

Section 1983 File Handling Checklist

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& C U L B E R T S O N L L P

1. ELEMENTS OF A §1983 ACTION

42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The elements of a §1983 claim are:

- a) a "person";
- b) acted under "color of law"; and
- c) deprived another person of a constitutional right.

A state, county or local unit of government sued under 42 U.S.C. §1983 can be a "person" if certain additional requirements (outlined below in Section 3) are met.

2. INDIVIDUAL VS. OFFICIAL CAPACITY

Determine whether a defendant is being sued in his or her individual capacity, official capacity, or both. The capacity in which a "person" is sued affects the damages and defenses available, as well as the elements a plaintiff must plead and prove.

- a) An official capacity claim is considered an action against the "office" which employs the defendant, not the individual defendant himself. It is simply another way of suing a municipality. Therefore, the pleading elements of an official capacity claim against an individual defendant are the same as a claim against the municipality itself.
- b) Punitive damages are *not* recoverable under §1983 when a defendant is sued under an official capacity theory or against a municipality.
- c) Qualified immunity is available only as a defense to a defendant when sued in his "individual" capacity. It is not available to a local unit of government or to an individual sued in his official capacity.
- d) If a municipality or a local unit of government is a named defendant in a lawsuit, an official capacity claim against the employee is redundant since the official capacity claim is deemed to be an action against the office employing the person and not the individual.

- e) Referencing the defendant's office in a complaint suggests the plaintiff is suing the defendant in his official capacity. If the plaintiff intends to sue a defendant in both capacities or in his individual capacity, he must say so in his pleading.
- f) Eleventh Amendment immunity is only available to a State employee when sued in his official capacity.

3. IF A MUNICIPALITY IS SUED, WHAT IS THE THEORY OF LIABILITY?

Respondeat superior liability or vicarious liability is not recognized under §1983. Following the Supreme Court's *Monell* decision, municipal liability under §1983 requires a constitutional violation plus either: (i) a written policy; (ii) a long-standing custom or practice – e.g., other similar violations, or (iii) the act of a “final policymaker.”

Proximate Cause – The written policy, custom or practice, or the act of a final policy maker must be the “moving force” behind, or the alleged cause of the constitutional violation.

- a) One or two prior acts or similar incidents does not suffice to establish a custom or practice. Rather, what is required is a widespread practice that is long-standing and well-settled in nature.
- b) State law determines which officials are the “final policymakers.” A final decisionmaker is not necessarily a final policymaker for §1983 purposes, *i.e.*, police chief not necessarily final policymaker when it comes to hiring and firing decisions, rather, the city counsel is the policymaker. If an individual's decisions are reviewed by others, then that person is not a final policymaker. Final authority to establish policy specifically related to the challenged action is required.
- c) If there is no underlying constitutional violation, *i.e.*, plaintiff's rights were not violated, then a municipality cannot be found liable even if its policies or practices are deficient or improper.
- d) Municipal liability can be based on an alleged failure to train. However, liability will attach only where the alleged failure amounts to a deliberate indifference to a citizen's rights. There are two scenarios where municipal liability for a failure to train has been recognized:
 - i) Where a local unit of government fails to train its employees with respect to a clear constitutional duty that will arise in situations that its employees are certain to face, *i.e.*, police officer's use of deadly force;
 - ii) Where the need for training is not obvious at the outset, but a pattern of violations put the defendant on notice of the need to train.
- e) There is no “heightened” pleading standard in federal court for §1983 municipal liability claims. However, the Supreme Court recently explained that to properly plead any claim in federal court, the plaintiff's factual allegations must demonstrate a plausible entitlement to relief.

- f) f) If a *Monell* claim based on a custom or practice of constitutional violations, is combined with a claim against one or more individual defendants, at trial move to sever or bifurcate the *Monell* claim to avoid prejudice to the individual defendants. If there is a clear constitutional violation, consider a “sever and stay” motion raising §10/9-102 of the Local Governmental Tort Immunity Act.
- g) g) §10/2-109 of Illinois’ Local Governmental Tort Immunity Act – provides that a local unit of government cannot be held liable where its employee is not liable applies to state-law claims only.

4. DAMAGES

There are three forms of damages (in addition to attorney fees) available in a §1983 civil rights claim:

Nominal Damages: Where a constitutional violation is proven without any accompanying personal injury, compensable “actual” damages, or out-of-pocket loss, the plaintiff is only entitled to recover “nominal” damages. Typically, “\$1 is the norm” when nominal damages are awarded. Nominal damages are available because the law recognizes the importance to organized society that constitutional rights be scrupulously observed while still recognizing that the recovery of substantial damages requires proof of an actual inquiry. Compensatory damages are not awarded merely for the “abstract value” or the “importance” of a constitutional right. That is the purpose of nominal damages.

Compensatory Damages: To recover compensatory damages, plaintiff must prove a “demonstrable” physical or emotional injury or some other recognized compensable harm. While proof of a “significant” injury is not required, the injury or harm claimed must be more than “*de minimis* or trivial” to trigger an award of compensatory damages.

Punitive Damages: To obtain punitive damages, the plaintiff must establish that a defendant acted with a “callous or reckless indifference” to the his or her constitutional rights. Punitive damages can be recovered in the absence of any compensatory damages. However, punitive damages cannot be recovered from a municipality (or an individual sued in his official capacity).

