prisoner.

2) Interview a lot of inmates. You should talk to as many inmates as possible[243] during the course of the lawsuit and find out how to keep up with them after they are released or (in many cases) sentenced to state prison. Given the high turnover in jails, you cannot assume that any individual will still be there at the time of trial. You also cannot assume that everyone who is willing to testify in January will still be interested in June. You should therefore keep a fairly long list of potential witnesses and be prepared to make last-minute substitutions.

Interviewing a large number of inmates has other advantages. The more inmates you talk with, the better you will get at assessing their credibility and judging how they will fit in with the rest of your proof. Also, the more inmates you talk with, the better known you will become at the jail, and the more inmates will seek you out and provide information.

3) Look for "horror stories." Assaults, stabbings, rapes, medical neglect, and suicide attempts may grab the attention of an otherwise uninterested judge and may graphically demonstrate the seriousness of issues of staffing, supervision and procedures that otherwise may seem like technical disputes. You should not rely exclusively on direct contacts with inmates

---

[243] If the jail is large and your time is limited, it may be worthwhile to try to distribute a questionnaire among inmates as a means of finding potential witnesses and deciding which ones are most worth interviewing. The means for distributing such a questionnaire range from mailing it to individuals to having it made available in housing units or libraries, depending on how cooperative defendants are. Also, a court probably has the authority to order distribution in a class action pursuant to Rule 23(d), F.R.C.P. The National Jail Project will supply a model questionnaire on request.

to find such witnesses. If there are records of serious injuries or altercations at the jail, it is worthwhile to try to track down the victims even if they are no longer at the facility.

Horror stories must, however, be put in a context and connected with regular practices at the jail. If your only inmate testimony is accounts of stabbings and rapes, the court may be tempted to write these incidents off as aberrations. Corroborating testimony about the underlying problems should also be presented. If a witness testifies that he or she was jailed for a weekend and raped and that the guards never came to the cell area, other witnesses should also testify regarding the lack of supervision even if they were not raped or assaulted.

4) Look for corroboration. Obviously, your witnesses' stories -- especially horror stories -- should be checked against any available source of corroboration (including jail records and the stories of the defendants and other inmates) so you can avoid presenting false or incredible testimony. You should also be prepared to present any corroborating evidence that you do find even if defendants do not seriously contest your witness's account. Even if the evidence only supports part of the testimony -- e.g., a medical record showing injuries but not reflecting their cause -- it is helpful to begin showing the judge as early as possible that your witnesses are to be believed.

5) Be prepared for efforts to limit testimony. Some judges feel that they should not have to listen to a parade of inmates testifying to the same conditions. If the court or the defense objects to your inmate testimony as cumulative, ask the

defendants if they will stipulate to the truth -- and more importantly, the typicality of what your witnesses have said; if not, you should argue that when the facts are contested, it is inappropriate to limit a party's ability to buttress its case. You should also have prepared offers of proof for each inmate so that if the judge is inclined to limit your presentation you can at least get it on the record that others would testify similarly. You may also wish to ask the defendants for stipulations regarding your offers of proof.

Obviously it is better to avoid this situation. One way to do so is to intersperse inmate testimony with the testimony of other witnesses so its cumulativeness is less obvious; another approach is to emphasize in each witness's testimony those elements which are not cumulative.

Photographs may also be used to great effect in jail cases. Photographs can be used to demonstrate dilapidation, inadequate sanitation practices, cramped conditions, "strip cells," and other physical conditions, as well as injuries suffered by

inmates.[244] Often the best way to use photographs is in connection with the testimony of an expert who toured the jail.

Sometimes the best way for a judge to find out what the jail is like is to go there. Court tours have become an accepted practice in jail and prison cases.[245] It is better if the tour can be conducted with little or no advance notice so the defendants have no opportunity to make cosmetic changes in advance. In a few cases, judges have stayed overnight in jails.[246] While few judges will go so far, it may be useful to propose an overnight stay if only to elicit an admission from the defendants that they cannot guarantee the judge's safety. Keep in mind that in an adversary system counsel should not propose that the judge go anywhere or do anything unless counsel is willing to go along.

---

[244] For a published example of the effective use of photographs in a jail case, see Rhem v. Malcolm, 432 F.Supp. 769, 790 (S.D. N.Y. 1977).

When a practice or procedure is at issue, videotaping may be helpful. For example the Legal Defense Fund, incident to its litigation concerning contact visitation, O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D. Mich. 1977) and 446 F.Supp. 436 (1978), obtained a videotape of the facility's court-ordered procedure for such barrier-free visits. 437 F.Supp. 582 (E.D. Mich. 1977) and 446 F.Supp. 436 (1978). The district court on remand after Wolfish, 620 F.2d 303 (6th Cir. 1980), permitted termination of the program. 529 F.Supp. 206 (1981). At the appellate argument the tapes which were made part of the record, were shown to the panel which heard the case. At this writing the case is submitted; however, it is likely the panel will await Supreme Court action in Block v. Pitchess, certiorari granted inter alia on the contact visitation issue, 104 S.Ct. 390 (1983); see Rutherford v. Pitchess, 710 F.2d 572 (9th Cir. 1983) for the decision below.

[245] See, e.g., Benjamin v. Malcolm, 564 F.Supp. 668, 671 (S.D. N.Y. 1983); United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 119 (S.D. N.Y. 1977), aff'd in part, rev'd in part sub nom. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), rev'd on other grds. sub nom Bell v. Wolfish, 441 U.S. (1979).

[246] Inmates of Suffolk County Jail v. Eisentadt, 360 F.Supp. 676, 678 (D. Mass. 1973).

B. Making Sense Out of It.

A multi-issue injunctive jail suit requires counsel to organize a disparate mass of evidence -- lay testimony, expert testimony, jail documents, depositions and interrogatories for the defendants, photographs, etc. -- into a coherent whole intelligible to the trial judge and, if necessary, to an appellate court. There are a number of techniques which will assist counsel in getting a clear understanding of his or her own case and in putting it across to the judge.

First, counsel should break the case down into issue parcels reflecting each subject that will be the subject of proof: lighting, heating, sick call, emergency medical services, protection from inmate assault, protection from staff assault, etc., etc. Even under a "totality of circumstances" standard, the best way to put the case together is first to take it apart. Once one has identified all the issues, one should ask about each:

- What do the defendants claim is their policy?
- What is their actual practice?
- What are the relevant physical conditions?
- How does the policy, condition or practice deviate from relevant statutes, regulations, or standards?
- What are the consequences for inmates of the policy, conditions, or practices?
- What must be done to remedy the existing situation?

This process, which should be begun early in the litigation and should be continued or repeated as the case progresses, will

serve as a guide to discovery and preparation efforts up to the time of trial. It should also reveal to counsel new issues and new relationships among issues which will have to be spelled out for the court (e.g., the amount of training nurses should have may depend on the way sick call is conducted, and the organization of sick call may depend on physical features of the building; lack of staffing may be aggravated by lack of a classification procedure and both may contribute to violence in the facility).

Second, counsel should do as much as possible to reduce the proof to manageable form. There are a series of steps which can be taken to this end, and counsel should realize that several of them -- requests for admissions, stipulations, the pre-trial order, and proposed findings of fact -- may involve variations on a single basic document, one which can be prepared relatively easily using the issues outline described above.

A request for admissions should involve a series of clear and succinct statements which, if admitted, will help plaintiffs establish their case. (See §VII. above for further discussion of admissions.) A compact and well organized request for admissions can do great service in abstracting kernels of relevant evidence from the mountains of chaff to be found in the depositions of confused and inarticulate jail officials, the voluminous records maintained by the jail, and other reports, correspondence, and documentation which refer to jail affairs. For example, counsel may have to take five or six depositions to find out how sick call is supposed to work, how often a doctor comes to the jail, and how a sick or injured inmate can get taken to an emergency

room. Having done so, counsel can probably summarize the information in ten sentences. If admissions as to these can be obtained, counsel can avoid the whole rigmarole of putting the depositions into evidence[247/] or calling the witnesses at trial. Multiply this example by the number of issues to be dealt with, and it is clear that the use of requests for admissions can greatly simplify counsel's task at trial and the court's task after trial.

Other uses of requests for admissions include obtaining concessions as to the validity of summaries of voluminous records such as reports of injuries, assaults, suicides, attempts at suicides, medical procedures, or disciplinary proceedings, and as to the contents of documents that are difficult to read. In addition, admissions can be sought as to the authenticity of documents that will be produced at trial, and for that matter as to their admissibility in the face of other possible objections.

Counsel should remember in drafting admissons to leave room for the evidence to be presented at trial. An admission regarding defendants' policy in some regard should be drafted so as not to exclude proof that defendants have not met the requirements of that policy. Moreover, proof that may be more effective presented live -- for example, narratives of assaults and rapes -- should not be reduced to admissions even if you

---

247/ Using portions of the actual depositions often leads to the annoying scenario in which the adverse party then introduces the whole deposition pursuant to Rule 32(a)(4), F.R.C.P., giving the judge more hundreds of pages to slog through.

think the defendant will admit them. A photograph of a dead rat in the kitchen will probably have more impact than an admission about it.

Even if plaintiffs' admissions are mostly denied and if the court declines to compel a different response,[248] the work involved in drafting them will not be wasted, since, as noted above, they can be recycled as portions of a pre-trial order or as proposed findings of fact.

Material that is appropriate for admissions is also appropriate for ordinary stipulations, and if one has a good working relationship with opposing counsel this may be a satisfactory way to proceed. Admissions have the advantage that if no response is made within a set time, they are deemed admitted, placing some constraint on an adversary who is lazy, inept, or uncooperative.

The pre-trial order is a mechanism used in various and discretionary ways by federal judges to narrow issues and make trials more manageable. Rule 16, F.R.C.P., authorizes the court to hold a pre-trial conference to discuss various issues pertaining to trial management and to issue an order memorializing the results of the conference. In practice, many judges first direct the parties to prepare a pre-trial order of

---

[248] Rule 36(a), F.R.C.P., permits the party seeking admissions to move to determine the sufficiency of the answers.

more or less specificity and then either dispense with the conference or hold a conference only about those matters which cannot be resolved in the written order.

