

Table of Contents

CHAPTER 1. BASIC PRINCIPLES OF SECTION 1983 LITIGATION

- § 1:1 Introduction
- § 1:2 Color of law
- § 1:3 No exhaustion requirement
- § 1:4 —Qualifications
- § 1:5 — —PLRA
- § 1:6 — —*Heck v. Humphrey* issues
- § 1:7 — —Abstention
- § 1:8 — —Procedural due process claims
- § 1:9 No specific intent or state-of-mind requirement
- § 1:10 —Exceptions—No claim for negligent acts
- § 1:11 —Qualifications—Eighth Amendment
- § 1:12 — —Fourteenth Amendment substantive due process
- § 1:13 — —Discrimination and retaliation claims
- § 1:14 Standing
- § 1:15 Subject matter jurisdiction
- § 1:16 —Supplemental jurisdiction

CHAPTER 2. ACTIONABLE CONDUCT UNDER THE FEDERAL CIVIL RIGHTS ACTS

- § 2:1 Introduction
- § 2:2 Negligence claims
- § 2:3 Arrest and detention
- § 2:4 Racially motivated misconduct
- § 2:5 —The nature and extent of racial profiling
- § 2:6 —Equal protection principles
- § 2:7 Title VI of the Civil Rights Act of 1964
- § 2:8 Warrantless arrests
- § 2:9 Arrests under unconstitutional statutes and ordinances
- § 2:10 Arrests made under a warrant
- § 2:11 Warrantless arrests: Prompt judicial determination of probable cause
- § 2:12 Duty to investigate
- § 2:13 Miscellaneous issues
- § 2:14 Malicious prosecution
- § 2:15 Abuse of process
- § 2:16 Retaliatory prosecution
- § 2:17 Release-dismissal agreements

- § 2:18 Excessive force and physical brutality
- § 2:19 —Fourth Amendment excessive force claims by persons at liberty
- § 2:20 —Prisoners and the Eighth Amendment
- § 2:21 —Defining a seizure—Arbitrary use of force and substantive due process
- § 2:22 —Use of deadly force
- § 2:23 Illegal search and seizure and the right to privacy
- § 2:24 —Search and seizure
- § 2:25 —Strip searches and body cavity examinations
- § 2:26 —Privacy
- § 2:27 —Informers and undercover agents
- § 2:28 Denial of First Amendment rights
- § 2:29 Fifth Amendment; Illegal interrogation
- § 2:30 Fourth, Fifth and Sixth Amendments: Denial of counsel, denial of liberty without due process, detention without probable cause
- § 2:31 Denial of medical attention
- § 2:32 —Jail suicides
- § 2:33 Defamation
- § 2:34 Verbal abuse and harassment
- § 2:35 Failure to provide police protection
- § 2:36 —General principles
- § 2:37 —Domestic violence
- § 2:38 —Releasing prisoners into society
- § 2:39 —Persons exercising First Amendment rights
- § 2:40 —Jail and Prison violence
- § 2:41 Conspiracies to violate civil rights
- § 2:42 —§ 1983 conspiracy claims
- § 2:43 —§ 1985(3) conspiracies
- § 2:44 Interference with family relationships
- § 2:45 Substantive due process violations
- § 2:46 Procedural due process claims

CHAPTER 3. ABSOLUTE AND QUALIFIED IMMUNITY DEFENSES

- § 3:1 Absolute and qualified immunity: Introduction
- § 3:2 Absolute immunity defense: General considerations
- § 3:3 —Judicial immunity
- § 3:4 —Prosecutorial immunity
- § 3:5 —Witness immunity
- § 3:6 Qualified immunity: Introduction
- § 3:7 Development of the qualified immunity doctrine
- § 3:8 The “clearly established right” standard
- § 3:9 Nature of authority required to find a clearly established right

TABLE OF CONTENTS

- § 3:10 Motive and bad faith
- § 3:11 Extraordinary circumstances and reliance on third party advice
- § 3:12 Application of the doctrine to specific constitutional claims
- § 3:13 —Cases where the defense is inapplicable
- § 3:14 —Fourth Amendment claims
- § 3:15 — —Probable cause issues
- § 3:16 — —Excessive force cases
- § 3:17 — —Other Fourth Amendment issues
- § 3:18 —First Amendment claims
- § 3:19 Procedural issues in the litigation of the qualified immunity defense
- § 3:20 —Structure of the qualified immunity analysis
- § 3:21 —Pleading and proving the defense
- § 3:22 —Pretrial litigation of the defense
- § 3:23 —Interlocutory appeals
- § 3:24 —Trial issues
- § 3:25 Qualified immunity defense and municipal liability
- § 3:26 Qualified immunity defense for a private actor

