"THE BLUE PRINT: AN ESSENTIAL GUIDE FOR THE PRO SE CIVIL LITIGANT IN WISCONSIN"

PART ONE

WRITTEN BY:
LORENZO BALLI

This booklet is a guide for those Wisconsin prisoners that haven't been afforded the same legal advice offered to prisoners on the East Coast. This booklet is the first installment that deals in particular detail everything you will need to draft a successful civil complaint, but like with all information obtained… it is how you use it that matters.

My job is to provide you with a concise and meaningful vehicle to get your grievances addressed; it's up to you and your application of the tools afforded to you to make your concerns prevail.

Success is based on the knowledge you acquire and the merits of your claims. Frivolous suits are the bane of prison litigators and are the reason many meritorious claims are locked out of the court house.

So, before rushing into court with a piggy backed suit; be sure the claims you are presenting are founded in law, and passes Constitutional muster or you could end up doing more harm than good to yourself and may close the door for others coming with suits after you.

IN SOLIDARITY

SPECIAL FEDERAL COURTS

The Special Federal Court was created by Acts of Congress. The jurisdiction of a special court is determined by the statute that created it. An easy guide to the Congressional Acts (called Federal Statutes) is the United States Code Annotated. It's a multi-volume set of books that contain the text of all Federal Statutes which includes pocket parts in the back of each book which is updated yearly. The following are the basic books prison litigators should review and acclimate themselves with:

1. **United States Court of Appeals for the Federal Court**
See: 28 U.S.C.A. 1338, 28 U.S.C.A. 1346, 15 U.S.C.A. 1071, 19 U.S.C.A. 1337, 28 U.S.C.A. 1295 (see also the courts special rules supplementing the Federal Rules of Appellate Procedure.)

2. **United States Claims Court**
See: 28 U.S.C.A. 2503, 28 U.S.C.A. 2522 (see also Contract Dispute Act of 1978 paragraph 10(a)(1). Court prescribes its own rules.)

3. **All Writs Act**
See: 28 U.S.C.A. 1651.

GENERAL JURISDICTION

The district courts in the Federal Court system have what is known as original jurisdiction of actions involving "Federal Questions of Law" (such as breach of a federal statute, regulation, or a violation of the provisions of the Constitution of the United States.) It includes all criminal actions where the defendant was charged with a federal crime (a crime defined congress). Some examples are: bankruptcy, copyrights, unfair competition lawsuits under the federal acts, civil rights claims are based on Federal Statutes, or the Constitution of the United States. Special Federal Courts of 'limited jurisdiction may subject your claim to an automatic rejection at any time of the proceeding up to the point of the appellate hearing.' Therefore you should familiarize yourself with the United States Code Title 28 sections 1331 and 1332 and the citations for Special Federal Courts. These United States code sections set forth the conditions under which a claim may be filed in the Federal Courts jurisdiction to hear and determine the claim. See the Annotated Statutes to find cases interpreting the Act such as 28 U.S.C.A. 1331 and 1332.

~PRACTICE AND PROCEDURE~

GENERAL RULES

Federal Courts apply 'procedural rules', which are under the Federal Rules of Civil Procedure (herein after indicated by "F.R.C.P."). The 'substantive law' will be the law of the state where the incident occurred. The Federal Court must have 'subject matter jurisdiction'. The issue must be one that arose out of Federal questions which are those matters 'arising under' the Constitution, such as a Federal Statute or the Federal Criminal Code.

Types of jurisdiction under the F.R.C.P.:

1. Concurrent Jurisdiction (Diversity): joint jurisdiction with the State Court, at the discretion of Congress; "When a case can be properly tried in either a Federal or State court." State court based claims based on State law involved; minimum contact, or in Federal Court, based on diversity of citizenship. Diversity must include the following:

A. Citizens of two different states.

B. The complaint must meet the jurisdictional amount which is not required in a federal case, i.e. $500,000.

2. Subject Matter Jurisdiction: these are the types of cases which the court may legitimately hear and decide; such as municipal court limit, Superior Court limit, subject matter, bankruptcy, criminal, etc.

3. Jurisdiction Over the Person (in Personam): these types of cases fall into two types and is based on:

A. Over the person, any person(s) who resides within the jurisdictional area served by the court.

B. The long arm statutes (public policy):

1. Conducting business within the forum area.
2. Committing a tort within the forum area.
3. Insuring persons or property located within the forum area.
4. Entering a contract that will be performed within the forum area.

4. In Rem Jurisdiction over Property: property of the defendant within the forum area or any assets of the defendant which can be attached or garnished within the court's jurisdiction.

5. Exclusive Jurisdiction: cases which can only be tried in a particular court or if only in a particular type of court can hear and determine a case such as 'bankruptcy' and cases having the United States as a defendant/party.

6. Prudent Jurisdiction: these cases have both a Federal and a State claim.

7. Appellate Jurisdiction: these cases go beyond the trial stages.

8. Original Jurisdiction

~PROCEDURE IN COMMENCING A FEDERAL CLAIM OF ACTION~

When filing a complaint no technical language is needed. The Federal Courts emphasis is placed on the trial rather than on the forms needed to go to trial. The State Courts, on the other hand, require the use of particular and exact forms of pleadings and decorum.

1. SERVICE: the clerk will issue a 'summons' on the defendant or his/her agent or the U.S. Marshal will serve the summons and complaint on the defendants

2. PRETRIAL MOTIONS:

A. Motion to dismiss:

1. Not sufficient to state a cause of action.
2. Denying jurisdiction of the court.
3. Other

If the complaint is dismissed because the motion was granted, the court can dismiss the complaint 'without prejudice'; the plaintiff can re-file in the proper court or amend the complaint. If dismissed 'with prejudice' the plaintiff cannot amend the complaint or re-file.

B. Motion for more definite statement: asks for more 'specific statement' ('special demurrer').

C. Motion to strike: is asking the court to strike from the complaint facts which are not 'germane' or pertinent to the case at hand.

D. Motion for general demurrer: this motion admits to all the allegations but denies that these allegations state a cause of action. If granted, the case is dismissed.

E. Answer: an enumerated response to the complaint.

F. Counter claim: filed against the plaintiff, cross claim against a third party. Plaintiff must file a 'reply' to the counter claim.

3. PLEADING STAGE:

A. Motion for judgment on the pleadings.
B. Motion for summary judgment (these motions can be filed by either party **after** all other pleadings have been resolved. Summary judgment is granted as a 'matter of law.'

4. DISCOVERY STAGE:

There are five types of discovery methods:

1. Depositions
2. Interrogatories
3. Demand for protection of documents
4. Physical/mental examinations
5. Request for admissions.

~THREE MAJOR METHODS FOR RESOLVING LEGAL CONTROVERSY~

ALTERNATIVES TO TRIAL:

1. Negotiation: concerns itself with discussions between the parties, seeking to establish the final form of future proceedings or a settlement of the controversy which is:

A. A mutual agreement
B. Informal
C. Simple

One major drawback is a settlement is not binding upon the parties.

2. Mediation: this is when the matter is referred to a 3rd party who will attempt to reconcile the differences between the parties and to settle it through compromise. In some situations the mediator is a 'fact finder' who will then issue a conclusion based on the facts as he/she understands them.

3. Arbitration: is used by referring the controversy to a 3rd party, chosen by the litigants or one provided by law, whichever is applicable. Here, to avoid going to trial the result is 'an award'; the 'final resolution' of the controversy. Arbitration is often mandated by law or provided for in an agreement. There are two types of arbitration: compulsory and voluntary.

~PROCEDURE FOR REMOVAL OF A STATE COURT ACTION TO THE FEDERAL COURT SYSTEM~

1. Prepare the notice for removal: the state court requires a 'fact pleading'; the Federal Courts require only notice of pleading, i.e. pleadings which contain a brief statement of the facts to satisfy the state rules. Be sure to include in your statement the jurisdiction of the Federal law giving you the right to file an action in the Federal Court system. An example of this would be the Constitutional requirement that the claim arises under Federal law, thereby creating a cause of action for the plaintiff; as well the diversity of citizenship. Remember, diversity of citizenship must include the following: Citizen of two different states and/or the complaint must meet the jurisdictional amount which is not required in a federal question case, i.e. $50,000.