Pre-trial orders can be of immense help in institutional litigation. A comprehensive pre-trial order may contain stipulated facts, contested facts, contested legal issues, lists of each party's exhibits and objections to exhibits, lists of each party's lay and expert witnesses, and the expected length of the trial. The great virtue of the pre-trial order procedure is that it compels one's adversary to determine exactly what his or her defense will be, which otherwise may be unknown until the trial begins. However, it is often very difficult to get defendants' counsel to deal responsibly with the pre-trial order; one should begin pressing early to avoid a last-minute crush before the court's deadline. Too often, the opposing counsel meet at the last minute, waste their time quibbling about trivia, and wind up submitting what amounts to independent reports to the court.

Pre-trial conferences and orders may also provide a useful forum for the commencement of settlement negotiations. Often it is not until opposing counsel for the first time is forced to confront the reality of trial that he or she becomes interested in settlement. This epiphany on the part of defense counsel carries risks as well as benefits to plaintiffs. Last-minute settlement negotiations may drag on until plaintiffs' evidence is stale and witnesses are scattered posing serious risks to the case if negotiations break down. Counsel should remember that

the most powerful incentive for meaningful negotiations is an impending trial date and should therefore not consent to more than a brief adjournment until there is a signature on an agreement.

At the trial, one's options regarding the order of witnesses are likely to be limited by the need to accommodate the schedules of expert witnesses. If possible, however, it is often effective to begin with a strong general expert witness (usually a present or a former correctional official) who has toured the jail and who can give an overall view of the jail's problems and provide a context in which the judge can place the more limited or specific testimony of the witnesses to follow.

After the trial, it is appropriate, at the judge's option, to submit proposed findings of fact and conclusions of law or a post-trial brief. The former may be easier, since if you have drafted admissions, stipulation, or a pre-trial order you should be able to transplant much of their contents with little change except to add appropriate citations to the record. Depending on the judge's familiarity with the issues and on whether a pre-trial brief was submitted, you may wish to submit a document with a statement of facts in the form of proposed findings but a legal argument in the usual brief style rather than in the form of conclusions of law.

C. Fitting the Facts to the Law.

There are a number of recurrent factual problems that arise in trying to meet the relevant legal standards in jail cases.[249]

1. Deference. In Bell v. Wolfish the Supreme Court held -- repeatedly -- that courts should accord "wide-ranging deference" to prison administrators in matters related to preserving institutional security.[250] (See §I.A. for additional comments on "deference.") At first blush, this rule appears to present a purely legal issue. However, there is room for factual maneuver within the confines of the "deference" standard. There may be someone to whom the court can "defer" who supports the plaintiffs' position. In places, the Wolfish opinion suggests that the basis for deference is the expertise of corrections officials;[251] the opinion also acknowledges, however, that this expertise may sometimes be nonexistent, and expresses the view that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our

---

249/ The following highly selective discussion of particular substantive issues does not reflect our view of the relative importance of the issues; rather, we have selected the issues about which we have something useful to say. For a recent catalogue of substantive issues in prison and jail cases, see Manville and Boston, Prisoners' Self-Help Litigation Manual, (Oceana Press 1983), Chapter V.

250/ 441 U.S. 520, 547 (1979); see also id at n.29, 548, n.30, 551, n.32, 554-55, n.40, 563.

251/ Id. at 548.

Government, not the Judicial."[252] This language suggests that if there is a state law or regulation, or even a non-binding standard promulgated pursuant to statutory authority, which the jail violates, the deference standard can be invoked to support relief.[252a] Conversely, if the jail administrator expresses a supportive view contrary to that of the commissioner, sheriff, or mayor, counsel can argue that the expert administrator who has day-to-day familiarity with jail operations should be deferred to. There may be other permutations of these strategies. In some cases, it may be possible to show such a conflict of views that the idea of deference to anyone becomes nonsensical. The essential point is that counsel should identify all persons and organizations in positions of authority vis-a-vis the jail and explore their views.

Counsel should also exploit any inconsistencies in defendants' justifications for their policies. A practice defended as essential to security during litigation may have been presented solely as a money-saving device or a convenience at some other time. If this is the case, counsel should press the court for a factual finding that defendants' views regarding security are not sincerely held. Such a finding not only undermines the requirement of deference but is also less vulnerable on appeal than a legal conclusion that the defendant's views constitute an "exaggerated response."[253]

---

[252] Id.

[252a] See e.g. Michaud v. Sheriff of Essex County, 390 Mass. 523 (Mass. Sup. Jud. Ct. 1983) (State sanitary regulations reflect current standards of decency against which court measures violations of constitutional rights.)

[253] See Morris v. Travisono, 707 F.2d 28, 31 (1st Cir. 1983).

2. Length of Stay. The constitutionality of jail conditions may depend on how long they must be endured. In Bell v. Wolfish, the Court emphasized that "[n]early all of the detainees are released within 60 days."254/ Length of stay may become a major factual issue. Even if the underlying facts are undisputed, what they mean may depend on who does the arithmetic.

First, one must decide what data to use. A calculation may be made based on all the inmates who pass through the jail during a year or other long period of time. This method will emphasize the short-term, high-turnover population of inmates who are bailed after arrest or who receive short sentences for petty offenses. Alternatively, one can base the calculation on a one-day "slice" including all persons found in the jail on a particular date. "Neither of these opposing statistical approaches is dishonest. They merely measure different things."255/ In either case, one should use a period far enough in the past that most of the inmates in question will have been released so their full terms of incarceration will be reflected.

Once one has selected the data base, the impulse may be to calculate a mean (average) or median. However, for a court to rule on this basis is like building a bridge based on the average height of the ships that will pass under it. It is preferable to break length of stay down into intervals (e.g., 0-30 days, 31-60

254/ Note 250, above, at 544. See also Hutto v. Finney, 437 U.S. 678, 686-87 (1978) (length of stay emphasized in Eighth Amendment analysis).

255/ LaReau v. Manson, 651 F.2d 96, 102 (2d Cir. 1981).

days, 60-90 days, etc.), which will usually show that, along with a large short-term population, there is also a substantial long-term population of persons serving sentences of several months or awaiting trial on serious charges. This presentation is the best way to show that some portion of the jail population is subjected to "genuine privation and hardship over an extended period of time."256/

3. Medical Care. The constitutional standard for prison and jail medical care prohibits "deliberate indifference to serious medical needs of prisoners...."257/ When the focus is on the health care system and not on the treatment of a particular individual, courts have interpreted the ill-adapted "deliberate indifference" standard258/ to hold that "a series of incidents closely related in time...may disclose a pattern of conduct amounting to deliberate indifference" and that injunctive

---

256/ Bell v. Wolfish, note 250, above, at 542.

257/ Estelle v. Gamble, 429 U.S. 97, 105 (1976). Estelle based its holding on the Eighth Amendment's prohibition of the "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 182-83 (1976). Pre-trial detainees enjoy due process rights "at least as great as [these] Eighth Amendment protections." City of Revere v. Massachusetts General Hospital, __ U.S. __, 103 S.Ct. 2979, 2983 (1983). It is unlikely that the due process standards will ever be defined as significantly more favorable than the Eighth Amendment standard. Since deprivation of care for serious medical needs is presumably not a legitimate means of punishment, the difference between "punishment" and "cruel and unusual punishment" in this context should be minimal.

258/ For criticism of this standard, see Estelle v. Gamble, note 257 above, at 117 (Stevens, J., dissenting); Neisser, Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care, 63 Va. L.Rev. 921 (1979).

relief can be granted "if it can be shown that the medical facilities were so wholly inadequate for the prison population's needs that suffering would be inevitable."[259] In such cases, evidence of subjective motivations of jail personnel may be beside the point.[260]

Although the above quoted standard suggests that the "series of incidents" and "inadequate facilities" are alternative bases for granting injunctive relief, the prudent litigator will pursue both avenues of proof. Evidence of a series of failures of the medical system may prove that something is wrong, but without evidence concerning systems and procedures the court will have little basis on which to formulate an injunction; conversely, without proof that individuals have suffered, experts' criticism of the system and proof of its deviation from standards may be dismissed as mere theorizing or as policy differences that do not rise to a constitutional level.

The Estelle v. Gamble standard also requires that "serious medical needs of prisoners" be involved. A "serious" medical need has been defined as "one that has been diagnosed by a

---

259/ Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974) (emphasis supplied).

260/ Thus, in one leading case, the court found systemic deficiencies in medical care to violate the "deliberate indifference" standard at the same time that it found that the prison medical staff "appeared to be truly concerned with the well-being of the inmates they served." Todaro v. Ward, 431 F.Supp. 1129, 1160 (S.D. N.Y. 1977), aff'd, 565 F.2d 48 (2d Cir. 1977). Accord, Wellman v. Faulkner, 715 F.2d 269, 273 (7th Cir. 1983) (violation found despite "apparent good intentions of prison officials").

physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention."[261] However, courts sometimes dismiss medical lapses which might otherwise state a constitutional violation on the ground that they do not relate to serious needs.[262] You should therefore be sure to present evidence of the actual or potential consequences of the kinds of medical failures that you prove. This should be done both through expert testimony and through testimony of inmates who have suffered. It should be sufficient to show that a condition causes significant pain.[263]

4. Protection from Inmate Assault. Prisoners are entitled to protection from assault by other inmates; the constitutional standard forbids "deliberate indifference" to

---

261/ Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981) and cases cited.

262/ See, e.g., Butler v. Best, 478 F.Supp. 377 (E.D. Ark. 1979) (ten-day failure to give prescribed medication did not relate to serious medical needs).

263/ West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978); Case v. Bixler, 518 F.Supp. 1277 (S.D. Oh. 1981).

prisoners' physical safety.[264] This standard may be met either by showing a failure to act in the face of a known risk to a particular prisoner[265] or by proving the existence of a "constant threat of violence"[266] or of a "pervasive risk of harm" to all prisoners or to some identifiable group of them[267] combined with a failure to take adequate remedial measures. In finding such a failure, courts have cited such factors as an extensive history of prior assaults,[268] a well-entrenched subculture of sexual violence and a failure properly to classify prisoners,[269] and overcrowding, understaffing and/or underfunding which materially contributed to the risk of

---

264/ Branchcombe v. Brewer, 669 F.2d 1297 (8th Cir. 1982); Holmes v. Goldin, 615 F.2d 83 (2d Cir. 1980); Little v. Walker, 552 F.2d 193 (7th Cir. 1977) cert den. 435 U.S. 932 (1978). Courts have also used a variety of other terms, such as "reckless disregard," "gross negligence," and "callous indifference," to state essentially the same standard. See Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), aff'd on other grds. sub nom. Smith v. Wade, __ U.S. __, 103 S.Ct. 1625 (1983); Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979) (conduct so grossly incompetent, inadequate or excessive as to shock the conscience or be intolerable to basic fairness). As with medical care, no meaningful distinction between convicts and detainees has so far been drawn.