CHAPTER 4. INDIVIDUAL, SUPERVISORY, AND LOCAL GOVERNMENT LIABILITY

- § 4:1 Liability of individual officers
- § 4:2 —Requirement of personal involvement
- § 4:3 Liability of supervisory officers
- § 4:4 —Degree of culpability required
- § 4:5 —Proximate cause required
- § 4:6 —Specific theories of liability against supervisors
- § 4:7 — —Presence at scene or direction of challenged action
- § 4:8 — —Failure to train subordinates
- § 4:9 — —Violation of statutory duty
- § 4:10 — —Hiring or failure to discipline subordinates with history of misbehavior
- § 4:11 — —Creation of or failure to correct unconstitutional policies, practices, or conditions
- § 4:12 —Proving failure to supervise
- § 4:13 —Differences between supervisory liability and municipal liability
- § 4:14 General principles of municipal liability
- § 4:15 Specific theories of municipal liability
- § 4:16 —Formal policy or custom
- § 4:17 — —Proof of custom
- § 4:18 —Inadequate training
- § 4:19 —Inadequate hiring procedures
- § 4:20 —Inadequate supervision and discipline

- § 4:21 —Actions by policymaking officials
- § 4:22 —Derivative nature of liability
- § 4:23 Conflicts of interest
- § 4:24 States and state agencies

CHAPTER 5. SUITS AGAINST FEDERAL OFFICIALS AND THE UNITED STATES

- § 5:1 Suits against federal officers
- § 5:2 *Bivens* cause of action
- § 5:3 Federal Tort Claims Act: Jurisdiction and actionable conduct
- § 5:4 —Procedure and statute of limitations
- § 5:5 —Attorneys' fees
- § 5:6 —Discretionary function

CHAPTER 6. INVESTIGATION AND EVALUATION OF THE CASE

- § 6:1 Introduction
- § 6:2 Interviewing the complainant
- § 6:3 Interviewing witnesses
- § 6:4 Other investigatory steps
- § 6:5 —Photographs of the complainant and videos of the incident
- § 6:6 —Medical attention
- § 6:7 —Physical and documentary evidence
- § 6:8 —Information about the police officers involved in the incident
- § 6:9 —Scene of the incident
- § 6:10 —Statements
- § 6:11 —Press and Social Media
- § 6:12 —Similar incidents of abuse
- § 6:13 —Transcripts of testimony
- § 6:14 —Court records and files
- § 6:15 —Employment and income tax records
- § 6:16 Evaluation of the case
- § 6:17 Federal or state court
- § 6:18 —Discovery rules
- § 6:19 —Jury composition
- § 6:20 —Calendar
- § 6:21 —Jurisdictional questions
- § 6:22 —Substantive causes of action
- § 6:23 —Judges
- § 6:24 —Counsel fees
- § 6:25 Counterclaims and retaliatory actions by the police

CHAPTER 7. DRAFTING THE COMPLAINT

- § 7:1 General considerations

TABLE OF CONTENTS

- § 7:2 Caption
- § 7:3 Introductory paragraph
- § 7:4 Jurisdiction
- § 7:5 Plaintiffs
- § 7:6 Defendants
- § 7:7 Unknown defendants
- § 7:8 Amending the complaint to add defendants
- § 7:9 Color of law
- § 7:10 Factual allegations
- § 7:11 Legal claims
- § 7:12 Allegations of bad faith or malice
- § 7:13 Prayer for relief
- § 7:14 Rule 11
- § 7:15 Statute of limitations
- § 7:16 Tolling provisions
- § 7:17 Notice requirements
- § 7:18 Survival of actions