2. Serve a copy of the notice: serve a copy of the notice of removal with the Federal clerk together with all pleadings and any state court orders that were filed in the State Court. You should check with the Federal clerk to determine if a separate filing fee is required (which is different in each district court).

3. Question of bond: because you are filing your suit in the Federal Court you no longer are required to obtain a bond from an insurance company to cover the cost incurred (from a state claim in the State Court), nor for a removal process.

4. Give notice to State Court: give prompt notice to the state court that you have removed the case to the Federal Court system. Defendants should file an answer to the pleadings (complaint) or the notice of removal in the state court

before the 30 day (60 days for government agents) statute of limitation has passed. Otherwise, a default judgment can be taken against the defendants.

5. Notify all parties: contact all parties of the notice of removal to the Federal Court.

6. Court orders: if there was any State Court orders rendered during the proceedings (while in the state court) you must decide if you will request the Federal Court to uphold these orders or make changes to them and why. The removal of a case from the state to the Federal Courts does not need to be re-pleaded in the Federal Court.

~PLEADINGS AND MOTIONS~

In some State Courts you have what's commonly referred to as 'common law pleadings' and 'code proceedings'. Common law proceedings and pleadings are concerned with the content rather than 'words of art' that the State Court requires, which is referred to as 'code proceedings' or 'code pleadings.'

~SUMMONS AND COMPLAINT~

The 'summons' and a copy of the complaint are normally served on the defendants by a U.S. Marshal to start the action. Should you need another form of service to serve the defendant, you must obtain authority from the clerk of the courts to do so. This is done by applying to the clerk of courts with a printed form entitled "Request for Personal Service." This is merely a formality as the clerk just signs and stamps the document, see: F.R.C.P. 4(c).

Upon completion of the service of process you should immediately send the proof of service of the summons and complaint to be filed with the court should a question arise as to proper service; having the original on file with the court is the best protection and proof.

~ANSWER~

After service of the summons and complaint, the defendants have 20 days in which to file a responsive pleading; unless otherwise extended by the court exception under F.R.C.P. 12(a). An answer by the U.S. attorney or other officer or agency of the U.S. Government has 60 days to respond under F.R.C.P. 12(a).

Defenses must be appropriately pleaded or they are waived with few exceptions. With both the State and Federal Courts, the answer is when the defendant has to admit or deny part of the paragraph; or the defendant can specifically deny or generally deny part of the paragraph and so on. Here too, it is admitted if the defendant does not do one or the other. A lack of information sufficient to form a belief to form a belief as to the jurisdictional facts is an appropriate challenge and puts the burden of proof on the plaintiff. All 'affirmative defenses' should be pleaded in the answer to a Federal Court complaint (see F.R.C.P. 8(c)).

Under F.R.C.P. 12(b), the defendant can put certain defenses in the answer or make a motion to dismiss based upon the following defenses:

1. Lack of jurisdiction of subject matter.

2. Lack of jurisdiction over the person.

3. Improper venue.

4. Insufficiency of process (means the summons and complaint were not properly issued, see F.R.C.P. 4(a) and (b)).

5. Insufficiency of process of summons (means the summons was not served correctly). In some State Courts, a 'motion to quash' is used to raise these questions, see F.R.C.P. 4(c) through (i).

6. Failure to state a claim upon which relief can be granted. This would be the same as a 'general demurrer' in some State Court actions or a motion to dismiss for failure to state a cause of action in some State Courts (Wisconsin is one of these states).

7. Failure to join an indispensable party to the action. This is important because even though they are not a party to the action, if they were not brought in as a party/defendant (or party/plaintiff) complete relief could not be given to the party's privy to the lawsuit. If and when this additional party is brought in,

the defendant must consider the problem of venue service of process and diversity jurisdiction.

Some defenses cannot be waived, which are as follows:

A. Lack of subject matter (see statute creating the Federal Courts.)

B. Failure to state a claim which relief can be granted.

C. Failure to join an indispensable party (F.R.C.P. 19 and 20 covering permissive joiner of parties and F.R.C.P. covering the right to add or drop parties.)

The defenses that cannot be waived are defenses that concern the jurisdiction of the court. If a court has no jurisdiction, it has no power and its judgments are void. Other affirmative defenses defined in F.R.C.P. &(c) must be pleaded or are waived. For example, the statute of limitations is an affirmative defense that must be pleaded or waived.

~AMENDED AND SUPPLEMENTAL PLEADINGS~

The plaintiff can amend the original complaint without permission of the court, as long as it is done prior to the defendants filing of an answer. There is a 20 to 60 day period to do this, depending on whether the defendant is a government agent or not. Afterwards the plaintiff will have to prepare a motion for leave to amend the complaint. The defendants would then have to file an amended answer if the plaintiff is granted permission to amend (see F.R.C.P. 15(a)).

If the defendant files an objecting motion, motion to dismiss or other preliminary motion objecting to the complaint the court will usually give leave to amend the complaint if it grants the motion.

The proper procedure for filing an amended complaint is by request (after the defendant has filed an answer). The plaintiff has to make a motion to amend the complaint and attach a copy of the proposed amended complaint as an exhibit (the judge may want to see what has been amended to determine whether or not to grant the motion).

Check the local Federal Court rules to determine whether the entire amended complaint must be retyped and re-filed after leave to amend is granted.

~PRETIRAL MOTIONS~

A pretrial motion must be in writing and must state the grounds for the motion with particularity. The motion may be written together with a written notice depending on the local Federal District Court rules and customs (see F.R.C.P. 7(b)). Filing the pretrial motions that are prescribed in the F.R.C.P. 12 extends the time for filing an answer until 10 days after the courts order on the motion. The following is a list of pretrial motions:

1. Motion for a more definite statement: this motion is granted and it is not obeyed within 10 days after notice of the order, or such other time as the court may direct, the court may at its discretion strike the pleadings or make such other order as it deems just. The motion is used where a pleading (complaint or response) is so vague or ambiguous that a party could not reasonably respond to it in a required pleading. The key word is reasonably. Pleadings do not require perfect clarity. If a motion for more definite statement is granted and the plaintiff obeys the order by filing an amended complaint, the defendant ('movant') has 10 days from the date the amended complaint is filed to file an answer.

2. Motion to strike, F.R.C.P. 2(f): this motion is made before responding to a pleading within 20 days after service of the pleading; as a result of this motion the court may order stricken from any pleading any redundant, immaterial, impertinent or scandalous matter. In some State Courts, a motion to strike does not expand the time for filing an answer.

3. Motion for judgment on the pleadings, F.R.C.P. 12 (c): this motion may be made after the pleadings are closed, but within a time that will not delay the trial of the action. This is a dangerous motion, in that if matters outside of the pleadings are presented and admitted into evidence by the court; the motion can be disposed of such as provided in Rule 56 of the F.R.C.P. If this occurs, all parties are given notice and a reasonable time within which to present materials pertinent to such by a Rule 56 motion.

4. Motion for summary judgment, F.R.C.P. 5: this motion will be granted if there are no genuine issues, as to any material fact and the moving party is entitled to a judgment as a matter of law. As in the State Court system, this motion is normally

made after the completion of all discoveries and you can also obtain a partial summary judgment under Federal practice procedures, as in the state court system, to narrow the triable issues of fact.

The purpose of this motion is primarily to achieve a quick, final resolution of a dispute when there is no real necessity for a trial. If this appears on the face of the pleadings, a motion for summary judgment is proper. Under Rule 56, the parties making and opposing a motion for summary judgment are required, if such affidavits are available, to present them in support or in opposition of the motion. The Court may also consider depositions and sworn answers to the interrogatories filed in the case.

When filing any of these motions, there should be:

A. A careful review of the case file.
B. A thorough review of the depositions or the summary digest of the depositions.
C. A careful review of the answers to the interrogatories and requests for admissions.
D. Review the applicable code sections.
E. Check the applicable law to the facts.
F. Draft the appropriate motions to be filed.

A motion for partial summary judgment under Rule 56(c) is for liability alone, despite the fact that the amount of liability is still in dispute. This is often easier to obtain than final summary judgment, (the parties making and opposing a motion for summary judgment are permitted to file affidavits in support of their arguments. If an affidavit is filed, a counter affidavit should be filed to establish a genuine issue of material fact in order to defeat a motion for summary or partial summary judgment) grounds for the motion must be stated. A memorandum of law in support of the motion may be indicated.