265/ Gullatte v. Potts, 654 F.2d 1007 (5th Cir. 1981); Wade v. Haynes, note 264 above; Holmes v. Goldin, note 264 above.

266/ Ruiz v. Estelle, 679 F.2d 1115, 1140-42 (5th Cir. 1982); Ramos v. Lamm, note 261 above, at 572.

267/ Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980).

268/ Stevens v. County of Dutchess, N.Y., 445 F.Supp. 89 (S.D. N.Y. 1977).

269/ Doe v. Lally, 467 F.Supp. 1339 (D. Md. 1979); Redmond v. Baxley, 475 F.Supp. 1111 (E.D. Mich. 1979).

assault.270/ The point to keep in mind is that plaintiffs must show some fault on the part of jail officials or other local authorities, both to establish liability and to formulate a remedy.

In proving a "risk of assault" case, one should look carefully at protective custody cells or units (if any) in the jail. An unusually large protective custody population is one indirect measure of lack of safety.271/ Records (if any) of the reasons why individuals are in protective custody may also be revealing. It may be also that provisions for protective custody do not provide adequate safety. Find out how many protective cells there are and ask a correctional expert if there are enough. Find out if protective custody inmates are intermingled with inmates who have been segregated for other reasons such as violent acts.272/ Explore the means by which prisoners are admitted to protective custody: are requests ever rejected? Must inmates "name names" and risk retaliation?

270/ Ruiz v. Estelle, note 266 above, at 1140-42 (crowding and understaffing); Dawson v. Kendrick, 527 F.Supp. 1252, 1289 (S.D. W.Va. 1981) (understaffing); Finney v. Mabry, 534 F.Supp. 1026, 1039 (E.D. Ark. 1982) (crowding which made proper surveillance impossible); McKenna v. County of Nassau, 538 F.Supp. 737 (E.D. N.Y. 1982) (crowding); Mayes v. Elrod, 470 F.Supp. 1188 (N.D. Ill. 1979) (underfunding).

271/ Ramos v. Lamm, 485 F.Supp. 122, 141 (D. Colo. 1979), aff'd in part and remanded, 639 F.2d 559 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981); Palmigiano v. Garrahy, 443 F.Supp. 956, 967 (D. R.I. 1977).

272/ Palmigiano v. Garrahy, id.

One should also look for architectural "blind spots"[273] and other physical features which impede surveillance in housing units and common areas. These structural issues can be particularly crucial in facilities containing dormitory housing, since without adequate supervision there may be nowhere an inmate can be safe.

Records of "unusual incidents" or of officers' use of force, of injuries to inmates, and of disciplinary proceedings may be a productive source of proof of a personal safety claim. However, one must not simply rest on the jail's records in proving such a claim. The jail's records should be the subject of commentary by an expert witness who will be able to say whether the level of violence shown by the records is more or less than it should be under appropriate safeguards, and what the causes and remedies of excessive violence are in the particular jail. One should also be aware that jail records, no matter how well they are maintained, are unlikely to reflect the full incidence of assaultive behavior because of the fear or unwillingness of inmates to inform on each other.[274] Often, jail officials themselves will acknowledge that many assaults are never

---

[273] Ramos v. Lamm, note 271 above, at 141; Palmigiano v. Garrahy, note 271 above.

[274] See Grubbs v. Bradley, 552 F.Supp. 1052, 1078-81 (M.D. Tenn. 1982) for an extensive discussion of the "inmate code" and inadequacy of institutional records to establish the level of violence. See also Ramos v. Lamm, note 271 above, at 141.

reported; one official at a large urban jail recently estimated that no more than 20 percent of assaults resulted in any written record.

This point is of the utmost importance if -- as is often the case -- you are litigating personal safety issues in connection with overcrowding. It is a truism among corrections professionals that crowding increases the risk of assault. However, in Rhodes v. Chapman, the Supreme Court emphasized in reversing the lower court's finding of unconstitutionality that the demonstrated increase in violence was "only in proportion to the increase in population."[275] Thus, the risk of assault for each prisoner was not increased. To avoid a similar finding (if you do not obtain an admission), you should be prepared either to show from jail records that assaults have increased at a rate disproportionate to the increase in population, or to argue that the jail records do not accurately reflect the increase which must exist based on your expert's testimony about the relationship of crowding and violence. You should also argue that the more crowded and chaotic the jail is, the more likely it is that assaults will go unnoticed or unrecorded by overworked employees.[276]

---

[275] 452 U.S. 337, 373 (1981). In Rhodes, unlike Grubbs v. Bradley, the prison's records were uncontroverted and were found by the district court to be credible. Id. at 349 n.15.

[276] See Fischer v. Winter, 564 F.Supp. 281, 291-2 n.10 (N.D. Calif. 1983).

5. Access to Courts. Prisoners have a right of access to the courts which may be satisfied either by access to an adequate law library or by adequate assistance from persons with legal training.277/ This requirement extends to local jails as well as to state and federal prisons, although small jails may be permitted to have small libraries.278/ In jail cases, where most inmates are pre-trial detainees, defendants will often claim that the provision of criminal defense counsel sufficiently protects the right of court access. As to criminal defense, that is correct; even if an inmate chooses to proceed pro se, the offer of a lawyer's assistance obviates the necessity to provide access to a law library.279/ However, the right of court access also encompasses habeas corpus proceedings, civil rights actions, and other matters in which there is no right to appointed counsel.280/ In a jail case, counsel should carefully explore and prove the limitations in services of the local public defender or legal aid office or of any other source of legal

---

277/ Bounds v. Smith, 430 U.S. 817, 827 (1977).

278/ Leeds v. Watson, 630 F.2d 674 (9th Cir. 1981); Parnell v. Waldrep, 511 F.Supp. 764 (W.D. N.C. 1981); Fluhr v. Roberts, 460 F.Supp. 536 (W.D. Ky. 1978). But see Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (suggests some jails may be exempt from law library requirement).

279/ United States v. Garza, 664 F.2d 135 (7th Cir. 1981) cert. den. 102 S.Ct. 1620 (1982); Almond v. Davis, 639 F.2d 1086 (4th Cir. 1981).

280/ Bounds v. Smith, note 277 above, at 827; Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 489 (1969).

assistance available to prisoners.[281] This prescription holds true even if there is a legal services agency which is specifically charged with providing civil legal services to jail inmates; either by contract or because of large caseloads, these agencies may exclude important categories of claims, such as damage cases, from consideration.

In injunctive challenges to the inadequacy of court access, courts are usually satisfied with proof that the existing means of access do not meet the needs of all prisoners.[282] It should not be necessary to present evidence that particular inmates have lost or been unable to file meritorious legal claims. However, counsel should at least present testimony by inmates who have sought or have needed legal services or information that were not available. Otherwise, the court may find that no actual need for court access has been shown on the record.

Even if the jail has a law library, it may not be adequate. Counsel should look closely at the arrangements for gaining access to the library and for using it once one is there. If the

---

[281] Spates v. Manson, 644 F.2d 80, 84 (2d Cir. 1981); Leeds v. Watson, note 278 above; Hooks v. Wainwright, 578 F.2d 1102 (5th Cir. 1978); Carter v. Mandel, 573 F.2d 172 (4th Cir. 1978). But see Kelsey v. State of Minnesota, 622 F.2d 956 (8th cir. 1980) (program that excluded "lawsuits against public agencies or public officials to change social or public policy" adequate).

[282] Williams v. Leeke, note 278 above; Hooks v. Wainwright, 578 F.2d 1102 (5th Cir. 1978), on remand, 536 F.Supp. 1330 (M.D. Fla. 1982); Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977); Carter v. Mandel, note 281 above; Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980); Battle v. Anderson, 614 F.2d 251, 254-56 (10th Cir. 1980).

hours are limited,283/ if there is no actual physical access to the library,284/ or if cumbersome or harassing procedures are required in order to use the library,285/ the Constitution may be violated. It may also be possible to show that most inmates are not capable of effectively using a law library without some assistance by trained personnel; several courts have required some trained assistance in addition to the mere provision of a library.286/

283/ Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1978); Walker v. Johnson, 544 F.Supp. 345 (E.D. Mich. 1982); Ramos v. Lamm, 485 F.Supp. 122, 166 (D. Colo. 1979), aff'd in part and rev'd in part, 639 F.2d 559 (10th Cir. 1980), cert. den., 101 S.Ct. 1759 (1981).

284/ Leeds v. Watson, note 288 above; Williams v. Leeke, note 278 above; United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 129 (S.D. N.Y. 1977), aff'd in pertinent part sub nom. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), rev'd on other grds. sub nom. Bell v. Wolfish, 441 U.S. 520 (1979); Hooks v. Wainwright, 536 F.Supp. 1330 (M.D. Fla. 1982).

285/ Ruiz v. Estelle, 679 F.2d 1115, 1154 (5th Cir. 1982).

286/ Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980); Hooks v. Wainwright, 536 F.Supp. 1330 (M.D. Fla. 1982); Glover v. Johnson, 478 F.Supp. 1075 (E.D. Mich. 1979).

SECTION X. ENFORCING AND DEFENDING A JUDGEMENT.

Most lawsuits end with a judgement. In jail litigation, the judgement often seems to be only the beginning. Jail officials are frequently unable or unwilling to comply even with judgements they have consented to, requiring enforcement motions by the plaintiffs,[287] and second thoughts or new developments often lead to motions to vacate or modify judgements.[288] Translating a paper victory in litigation into permanent benefits for the plaintiffs may be the greatest challenge in a jail conditions case.

A. Writing an Enforceable Judgement.

Effective post-judgement work depends on what is in the judgement. Plaintiffs' counsel will have more or less to say about the terms of a judgement depending on defendants' style of negotiations and the judge's practices in writing or settling litigated judgements. However, there are certain basic ideas that should be kept in mind in negotiating a settlement or drafting a proposed judgement.