Attorney Fees: When evaluating the potential exposure of a §1983 claim, don’t overlook the issue of attorney fees. Attorney fees can be recovered by a prevailing party in a §1983 claim, and frequently those fees can exceed the value of plaintiff’s claim. See section 12 below for a strategy for possibly limiting the recovery of fees. **Be certain when negotiating a settlement of any §1983 claim that attorney fees is encompassed by the settlement, otherwise the plaintiff could present a fee petition and seek fees after the settlement is finalized.**

5. WHAT AMENDMENT/CONSTITUTIONAL RIGHT VIOLATED?

42 U.S.C. §1983 does not confer any substantive rights, it simply provides a statutory cause of action to vindicate rights conferred elsewhere. Accordingly, one of the first steps to take when defending a §1983 claim is to determine what constitutional right is

allegedly implicated by the plaintiff's claim. Once the proper constitutional right is identified, you can then determine the statutory elements and the "state of mind" that must be pled and proved.

- a) **First Amendment** – applies to claims involving speech, association or religion.
- b) **Fourth Amendment** – prohibits unreasonable searches and seizures.
- c) **Fourth vs. Fourteenth** – which amendment applies depends upon the stage of the criminal process when the constitutional violation occurred. Also depends on whether a "search or seizure" occurred. Both amendments are potentially applicable to civil seizures of property.
- d) **Fifth Amendment** – its "Due Process Clause" only applies to federal officials or agents. The Fifth Amendment also protects against "takings" without just compensation (e.g., eminent domain) and against self-incrimination.
- e) **Eighth Amendment** – "Cruel and Unusual Punishment" – Applies only to convicted prisoners.
- f) **Fourteenth Amendment** – "Equal Protection Clause" – protects against race and gender discrimination. Its Due Process Clause requires some form of hearing before or after a party's liability or property rights are taken. In limited circumstances, a duty to protect has been recognized under the due process clause.
- g) **Illinois Constitution** – The general rule is that there is no private right of action to sue for a violation of the Illinois Constitution. The "every wrong should have a remedy" provision found in Article I, Sec. 12 of the Illinois Constitution is considered a statement of philosophy. §1983 provides a cause of action for a violation of the federal Constitution or, in some instances, federal laws, not for a violation of state law or the Illinois Constitution.

FOURTH VS. FOURTEENTH VS. EIGHTH

The Seventh Circuit has set up three bright lines to follow in "police misconduct" cases. The Fourth Amendment applies from the time of an arrest or seizure until the arrestee is brought before a judge or magistrate for a *Gernstein* (bond or probable cause) hearing. The arrestee then becomes a "pretrial detainee" and the Fourteenth Amendment applies. Once the "detainee" has been convicted, the Eighth Amendment applies.

If a seizure under the Fourth Amendment has not occurred, a court may fall back to the Fourteenth Amendment.

FOURTH AMENDMENT SEIZURE – DEFINITION

A seizure under of the Fourth Amendment occurs when the plaintiff's freedom of movement has been restrained through the use of force intentionally applied or when the plaintiff voluntarily submits to the defendant's authority; *i.e.*, when a suspect runs from an officer before the officer can even question him, no Fourth Amendment seizure has occurred; in a police chase, where the plaintiff loses control of his car and its light pole, no Fourth Amendment seizure occurred because there was no intentional

application of force, but if he drives into a roadblock, a seizure has occurred; in a police shooting, if the officer mistakenly shoots the wrong person, no Fourth Amendment seizure has occurred.

When the Fourth Amendment does not apply, the law enforcement official's conduct is judged under the Fourteenth Amendment.

FIRST AMENDMENT – TYPICAL CLAIMS

First Amendment has been applied to claims involving:

- a) Municipal employees being fired for speaking out as private citizens on matters of public concern. However, where a public employee makes a statement pursuant to his official duties, he is not speaking as a private citizen and his speech is not protected under the First Amendment;
- b) Politically motivated firings, demotions or adverse employment decisions taken against most employees. There is an exception as for those employees who are in "government's top level of management" – policymakers. Note that the so-called policymaker exception does apply to claims of "petty harassment."

FOURTEENTH AMENDMENT – EQUAL PROTECTION

To state a violation of the equal protection clause, plaintiff must allege that he or she is a member of a "protected class," that he or she was treated differently from another similarly situated person who was not a member of that class, and that the difference in treatment was due to his or her race, gender or membership in that protected class. Plaintiff must show that defendant acted with a discriminatory purpose and treated the plaintiff differently because of his or her race, sex, national origin, etc. The mere difference between plaintiff's and defendant's race or gender will not state a claim.

Several years ago, the Supreme Court recognized the so-called "class of one" theory of equal protection. Plaintiff does not have to be a member of a protected class under this theory. Rather, a defendant must single-out the plaintiff for discriminatory treatment on an irrational and wholly arbitrary basis and prove that the defendant's conduct was motivated by a "spiteful effort to get the plaintiff for reasons wholly unrelated to any legitimate state objective."

FOURTEENTH AMENDMENT – DUE PROCESS – DUTY TO PROTECT

Generally, there is no duty under §1983 to protect a private citizen. The Seventh Circuit has explained that our constitution is a "charter of negative liabilities." However, there are two exceptions where a duty is recognized:

- a) State Created Dangers Exception – Where the State creates the dangerous situation, then it has a duty to protect the plaintiff; *i.e.*, police officer arrests a driver for DUI and leaves minor children or intoxicated passengers in car with access to the keys.
- b) Restraint of Personal Liberty Exception – Where the State takes a person into its custody through "incarceration, institutionalization or other similar restraint of personal liberty," a duty to protect under the Fourteenth Amendment is triggered.