~MOTION PROCEEDINGS~

1. In the Federal District Court, a written motion and appropriate notice of the hearing is to be filed no later than five days before the date set for the hearing on the motion (see F.R.C.P. 6(d)).

2. That the notice gives opposing counsel seven days from receipt of service of the motion to file the memorandum of law and/or affidavits in opposing the motion and ensuring the service by mail and certification is important. Service by mail is complete upon mailing (see F.R.C.P. 5(b)).

A memorandum at law in support of a motion or opposing a motion is not required by F.R.C.P., but a memorandum of law makes your position clearer and saves time for the court. Therefore prepare a memorandum that is clear and concise, especially if the legal issues are complex and/or not obviously in your favor.

On the motion for production of documents; if the list is too long or if there is a controversy as to the need for certain documents requested, the court clerk will send out an order requiring the parties to meet and decide on what documents should be produced. The parties usually have two weeks to perform and/or reply to this request.

~DISCOVERY~

Discovery in civil cases in the Federal Courts is governed by the F.R.C.P. 26-27. The part of the rules is Titled V: Depositions and Discovery. You are required to:

1. Set deposition dates by notice (see F.R.C.P. 27).
2. Send out sets of written interrogatories (see F.R.C.P. 33).
3. Request production of documents and entry upon land inspection, and other purposes (see F.R.C.P. 34).
4. Prepare a physical or mental examination of a defendant (see F.R.C.P. 35).
5. Send out a set of requests for admissions (see F.R.C.P. 36).

The scope of Federal Court discovery is quite broad in that any matter not privileged, which is relevant to the subject matter is discoverable. You can utilize any of the proceeding vehicles, as much as you want and whenever you want. The most important is there is not a 30 day rule that all 'discovery' should be completed before trial, like in the State Court rules. Protection from improper and unduly burdensome discovery can be obtained by order of the Federal Court in which the action is filed or where the deposition is being taken (see F.R.C.P. 26(c)).

~DEPOSITIONS~

Depositions are usually taken after the complaint has been filed. In certain circumstances, they are allowed before the action (see F.R.C.P. 27). Steps to be taken in taking depositions:

1. To obtain a deposition before an action has commenced, a petition to 'perpetuate testimony' must be filed in the district court for the district where the adverse party resides. The petition must ask for an order authorizing the

petitioner to depose the named person in order to perpetuate their testimony. The petition must be titled in the petitioners name and be verified and show:

A. The petitioner expects to be a party to the action recognized in the jurisdiction of the United States court but cannot presently bring it or cause it to be brought.

B. The subject matter of the expected action and the petitioner's interest.

C. The facts of why the petitioner wants to establish the proposed testimony and the reason to perpetuate it.

D. The names, addresses and expected substance of the testimony of each 'deponent' (persons to be deposed).

2. You must serve a notice at least 20 days before the hearings date and serve each expected adverse party with a copy of the petition, stating time and place of hearing (see F.R.C.P. 27(2)).

Depositions have to be noticed by a party litigant in the action, but you can take the deposition of anybody, by giving reasonable notice whether or not the person to be deposed is a party to the action. If you want documents produced at the deposition, you should describe them with particularity in a 'subpoena duces tecum' to a non-party or in the notice to a party. If you are not sure of the name or the identity of the custodian of records of a corporate or governmental defendant; merely describe in your 'subpoena duces tecum' or notice the subject matter of the deposition and clearly state which pertinent documents you wish presented at the deposition. It is incumbent upon the corporation or government entity to designate a person to come to the deposition with the proper documents.

A transcript of the deposition must be filed with the clerk of courts immediately after it has been reviewed and signed by the party deposed. During a regular deposition all of the attorneys will ask any question they want that is within the general scope of discovery. Federal rules and some State rules also allow depositions to be taken on specified questions only (see F.R.C.P. 31). You may want to request only specified questions to be subject to review (see F.R.C.P. 26(c)). For protective orders and motion to compel discovery see F.R.C.P. 37.

~INTERROGATORIES~

As in the State Court, you can only serve interrogatories on party litigants in a Federal Court action. In preparing written answers to a set of interrogatories for filing, you must type the answer to the interrogatory being answered. Interrogatories in a civil case in the Federal Courts are governed by Rule 33 of the F.R.C.P. Some of the provisions relating to interrogatories are:

1. Interrogatories may be filed and served any time after commencement of the action.

2. Unless extended by the court, the time within which to answer a set of interrogatories is 30 days (see F.R.C.P. 6(e)). If they are served by mail you get an extra 3 days. An extension of time, other than this, must be obtained by stipulation of the parties approved by the court or by order of the court on motion of a party (see F.R.C.P. 6(b) and (d)). One exception is where interrogatories are filed so quickly that 45 days has not passed since the filing of the complaint (see F.R.C.P. 33(a)).

3. If there are any objections to the interrogatories, you have 30 days after service with which to file the objections or answer the interrogatory. These objections must be verified and signed.

4. If a party fails to answer or object o the interrogatories, the party who filed the interrogatory may file a motion to compel further answers. This can be done at any time as opposed to the procedure for objections to interrogatories (see F.R.C.P. 37)).

~REQUEST FOR ADMISSIONS~

Requests for Admissions (herein after referred to as 'RFA') can be served any time after commencement of the action. The party to whom the RFA is directed has 30 days to respond per F.R.C.P. 36(a); unless 45 days has not passed since service of the complaint and summons on the defendant. If a plaintiff wants to serve a request, for example 10 days early, after filing and service of the summons and complaint; the party to whom the request is directed has 35 days to respond.

~HOW TO STATE A CAUSE OF ACTION~

A cause of action is the legal or equitable right to recover damages or other claimed relief in a court action. The allegations of the complaint must be sufficient to support that relief from the court where prepared in accordance with the rules of the court where the action was filed. The right to bring a legal action in a court is called 'the right to seek judicial relief' for the cause of action in the 'jurisdiction' of the court in which the action was filed. The facts alleged to, in the pleadings (the complaint), must be proved or admitted before the plaintiff in the cause of action can recover damages. In some courts, the rules differ from the Federal rules in that they require the complaint to state the facts sufficient to state a cause of action. The Federal Courts use the word 'claim' instead of the states usage of the word 'cause' (see F.R.C.P. 8(a)).

~ELEMENTS OF A CAUSE OF ACTION~

To recover damages or other relief from a court, you must allege (state) facts in a complaint that if proved at trial would entitle the plaintiff to a final judgment after the trial of the case. The legal elements of a cause of action are found in case law statutes and government regulations.

Damages are recovered in an action 'at law.' Other relief may be obtained in an action 'in equity.' The factually element of the cause of action are argued to the court to the jury in the trial of the case. To state a cause of action in pleading the facts which show the right of the plaintiff to recover must be stated in numbered paragraphs.

The first paragraph states the facts that show the court has jurisdiction over the subject matter and of the parties. The following paragraphs state the facts in logical and chronological order, showing that you have a right to recover for legal reasons. The facts are as important as the law in stating a cause of action. The facts stated in a pleading must show that the defendant had a legal duty to the plaintiff which was breached without legal excuse.

A legal excuse for breaching a legal duty to the plaintiff is called an 'affirmative defense.' The defendant's affirmative defenses consist of facts alleged by the defendant in the answer if proved at trial would show that the plaintiff is not entitled to recovery, even if the plaintiff suffered injury inflicted by the defendant because the defendant's actions were legally excused.

~BASIC CAUSE OF ACTION 'AT LAW' CLAIMS~

Court actions or claims 'at law' are divided into two basic categories that are important to determine in which court the legal action should be filed.

1. Local Actions: usually include those actions dealing with real property such as: actions to gain possession of real property, negligence, etc. Local actions must be brought in the county where the property is located or where the local action arose.

2. Transitory Actions: include actions that can be tried anywhere the defendant can be found and served with process. In a transitory action, the 'substantive law' of the place where the issue took place is applied. The court hearing the case follows its own procedural law. Transitory actions deal with personal injury, with property and with breach of contract. These actions can be filed where at least one of the defendants resides.