CHAPTER 8. DISCOVERY

- § 8:1 General principles and considerations
- § 8:2 Police files
- § 8:3 Internal affairs, disciplinary and police personnel records
- § 8:4 —Misconduct complaints
- § 8:5 —General information regarding the Internal Affairs Division
- § 8:6 —Administrative complaints
- § 8:7 —Firearm discharge and use of force reports
- § 8:8 —Records of arrests by individual officers
- § 8:9 —Reports regarding injuries received by the defendant police officer
- § 8:10 —Reports regarding injuries to persons arrested by the defendant officer
- § 8:11 —Performance evaluations
- § 8:12 —Rules and regulations
- § 8:13 Police statements and depositions
- § 8:14 Discovery and qualified immunity
- § 8:15 Expert witnesses
- § 8:16 Insurance agreements
- § 8:17 Discovery of facts and documents relating to damages
- § 8:18 Informers
- § 8:19 Grand jury testimony and prosecution records
- § 8:20 Psychiatric and psychotherapist records
- § 8:21 Defendants' medical records
- § 8:22 Media sources
- § 8:23 Discovery against the plaintiff

- § 8:24 —Work-product doctrine of Rule 26(b)(3)
- § 8:25 —Attorney-client privilege
- § 8:26 —First Amendment privilege
- § 8:27 —Deposition of the plaintiff

CHAPTER 9. EFFECT OF PRIOR COURT PROCEEDINGS

- § 9:1 Res judicata, collateral estoppel and § 1983
- § 9:2 Prior criminal proceedings
- § 9:3 —Practical concerns
- § 9:4 —Release—Dismissal agreements
- § 9:5 —Malicious prosecution actions
- § 9:6 —Legal effect of criminal adjudications
- § 9:7 Use of prior criminal litigation to bar defenses to § 1983 claims
- § 9:8 Prior civil litigation

CHAPTER 10. VOIR DIRE AND JURY SELECTION

- § 10:1 Introduction
- § 10:2 Juror attitudes
- § 10:3 —Police
- § 10:4 —Fear of crime
- § 10:5 —Race
- § 10:6 —Intangible damages
- § 10:7 Expanded voir dire procedures
- § 10:8 —Use of a supplementary juror questionnaire
- § 10:9 —Authorities for expanded voir dire
- § 10:10 Voir dire questions
- § 10:11 —Introduction
- § 10:12 —Suggested voir dire questions
- § 10:13 — —Associations, contacts, ideas about police
- § 10:14 — —Race
- § 10:15 — —Questionnaire

CHAPTER 11. TRIAL OF THE CASE

- § 11:1 Introduction
- § 11:2 Final pretrial preparation
- § 11:3 —Pretrial memorandum
- § 11:4 —Theory of the case
- § 11:5 —State and federal claims
- § 11:6 —Motions in limine
- § 11:7 —Conflicts of interest
- § 11:8 —Bifurcation of trial
- § 11:9 Examination of plaintiff

TABLE OF CONTENTS

- § 11:10 Examination of police officers
- § 11:11 —Calling police witnesses in plaintiff's case
- § 11:12 —General considerations in cross-examining police officers
- § 11:13 —Use of prior inconsistent statements
- § 11:14 Demonstrative aids
- § 11:15 Expert testimony
- § 11:16 Claims against municipalities based on prior misconduct
- § 11:17 Code of silence
- § 11:18 Special verdicts and interrogatories
- § 11:19 Evidentiary issues

CHAPTER 12. JURY INSTRUCTIONS

- § 12:1 Introduction
- § 12:2 General instructions
- § 12:3 —Elements of § 1983
- § 12:4 —Color of law (where uncontested)
- § 12:5 —Color of law (contested)
- § 12:6 Causation
- § 12:7 General instructions—No specific intent required
- § 12:8 —Credibility of witnesses
- § 12:9 —Bias of officials as witnesses
- § 12:10 Illustrative specific violations
- § 12:11 —Fourth Amendment
- § 12:12 —Definition of a Fourth Amendment “search and seizure”
- § 12:13 —Probable cause for arrest
- § 12:14 —Probable cause—Informant's tip
- § 12:15 —Search—Knock and announce requirement
- § 12:16 —Strip search—Definition
- § 12:17 —Scope of search—Strip searches
- § 12:18 —Method of strip searches—Privacy and hygiene
- § 12:19 —Place of strip search—Exigency
- § 12:20 —Excessive force—Fourth Amendment standard
- § 12:21 — —Criteria
- § 12:22 — —Objective test
- § 12:23 — —Person already restrained
- § 12:24 — —Jails and police holding facilities—Pre-trial
- § 12:25 —Denial of medical attention to pretrial inmate
- § 12:26 Manufacturing evidence
- § 12:27 Obtaining false statements
- § 12:28 Coercing a confession
- § 12:29 Obtaining identifications through suggestive methods
- § 12:30 Suppression of exculpatory information
- § 12:31 Officer's obligation to furnish exculpatory evidence to prosecutor