287/ See, e.g., West v. Lamb, 497 F.Supp. 989 (D. Nev. 1980); Padgett v. Stein, 406 F.Supp. 287 (M.D. Pa. 1975); Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Oh. 1971), supplemented, 330 F.Supp. 707 (N.D. Oh. 1971), aff'd on other grds. sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), motion to vac. den., 357 F.Supp. 696 (N.D. Oh. 1973), defendants held in contempt, 73 F.R.D. 82 (N.D. Oh. 1976), further relief ordered, 440 F.Supp. 60 (N.D. Oh. 1977), further relief ordered, 509 F.Supp. 653 (N.D. Oh. 1980).

288/ See, e.g., Benjamin v. Malcolm, 564 F.Supp. 668 (S.D. N.Y. 1983); Benjamin v. Malcolm, 528 F.Supp. 925 (S.D. N.Y. 1981); McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978).

- Spell out the defendants' obligations explicitly. Avoid vague words and terms such as "reasonable" or "best efforts" wherever possible. A judgement that contains such terms is subject to reinterpretation by the defendants for their own ends and may be too unclear to be the subject of a contempt finding.289/

Some judges have an aversion to judgements that they think are "too detailed" or that they think go beyond constitutional requirements, even if the parties agree to them.290/ The underlying concern appears to be that imposing detailed rules on jail officials will drag the court into a morass of disputes about what the judgement means. If the judgement is a proposed consent judgement, try to get the defendants to say that they would rather have an unambiguous set of rules so their staff will always know what their obligations are, and point out that the more specific the judgement is the less likely the court will be required to clarify or interpret it. Suggest to the court that if the defendants have agreed to particular terms, to reject the settlement in favor of a different or less detailed order formulated by the court after litigation would be contrary to the spirit of the Bell v. Wolfish "deference" principle. (See §§ I.A., IX.C.1. for further discussion of deference.) Remember (and remind the judge) that every term of a judgement need not be

---

289/ See Folsum v. Blum, 554 F.Supp. 828 (S.D. N.Y. 1982); Rinehart v. Brewer, 483 F.Supp. 165, 170-71 (S.D. Ia. 1980); Jordan v. Arnold, 472 F.Supp. 265, 289 (M.D. Pa. 1979).

290/ See Morales v. Turman, 562 F.2d 993, 999 (5th Cir. 1977).

independently compelled by the Constitution; rather, the judgement as a whole should be designed to remedy the constitutional violation.[291]

Often, jail practices violate not only the Constitution but also state or local statutes, regulations or standards. Tracking the language of a state or local rule in the judgement has the advantage of giving the defendants a single standard to obey and thus avoiding a possible source of confusion. A federal judge may also be more willing to enter a detailed judgement when it embodies pre-existing state or local policy.[292] When the case is litigated to judgement rather than settled, adopting the terms of state or local law is arguably more consistent with the

---

[291] Hutto v. Finney, 434 U.S. 678, 685-88 (1978); Ruiz v. Estelle, 679 F.2d 1115, 1155 (5th Cir. 1982). One court has observed that "an equitable decree properly may prohibit more than the statute on which the decree is based prohibits, in order more completely to restore the status quo ante, or more securely to prevent a repetition of the alleged violation by making the decree easy to administer...." Larsen v. Sielaff, 702 F.2d 116, 118 (7th Cir. 1982) cert. den. 104 S.Ct. 372 (1983) (dictum). But see Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) (consent judgement not enforced where terms not required by Constitution and where Attorney General lacked power under state law to bind state to terms). Some recent caselaw has suggested that litigated judgements should be carefully limited to assure that they do not do more than the law requires, and that the district court should approach the remedial process in stages in order to assess precisely how much relief is necessary to remedy the constitutional violation. Ruiz v. Estelle, 679 F.2d 1115, 1144-46 (5th Cir. 1982); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

[292] See Padgett v. Stein, 406 F.Supp. 287, 292 (M.D. Pa. 1975).

Ashwander doctrine [293] of avoiding unnecessary constitutional adjudication than is entering a wholly court-written judgement. For that reason, borrowing such existing provisions may be particularly attractive to a federal judge.

- Place the burden of showing compliance on the defendants. Defendants may be required to keep records, to make them available to the court or plaintiffs' counsel, to submit reports, or otherwise to demonstrate their compliance with a judgement.[294] Although counsel cannot rely exclusively on defendants' records, these will often reveal compliance problems. Moreover, the necessity of keeping records or making reports may cause the defendants to approach their substantive tasks in a more organized fashion and may reveal correctable administrative or procedural defects in their operations.

- Ensure counsel's access to the jail for assessing compliance. Many failures of compliance will not be evident from defendants' records. Physical access to and inspection of the jail are necessary, especially where physical renovations or delivery of medical, psychiatric or other services are

---

293/ See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

294/ West v. Lamb, 497 F.Supp. 989, 996, 1006 (D. Nev. 1980); Davis v. Watkins, 384 F.Supp. 1196, 1203-05 (N.D. Ohio 1974); Alberti v. Sheriff of Harris County, 406 F.Supp. 649, 678-82 (S.D. Tex. 1975); Valvano v. McGrath, 325 F.Supp. 408, 411-12 (E.D. N.Y. 1971); Cronin v. Holt, 81-8309-CIV-EPS (S.D. Fla., September 25, 1982) (Stipulation and Order); Jensen v. County of Lake, H-74-230 (N.D. Ind., June 26, 1983) (Judgment and Order).

concerned. Provisions can be written permitting counsel and experts to tour part or all of the jail at stated intervals or upon request.[295]

- Ensure continuing inmate contact and continuing publicization of the judgement. Counsel must maintain contact with the inmates in order to assess compliance. After a judgement is entered, inmates will generally no longer receive notice of the lawsuit's existence and counsel's identity, and they may soon be forgotten, especially in a high-turnover institution like most local jails. There are several means of avoiding this, any and all of which can be provided for in a judgement:

a. Require that new inmates be notified of the judgement's terms and counsel's identity in some fashion.[296]

---

[295] See New York State Association for Retarded Children v. Carey, 706 F.2d 956, 960-61 (2d Cir. 1982) (post-judgment tours by plaintiffs' counsel and expert witnesses approved as enforcement measure); Cronin v. Holt, note 294 above; Jensen v. County of Lake, note 294 above (establishes "community committee" to keep public advised of living conditions at jail; access to jail, staff and prisoners as well as jail records required); O'Bryan v. County of Saginaw, Mich., 446 F.Supp. 436, 446 (E.D. Mich. 1978) (weekly inspections by plaintiffs' counsel); Martinez v. Board of County Commissioners, 75-M-1260, Consent Judgment at 3 (D. Colo., December 11, 1975) (plaintiffs' counsel permitted to tour without notice); Jackson v. Hendrick, No. 2437, Final Decree I at 13 (Pa. Ct. of Common Pleas, November 20, 1976) (counsel may inspect on one day's notice and consult with any inmate or group of inmates).

[296] See Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 352 (7th Cir. 1976) (judgement provided for notice to all employees; notices still posted three years later).

b. Permit counsel to meet with inmates during the jail tours discussed above.

c. Permit counsel to meet regularly with an inmate council or other representative body if one exists.

- Get outside assistance in monitoring and assessing compliance. The use of monitors, special masters, and other impartial third parties is well established in jail and prison litigation.297/ The great advantage of these devices is to remove some of the long-term burden of monitoring and enforcement from plaintiffs' counsel. The disadvantage, of course, is that some influence and control over enforcement is shifted away from plaintiffs' counsel. However, if counsel's resources are limited and the monitoring task is large, the trade-off may be fully justified.

The value of a monitoring arrangement depends absolutely on who is chosen for the job. Courts have approved or appointed magistrates, attorneys, academics, corrections professionals, medical and other experts, and agencies of government to assess compliance, depending on the nature of the task and the expertise

---

297/ See, e.g., Miller v. Carson, 563 F.2d 741, 752-53 (5th Cir. 1977); Lightfoot v. Walker, 486 F.Supp. 504, 528-29 (S.D. Ill. 1980); Finney v. Mabry, 458 F.Supp. 720, 724 (E.D. Ark. 1978); Owens-El v. Robinson, 457 F.Supp. 984, 988 (W.D. Pa. 1978); Palmigiano v. Garrahy, 443 F.Supp. 956, 989 (D. R.I. 1977). See also Note, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062 (1979); V.M. Nathan, The Use of Masters in Institutional Reform Litigation, 10 Toledo L.Rev. 419, 427-28 (1979).

required.[298] Counsel should carefully consider the exact nature of the monitoring task, to the extent it can be predicted, in proposing or selecting a monitor. Whether the task will be primarily fact-finding and reporting, negotiating and consulting with jail officials, or advising the court and the parties concerning remedial modifications or improvements, and whether the activities to be monitored involve specialized technical expertise, will be major considerations influencing this decision.