Typical transitory actions may be filed as follows:

1. A personal injury may be filed in either the county where the accident/incident occurred, or in the county where the defendant lives.

2. A breach of contract action may be filed in any county where one of the defendants lives, or where the contract was entered into, or in the county where the contract was to be performed or substantially performed. State statutes may prescribe 'venue' (as opposed to jurisdiction) for bringing transitory actions; particularly where corporations and/or government entities are for court procedures.

~BASIC CAUSE OF ACTION 'IN EQUITY' CLAIMS~

In most civil cases, parties suffering harm are seeking money awards to alleviate their loss/pain and suffering. This would appear the norm but there are times when a monetary award will not make the parties whole. In such cases, a complaint in equity is filed. The court hearing a case in equity can make an order to prevent irreparable injury and give relief where a court of law will not or cannot. A court hearing an equity case may order the return or delivery of property or the performing or refraining from doing some other act. Courts of equity consider the equitable rights of both parties. They weigh what is right and what is not fair. For example, issuance of an injunction is not a matter of right, but rests in the discretion of the court which will consider

whether greater injury will result to the defendant from granting the injunction than would be caused to the plaintiff by denying the injunction. The prerequisites to filing an action in equity are as follows:

1. The plaintiff does not have an adequate remedy at law.

2. The plaintiff is suffering, or is about to suffer, an irreparable harm.

A plaintiff may be entitled to equitable relief if he does not have a remedy at law. So if a monetary award will satisfy the damages caused; do not file a lawsuit in a court of equity when none exists or be a relief that cannot be granted. A question to consider before filing a suit in equity is whether the court decree (or order), if ordered, will be feasible to enforce.

In an equity case the court hears the case without a jury. The court makes a finding of both fact and law as the basis for its final order. The court may, in some cases, allow a jury to hear a certain factual phase of the case if the judge believes it would be necessary, on motion of either party to the case. The relief that an equity court may give, if the plaintiff states a cause of action entitling relief, one or more of the following can be applicable:

1. Injunction
2. Rescission
3. Specific performance
4. Reformation

~INJUNCTIVE RELIEF~

An injunction is an order of the court directing a party to a cause of action in equity to do something or refrain from doing something. There are four types of injunction:

1. Mandatory injunctive relief: this requires that an act be performed.

2. Negative injunctive relief: this requires the defendant from doing acts specified in the court order.

3. Preliminary injunctive relief: this may be granted before trial.

4. Permanent injunctive relief: this can be granted after the hearing and may be made a part of the final order of the court in the case.

~RESCISSION~

Rescission is an equitable remedy where the plaintiff seeks to avoid the existence of a contract. The primary consideration of rescission is if the grounds for rescission occurred at or before the time the contract was entered into by the parties. The usual basics for a complaint for rescission are:

1. Mistake: the facts constituting the mistake must be stated in the complaint.

2. Misrepresentation or fraud: the facts constituting the fraud must be stated in the complaint.

A 'bilateral mistake' of fact by each party that is material to the contract is one that goes to the heart of the contract. In the case of a 'unilateral mistake', the court will not order a rescission of a contract for a unilateral mistake unless the non-mistaken party knows or should have known of the mistaken party's mistake. The court will grant an equitable rescission for a unilateral mistake not known by the defendant if the degree of hardship incurred by the plaintiff by having to perform the contract outweighs the expectancies of the defendant. To do otherwise would be unjust enrichment.

Fraud that induced the making of the contract that the plaintiff desires to rescind must be pleaded in the complaint with specificity. This means the misrepresentations must be stated and the other fraudulent actions must be described in detail (evidentiary facts need not be pleaded). Where acts of fraud are alleged, it must also be stated that the plaintiff had a right to rely on those acts or misrepresentations and that the plaintiff did rely on them.

When drafting a complaint in equity for rescission, you must allege sufficient facts which comply with the pleadings requirement. You can't just state the defendant committed fraud. That is the legal conclusion that has to be proved by entering evidence of the facts alleged.

~REFORMATION~

Reformation is the equitable remedy for reforming or changing a written contract by decree to conform to the original intent of the parties. This occurs when the writing does not state exactly what the parties mean it to say. The difference between

reformation and rescission is that in a rescission there is a finding that no original valid contract existed, as it was entered into only because of a mistake, misrepresentation or fraud. In reformation there is a valid original contract that simply does not conform to the true intent of the parties. To state the cause of action, the complaint must allege the facts of the contract as written and the actions or events that show what both parties intended.

~PRACTICAL DUTIES IN DETERMINING AND CREATING CAPACITY TO SUE~

Before filing a complaint on behalf of a minor or an incompetent, the lack of capacity to sue must be cured. The duty of the person filing suit would be to draft the petition for appointment of a guardian ad litem for the minor or appointment of a conservator or guardian for the senile or incompetent person. This petition should be prepared and signed by the parties at the time of the drafting.

Failure to have a guardian appointed does not deprive the court jurisdiction over the person and estate, a guardian has the same power as the person he represents, with an exception that any compromise or settlement or satisfaction of judgment must be approved by the court. If the 'guardian of the property' (to be distinguished from a 'guardian of the person') has been appointed by the court that adjudicated the person incompetent, that guardian has the capacity to sue on behalf of the incompetent 'ward' in any other action. That guardian may be an individual or a corporation (such as a bank that is authorized to conduct trust business).

It is not necessary to file a petition for a new appointment in the present cause of action. Simply state the facts and date of appointment of that guardian in the complaint or petition that is filed after the facts alleging jurisdiction are stated and before the facts alleging the cause of action. The same pleading procedure applies where another court has formerly appointed a guardian of the property of a minor plaintiff.

~GOVERNMENT ENTITIES~

When bringing a cause of action against a government entity as the defendant the 'doctrine of sovereign immunity' must be considered. Sovereign immunity is waived if the actions violate the law or is in violation of the Constitution, state statutes and knew or should have known so. As a general rule of thumb, in the absence of statutory authority or consent, the doctrine of sovereign immunity exempts Federal and State

agencies and their political subdivisions from liability resulting from injury or damages out of lawful exercise of government duties that would include the running of prisons and the care of prisoners.

It should be noted here that 'consent statutes' have not received nationwide acceptance and there is still a dispute as to whether this type of immunity exempts municipalities in general. In Wisconsin State Courts, in order to bring a suit naming a government agency of Wisconsin as a defendant you must first obtain consent by filing a petition or claim for damages known as a 'notice of claims.' This notice is a printed form available for the law libraries in prison or directly from the Wisconsin Attorney General's office.

In order to obtain consent to sue you have to set forth facts of the incident which justifies naming it as a defendant, which includes:

1. How the incident occurred
2. An estimate of the damages
3. The extent of the injuries received
4. The time, place and names of the persons involved (see state statutes).

The statutory procedure for this type of filing is found in the statutes. In Wisconsin, you have 120 days in which to file a claim, from the date of the incidents occurrence. After a 180 day waiting period, the plaintiff can consider the claim denied and at that time is free to file suit.

Wisconsin statutes of limitations is 3 years for a normal suit, but exceptions are provided for medical suits (see state statutes). In the event the notice of claims time has elapsed, an application for leave to present a late claim can be filed which should be accompanied by a 'notice of petition for relief from governmental restrictions and order that suit may be filed', a declaration in support thereof and a copy of the proposed claim.

You will receive notification of the hearing on this request. If the petition is approved, prepare the order, file the original and a copy with the court clerk and serve a copy within a two week period on the Attorney General. You have 30 days in which to file your complaint.

All these documents should be sent certified registered mail with return receipt request (as a proof of mailing).

~PLEADING A CAUSE OF ACTION~

The cause of action must be stated in the complaint or petition that will be filed iin the court by the plaintiff or petitioner to commence the action. The form, filing and service of the complaint or petition are governed by the court rules for the court for which the complaint or petition is to be filed. The content of the complaint depends upon the nature of the plaintiff's claim.

What to incorporate into the complaint?