- § 12:32 Conspiracy
- § 12:33 —Evidence
- § 12:34 —Liability
- § 12:35 Liability of specific defendants
- § 12:36 —Duty to prevent other officers from violating rights
- § 12:37 —Joint tortfeasors
- § 12:38 —Supervisory liability
- § 12:39 —Municipal liability generally
- § 12:40 —Municipal liability—Causation
- § 12:41 — —Unwritten policy or custom
- § 12:42 — —Failure to have a policy (strip search)
- § 12:43 — —Deliberate indifference
- § 12:44 —Conspiracy
- § 12:45 Damages
- § 12:46 —Compensatory damages
- § 12:47 —Punitive damages
- § 12:48 —Interest—42 U.S.C.A. § 1983

CHAPTER 13. DAMAGES

- § 13:1 Introduction
- § 13:2 Compensatory damages
- § 13:3 —Special damages
- § 13:4 —Medical expenses
- § 13:5 —Impairment of earning capacity
- § 13:6 — —Pretrial loss of wages and earnings
- § 13:7 — —Impairment of future earning capacity
- § 13:8 — —Tax issues
- § 13:9 —Pain and suffering
- § 13:10 —Denial of civil rights
- § 13:11 Punitive damages
- § 13:12 Prejudgment interest
- § 13:13 Wrongful death cases
- § 13:14 Unitary or bifurcated trial
- § 13:15 Sample damages awards
- § 13:16 —Wrongful death cases—Police shooting
- § 13:17 — —Other
- § 13:18 —Permanent injuries
- § 13:19 —Nonpermanent injuries
- § 13:20 —No significant physical injuries

CHAPTER 14. ATTORNEYS' FEES

- § 14:1 General principles regarding award of attorneys' fees under 42 U.S.C.A. § 1988
- § 14:2 Prevailing party
- § 14:3 Plaintiffs who may claim attorneys' fees

TABLE OF CONTENTS

- § 14:4 When fees may be collected from state or municipal governments
- § 14:5 Suits against federal defendants
- § 14:6 Fee awards against the plaintiff
- § 14:7 Setting amount of the fee
- § 14:8 —Time factor
- § 14:9 —Determining a reasonable hourly rate
- § 14:10 —Upward adjustments—Delay in payment
- § 14:11 — —Quality of work
- § 14:12 —Contingent fee factor
- § 14:13 —Costs and expenses
- § 14:14 Preparation and litigation of the application for fees
- § 14:15 —Offers of judgment and settlements
- § 14:16 —The court’s decision on the fee application

CHAPTER 15. EQUITABLE RELIEF: ENJOINING POLICE MISCONDUCT

- § 15:1 Introduction
- § 15:2 Obtaining injunctive relief: Legal requirements
- § 15:3 Justiciability problems and the “likelihood of recurrence” test
- § 15:4 —Existence of “continuing, present adverse effects”
- § 15:5 —Officially authorized conduct
- § 15:6 —Past violations
- § 15:7 —Conduct directed at particular groups
- § 15:8 —Class actions and organizational/associational plaintiffs
- § 15:9 Procedural considerations
- § 15:10 Eleventh Amendment limitations
- § 15:11 Federalism and comity considerations
- § 15:12 Preliminary injunctions
- § 15:13 Enjoining state prosecutions: *Younger v. Harris*
- § 15:14 Enjoining police misconduct: Examples
- § 15:15 —Harassment of minorities or protected activity
- § 15:16 —“Sweeps” and other indiscriminate searches, stops, or arrests
- § 15:17 —Police surveillance and intelligence-gathering programs
- § 15:18 Declaratory relief

APPENDICES

- APPENDIX A. Litigation Checklist
- APPENDIX B. Sample Complaints
- APPENDIX C. Interrogatories
- APPENDIX D. Requests for Production of Documents

APPENDIX E. Text of Federal Civil Rights Acts, 42 U.S.C.
§§ 1981, 1982, 1983, 1985, 1986 and 1988,
and 28 U.S.C. §§ 1343, 1331 and 1332

APPENDIX F. Verdict Sheets

APPENDIX G. Attorney Retainer Agreement

APPENDIX H. Application for Attorney's Fees

Table of Cases

Index