FOURTEENTH AMENDMENT – DUE PROCESS RIGHT TO A HEARING

Plaintiff must establish that he has a recognized property or liability interest that was seized or impaired by the defendant. State law determines whether plaintiff has a right protected under the due process clause, e.g., most employees are “terminable at will,” and thus, have no right to continued employment, e.g., a student generally has not right to participate in extracurricular activities.

6. STANDING - WHOSE RIGHTS WERE VIOLATED?

Plaintiff’s or someone else? Constitutional rights are personal in nature and cannot be vicariously asserted, e.g., decedent was shot and killed, his wife, mother, sister and children *generally* have no standing to bring a §1983 claim relating to his death.

Challenge plaintiff’s standing if a third party’s rights involved, there would be no “Article III case or controversy.”

7. IF A SUPERVISOR OR MANAGER IS SUED – WHAT IS THE THEORY OF LIABILITY?

- a) §1983 liability is based upon personal responsibility and predicated upon fault, there is no respondeat superior liability.
- b) A supervisor must have knowledge of the “potential” for a constitutional violation and either authorize, condone or approve it, or assist the violation before liability can attach. There is no liability for failing to discover the constitutional violation of a lower level employee. Neither negligence nor even gross negligence will sustain a §1983 cause of action.
- c) There is a duty imposed on a governmental employee (e.g., police officer) to prevent another employee from violating the constitution. For those who are present when a constitutional violation occurred, in order for liability to attach to them, they must have an adequate opportunity to intervene and prevent the violation from occurring. Accordingly, a §1983 claim against a fellow officer or supervisory-level officer on the scene will turn on where the defendant was located, how quickly the incident occurred, whether there were any circumstances that should have made those present expect a constitutional violation might occur.
- d) §10/2-204 of the Tort Immunity Act which provides that one public employee cannot be held liable for the act or omission of another applies to state law claims only.

8. STATUTE OF LIMITATIONS

- a) 42 U.S.C. §1983 applies the *general* personal injury statute of limitations from the state where the constitutional violation occurred which in Illinois is 2 years.
- b) John Doe defendants – The plaintiff has 120 days to identify and serve “John Does” under FRCP 4(m). Claims against unknown defendants do not “relate back” under FRCP 15. Accordingly, if the statute of limitations expires before

the John Doe defendants are identified and served, the claims against them should be dismissed.

- c) Conspiracy Claims – The statute of limitations for a civil rights conspiracy claim runs from the last overt act in furtherance of the conspiracy.
- d) False Arrest/Excessive Force/“Malicious Prosecution” (a *Brady* violation in the Seventh Circuit). The statute of limitations for a §1983 false arrest or excessive force claim runs from the date of the arrest or when the excessive force was allegedly used. However, for a §1983 “malicious prosecution” claim (*Brady* violation), the statute does not begin to run until the underlying criminal or civil proceeding was dismissed or a conviction is overturned.
- e) State-law claims against local units of government and their employees: 1 year (Illinois)
 - Exceptions:**
 - Construction: 4 years (Illinois)
 - Minors: Tolled until 18 (Illinois)
 - Contribution: 2 years (Illinois)
 - (however, contribution is generally not available in §1983 claims but may be in the context of state law claims).

9. IMMUNITIES AVAILABLE – §1983 CLAIMS

Immunities under state laws such as Illinois’ Local Governmental Tort Immunity Act are only applicable to “state-law” claims, not to §1983 actions by virtue of the supremacy clause of the federal constitution.

- a) Absolute Immunity – defendant has the burden to prove.
 - i) Prosecutorial – applies to a prosecutor’s conduct in any type of judicial proceeding as well as to the decision to indict or approve charges; the evaluation of evidence assembled by the police or for its presentation at trial or before a grand jury after the decision to indict was made. It does not apply where a prosecutor provides erroneous legal advice to the police or becomes involved in the investigation of charges prior to the indictment or where a prosecutor makes sworn statements in an affidavit supporting a warrant.
 - ii) Legislative – applies to legislative activities such as introducing, debating and voting on laws or ordinances.
 - iii) Judicial – applies to a judge’s conduct in any type of fact finding proceeding or ruling and is lost only when the court acts in the complete absence of any jurisdiction.
 - iv) Witnesses – applies to testimony in any type of judicial proceeding. The Seventh Circuit appears to now recognize a possible exception for complaining witnesses.

A functional approach is taken when absolute immunity is raised. So long as a defendant “functioned” in a capacity similar to a judge, prosecutor or legislator, he is entitled to absolute immunity for that function; *i.e.*, a liquor control commissioner in ruling on liquor license application is entitled to judicial immunity. When judges enact rules for lawyers to follow, they are not entitled to judicial immunity since they are not acting in their traditional fact-finding mode, but since they are functioning in a manner similar to legislators – passing rules for others to follow, they are entitled to legislative immunity. However, where a judge, legislator or prosecutor is acting in an administrative function; *i.e.*, firing a staff member, the defendant would not be entitled to absolute immunity for that function.