A complaint in the civil sense is a concise statement of the facts that constitutes the cause of the action. Each material allegation of fact must be stated distinctly and be separated by enumerated paragraphs. The purpose of the complaint is to give the defendant information of all the material facts upon which the plaintiff relies on to support his demand for legal relief. So bring an accurate presentation of the transaction between the parties, a statement of the plaintiff's grievances. The complaint must contain 'ultimate facts.' It need not contain 'evidentiary facts', which may be necessary to prove the ultimate facts. This is the rule for the Federal Courts and the complaint should not state conclusions of law (see F.R.C.P. 7 and 8). The courts have established certain rules:

- An 'ultimate fact' is an action or event that may be proved by presenting 'evidentiary facts' leading to the ultimate fact.
- A 'conclusion of fact' is an expected consequence inferred from a given set of facts.
- A 'law' is a 'principle' that determines whether a particular action or event is legal or illegal in the jurisdiction where the action or even occurs.
- A 'conclusion of law' is a statement that certain actions or events comply with or violate a law.

Some 'conclusions of facts' may be stated, in a complaint, as 'ultimate facts.' They are malice, intent, knowledge and comparable state court rules. 'Allegations of facts' in the complaint should normally be based and stated as 'actual knowledge.' 'Actual knowledge' cannot be obtained by reasonable investigation. 'Material facts' may be stated on information and belief. Sometimes, hearsay allegations are necessary to use especially in a medical malpractice area of law or in an equity action for an accounting.

In a medical malpractice action the party bringing the suit must rely on the opinions of others, medical experts, since the average lay person knows nothing about medical practice and procedures. So any allegations, made as to wrong committed or injury suffered by way of medical malfeasance, negligence and so on, would have to be on information and belief or the lack of it.

'Constructive knowledge' is information that one is presumed to know generally since it is a matter of public record. The wording for the type of allegations described here would be:

> "Plaintiff is informed and believes; and based upon such information and belief alleges…"

Or

> "Plaintiff does not possess sufficient information to allege ultimate facts, as the only source of information is in the sole custody and control of the defendant, but the plaintiff believes that…"

~STATING MORE THAN ONE CAUSE OF ACTION~

A plaintiff may have one or more legal claims based on the same act of facts. The claims may be alternate or cumulative. Each such claim must be stated in a separate count. In drafting a complaint, all causes of action arising out of the same set of facts must be pleaded or the ones not pleaded are 'waived.' Other unrelated claims may also be pleaded against the opposing party, but they are not waived if not pleaded (see F.R.C.P. 18).

Each count is enumerated as count one, count two, count three, etc. The enumeration of the paragraphs in each count does not begin with one, but starts from the last paragraph preceding the next count. For instance, if count one left off on paragraph 9, then count two's first paragraph would be enumerated as 10.

~INCORPORATING FACTS INTO THE COMPLAINT BY REFERENCE~

1. Exhibits incorporated in the complaint: in lawsuits based on a written instrument (contract), most courts permit parties to attach a true copy of the document to the complaint as an 'exhibit.' The exhibit is then incorporated into the complaint by reference to it in one of the enumerated paragraphs of the complaint.

Example, "Plaintiff was the subject of a written contract between the defendants and Badger Health Care to provide services or health care to plaintiff on January 1, 2008, a copy of which is attached hereto as Exhibit 'A' and made part hereof by reference as thought fully set forth in haec verba."

Be sure that all allegations in the complaint referring to the attached documents are a word by word, line by line verbatim exact quotation since the slightest deviation may subject your complaint, or that portion of it, to a motion to dismiss (demurrer). In such cases, the document controls. The allegations that inaccurately describe the exhibited documents may be subject to strike.

2. Allegations from other counts incorporated into the complaint: the facts alleged in one count contained in a complaint may be incorporated by reference in other counts in facts, which must be specifically alleged in a new count. As a safety measure, you must be careful that you are re-alleging all the proper factual allegations to state a cause of action in the new count and not limiting yourself to the allegations pertinent only to the first count.

Example: Count 1 – Negligence, Count 2 – Deliberate Indifference or Punitive Damages. Plaintiff incorporates herein by reference all the allegations contained in paragraphs 1, 2, 3, 4, and 5 of its first cause of action (Count 1) as though the same were fully set forth herein. The conduct of the defendant was intentional, willful and wanton and in complete disregard for the rights of…" and so on.

~DEFENSES APPEARING ON THE FACE OF THE COMPLAINT~

As the purpose of any complaint or petition filed on behalf of the plaintiff is to present that legal claim to the court, it should not contain or set forth any possible defenses to the allegations contained in the complaint. In other words, do not school the defendant; make the defendant do their own homework. The only obligation the plaintiff has is to allege facts that are true and complete enough to state a cause of action. Defenses like the statute of limitations and the statutes of frauds, even if they are in the complaint, must be responded to by the defendants. The statute of limitations is an affirmative defense the defendant must raise. Failure to do so waives that defense. The defendants then have a decision to make; they can file an answer, addressing any affirmative defenses, or even file a counter complaint, but do not put the defendants up on game; otherwise a claim previously not triable (by statute of limitation violation) would get dismissed or more difficult to litigate. If the defendants did not do their homework they might not argue statute of limitations as an affirmative defense and it would have then been waived.

~DRAFTING THE COMPLAINT~

Legal documents filed with the court are on legal size paper with a printed margin. In the upper left hand corner is the space designated for the plaintiffs name (most prisoners file suits representing themselves, so indicate this by putting Pro Se after your name), place the prisoner identification number and complete mailing address. Then lastly, the capacity in which you are representing (plaintiff). This is the proper procedure for the state court, the federal courts only require you to submit on the complaint caption your representing capacity, as long as the signing of the verified complaint you include your prison identification number and full mailing address.

Name of court at or on about line 8 (depending on your local court procedure and rules the name of the court is entered in all capital letters. In some courts, the title of the document is typed in all capital letters in the center immediately below the other caption information.

Body of complaint begins with an introductory paragraph of the complaint identifying the plaintiff and is not numbered. Some courts recognize a short preliminary statement which introduces the plaintiff and names the types of allegations and complaints the plaintiff is raising in his suit.

Example: Preliminary statement… "Plaintiff is a Wisconsin State prisoner bringing a §1983 Civil Rights complaint for the violation of his constitutional rights to be free from cruel and unusual punishment…"

After the introduction or preliminary statement, you begin to incorporate the inclusions or exclusions of ultimate or evidentiary facts or pleading conclusions of law that may be demurable or factual conclusions that may be accepted. As a result, the body of the complaint is normally divided into six categories:

1. **Fictitious name or Doe clause.**
2. **Jurisdiction of the court over the subject matter.**
3. **Agency clause (if your court rules require this).**
4. **Allegations of ultimate facts that shows that the plaintiff has a cause of action.**
5. **Prayer for relief.**
6. **Verification signed under penalty of perjury with the plaintiffs date of signature and full mailing address.**

If applicable (Wisconsin Small Claims Court), you must add proof of certified mailing (proof of certified mailing is normally at the bottom of the document and signed by the person mailing the document (complaint), if it can be served by mail (small claims).

~FIRST PARAGRAPH – FICTIOUS NAME OR DOE CLAUSE~

The purpose of this clause is to enable the moving party to file his complaint against and serve an unknown or undiscovered defendant prior to the running of the statute of limitations. The moving party must allege this ignorance in the complaint as a separate allegation; otherwise, you are forever barred to join such defendant in the law suit. The allegation is made in a separate paragraph.

Example: "Specimen Fictitious name clause is the true name or capacities whether individual corporate associate, or otherwise, and defendantship of defendants DOE's 1 through _ inclusive, are unknown at the time of the filing of this to plaintiff who therefore sues said defendants by such fictitious names and will ask leave of court to amend this complaint to show their true names or capacities and defendantship when the same have been ascertained. Plaintiff is informed and believes and based upon such information and belief, alleges that each defendant designated herein as a DOE and was responsible negligently or in some other actionable manner for the events and happenings referred to herein that proximately caused injury to plaintiff as hereinafter alleged."

~SECOND PARAGRAPH – JURISDICTION~

This is a separate enumerated paragraph that sets forth the authority of the court to hear and determine the controversy (your allegations set forth in the complaint). There is also a statement when setting forth the jurisdiction over individuals and an alternative one for corporate entities. For example, see the following jurisdictional clauses:

> **1. "Individual residence requirement:** 2. Plaintiff is now and at all times herein mentioned has been a resident of the county of Columbia, state of Wisconsin."