- Try to limit the defendants' post-judgement options. You should assume from the beginning that defendants will be unable or unwilling to comply with any judgement and will try to get out of it whenever its terms become inconvenient. (Plaintiffs' strategy in responding to attempts to vacate or

---

[298] Campbell v. Cauthron, 623 F.2d 503, 508-09 (8th Cir. 1980) (dietitian); Miller v. Carson, 563 F.2d 741, 752-54 (5th Cir. 1977) (magistrate); Powell v. Ward, 540 F.Supp. 515 (S.D. N.Y. 1982) (attorney); Milburn v. Coughlin, 79 Civ. 5077 (RJW), Stipulation for Entry of Final Judgment (S.D. N.Y., Aug. 20,1982) (social medicine department of hospital); Union County Jail Inmates v. Scanlon, 537 F.Supp. 993, 998 (D. N.J. 1982), rev'd on other grds. sub nom. Union County Jail Imates v. Di Buono, 713 F.2d 984 (3d Cir. 1983) (retired state court judge); Owens-El v. Robinson, 457 F.Supp. 984, 985 (W.D. Pa. 1978) (former warden and penology expert); Palmigiano v. Garrahy, 448 F.Supp. 659, 662 (D. R.I. 1978) (corrections expert) Goldsby v. Carnes, 429 F.Supp. 370, 381 (W.D. Mo. 1977) (Community Relations Service of U.S. Justice Department); Negron v. Ward, 74 Civ. 1480, Order (S.D. N.Y., July 12, 1976) (psychiatrist); Lasky v. Quinlan, 419 F.Supp. 799, 808 (S.D. N.Y. 1976), vac. as moot, 558 F.2d 1133 (2d Cir. 1977) (director of county board of health); Taylor v. Perini, 413 F.Supp. 189, 198 (N.D. Ohio 1976) (law professor); Valvano v. McGrath, 325 F.Supp. 408, 411, 12 (E.D. N.Y. 1971) (city agency with supervisory power over jails).

modify the decree is discussed in more detail in §X.B. below.) Counsel should try to anticipate the most probable post-judgement problems and draft language specifically addressing them. For example, one consent decree contained terms estopping defendants from relying on economic considerations in seeking to escape the decree's obligations.299/ If a decree contains an "escape clause" for emergency situations, counsel might attempt to define or limit the term "emergency," e.g., by stating in the decree that shortages of personnel or overcrowding do not constitute an emergency.300/ Counsel should also seek to avoid the situation in which defendants attempt to vacate the decree and litigate the merits de novo at a time when plaintiffs' proof is stale and there is an impending crisis of jail population or manageability which places political pressure on the court. One approach to this problem -- one which will usually be strongly resisted by defendants -- is to demand concessions of unconstitutionality, in the decree.301/ While none of these provisions will be immune from subsequent modification, they should serve to increase the defendants' burden in seeking to avoid the decree's terms and should also refute any argument that the problems the provisions address are new and unforeseen.

299/ West v. Lamb, 497 F.Supp. 989, 996 (D. Nev. 1980).

300/ See Costello v. Wainwright, 489 F.Supp. 1100, 1107 (M.D. Fla. 1980) (limited definition of emergency in consent decree.)

301/ See Benjamin v. Malcolm, 564 F.Supp. 668, 670-71 (S.D. N.Y. 1983).

B. Enforcing an Injunction.

If defendants do not comply with a judgement, one must usually go to court to make them. Sometimes negotiations or the threat of an enforcement motion can resolve minor and technical compliance problems. Noncompliance in politically sensitive areas like population reduction or complicated and expensive ones like physical renovation is rarely corrected without court intervention.

A federal court has the inherent power to enforce its orders through civil contempt;[302] it has power under statute, court rule, and traditional equity doctrines[303] to make further orders necessary to effectuate its judgements. A finding of contempt permits the imposition of coercive relief including fines or incarceration.[304] Even without a contempt finding, courts may grant further relief to effectuate the original injunction's purpose.[305] Such relief may include new inspection, record-

---

[302] United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947) McComb v. Jacksonville Paper Corp., 336 U.S. 187 (1949); Powell v. Ward, 487 F.Supp. 917 (S.D. N.Y. 1980), aff'd as mod., 643 F.2d 924 (2d Cir. 191), cert. den., 454 U.S. 832 (1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978).

[303] 28 U.S.C. §1651 (All Writs Act); Rule 60(b), F.R.C.P.; United States v. United Shoe Machinery Corp., 391 U.S. 244, 248-49 (1968).

[304] Newman v. State of Alabama, 683 F.2d 1312, 1318 (11th Cir. 1982) Mobile County Jail Inmates v. Purvis, 551 F.Supp. 92 (S.D. Ala. 1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982).

[305] United States v. United Shoe Machinery Corp., note 303 above, at 248-49; but see Newman v. State of Alabama, id. at 1319-20 (further injunctive relief not available until coercive sanctions of contempt found inadequate).

keeping or reporting requirements,[306] appointment of a master or monitor,[307] or even substantive modifications of the prior injunction.[308] Such modifications need not be predicated on a finding of "grievous wrong";[309] plaintiffs need only show that the existing order has not accomplished its purpose.[310] If the modifications sought are sweeping, however, the proceeding may amount to a de novo consideration of the constitutionality of conditions at the time of the motion.[311]

Enforcement of judgements in complex jail conditions cases is frequently frustrating and difficult. Many judges are extremely reluctant to hold jail officials in contempt; many are frightened of the politically explosive issue of jail population; others become worn down by the sheer ineptitude and sloth demonstrated by many jail officials. At best, defendants are likely to be given many extensions of time and opportunities to comply before

---

306/ Powell v. Ward, note 302 above; Todaro v. Ward, 74 Civ. 4581 (RJW), (S.D. N.Y., November 21, 1979) (Order).

307/ Powell v. Ward, note 302 above; Jones v. Wittenberg, 73 F.R.D. 82 (N.D. Ohio 1982); Jensen v. County of Lake, note 304 above.

308/ Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1297 (W.D. Pa. 1983) (overcrowding limited based on finding that it impeded implementation of prior conditions orders); Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D. Calif. 1983) (additional procedural safeguards added where abuses in use of segregation persisted).

309/ See text accompanying notes 319-324 below.

310/ United States v. United Shoe Machinery Co., note 303 above, at 248-49, King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31, 35 (2d Cir. 1969); English v. Cunningham, 269 F.2d 517, 523 (D.C. Cir. 1959).

311/ Fischer v. Winter, 564 F.Supp. 281, 299 (N.D. Calif. 1983).

the court takes any decisive action. For this reason, it makes little sense to delay enforcement motions if compliance is not forthcoming immediately or by a court-set deadline. It is generally wishful thinking to believe that the defendants will shape up if plaintiff's counsel goes easy for a while. The sooner the court learns of the noncompliance and begins to hear the defendants' sequence of lame excuses and changing explanations, the sooner its patience will be exhausted and meaningful enforcement will commence.

Plaintiffs' counsel should keep in mind that in enforcement situations it is often necessary to do defendants' work as well as their own. For example, there are numerous ways to reduce a population of pre-trial detainees short of court-ordered release.312/ Defendants can usually be relied upon not to implement or even canvass these alternatives unless forced to do

---

312/ See Benjamin v. Malcolm, note 301 above, 688-91; West v. Lamb, note 301 above, at 1006, 1008-13; Alberti v. Sheriff of Harris County, note 294 above; Cronin v. Holt, note 294 above; Cherco v. County of Sonoma, C-80-0334-SAW (N.D. Calif., September 27, 1982) (consent decree required county to reduce population through citation program and to improve pretrial release efforts through increase in staffing and resources). Litigators are advised to consult with their experts and with agencies and organizations which provide information and materials on alternatives to incarceration, such as the National Jail Project. Another valuable source of assistance is the Pretrial Services Resource Center, 918 F Street N.W., Washington, D.C. 20004-1482, (202) 638-3080, a non-profit federally-funded agency which provides technical analysis and assistance materials. The Resource Center also contracts independently and through the National Institute of Corrections (NIC) Jail Center to assess the effects of pre-trial practices on jail populations and recommends appropriate remedial alternatives. NIC, an agency of the U.S. Department of Justice, provides assistance to local correctional agencies through the Jail Center, 1790 30th Street, Suite 140, Boulder, CO 80301, (303) 497-6700.

so.[313] Counsel should also consider the advantages of having a monitor or master with relevant experience who can canvass remedial alternatives and make recommendations to the court. As a practical matter, it is plaintiffs' burden to bring these solutions to defendants' and the courts' attention, both to assist the defendants in meeting their obligations and to show the court that noncompliance is in fact caused by defendants' nonfeasance and not inexorable fate. In this area and in others, the assistance of experts may be as important after judgement as before judgement.

The difficult question is what the court is to do if a legislature or other funding source simply refuses to provide the required funds after the court rules against them. The federal courts have not agreed as to whether and how they can directly

---

[313] See, e.g., Mobile County Jail Inmates v. Purvis, 551 F.Supp. 92, 96 (S.D. Ala. 1982); Anderson v. Redman, 429 F.Supp. 1105, 1123 (D. Del. 1977) (noting prison officials' inability to act "unless and until supplied with the protective succor and warmth of a federal court order"). See also Special Project, "The Remedial Process in Institutional Reform Litigation," 78 Columbia L. Rev. 784, 795-96 (1978).

order expenditures of funds by state and local governments,[314] and have preferred to avoid the question where possible.[315] However, there is little doubt that if the defendants fail to make the required expenditures or improvements, the court can

---

[314] Compare Griffin v. School Board of Prince Edward County, 377 U.S. 218, 232-23 (1963) (district court could require court officials to levy taxes to reopen schools); Jones v. Diamond, 519 F.2d 1090, 1101 n.20 (5th Cir. 1975) (county supervisors proper defendants "by virtue of their statutory duties and their control over the budget"); Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241, 1242 (1st Cir. 1975) (continued funding of Bail Appeal Project required); United States v. Missouri, 515 F.2d 1365, 1372-73 (8th Cir. 1975), cert. den., 423 U.S. 957 (1975) (district court could direct school tax levy); Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972) (local government funds ordered redirected to jail improvements); Hamilton v. Landrieu, 351 F.Supp. 549, 552-53 (E.D. La. 1972) (funding of "Prison Ombudsman" required) with Smith v. Sullivan, 553 F.2d 373, 380-381 (5th Cir. 1977) (order to raise guards' pay reversed); Rhem v. Malcolm, 507 F.2d 33, 341 (2d Cir. 1974) (district court should avoid "difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money"); Padgett v. Stein, 406 F.Supp. 287, 303 (M.D. Pa. 1975) (court lacks power to order public funds expended); Hamilton v. Love, 328 F.Supp. 1182, 1194 (E.D. Ark. 1971) (same). See also Cabrera v. Municipality of Bayamon, 622 F.2d 4 (1st Cir. 1980) (contempt fines may be imposed and the funds used to implement remedial measures); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978) (same); Mobil County Jail Inmates v. Purvis, Civ. Action #76-416P, Memorandum Order (S.D. Ala. December, 1983) (contempt fine used to create bail fund to help relieve jail overcrowding).

[315] See Welsch v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1977); Palmigiano v. Garrahy, 599 F.2d 17, 20-21 (1st Cir. 1979).

order the institution closed or inmates released.316/ Generally, in these cases push does not come to shove, and local governments eventually shoulder their legal obligations.317/ (See §XI.K. below for comment on enforcement of attorneys' fees awards.)