- i) Legislators enjoy absolute immunity against claims of injunctive relief, judges do not. Accordingly, a judge may have to pay attorney fees to a prevailing party under 42 U.S.C. §1988 if injunctive relief is entered against that judge.
 - ii) If a defendant is not entitled to absolute immunity because it is not recognized for the function the party was performing, the defendant can raise qualified immunity.
- b) Qualified Immunity – available so long as a defendant did not violate a clearly established constitutional right which a reasonable person should have known. Once raised, the plaintiff has the burden of proof and generally is required to show the law on the area was clearly established – by pointing to a “closely analogous” case.
- c) Eleventh Amendment – Neither the state nor a state official (when sued in his official capacity) can be sued for monetary damages in federal court. Some county officials may be considered state officials for purposes of the 11th Amendment; *i.e.*, county sheriffs, county judges, county state’s attorneys -- (in the Seventh Circuit, county sheriffs may be considered state officials when serving state court orders).
- i) A §1983 claim can be brought against a State official when the suit merely seeks the entry of prospective injunctive relief to remedy an ongoing constitutional violation, and not damages for a past wrong. This is the so-called *Ex parte Young* exception to Eleventh Amendment immunity.
 - ii) State employees sued in their “official capacities” are not “persons” amenable to suit under §1983. Unlike the Eleventh Amendment, this defense can be raised when a §1983 claim is brought in state court.
- d) The denial of a motion to dismiss or a motion for summary judgment based upon either qualified, absolute or Eleventh Amendment immunity is immediately appealable in federal court so long as the basis of the district court’s denial involves a question of law. When there are disputed issues of material fact, you cannot appeal. However, the Seventh Circuit has held that it has jurisdiction to determine whether the disputed factual issue was material. A careful analysis of the issue(s) must be made – the Seventh Circuit can and will sanction parties if it

deems an appeal to be frivolous. Denials of qualified immunity are not immediately appealable in Illinois state court.

10. DID THE DEFENDANT ACT UNDER COLOR OF LAW?

- a) Liability under §1983 does not turn on whether a defendant acted in the course and scope of employment but rather, whether the defendant acted “under color of state law.”
- b) The analysis of whether a defendant acted under color of law is based on the totality of the circumstances. Factors a court will consider include: whether the defendant was on duty/off duty; in uniform or out of uniform; whether departmental issued or approved equipment was involved, *i.e.*, police gun, badge, etc.; whether the defendant identified himself as a municipal official or invoked the authority of his office, *i.e.*, stop, I’m a cop; whether the departmental rules or regulations permitted or prohibited the defendant’s actions or required that the defendant act while off duty; if the incident occurred while on an “off-duty job,” whether the department approved it or whether departmental approval was even required; how close was the defendant’s conduct to type he or she routinely performed while on duty and whether the defendant’s motivation was employment related or involved a purely personal or private pursuit.

11. CONSPIRACY CLAIMS

- a) A conspiracy itself is not actionable, there must be some underlying “constitutional tort.” If none is alleged, move to dismiss. If the constitutional violation which was the subject of the conspiracy is dismissed by the court, then the alleged conspiracy to violate that right should also be dismissed.
- b) Conspiracy requires a “meeting of the minds.” Check if any agreement alleged? Vague allegations of conspiracy are still generally found to be insufficient to state a claim even under liberal federal pleading rules.
- c) Intra-corporate conspiracy defense is available in the Seventh Circuit if all defendants are employed by the same local unit of government.
- d) Conspiracy is simply a “yoke to tie” defendants to a violation. If all parties involved in the alleged conspiracy are named defendants, a conspiracy claim is redundant and move to dismiss.
- e) If the plaintiff’s conspiracy claim is based upon allegations that the defendant’s actions violated his right of access to the courts, the fact the plaintiff was able to file his or her §1983 lawsuit before the statute of limitations expired establishes that plaintiff’s right of access was not prohibited and the conspiracy claim should be dismissed.

12. OFFERS OF JUDGMENT

- a) 42 U.S.C. §1988 – Attorney fee shifting statute applies where the plaintiff is a prevailing party. However, there is a *de minimis* recovery exception.
- b) If a Rule 68 offer of judgment is made and the verdict is less favorable than the offer, then no attorney fees are recoverable after the date the offer was rejected.
- c) Be careful how you draft it – do you include attorney fees in offer or not? This will impact the determination of whether the outcome is more favorable. It must be in writing and made more than ten (10) days prior to trial under FRCP 68.

13. REMOVAL ISSUES IF §1983 CLAIM FILED IN STATE COURT – CONSIDER REMOVAL TO FEDERAL

- a) All defendants must agree.
- b) 30 day window of opportunity.
- c) Cannot appeal denial of qualified immunity in state court.
- d) While federal judges are more knowledgeable on §1983 issues, notice pleading rules apply in federal court.
- e) Better potential jury pool in federal district court in Chicago than in Cook County, but not DuPage County.
- f) Payment of filing fee in federal court, if removed.
- g) State official may waive the right to assert Eleventh Amendment immunity by removing a case to federal court and thereby invoking the court's jurisdiction.

14. INJUNCTIVE RELIEF

- a) If the plaintiff has merely alleged past exposure to illegal conduct and not an ongoing constitutional violation; *i.e.*, plaintiff was placed in a choke hold when arrested – he lacks standing to obtain injunctive relief because there exists no “Article III case or controversy.” In the Seventh Circuit, this limitation on the court's jurisdiction to enter injunctive relief cannot be overcome by allegations that the plaintiff might be arrested again in the future or that some third-party's right may be violated.
- b) Injunctive relief will not be issued if the matter has been rendered moot by subsequent events; *i.e.*, conditions of confinement in county jail rendered moot by transfer to state prison following conviction. Exception for claims that are “capable of repetition” but will “evade review.”