Or

> **2. "Corporation residence requirement:** 2. Defendant is now and at all times herein mentioned has been a resident of the county of Brown, in the state of Wisconsin."

Or

"2. Defendant is now, and has been at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the state of Florida and licensed and authorized to do business in the state of Wisconsin having it's principle office city of Green Bay and in Brown county."

~THIRD PARAGRAPH – AGENCY CLAUSE~

One purpose of this clause and paragraph is to pinpoint the responsibility for the wrong or injury committed by defendant and anyone else whose name and/or capacity you may not know at the time of the filing. Another purpose is to anticipate that, the individual may have been part of a larger entity, and since you do not know this for a fact, you include a DOE as an agent to accommodate the unknown individual or entity.

Example: **Doe Agency**… "John Marks and Doe's 1 and 2 and each of them to allege or state a possible agency relationship between the parties, including course and scope of employment together with consent and permission of 'each of them'."

Example: **Agency Clause**… "At all times herein mentioned, defendant and each of them, were the agent, servant and employee of each remaining defendant and was at all times herein mentioned acting within the course scope and authority of said agency service, and employment…"

Example: **Permission Clause**… "Plaintiff is informed and believes and thereon alleges that at all times herein mentioned, defendant and each of them with the consent, permission and knowledge of each other remaining defendants drove subjects golf cart…"

~FOURTH PARAGRAPH – ALLEGATIONS OF ULTIMATE FACTS~

In this paragraph, you spell out the details with specificity and in chronological order the events and happenings that led to the wrong or breach of duty and the resulting damage caused thereby. State the date and time (if applicable) the actions and events creating defendants negligence or his violation of your constitutional rights and any acts of the defendant and any other factual elements of the cause of action. Each should be separated and distinctly enumerated in paragraphs, never lump them up in one paragraph.

Example: "1. At all times mentioned herein at 2383 Riverside Drive on the penal grounds of Green Bay Correctional Institution (herein after 'G.B.C.I.'), a state run and authorized prison in Brown County, the city of Green Bay and in the state of Wisconsin."

"2. On or about July 1, 2010, plaintiff was being escorted about by prison guards ____ and ____ whom operating a state owned vehicle, that being a golf cart, on 2383 Riverside Drive, G.B.C.I. penal grounds in the direction of the prison dental office in the city, county and state aforesaid."

"3. At said time and place, defendants and each of them so negligently managed, operated, and controlled said motor vehicle in the direction of the prison dental office did fail to ensure plaintiffs safety by negligently failing to secure any form of safety belt to secure the plaintiffs person and by recklessly driving said vehicle in excess of 30 miles per hour subjected plaintiff to be thrown from the vehicle which had no doors, thereby proximately causing severe and serious physical injuries to plaintiff, all to his damage in the sum of $_____."

The fourth paragraph is where you establish the 'situs', place defendant at the scene of the incident and spell out the negligent acts of the defendant that caused injury, irreparable harm, deliberate indifference etc. and set forth the 'general damages.' If 'special' or 'consequential' damages were suffered, the facts causing those damages should be set out in separate paragraphs.

~LAST PARAGRAPH OF EACH COUNT~

1. Prayer for relief: this is a statement of the request for relief for damages, restitution, or other action by the court that is requested by the plaintif.

Example: **Prayer for Relief for Special Damages**… "Wherefore, plaintiff prays for judgment against defendant and each of them as follows:

1. General damages in the sum of $_____.
2. For sums incurred and to be incurred for [medical treatment, dental treatment, etc.] in conformity to proof.
3. Loss of income incurred and to be incurred [from rents, loss of ability to work, etc.] in conformity to proof.
4. Loss of sums incurred to television, radio, etc.
5. [Optional: Punitive damages, exemplary damages, special damages, etc.]
6. Cost of suits.

7. For such other and further relief as to the court seems just and proper in the premises."

Or

Example: **General Damages**… "Wherefore plaintiff demands judgment against the defendant for damages in excess of five thousand dollars ($5,000) [or for the lowest jurisdictional amount for the trial court in which the legal action will be filed] plus costs of this proceeding and interest (where applicable)."

2. Signature: complaints in civil actions require the signatures of both the attorney and plaintiff or plaintiffs (and/or representative especially when the complaint is filed on behalf of a plaintiff as a friend of the court alleging plaintiff to be an incompetent and requesting a guardian be appointed), and the complaint should be verified.

By verification a complaint and the allegations contained therein becomes fact and true. By verification being sworn under oath and penalty of perjury the weight of these now truthful facts in and of themselves situated in a complaint can be determining factors as to the defendants' ability to attack it, especially by means of a summary judgment motion because of the now verified material facts sworn to. It is important that the verification be signed, dated and an indication of where the complaint was signed.

Example: **Verification**… "Pursuant to 28 U.S.C. §1746 I _____ declares under the penalty of perjury under oath that the statements contained herein is true and correct to the best of my personal knowledge information, understanding and belief. My signature verifies the same. Signed and dated on _____ at county of _____ in the state of Wisconsin. Signed under penalty of perjury by: _____ #000000 Columbia Correctional Institution 2925 Columbia Drive PO Box 900 Portage, WI 53901."

~SUMMONS~

A summons is a form that is used to give notice to a defendant of an action pending against him in the court that issues it. The summons is prepared by you and signed by the clerk of courts or the clerk's deputy, directing the sheriff or marshal or other lawfully appointed person to personally serve the defendant with this notice of an action that has been filed against the defendant in the court named in the summons. The summons contains the number of days or a certain day before which the defendant must appear or answer to the complaint (as a copy of the complaint is

served with the summons), the name of the court which the defendant must appear (such as small claims), or to respond to by pleading or motion appears in the captions of both the summons and the complaint.

If a defendant fails to answer or otherwise plead or appear within the specified time limit shown on the face of the summons, the plaintiff can file a motion to secure a default judgment. Most summonses have a 30 day returnable period – the exceptions are on partition suits, summons on unlawful detainer action, summons on actions against a judgment debtor, a family law complaint, or a summons where the government is a party – and then the government or its agents have 60 days.

Preparation of summons –The heading and caption of the summons should be exactly the same as on the complaint. The exception to this rule applies when you have a long list of defendants in which case it is usually permissible to list them either up to and including the name of the defendant you want served or just the first named defendant followed by the phrase 'et. al.' In some courts where unknown defendants can be sued as Doe's, put the named Doe's in the caption of the summons even though a summons cannot be presently served on them. In the body of the Doe summons, include the following:

"You are hereby served as the person named herein as 'Doe 1'."

In all states, the name of any person who is allowed by law to accept substituted service for him individually or for a corporation must appear in the body of the summons. Where a resident agent or registered agent is to be served as a substitute for service on a corporation as its principle office, name in the body of the summons might be:

"James Jones, as registered for Keefe Corporation a Florida corporation (give the registered agents' address if not the same as the corporation)"

Or

"John Doe Insurance Commissioner for the state of Wisconsin, Madison, Wisconsin for Mutual Family Insurance Company…"

Give the address for the correct home office even though it may be out of state. When suing a corporation or government entity, the following steps must be taken:

1. Get a status report from the Department of State in the state where you believe the corporation is incorporated or from your Department of State if it is a domestic corporation.

2. Read the status report to get the name and address of the registered agent for service of process of a domestic corporation.

3. If it is a foreign corporation, check with your Department of State to see if it is 'registered' to do business in your state, and if so, who is its resident agent for service of process.

4. In all the preceding cases, get and use the exact registered corporate name in the summons and complaint captions.

5. All prisons have a person (or agent) designated to accept service on the warden, as well as on the Department of Corrections. Normally, it is the Attorney General.

~RESPONSIVE PLEADINGS~

ANSWERING THE COMPLAINT: The defendants answer with or without affirmative defenses, plays a vital role in raising 'issues' of fact in the pending litigation. The defendant does this by denying the allegations of the complaint or by pleading an affirmative defense to the allegations contained in the complaint. The defendant is not required to answer evidentiary facts or conclusions of law, but he should deny them to play it safe. He may deny by stating he 'has no knowledge.' The defendant may file a motion to 'strike' those facts and/or other allegations (see F.R.C.P. 12(f)).