C. Modification of Judgements.

Increasingly, jail and prison officials who find themselves inconvenienced by or unable to comply with court orders are seeking to have them vacated or modified. In federal court, such relief is sought under the authority of the rule providing inter alia, when "a prior judgement upon which [the challenged judgement] is based has been reversed or otherwise vacated, or it is no

---

316/ Duran v. Elrod, 713 F.2d 292, 299-98 (7th Cir. 1983); Dimarzo v. Cahill, 575 F.2d 15, 19-20 (1st Cir. 1978); Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 101 (1st Cir. 1978); Rhem v. Malcolm, 507 F.2d 333, 340-41 (2d Cir. 1974); Parnell v. Waldrep, 511 F.Supp. 765 (W.D. N.C. 1981); Barnes v. Government of Virgin Islands, 415 F.Supp. 1218, 1227, 1230 (D. V.I. 1976). See also Lightfoot v. Walker, 486 F.Supp. 504, 524 (S.D. Ill. 1980) (if medical services not enhanced, prison population must be reduced to level commensurate with existing services). One court, however, has held that an injunction regarding conditions must be enforced at least initially through contempt and not by a release order. Newman v. State of Alabama, 683 F.2d 1312 (11th Cir. 1982) cert. den. 103 S.Ct. 1312 (1983). On remand, the district court entered both a judgement of contempt and a new release order to take effect some months later. Newman v. Alabama ___ F.Supp. ___, Civ. Action # 3501-N, Order and Judgement and Memorandum Opinion (M.D. Al. 1983), appeal pending in 11th Circuit. See also Mobil County Jail Inmates v. Purvis, note 314 above (bail fund created by court order). See generally Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 721 (1978); Comment, "Enforcement of Judicial Financial Orders: Constitutional Rights in Search of a Remedy;" 59 Geo. L.J. 393, 418-19 (1970).

317/ Harris and Spiller, Resource Center on Correctional Law & Legal Services, Commission on Correctional Facilities and Services, American Bar Association, After Decision: Implementation of Judicial Decrees in Correctional Settings, 22-23 (1976).

longer equitable that the judgement should have prospective application; or...any other reason justifying relief from the operation of the judgment."318/

Traditional doctrine holds that when defendants seek to escape the terms of an injunction, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decided after years of litigation."319/ This doctrine is applicable equally to consent decrees and to litigated judgements.320/ The "grievous wrong" standard has been followed by many modern courts in jail and prison cases and in other contexts.321/ Other courts have declined, often without explanation, to hold jail and prison officials to the usual standard.322/ One federal circuit has adhered to the "new and unforeseen conditions" requirement while

---

318/ Rule 60(b) (5) and (6), F.R.C.P.

319/ United States v. Swift & Co., 286 U.S. 106, 119 (1932). Plaintiffs seeking additional relief to effectuate the intent of an injunction are governed by a less exacting standard. See text accompanying note 310.

320/ Note 319 above, at 114.

321/ Duran v. Elrod, 713 F.2d 292, 296-97 (7th Cir. 1983); Mayberry v. Maroney, 529 F.2d 332, 335 (3d Cir. 1976) ("exceptional circumstances"); Humble Oil Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969), cert. den., 395 U.S. 905 (1969) ("oppressive hardship"); Frazier v. Ward, 528 F.Supp. 80 (N.D. N.Y. 1981); Rhem v. Malcolm, 432 F.Supp. 769, 780 (S.D. N.Y. 1977).

322/ Campbell v. McGruder, 554 F.Supp. 562 (D. D.C. 1982); Thompson v. Enomoto, 542 F.Supp. 768 (N.D. Calif. 1982); Merriweather v. Sherwood, 518 F.Supp. 355 (S.D. N.Y. 1981); Imprisoned Citizens Union v. Shapp, 461 F.Supp. 522 (E.D. Pa. 1978); Gates v. Collier, 454 F.Supp. 579, 582 (N.D. Miss. 1978).

relaxing the "grievous wrong" standard.[323] Another federal circuit has held that the "grievous wrong" standard is inapplicable in complex injunctive cases if the proposed modification is not "in derogation of the primary objective of the decree."[324] The courts are divided as to whether changes in decisional law constitute a basis for modification.[325]

In opposing a motion to modify, there are various approaches to take, depending on the issue, the facts, and the nature of the judgement. Under the traditional modification standard, counsel should emphasize defendants' failure to show new and unforeseen circumstances and their failure to show sufficiently serious problems to justify disturbing the finality of judgements.[326] Sometimes these may be apparent on the face of the papers, and counsel should attempt to have the motion dismissed without a

---

323/ Compare Nelson v. Collins, 700 F.2d 145 (4th Cir. 1983) (modification prohibited without proven changes in circumstances after entry of judgement) with Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) ("review anew" justified by changed conditions and Supreme Court decisions).

324/ New York State Association for Retarded Children v. Carey, 706 F.2d 956, 969 (2d Cir. 1983), cert. den., 104 S.Ct. 277 (1983). See Benjamin v. Malcolm, 564 F.Supp. 668, 685-87 (S.D. N.Y. 1983) (modification denied where in conflict with primary objective of decree).

325/ Compare Coalition of Black Leadership v. Ciana, 570 F.2d 12, 16 (1st Cir. 1978); Morris v. Travisono, 499 F.Supp. 149, 154 (D. R.I. 1980) Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 394 F.Supp. 393, 395 n.4 (S.D. N.Y.), aff'd, 532 F.2d 846 (2d Cir.), cert. den., 425 U.S. 976 (1976) with Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979); Jordan v. School District of Erie, Pa., 583 F.2d 91 (3d Cir. 1978); Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).

326/ See Frazier v. Ward, 528 F.Supp. 80 (N.D. N.Y. 1981) (staffing problems not "oppressive hardship").

hearing. If there is to be a hearing, counsel should seek discovery. Depositions are preferable for this purpose, since they are likely to expose defendants' lack of foresight and failure to think through their positions; written discovery may sensitize them to these problems in time to cover them up. Further expert tours might be advisable. Under a more relaxed modification standard, plaintiffs should be prepared to demonstrate that the constitutional violation persists, or that it would recur under the defendants' proposal (although the burden of proof should presumably be on the defendant). Expert testimony and consultation is plainly called for under these circumstances. If the judgement is a multi-issue consent judgement and defendants seek relief as to one or a few issues, counsel should argue that the judgement is a product of give and take in which the parties may have sacrificed benefits on some issues to obtain benefits on others; in that context, it is unfair to permit a party to reopen only those issues as to which it is dissatisfied.327/ An alternative position is to request that the court, if it considers defendants' motion on the merits, also reopen issues on which the plaintiffs might be entitled to more relief; if attorneys' fees have been settled, reopening the

---

327/ See United States v. Armour & Co., 402 U.S. 673, 681 (1971) ("...in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

amount of fees. They may be a fruitful subject for a counter-motion. Counsel's object should be to preserve the integrity of the judgement by making any reopening of it more risky and burdensome for the defendants and more inconvenient for the court.

SECTION XI. ATTORNEYS' FEES

Under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. §1988, successful §1983 litigants will probably be compensated to some extent for their time and efforts. The Act provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost." Legislative history makes it clear that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust."328/ Attorneys' fees motions are more hotly contested than the merits in many cases. There is consequently an enormous body of fees caselaw in every federal jurisdiction. This brief review is

---

328/ S.Rep. No. 94-1011, 94th Cong. 2d Sess., 4 (1976), quoting from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Prevailing defendants are entitled to fees only if the plaintiffs' action was frivolous or in bad faith. Hughes v. Rowe, 449 U.S. 5, 14 (1980); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).

Substantial awards have been made in many jail cases, with rates and amounts depending on the jurisdiction, when the work was done, the length and complexity of the case, and the credentials of the lawyers. See, e.g., Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981) ($40-$60 an hour); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) ($2,000 for prosecuting appeal); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) ($45,792 at $30-$60 an hour); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980) ($17,407.50 for further proceedings); Martino v. Carey, 568 F.Supp. 848 (D. Or. 1983) ($125 and hour plus $75 an hour multiplier; total award of $195,470); Forney v. Wolke, 483 F.Supp. 809 (E.D. Wis. 1980) ($17,047.90 at $50-$75 an hour); Adams v. Mathis, 458 F.Supp. 302 (M.D. Al. 1978) ($50 an hour); Penland v. Warren County Jail, Civ-4-82-9 (E.D. Tenn., 1983) ($14,465 at $65 an hour); Brown v. Barr, CA 78-3046 (S.D. W.Va., 1981) ($50 an hour in court and $35 out-of-court time for further proceedings).

intended only to suggest the courts' basic approaches to some of the common fees issues jail litigators will face.[329/]

A. Record Keeping. From the beginning of the litigation, counsel should be careful to document hours expended with the same care that would be accorded billing records of a private paying client. Although the courts were initially somewhat lenient with lawyers who reconstructed the hours spent on litigation, rather than submitting contemporaneous records, those days are now gone. The lack of contemporaneous time records can be expected to result in a reduction of fees, if not an outright denial.[330/] The records for each lawyer should be kept on standardized forms, with a designation of all requested hours and a brief description of the nature of the tasks performed during these hours.

B. Prevailing Party Status. In jail litigation, it is likely that the single most recurrent issue will be the plaintiff's entitlement to a full fee award when the plaintiff succeeds on one or more, but not all issues. The problem routinely arises in totality of conditions jail litigation involving numerous issues and requests for relief. The Supreme

---

329/ A comprehensive review of attorneys' fees issues may be found in Larson, Federal Court Awards of Attorneys' Fees, (Harcourt Brace Jovanovich, Publishers, 1981) (hereinafter, "Larson").