15. IMPACT OF STATE COURT PROCEEDINGS – POSSIBLE DEFENSES

- a) *Res judicata*/collateral estoppel – Under 28 U.S.C. §1738, federal courts must afford full faith and credit to state judicial proceedings. The Seventh Circuit has held that findings from state court proceedings must be applied in §1983 actions where the elements of issue or claim preclusion are met. The Illinois rules on issue and claim preclusion apply to §1983 claims. These doctrines apply not only to claims or issues that were actually litigated, but also to any claims that *could have been raised* in the earlier litigation. *Res judicata* generally requires a final judgment on the merits; that the two claims arise from the same core of operative facts; that the party against whom the defense is raised had a full and fair opportunity to litigate the issue in the original proceeding as well as the opportunity for appellate review.
- b) *Heck Doctrine* – A §1983 claim cannot be used to collaterally attack a criminal conviction. Where a plaintiff's success in a §1983 claim would "suggest" the plaintiff's underlying conviction is invalid, the *Heck* doctrine is potentially implicated. However, the Seventh Circuit has limited the defense when plaintiff's claim involves a Fourth Amendment search, seizure or excessive force issue due to concepts like attenuation, inevitable discovery, etc.
- c) *Rooker/Feldman Doctrine* -- §1983 cannot be used to invalidate a state court civil judgment. This defense is potentially implicated where the §1983 plaintiff was the defendant in prior state court action and is now challenging the judgment entered in state court.

16. 1983 PROTECTS CONSTITUTIONAL RIGHTS, NOT EVIDENTIARY RULES

The Seventh Circuit has held that §1983 is intended to protect constitutional rights, not evidentiary rules designed to protect those rights. When a defendant's conduct violates an evidentiary rule designed to protect a fundamental constitutional right, but not the right itself, the Seventh Circuit has refused to recognize a §1983 claim. Historically, this doctrine has been applied to §1983 claims involving:

- a) *Miranda* violations.
- b) Unduly suggestive line-ups or show-ups.

The mere failure to give *Miranda* warnings to an arrestee is not actionable. However, where *Miranda* warnings were not provided and the arrestee gives a confession which is later used at a preliminary hearing or trial, such a claim may be actionable.

17. DUTY TO INDEMNIFY A JUDGMENT UNDER §10/9-102 OF ILLINOIS LOCAL GOVERNMENTAL TORT IMMUNITY ACT

Section 10/9-102 of the Local Governmental Tort Immunity Act requires a local unit of government to indemnify any judgment of compensatory damages entered against an employee for acts that occur in the course and scope of the defendant's employment. The Seventh Circuit has broadly interpreted a local unit of government's obligation to indemnify under §10/9-102. In one decision, the City of Chicago was obligated to

indemnify a judgment where several of its officers allegedly tortured the plaintiff into confessing to the murder of two Chicago police officers. In another decision, a county in Wisconsin (which has a similar indemnification statute) was required to indemnify a judgment entered against county sheriffs who committed a number of burglaries and then “framed” the plaintiff to make it appear as if he committed the crimes that the sheriffs had in fact committed. In light of these decisions, it is clear that a local unit of government will be obligated to indemnify virtually any §1983 compensatory judgment award entered against one of its employees.

While acting under “color of law” for purposes of §1983 and acting in the “course and scope of employment” for purposes of §10/9-102 employ different standards, it appears so long as the “color of law” threshold is met, the Seventh Circuit will find a duty to indemnify under §10/9-102 of the Local Governmental Tort Immunity Act.

18. WHAT MATERIALS SHOULD AN INVESTIGATOR INITIALLY OBTAIN

- a) Police Reports – full set;
- b) Mug Shots – (if an excessive force claim)/jail or lock-up records;
- c) Any applicable department policies;
- d) Any medical or hospital reports;
- e) Employee’s employment records, and disciplinary history –ask if he or she has any;
- f) Any citizen’s complaint against the officers;
- g) Any investigative reports about incident;
- h) Any other similar claims for *Monell* violation;
- i) Any police/fire commission hearing – obtain result and transcript;
- j) If there was an underlying criminal proceeding, what was outcome, if dismissal why and if conviction obtain for – “*Heck* doctrine.” If hearing and testimony taken, obtain copy of plaintiff’s testimony and court’s finding.
- k) Plaintiff’s criminal history.

Attorney Biography

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Practice Areas

Class Action Litigation

General Commercial Litigation

Civil Rights Defense Litigation

Municipal Litigation

Public Law

Professional Liability Litigation

Products Liability Litigation

Mediator

School Law

Practice Areas

Government

Manufacturing

Education

Education

J.D., Loyola University Chicago
School of Law, 1979

B.Sc., highest honors, DePaul
University, 1976

Bar Admissions

Illinois (1979)

U.S. Supreme Court (1999)

U.S. District Court, Northern
District of Illinois (1979)

Federal Trial Bar – Northern
District of Illinois (1983)

U.S. Courts of Appeals,
Seventh (1991) and Eighth
(2003) Circuits

Practice Focus

Steven Puiszis is a well-known and highly experienced trial attorney and mediator with a wide-ranging litigation and trial practice, who stopped counting after having taken more than 40 civil and criminal jury trials to verdict. He is one of the few attorneys nationally who has ever successfully defended through trial a federal class-action lawsuit. Mr. Puiszis is the immediate Past President of the Illinois Association of Defense Trial Counsel and continues to serve on its Executive Committee.