Under the Federal rules, the filing of 'motion to strike' tolls the time for filing a responsive pleading. In some state courts, the motion to strike does not toll the time unless a motion for a more definite statement or 'motion to dismiss' is also filed. The defendant may or may not allege in the answer to show that he has an affirmative defense, but they may do so. If they do not plead an affirmative defense they waive the right to plead one later (see F.R.C.P. 8(c). The most common affirmative defenses are:

1. Accord and satisfaction
2. Arbitration and award
3. Assumption of risk
4. Contributory negligence
5. Comparative negligence (not available in all states)
6. Discharge in bankruptcy
7. Duress
8. Estoppel

9. Failure of consideration
10. Fraud
11. Illegality
12. Injury by fellow servant
13. Laches
14. License
15. Payment
16. Release
17. Res judicata
18. Statute of frauds
19. Statute of limitations
20. Waiver

In addition to the common affirmative defenses listed most of which can be pleaded in an action at law there are certain affirmative defenses peculiar to a case of equity. One of them is the 'doctrine of unclean hands.' This doctrine stems from common law and stands for the proposition that 'he who seeks equity must do equity.' A court of equity carefully scrutinizes the conduct of the plaintiff in determining if equitable relief should be granted. The doctrine of unclean hands is operated under the general concepts of:

1. Balancing the damages and injuries.
2. Hardship on the defendant or third party as opposed to the rights of the plaintiff.
3. Fairness to all parties.

In an action at law, the statute of limitations is an affirmative defense. In an action in equity, the court may consider the statutory time limitations but will not necessarily enforce it or require its application. Equity does not concern itself with the passage of time, but with the effect the passage of time on the rights of the defendant. If the defendant can convince the court that though the statute of limitations has not run out, the plaintiff has 'unreasonably delayed' in filing the action to the prejudice of the defendants rights, the plaintiff may be barred, or prevented from prevailing on his claims.

The defense of 'laches' is used to serve the defendant in shortening the statute of limitations and prevent the plaintiff (or moving party) from asserting his claim for some particular equitable relief. If the defendant in his answer does include facts tending to show an affirmative defense, a 'reply' by the plaintiff may not be required; but if allowed without order of the court play it safe and file a reply by the plaintiff denying

the factual allegations made in the affirmative defense paragraphs of the defendants 'answer' (see F.R.C.P. 7); which does not allow a reply to be filed in Federal courts except by order of the court.

Drafting answers: An answer must be filed within the prescribed time after the summons and complaint have been served on the defendant – unless a preliminary motion objecting to the complaint has been filed. If no answer is filed, the facts of the complaint are admitted. Any facts that are not denied in the answer are admitted. Facts admitted in the answer are admitted for all purposes in the lawsuit. Some courts rule a general denial as no answer and as an admission. Other courts rule a general denial, a denial. The Federal court rules and many State court rules treat a statement of 'without knowledge or information to form a belief as to the truth of the paragraph' (with the corresponding paragraph number from the complaint) as a denial. In most courts, any numbered paragraph of the complaint may be admitted in part and denied in part in an identically numbered paragraph in the answer (qualified denial).

Denials are sometimes categorized as 'general denials', 'qualified general denials', and 'specific denials.' The key in answering a complaint is the defendant must either deny or admit each allegation. Failure to do so either as to any allegation is considered an admission as to the truth of the allegations so omitted. A general denial is a simple uncomplicated one sentence denial of all the allegations in a complaint, but is not recommended.

Example: "This answering defendant denies each and every allegation contained in the complaint and the whole thereof."

In some states, the defendant may take advantage of this type of denial if he can do so in good faith (which means having a bona fide reason to do so). If the reason is not bona fide, the general is treated as an admission. A qualified general denial is a combination of admission of a particular paragraph of a complaint.

Example: "In paragraph IV, defendant admits that he is the Secretary for the Wisconsin Department of Corrections, but denies each and every other allegation contained in said paragraph."

A specific denial is a denial of each paragraph of the complaint. Some paragraphs may be admitted. Any of these types of denial may be made on 'information and belief' or on 'lack of information and belief'. Since this denial is based upon information and belief it is in the conjunctive and neither 'information' alone or 'belief' alone will suffice.

You have to have both to successfully resist a special demurrer or comparable motion as either alone is not a denial. A denial will fail if there is an unauthorized use of the denial allegation (as you are basically admitting you have knowledge and/or information sufficient to challenge the allegation) based on information and belief or the lack of it; or if the denial contains a negative pregnant or is conjunctive.

While the use of the denial mechanism based on information and belief seems like an easy way to roll – but it is mainly used when the person cannot honestly deny or admit with any certainty any of the allegations for one reason or the other. If the defendant, in truth or in fact, has knowledge or can obtain the knowledge required by the allegation, a denial on information and belief will not stand (which the state routinely uses) and is subject to a motion to strike (pro se prisoners should get in the habit of utilizing this motion – in this instance – to keep the state honest, and pin them down, allowing no wiggle room). So although the defendant may not have personal knowledge, but if the subject matter at issue is a public record it is presumed that the defendant has constructive knowledge, making his denial or lack of information and belief invalid and an exposable sham since he had a means of acquiring the knowledge in question. So be aware of the defendant's answers.

~FILING AND SERVING ANSWER~

The answer must be filed and served within the time proscribed by the applicable rules (the state has 60 days), if no demurrer or motion objecting to the complaint is filed. If the state requests an extension of time to respond, do not respond to a formal correspondence. If a 'motion for an extension' is filed and does not state a true or valid legal argument, object to this motion stating an extension will prejudice you in some way, normally the court utilizing discretion will grant a motion to extend time limits for cause.

It is strongly urged that all pro se litigants keep some index or a docket calendar for posting follow-ups on motions for default dates, etc. This will allow you to keep on top of your game with notice of important deadline dates. Sometimes in multiple party cases, the court may excuse sending copies to every party if the expense and time would be too burdensome. Such excuse requires a written order of the court. Although prisoners may sue numerous state officials, the Federal Court of the Western District of Wisconsin will allow you to submit two complete copies of the complaint and summons, one for the defendants and one for the court; no matter how many defendants are sued. Note that different state district courts like Dane and Brown counties may require you to serve each defendant. The Eastern District of Wisconsin is the same.

If a defendant wants, if a plaintiff doesn't file any motions and there is a period of inactivity in the case the defendant can claim (as well as the plaintiff) that the plaintiff (sleeps) and move for a dismissal for want of prosecution., See local rules for when this action can be taken.

~PRETRIAL MOTIONS~

Court rules govern the form and time for filing certain motions. A pretrial motion is a request to the court which must be formally written and signed by the moving party. Most court rules require the 'grounds' (the reasons for the motion to be stated with particularity as to law and/or facts that can be applied to support your argument) in the motion. Both parties can argue these motions either orally or in a written memorandum at law (sometimes the courts will require a verbal argument for the basis of clarification). The following are a list of most common pretrial motions:

1. Motion to dismiss: this motion is filed for reasons similar to that stated in a demurrer to the complaint. Under the F.R.C.P. 12(b), a motion to dismiss (demurrer) may raise the following defenses:

1. Lack of jurisdiction of subject matter.
2. Lack of jurisdiction over the person.
3. Improper venue.
4. Insufficiency of process.
5. Insufficiency of service process.
6. Failure to state a claim upon which relief can be granted (or failure to state facts sufficient to constitute a cause of action).

A motion to dismiss or demur to a complaint on the basis of an affirmative defense, if only the facts constituting that affirmative defense appears on the face of the complaint (example is like for a statute of limitation violation).

The general demurrer or motion to dismiss attacks and tests the sufficiency of the whole complaint, stating that the complaint does not state a cause of action or that an answer does not state facts sufficient to state a defense. It has the effect of asking the court to search the whole complaint or answer and counter claim for the failure or defective allegation of essential facts to state a cause of action or defense. In a general demurrer, the defendants need not plead specific defects. A special demurrer serves the purpose of a motion for more definite statement, a motion to dismiss for affirmative defenses appearing on the face of the complaint.