330/ Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1939 (1983). At least three Circuits have now announced a requirement of contemporaneous records. New York State Ass'n. for Retarded Children v. Carey, 711 F.2d 1136, 1147 (2d Cir. 1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); and National Ass'n. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

Court has addressed but has done little to clarify this issue. It does appear, however, that the court has adopted the view that plaintiffs may be considered prevailing parties for purposes of awarding fees if they succeed on any significant issue in litigation on the merits.[331]

Nevertheless, achieving the position of prevailing party is but the first hurdle. If plaintiffs are prevailing parties, the trial court must determine the number of hours reasonably expended on the litigation under a reasonable hourly rate. After that determination, the trial court can adjust the amount awarded in either direction. If the lawsuit presented distinctly different claims for relief based on different facts and legal theories, time on an unsuccessful, unrelated claim can not be compensated.[332] As a practical matter, this should not be a common problem for successful counsel in jail cases. As the Supreme Court acknowledges, in civil rights cases, completely unrelated claims are unlikely to arise with great frequency. Moreover, the Supreme Court also recognized that it would be difficult to divide the hours expended on a claim-by-claim basis.[333]

331/ Hensley v. Eckerhart at 1939 and cases cited. But see Best v. Boswell, 696 F.2d 1282, 1289 (11th Cir. 1983) (plaintiff who did not prevail on "central issue" not entitled to fees).

332/ Hensley at 1940-41; McCann v. Coughlin, 698 F.2d 112, 129-30 (2d Cir. 1982).

333/ Hensley at 1940. See Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc) (acknowledges "overlapping and intertwined" issues).

Accordingly, the practical problem is the status of issues of related but unsuccessful claims. First, in its examination, the Supreme Court notes that "in some cases of exceptional success," an enhanced award (multiplier) may be given. In such circumstances, the award should not be reduced simply because the plaintiff has not been successful on every claim. When the plaintiff has achieved only partial or limited success, then the trial court must examine the total fee, as determined by multiplying the time reasonably expended by the hourly rate, and determine whether that fee remains reasonable in light of the results obtained.334/

C. Interim Awards.

In injunctive actions, when plaintiffs succeed in obtaining preliminary relief on the issues, an application for fees is in order.335/ However, interim procedural victories are not

---

334/ Hensley at 1940-41.

335/ See, e.g., Fitzharris v. Wolf, 702 F.2d 836 (9th Cir. 1983) (fees awarded for obtaining temporary restraining order even though case was later mooted); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 339 (5th Cir. 1981) (fees to be awarded based on preliminary injunction); Coalition for Basic Needs v. King, 691 F.2d 597 (1st Cir. 1982); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980); Bucktown v. NCAA, 436 F.Supp. 1258 (D. Mass. 1977); Howard v. Phelps, 443 F.Supp. 374 (E.D. La 1978) (interim award in jail case). But see Planned Parenthood of Minn. v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977) (inequitable to provide fees in initial stages of lawsuit); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) (Title VII case where plaintiffs won reinstatement through a preliminary injunction but ultimately lost case after trial not prevailing party for attorney fee purposes). See also Larson at 244-49; §II.B.3. above for additional comments on interim fee motions.

compensable until and unless plaintiffs establish their entitlement to some relief on the merits.336/

D. Awards to Public Interest Lawyers.

Most courts have held that the fact that plaintiffs' counsel was provided by legal services lawyers or by a public interest organization like the Legal Defense Fund or the American Civil Liberties Union was irrelevant to a fees award.337/ One Court of Appeals recently held that hourly fees for public interest lawyers should not be higher than hourly fees for comparable lawyers on the lower end of billing rates in the community, unless the public interest lawyers can demonstrate overhead costs justifying a higher hourly rate.338/ As we write, the Supreme Court has granted certiorari in a case which presents the question of the proper compensation of Legal Aid Society lawyers.339/

E. Prevailing Under a Consent Decree.

When the plaintiffs obtain relief through a settlement agreement, they have prevailed and are entitled to a fee on the

---

336/ Hanrahan v. Hampton, 446 U.S. 754, 757 (1980).

337/ Ramos v. Lamm, 713 F.2d 546, 551 (10th Cir. 1983) and cases cited; Larson at 99-113.

338/ New York Association for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983). This decision reflects judicial concern over the high billing rates prevalent among prestigious private lawyers in New York City. Counsel should argue that its holding is limited to New York and similar legal markets (if any).

339/ Stenson v. Blum, 512 F.Supp. 680 (S.D. N.Y. 1981), aff'd, 671 F.2d 493 (2d Cir. 1981), cert. grant., 103 S.Ct. 2426 (1983).

same basis as if the case had been fully litigated.[340] Sometimes defendants refuse to settle on the merits unless plaintiffs waive fees, presenting a major ethical problem for plaintiffs' counsel, who face a conflict between their clients' best interests and their own. A number of courts have suggested that putting counsel in this position is unethical,[341] but the Supreme Court has stated:

> Although sensitive to the [ethical] concerns that petitioner raises, we decline to rely on this proferred basis. On considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability for both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.[342]

Despite this language, some civil rights lawyers take the position that there can be no discussions bearing on fees while negotiations on the merits are proceeding. A possible alternative is to indicate to defendants the total number of hours billed in the case and what the lawyers consider their

---

340/ Maher v. Gagne, 448 U.S. 122 (1980).

341/ Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3rd Cir. 1977); Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980); Obin v. District No. 9 of the Int'l. Ass'n. of Machinists, 651 F.2d 574, 582-83 (8th Cir. 1981); Munoz v. Ariz. State University, 80 F.R.D. 670, 671-72 (D. Ariz. 1978); Lyon v. State of Ariz., 80 F.R.D. 665, 669 (D. Ariz. 1978); Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978). See also Rule 1.46, Manual for Complex Litigation, 62.

342/ White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 454, n.15 (1982).

normal billing rates to be. In that manner, the defendants are informed of their total potential liability, but plaintiffs' counsel is not in the position of trading fees for the rights of the clients.343/ In one case where defendants adamantly refused to negotiate without a waiver of fees, the Court ordered the defendants to enter settlement negotiations on the merits separately from the question of the plaintiffs' entitlement to attorneys fees.344/

F. Prevailing as a Catalyst for Relief.

Sometimes plaintiffs' claim to prevailing party status is based neither on a favorable decision nor on a formal consent judgement, but on a claim that the lawsuit acted as a catalyst to produce the relief sought by plaintiffs. In one widely cited case the First Circuit held that it is plaintiffs' burden to show that the lawsuit is causally related to defendants' actions that afforded relief.345/ In another case the Fifth Circuit remanded for the district court to determine whether the lawsuit was "a substantial factor or a significant catalyst in motivating the

---

343/ This has been the practice of staff attorneys with the National Prison Project and has been proposed for all ACLU attorneys in Barrett, "Settlement of Cases in Which Statutory Attorneys Fees Are Authorized: An Ethical Dilemma," 10 ACLU Lawyer 5 (1983).

344/ Lisa F. v. Snider, 561 F.Supp. 724 (N.D. Ind. 1983). Cf. Shadis v. Beal, 685 F.2d 824 (3rd Cir. 1982) (the court voided a provision in legal services contract prohibiting attorneys' fees awards as against public policy).

345/ Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978). See also Mendoza v. Blum, 560 F.Supp. 284 (S.D. N.Y. 1983) (fees awarded where lawsuit "encouraged" action by defendants); Jordan v. Multnomah County, 694 F.2d 1156, 1158 (9th Cir. 1982) (jail case); Martino v. Carey, 568 F.Supp. 848, 853 (D. Or. 1983) (jail case); Larson at 68-74.

defendants to end their [challenged] behavior."[346] While in an Eighth Circuit case the court simply stated that plaintiffs were probably catalysts and were therefore prevailing parties.[347]

G. Prevailing on Claims Other than §1983.

Sometimes the plaintiff prevails, but prevails on a non-§1983 claim. Maine v Thiboutot [348] and Maher v. Gagne, [349] when taken together, hold that attorney's fees are available in state or federal court in §1983 actions based on a federal statutory claim. In addition, the Supreme Court held in Thiboutot, in language that also appears to apply to pendent claims based on state law, that fees may be awarded when the plaintiffs prevail on a claim pendent to a substantial constitutional claim or one in which a substantial constitutional and a pendent claim are settled favorably to the plaintiffs without adjudication. (See §II.A.2. above concerning pendent state claims.) However, plaintiffs may not be entitled to fees if they prevail on a non-§1983 claim but lose on the §1983 claim.[350]

---

[346] Robinson v. Kimbrough, 652 F.2d 458, 466 (5th Cir. 1981). In a withdrawn opinion, the court had held that the chronological sequence of events had established the lawsuit's catalytic effect. 620 F.2d 468 (5th Cir. 1980).

[347] Williams v. Miller, 620 F.2d 199 (8th Cir. 1980).

[348] 448 U.S. 165 (1980).

[349] 448 U.S. 122 (1980).

[350] Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980); Allen v. Housing Authority of County of Chester, 563 F.Supp. 108, (E.D. Pa. 1983). But see Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981) (fees awarded where plaintiff recovered compensatory damages on pendent claim but only nominal damages under §1983).

Finally, for those lawsuits brought against federal jails, in which §1988 is not applicable, fees may be awarded against the federal govenment pursuant to the Equal Access to Justice Act[351] if the United States cannot establish that its position was substantially justified.[352]

H. Recovering Experts' Costs and Other Litigation Expenses.

In many jail cases the plaintiffs will have substantial outlays for experts' fees and expenses. In Jones v. Diamond,[353] the Fifth Circuit held that successful plaintiffs could recover these outlays as part of the attorney's fees award. The Supreme Court subsequently granted certiorari on this issue, then dismissed the case after the parties settled among themselves.[354] Other courts have awarded expert fees in §1983 cases;[355] some have refused to do so.[356] The lower federal

---

351/ 28 U.S.C. §2412(d).

352/ For an example of an award under the act in jail litigation, see Boudin v. Thomas, 554 F.Supp. 703 (S.D. N.Y. 1982).

353/ 636 F.2d 1364 (5th Cir. 1981) (en banc).

354/ Ledbetter v. Jones, 452 U.S. 959; 453 U.S. 911; ___ U.S. ___, 102 S.Ct. 27 (1981).

355/ See, e.g., Wuori v. Concannon, 551 F.Supp. 185 (D. Me. 1982) (expert fees and costs recoverable as costs); Loewen v. Turnipseed, 505 F.Supp. 512 (N.D. Miss. 1980) (consultant and expert fees reimbursed under §1988).

356/ Miller v. City of Mission, Kansas, 516 F.Supp. 1333 (D. Kan. 1981).

courts have taken various approaches as to what other out-of-pocket costs can be reimbursed and whether they are to be awarded under §1983 or as ordinary costs.[357]

I. Recovering Fees Against the Governmental Unit.

In most cases, attorneys' fees will be assessed against the relevant unit of government or against the defendants in their official capacities, which amounts to the same thing.[358] Some cases have awarded fees against defendants in their individual capacities when the acts for which liability was found could not be said to represent official policy,[359] using the criteria of Monell v. New York City Department of Social Services.[360] So far, this distinction has been reserved for damage claims and not injunctive cases.