Municipal and Civil Rights law are two of the primary areas of Mr. Puiszis' practice. He has handled a variety of claims in state and federal court on behalf of various units of state and local government. For example, he successfully represented the Governor and several other state officials in a civil rights action where the plaintiffs initially sought to certify a class of all developmentally disabled adults in Illinois who failed to receive residential Medicaid services on a timely basis. He also successfully defended the Secretary of the Illinois Department of Human Services and several other state officials while serving as lead counsel in a class-action trial involving Illinois' Sexually Violent Persons Commitment Act (SVP) Program. That matter involved a variety of constitutional challenges brought by the American Civil Liberties Union against Illinois' SVP Program.

In 2004, Mr. Puiszis obtained a defense verdict in a jury trial on behalf of a Cook County Assistant Public Defender in a legal malpractice action. In that case, the plaintiff had been convicted of a rape which he did not commit and sentenced to 36 years in prison. DNA testing, which occurred years after the conviction and sentence were affirmed on appeal, established the plaintiff's innocence. The underlying criminal trial involved complex scientific issues, and Mr. Puiszis convinced the jury that his client's strategy for dealing with those issues at the criminal trial was both reasonable and appropriate. That case is believed to be the first legal malpractice case against a public defender taken to verdict in Illinois.

A number of matters involving the use of deadly force and claims of wrongful prosecution that he has handled on behalf of law enforcement officials in federal court have resulted in published appellate opinions affirming summary judgment in his client's favor. Mr. Puiszis also represented the DuPage County Board on issues stemming from the "DuPage 7" criminal prosecution. He has also been requested to defend the Sheriff of Cook County in a series of putative class actions stemming from procedures followed at the Cook County Jail, which is the largest single-site jail in the country.



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In one of the municipal matters handled by Mr. Puiszis, (*Zimmerman v. Village of Skokie*), the Illinois Supreme Court declared unconstitutional the use of the common law's "public duty" doctrine to override statutory immunities available under the Illinois Tort Immunity Act. That decision substantially broadened the scope of protection available to local public entities and their employees under the Act.

Another matter he handled before the Illinois Supreme Court (*Arteman vs. Clinton Community Unit School District*) clarified the interplay of immunities between the Illinois School Code and the Tort Immunity Act, and substantially broadened the scope of protection available to school districts in Illinois. As a result of that decision, Illinois school districts can now raise the Tort Immunity Act as defense to claims involving the provision of defective equipment and the failure to provide safety equipment to its students.

Mr. Puiszis' litigation background is not strictly limited to the representation of local units of government or state and local officials. He has also successfully handled numerous professional liability claims on behalf of architects, engineers, attorneys and various health care providers.

With his background in accounting, he has also been asked to handle matters involving sophisticated accounting and tax issues, including the representation of lawyers and accountants in professional liability matters. He has also successfully handled various types of product liability claims.

Representative Cases

In addition to his noteworthy municipal and civil rights representations, Mr. Puiszis has represented the following clients in product liability litigation:

- Siemens Energy & Automation, Inc. – In a span of approximately 18 months, Mr. Puiszis obtained summary judgment in five separate product liability actions involving wrongful death and personal injury claims allegedly resulting from defects in different products manufactured by Furnas Electric Co., a division of Siemens.
- Rudd Industries – Mr. Puiszis secured a jury verdict in favor of his client in *Mark v. Rudd International*, in which he represented the manufacturer of an FAA air traffic controller chair in a product liability claim filed in the U.S. District Court for the Northern District of Illinois. The plaintiff contended that an adjustable height control mechanism for the air traffic controller's chair (manufactured in Germany and distributed by a company in the Netherlands) malfunctioned, allegedly causing the chair to rapidly descend and cause a back injury that the plaintiff claimed prevented him from returning to work as an air traffic controller. Third-party actions for contribution were filed in that matter against the foreign manufacturer and distributor of the failed component part.

In the area of professional liability, Mr. Puiszis handled a claim resulting in the first reported Illinois appellate decision interpreting the Accountant's Privity Statute in *Chestnut v.*

Pestine, Branati, et al., reported at 607 N.E.2d 543. He also represented a Dallas-based law firm in a professional liability claim filed in federal district court in St. Louis, Missouri, arising from that firm's handling of an antitrust lawsuit on behalf of a local telephone company against several of the "Baby Bells." The underlying antitrust lawsuit involved the manner in which long distance phone calls were billed and reimbursed. The case was ultimately settled for a modest amount, and for a fraction of the settlement demand made before Mr. Puiszis assumed the defense.

Mr. Puiszis was one of three Hinshaw & Culbertson LLP attorneys requested to coordinate the defense of the 1995 Illinois Civil Justice Reform Amendments against multiple constitutional challenges in several consolidated lawsuits filed in the Circuit Court of Cook County. As part of that assignment, he briefed and argued the constitutionality of the "cap" on non-economic damages at the trial court level.