The one most often appearing on the face of the complaint is the 'statute of limitations.' This defense is prohibitive to the recovery of damages arising out of a

valid claim or cause of action. Unless the claim was filed within the statutory time period, that is, personal injury, one year from the date first recognized and so on. This defense is usually argued in the answer as an affirmative defense.

Another commonly used defense is that of res judicata which means that 'the thing has been decided' previously. This is a rule of law that bars the re-litigation of the same cause of action between the same parties. The rule for stating the general demurrer in utilization of a 'special demurrer' you must point out with specificity the defect in the pleadings where other than failure to state a claim or cause of action is the issue.

2. Defect as to form: which means a cause of action exists but are curable defects setting for the cause of action, may be subject to a special demurrer, comparable to a motion to strike. A special demurrer or a motion to strike is important since unless it is raised the defendant waives the right to raise 'defects in form.' Only the right to raise 'defects in substance' can be raised at a later time during the course of the proceedings.

A special demurrer may be filed for the plaintiff to state facts in the complaint, which if set forth (shown) would afford the defendant the chance to later file a general demurrer. That is basically filing a motion for more definite statement and once getting the plaintiff to admit something in the defendants' favor, move to strike the complaint or those claims. Most motions for more definite statement or special demurrer for the purpose of getting more essential facts will state:

"It cannot be ascertained from the complaint herein whether the allegations of a significant and atypical hardship in the cause of action is founded on a state created liberty interest founded on statute or administrative code?"

This is a trick to get the plaintiff to claim a significant hardship stems from some 'liberty interest bestowed upon the plaintiff by statute' or otherwise. If admitted this claim would be dismissed since mandatory language in Hewitt v. Helms, 459 U.S. 460; 103 S.Ct. 864; 74 L.Ed. 2d 675 (1983) was overturned and Sandin v. Conner, 515 U.S. at 487 held prisoners: "protected liberty interests be of 'real substance', Sandin limited state created liberties to [be] free from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the due process clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

So any claim not properly framed under conditions of confinement under the totality of circumstances as an 8th Amendment violation would fail. Be aware of these tactics

known as an attempt to derail your claims into ones substituted by the defendants with your unknown aided help.

3. Motion to strike: is made to get the court to strike all parts of any and all of a pleading that is defective in form. The motion to strike does not mean that the stricken pleadings or part is removed from the court record. It is just ignored from this point on. The words used in the F.R.C.P. for a motion to strike are 'insufficient defense' or any redundant, immaterial, impertinent, or scandalous matter, Rule 12f. The meaning of these words except for 'impertinent' is the common meanings of the word. Impertinent, as used in the court rules, means the matter should not be in the pleadings as a matter of form because it is superfluous or unintelligible as stated or not appropriate because it is irrelevant to the cause of action or defense. A motion to strike an answer because it 'does not state a sufficient defense' serves the same purpose that a motion to dismiss a complaint for failure to state a claim serves a general demurrer can be used for either of those purposes where demurrers rather than motions are used to object to pleadings. As a general rule, a motion to strike goes to ferret out irrelevancy, redundancy or shams.

For example, if in your state district court your attorney is not automatically entitled to receive attorney's fees when filing a complaint unless:

1. There is a contract.
2. There is something the codes/statutes that permits attorney fees and you included such a request in your prayer for relief without alleging this authority, the defendant can file a motion to strike that portion of the prayer of the complaint as both immaterial and impertinent.

The motion to strike can also be used against a pleading. If a complaint is verified and the defendant files a general denial, plaintiff can file a motion to strike the answer on the grounds that it is not a verified answer. Conversely, if someone other than the party to the action verifies the complaint; defendant can move to strike the improper verification.

4. Motion to compel: is used when either party fails or refuses to answer interrogatories or requests for admissions. The moving party files a motion requesting the court to compel the opposing party to answer and to apply sanctions, which are normally penalties in the form of a monetary award if the party fails to answer as ordered. Another sanction the court may impose is to dismiss a complaint or strike an answer of the party who fails to comply with the order.

5. Motion to quash service of summons: is another type of motion where if there is no jurisdiction of the court over the subject matter you attack this deficiency by filing a special demurrer or motion to dismiss; but if there is no jurisdiction of the court over the person, you may file a motion to 'quash' service of summons. This is known as a 'special appearance' and is only used to attach jurisdiction of the court over the person. This motion to quash must be accompanied by points and authorities to support your contentions then it is up to the court. Any other type of appearance; that is another motion, demurrer, answer and so on, by a defendant may create jurisdiction.

6. Motion for judgment on the pleadings: cannot be made until the required pleadings in the case have all been filed and the case is 'at issue.' At issue means ready to be tried, but not that the case has been set for trial. A motion for judgment on the pleadings can be brought at any time before the trial of the action. Most courts provide that the motion be made within such a time as not to delay the trial. This is a notice motion that should be accompanied by a memorandum of law points and authorities and a declaration of your support of the legal arguments contained therein. You should include in your declaration what order is being requested and the basis of the request. In other words, give the court a good valid legal reason and sufficient facts for granting the motion and requested order. It's important to include a memorandum at law in support of the motion; or in opposition of the motion filed against you.

7. Motion for summary judgment: is the most devastating motion. The key to understanding a summary judgment in that you are making a motion requesting the court grant you a judgment against the opposition 'without the benefit of trial' on the issues. In the Federal courts and many state courts, this motion may be filed anytime after the expiration of twenty days after the complaint was filed. Any party can make a motion for summary judgment alleging 'no triable issue of facts' or 'no genuine issue of material fact'; for if there is only a question of law left for determination, questions of law can be decided by a judge. Courts should and do take this motion very seriously. It is a final judgment which prejudiced you significantly.

Motion for partial summary judgment can be files as a cause of action or count in some courts. It does not have to be filed against the entire complaint in some jurisdictions. For example: if in your request for admissions you received an admission that a policy did exist that prevents Muslims from group religious meetings but allowed to other religious groups to have group meetings, you could file for partial summary judgment as to liability and remove that issue of liability from the trial of the action. The issue that remains to be tried is the amount of damages.

As with all motions previously discussed, a law memorandum of supporting case authority and statutes, if any, in support of your motion should be prepared with a declaration setting forth the basis for the motion; the contents of this declaration is the ammunition for your summary judgment. You can win or lose this motion on the declaration alone. So you should state succinctly and in chronological sequence, the facts of the case to aid the court in reaching its decision in your favor; that is, that there is no triable issues as to any material facts to be determined and that the moving party is entitled to a judgment as a matter of law. In the Federal courts, supporting and opposing 'affidavits' are required to support or oppose a motion for summary judgment (see F.R.C.P. 56).

You are required to have affidavits signed with a statement of facts by their own knowledge. The statements must be sworn before and signed by a public notary or when made under oath under penalty of perjury. The affidavits can be made by party members or non-party persons.

A step by step procedure for preparing a summary judgment motion is as follows:

1. Notice of motion (motion for summary judgment and notice of hearing).

2. Declaration in support of motion (with affidavits of facts with necessary exhibits attached and incorporated by reference into the affidavit).

3. Memorandum of points and authorities (in support of summary judgment, memorandum at law).

4. If you have had responses to requests for admissions or answers to interrogatories or depositions (include appropriate excerpts or copies of these should be attached or referred to in your declaration or in the alternative request that the court take judicial notice thereof).

Make sure a complete copy of everything is sent to opposing counsel at least ten days prior to the date the motion is set for hearing. The filing of this motion does not toll or extend the time within which opposing counsel is required to file a responsive pleading. So flag the responsive pleading date on your calendar to avoid default or in the event you want to file a default against opposing counsel.

It's extremely difficult for a prisoner appearing pro se to obtain a summary judgment since it, in essence prevents the state from cross-examining witnesses. But the state routinely wins summary judgment because these prisoners are not understandable about one important fact; if there is a question of material fact to the cause of action a court cannot grant summary by filing affidavits and file affidavits that the facts alleged in the complaint are based upon personal knowledge and belief and understanding through a simple verified complaint can be enough to overcome summary judgment.

~MISCELLANEOUS PRETRIAL MOTIONS~

1. Motion for continuance
2. Motion for transfer
3. Motion to dismiss 3rd party complaint

If the motion requires a hearing, 'notice of hearing' may be sent with the copy of the motion or may be made party of it.