---

[357] See, e.g., Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1192 (11th Cir. 1983) (all reasonable expenses except normal office overhead compensable under §1988); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) (deposition costs compensable under §1988); United Nuclear Corp. v. Cannon, 564 F.Supp. 581, 591-92 (D. R.I. 1983) (law clerk, paralegal, Lexis costs reimbursed under §1988); Wuori v. Concannon, note 355 above (copying, travel, telephone expenses recoverable under §1988; deposition expenses recoverable as costs); Dickerson v. Pritchard, 551 F.Supp. 306 (W.D. Ark. 1983) (telephone and copying recoverable as costs; travel, accommodations and parking not recoverable); Ruiz v. Estelle, 553 F.Supp. 567, 596 (S.D. Tex. 1982) ("all reasonable expenses, including travel expenses" reimbursed).

[358] See Hutto v. Finney, 437 U.S. 678, 692-93 (1978).

[359] Morrison v. Fox, 660 F.2d 87 (3d Cir. 1981); Williams v. Thomas, 511 F.Supp. 535, 545 (N.D. Tex. 1981). See Collins v. Thomas, 649 F.2d 1203, 1205 (5th Cir. 1981).

[360] 436 U.S. 658, 694 (1978).

J. Compliance Work.

A final issue arises when the plaintiffs' lawyers, after winning relief for their clients, find that they must expend additional time in enforcement litigation and monitoring of compliance. In general, courts hold that successful compliance efforts are as compensable as any other work in the case.361/ Indeed, courts have awarded fees for unsuccessful compliance efforts, once plaintiffs were initially prevailing parties.362/

K. Getting Paid.

Unfortunately, fee awards are not self-enforcing. Although it seems clear that state statutes, procedures, or actions that have the effect of denying payment are unlawful,363/ counsel may be relegated under Rule 69(a), F.R.C.P. to the state's procedures for enforcing judgements, however cumbersome or time consuming.364/ It may be that, upon a showing that timely payment is essential to continue the litigation, speedier

---

361/ See Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980); Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) cert. den., 447 U.S. 911 (1980). See also Rutherford v. Pitchess, 713 F.2d 1416, (9th Cir. 1983).

362/ Mader v. Crowell, 506 F.Supp. 484 (M.D. Tenn. 1981).

363/ Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981); Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980). See Hutto v. Finney, 437 U.S. 678, 793-95 (1978) (fee statute abrogates states' Eleventh Amendment immunity)

364/ Preston v. Thompson, 565 F.Supp. 294, 300-310 (N.D. Ill. 1983).

procedures may be required. Some courts have required the creation of a fund for the payment of future awards based on defendants' history of delay in payment.[365] "In order to minimize the effect of appellate delay" on the payment of fee and cost awards, attorneys are advised to seek an order requiring immediate payment of any conceded or uncontested amounts.[366]

365/ Miller v. Carson, 628 F.2d 346, 349 (5th Cir. 1980); Ruiz v. Estelle, 555 F.Supp. 567, 596 (S.D. Tex. 1982).

366/ Martino v. Carey, 568 F.Supp 848 (D. Or. 1983) (defendants' experts' lowest estimate of appropriate fee ordered paid immediately).

Appendix I

Leading Post-Wolfish and Chapman Federal Decisions

First Circuit:

Blake v. Hall, 668 F.2d 52 (1st Cir. 1981) (prison case).

Second Circuit:

Benjamin v. Malcolm, 495 F.Supp., 1357 (S.D. N.Y. 1980); 528 F.Supp. 925 (S.D. N.Y. 1981); 564 F.Supp. 668 (S.D. N.Y. 1983);
LaReau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980) aff'd as mod. 651 F.2d 96 (2d Cir. 1981).

Third Circuit:

Union Co. Jail Inmates v. DiBuono, 713 F.2d 984 (3rd Cir. 1983) pet. for reh. den., 718 F.2d 1247 (1983) (Gibbons, J. dissenting);
Inmates of Allegheny Co. Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D. Pa. 1980); further relief granted, Inmates of Allegheny Co. Jail v. Wecht, 565 F.Supp. 1278 (W.D. Pa. 1983).

Fourth Circuit:

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981);
Gross v. Tazewell Co. Jail, 533 F.Supp. 413 (W.D. Va. 1982);
Parnell v. Waldrep, 511 F.Supp. 764 (W.D. N.C. 1981).

Fifth Circuit:

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc);
Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980);
Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980) aff'd in part, vac. in part, vac. without prejudice in part remanded for further proceedings, 659 F.2d 1115 (5th Cir. 1982) (prison case).

Sixth Circuit:

Malone v. Colyer, 710 F.2d 258 (6th Cir. 1983);
Jones v. Wittenburg, 509 F.Supp. 653 (N.D. Oh. 1980);
Grubbs v. Bradley, 552 F.Supp. 1052 (M.D. Tenn. 1982) (prison case).

Seventh Circuit:

Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981);
Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980);
Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983);
Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982) (prison case);
Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (prison case).

Eighth Circuit:

Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980);
Hutchings v. Corum, 501 F.Supp. 1276 (W.D. Mo. 1980);
Heitman v. Gabriel, 524 F.Supp. 622 (W.D. Mo. 1981).

Ninth Circuit:

Rutherford v. Pitchess, 710 F.2d 572 (9th Cir. 1983); cert. granted sub nom., Block v. Rutherford, 104 S.Ct. 390 (1983).
Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980);
Martino v. Carey, 563 F.Supp. 984 (D. Or. 1983);
Fischer v. Winter, 564 F.Supp. 281 (N.D. Cal. 1983);
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1983) (prison case);
Touissant v. Rushen, 553 F.Supp. 1365 (N.D. Cal. 1983) aff'd, 722 F. 2d 1490 (9th Cir. 1984) (prison case).

Tenth Circuit:

Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981);
Ramos v. Lamm, 485 F.Supp. 122 (D. Col. 1979), aff'd in part and remanded, 639 F.2d 559 (10th Cir. 1980), cert. den., 101 S.Ct. 1259 (1981); on remand 520 F.Supp. 1059 (D. Col. 1981) (prison case);
Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983) (prison case).

Eleventh Circuit:

See Fifth Circuit cases above. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209-12 (11th Cir. 1981) (en banc) (pre-September 30, 1981 decisions of Fifth Circuit panels adopted as binding precedent by newly created court); Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982) (post-September 30, 1981 decisions of Unit B of the former Fifth Circuit also adopted as binding precedent).

D.C. Circuit:

Campbell v. McGruder, 554 F.Supp. 562 (D.C. D.C. 1982);
Doe v. District of Columbia, 701 F.2d 948, 957-58 (D.C. Cir. 1983) (Separate Statement of Edwards, J.) (discussion of totality approach in prison context).

Appendix II

A List of Correctional and Other Relevant Standards (and Where to Obtain Them)

1. NAC Standards
National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973)

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402

   Price: $6.95
   Stock No.: 027-000-00175-1

2. ABA Standards
American Bar Association, Fourth Draft of Standards Relating to the Legal Status of Prisoners (1980) (Approved as ABA policy by The House of Delegates on 2/9/81)

   Richard P. Lynch
   ABA
   1800 M St., N.W.
   Washington, D.C. 20036

   Price: $10.00

3. ACA Standards (also known as the CAC Standards)
Commission on Accreditation for Corrections,
Manual of Standards for Local and Adult Detention Facilities, 2d ed. (1981)

   American Correctional Association Publications
   4321 Hardwick Road, Suite L-208
   College Park, MD 20740

   Price: $10.00

4. U.S. Dept. of Justice Standards (DOJ Standards)
Federal Standards for Prisons and Jails (1980)

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402
   (202) 783-3238
   Stock #027-000-01083-1

5. UN Standards
The Standard Minimum Rules for the Treatment of Prisoners - In Light of Recent Developments in the Correctional Field

   United Nations
   2101 L Street, N.W., Suite 209
   Washington, D.C. 20036

6. National Sheriffs' Association Standards (NSA Standards) - Set of seven monographs entitled: Jail Architecture; Sanitation in the Jail; Jail Programs; Food Service in Jails; Jail Security: Classification and Discipline; Inmate Legal Rights; and Jail Administration

   Publications Division
   National Sheriffs' Association
   1250 Connecticut Ave., N.W.
   Suite 320
   Washington, D.C. 20036

   Price: $2.00 per monograph, $10.00 for a set of 7

7. AMA Standards
   American Medical Association Jail Project
   Standards for Health Care In Jails

   AMA Jail Project
   535 North Dearborn
   Chicago, IL 60610

   Price: One copy free and each copy thereafter $2.50

8. Della Penna, Health Care in Correctional Institutions

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402

   Price: $3.00
   Stock No.: 027-000-00349-4 (please include)

9. APHA Standards
   American Public Health Association: Standards for Health Services in Correctional Institutions (1978)

   APHA
   1015 15th Street, N.W.
   Washington, D.C. 20036

   Price: $5.00

10. American Association of Correctional Psychologists
    Standards for Psychological Services in Adult Jails and Prisons (1979)

    Dr. S.W. Wing
    President American Association of Correctional Psychologists
    Legal Offender Unit
    Western State Hospital
    Fort Steilacoom, WA 98984

    Price: $2.00

11. ABA Mental Health Standards
American Bar Association Standing Committee on Association Standards for Criminal Justice, First Tentative Draft, Criminal Justice Mental Health Standards (July 1983)

Standing Committee on Association Standards for Criminal Justice
ABA
1800 M Street, N.W.
2nd Floor, South Lobby
Washington, D.C.

Price: No charge

12. Life Safety Standards
National Fire Protection Association
Life Safety Code 101-81

National Fire Protection Association
Battery March
Quincy, MA 02269

Price: $10.50

13. NAPSA Standards
National Association of Pretrial Services Agencies
Performance Standards and Goals for Pretrial Release and Diversion (1978)

National Association of Pretrial Services Agencies
918 F Street, N.W., Suite 500
Washington, D.C. 20004

Price: No charge