Mr. Puiszis successfully represented the following clients in significant general commercial litigation:

- Chicago White Sox/Illinois Sports Facilities Authority – Mr. Puiszis secured a jury verdict in favor of the defendants in *Kaishas v. Chicago White Sox*, a general liability claim in which the plaintiff was struck by a foul ball hit by Tim Raines, then an outfielder for the White Sox. The plaintiff suffered a serious facial injury, and the case turned on the safety provided to patrons of baseball games.
- CNA Insurance Companies – Mr. Puiszis obtained a jury verdict in favor of building owner CNA in *Atkins v. Otis Elevator Co., et al.*, a general liability claim alleging that an elevator suddenly dropped five floors, injuring the plaintiff and several other passengers.
- Sprint Centel/360E Communications – Mr. Puiszis won summary judgment in a Structural Work Act claim arising out of the remodeling of Sprint Centel's corporate offices in Illinois. Following the spin-off of 360E Communications from Sprint, Mr. Puiszis was asked to redraft the indemnification provisions of 360E's communication tower construction and maintenance agreements, an assignment that involved a review of the relevant law in 36 states where 360E's towers were located or planned.

Professional Background

Mr. Puiszis joined Hinshaw in January 1984. He began his legal career in the Cook County State's Attorney's Office where he served in the Special Prosecution and General Criminal Divisions. He is a member of the firm's business litigation practice group and electronic discovery committee. He also formerly served as the head of the firm's school law group, and editor of Hinshaw's Report Card, a quarterly publication dealing with school law issues.

Besides serving as the immediate Past President of the Illinois Association of Defense Counsel (IDC), Mr. Puiszis is a member of the Defense Research Institute (DRI) and serves as Illinois' state representative to DRI. He is also a member of the Society of Trial Lawyers, the Trial Lawyers Club of Chicago and the Association of Defense Trial Attorneys (ADTA). He also serves as the Vice Chair of the ABA's Governmental Liability Committee in its Tort and Insurance Practice Section.

Illinois Super Lawyers magazine named Mr. Puiszis to the *Super Lawyers* list in 2005 and 2007 in the area of Civil Rights. In 2006 he was included on the *Super Lawyers* list in the area of Constitutional Law, and in 2009 in the area of Civil Rights/First Amendment Law. In addition, he holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability. He has also been recognized by his peers as a Leading Lawyer in the categories of governmental law, municipal law, lobbying & administrative law and personal injury defense law.

In the Fall of 2005, Mr. Puiszis completed intensive training in mediation from the faculty of Pepperdine University School of Law's top-ranked Straus Institute for Dispute Resolution, and is a Certified Mediator in the Cook County Court-Annexed Major Case Civil Mediation Program.

Publications and Presentations

Mr. Puiszis established Hinshaw's "Practical Ediscovery" blog and serves as its Editor-in-Chief.

He is the author of "Illinois Municipal Tort Liability," now in its second edition, published by Lexis Publishing (formerly Mathew Bender) with yearly cumulative supplements through 2008. The book is unique in that it is strictly devoted to liability issues facing units of government and public officials in state and federal court.

Mr. Puiszis has also written a number of articles and papers on litigation-related and other topics, including:

- "Schools and Social Media: First Amendment Issues Arising from Student Use of Social Media," co-author, *Intellectual Property & Technology Law Journal*, Aspen Publishers, April 2009.
- "Navigating the Quagmire of E-Discovery in Electronic Health Record (EHR) Systems," paper, American Health Lawyers Association 2008 Annual Meeting & In-House Counsel Program, San Francisco, California, July 2008.
- "A Civil Justice System That is Out of Balance," President's Message, *IDC Quarterly*, Vol. 17, No. 2, 2d. Qtr. 2007; and *Chicago Daily Law Bulletin*, Law Day, 2007.
- "What Do the E-Discovery Amendments to the Federal Rules of Civil Procedure and the Rock Musical Hair Have In Common?" *IDC Quarterly*, Volume 17, Number 1, 1st Qtr. 2007.
- "Are Your Information and Record Keeping Systems Ready for the New Federal Rules on Electronic Discovery?" Illinois Association of School Boards *Newsbulletin*, February 2007.

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- "Take Time to Learn About Judicial Elections," *Daily Southtown*, November 6, 2006.
- "Developing Trends With The Class Action Fairness Act of 2005," *The John Marshall Law Review*, Fall 2006, Vol. 40 No. 1.
- "What Makes a Lawyer Great?" President's Message, *IDC Quarterly*, Summer, 2006.
- "The Class Action Fairness Act of 2005 – Navigating Through its Sea of Uncertainty, Part II," *For the Defense*, Vol. 47, No. 11, Defense Research Institute, November 2005.
- "The Class Action Fairness Act of 2005 – Navigating Through its Sea of Uncertainty, Part I," *For the Defense*, Vol. 47, No. 10, Defense Research Institute, October 2005.
- "*Fabiano vs. City of Palos Hills*. A Modern Day Merchant of Venice," *IDC Quarterly*, Vol. 13, No. 1, 1st Qtr. 2003.
- "Tort Immunity for Discretionary Policy Determinations," Feature Article, *IDC Quarterly*, Vol. 11, No. 20, 2nd Qtr. 2001.
- "No Representation Without Indemnification Under the Public Defender Immunity Act," *IDC Quarterly*, Vol. 11, No. 2, 2nd Qtr. 2001.
- "Title IX Damages Liability Extended to Students on Student Harassment," *DCBA Brief*, Vol. 12, No. 2, October 1999.
- "Does the Local Governmental Tort Immunity Act Stand in Derogation of the Common Law?" (co-author with W. Morgan), *IDC Quarterly*, Vol. 8, No. 3, 3rd Qtr. 1998.
- "Now You See It, Now You Don't - How the Immunity for 'Executing or Enforcing the Law' Magically Disappeared," *IDC Quarterly*, Vol. 7, No. 5, 1st Qtr. 1998.
- "Update on Peremptory Challenges: *J.E.B. v. Alabama ex rel, T.B.*, Significant Case Comment," *IDC Quarterly*, Vol. 5, No. 1, 1st Qtr. 1995.
- "*Honda Motor Co. v. Oberg*: Punitive Damages Update, Significant Case Comment," *IDC Quarterly*, Vol. 4, No. 3, 3rd Qtr. 1994.
- "Constitutional Arguments Against the Imposition of Punitive Damages in Illinois," Monograph Article, *IDC Quarterly*, Vol. 3, No. 3, 3rd Qtr. 1993.
- "Will the Peremptory Challenge Survive its Battle with the Equal Protection Clause?" *The John Marshall Law Review*, Vol. 25, No. 1, Fall 1991.

Mr. Puiszis is also a frequent speaker on litigation-related topics, including "The E-Discovery Amendments to the Federal Rules of Civil Procedure – That Light You See is Not the End of the Tunnel," a presentation that qualified for two hours of Continuing Legal Education credit. He has delivered this presentation to all of Hinshaw's attorneys as well as to various clients since 2007, including Markel Corp., Walsh Construction Co., The Illinois Attorney General's Office, the civil divisions of the Cook and

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DuPage County States Attorneys Offices, the long-term care group at American Health Lawyers Association 2007 annual conference in Chicago, the legal departments of the Chicago Park District, METRA and to members of the legal and information technology departments of TTX Company.

His other presentations include:

- "Risk Management and Ethics Involving E-Discovery," Fireman's Fund Insurance Company, Chicago, Illinois, March 2009.
- "Blog Now, Pay Later – Legal Issues Concerning Social Networking Sites," Illinois Association of School Boards, Annual Conference, Chicago, Illinois, November 2008.
- "The Trial Attorney and Class Action Litigation in America," Union League Club of Chicago's Public Affairs Committee and the Illinois Channel videotaped forum, Chicago, Illinois, November 2008.
- "Benefits & Pitfalls of Electronic Medical Records and Communications Technologies," Illinois Risk Management Services 24th Annual Risk Managers Meeting, Springfield, Illinois, September 2008.
- "What Do Healthcare Lawyers Need to Know about E-Discovery?" American Health Lawyers Association's 2008 Annual Meeting & In-House Counsel Program, San Francisco, California, July 2008.
- "Training New Board Members," Defense Research Institute North Central Regional Meeting, Savannah, Georgia, January 2008.
- "Preserving and Producing Electronic Evidence," Illinois Council of School Attorneys' 21st Annual Seminar on School Law," Chicago, Illinois, November 2007.
- "Are Your Information and Record-Keeping Systems Ready for the New Rules on E-Discovery?" Hinshaw's 2007 Health Care Conference: Current Issues Affecting the Governance and Management of Hospitals and Health Systems, Oakbrook, Illinois, November 2007.
- "Emerging Issues Confronting Public Employers, Including Section 1983," Hinshaw's "Effectively Dealing with Current Labor & Employment Issues" seminar, Chicago, Illinois, September 2007.
- "Emerging Issues on Electronic Discovery," Federal Civil Practice Committee, Chicago Bar Association, Chicago, Illinois, September 2007.
- "Protecting Students from Sex Offenders and Sexual Misconduct," presentation at the Annual Conference sponsored by the Illinois Association of School Boards, Chicago, Illinois, November 2005.
- "Defense Tactics for a New Era," presentation to the Tort Litigation Section of the Chicago Bar Association, January 2003.

- "Police Liability in Illinois," seminar presentation through Lorman Education Services on Defenses and Immunities to 1983 Claims involving Police Liability for Excessive Force and False Arrest, Rolling Meadows, Illinois, November 2002.
- "Litigation – Liability Issues," presented at an invited attorneys seminar sponsored by the Institute for Local Government Law, Chicago, Illinois, February 2002.
- "Why Mold and Why Now? The Coming of the Spore Wars," presentation at the Annual Conference sponsored by the Illinois Association of School Boards, Chicago, Illinois, November 2001.
- "Tort Immunity and Section 1983 Issues," presentation at the 2000 Winter Conference sponsored by the Illinois State's Attorney's Association, Chicago, Illinois, December 2000.
- "Mediation of Claims and Lawsuits Against Law Enforcement Officers," Presentation at Conclave and Workshop sponsored by the ADR Committee of the Federal District Court and the ADR Consortium and Center for Employment Dispute Resolution at Loyola University of Chicago, September 2000.
- "Hot Topics in School Law in Illinois," seminar presentation through Lorman Education Services, Oak Brook, Illinois, August 1999.
- "The Special Duty Doctrine, Its Current Status and Its Future," presented at an invited attorneys seminar sponsored by the Illinois Municipal League, Chicago, Illinois, September 1997.
- "The 1995 Civil Justice Reform Amendments," paper and lecture presented to over 250 clients at the October 1995 seminar sponsored by Hinshaw & Culbertson LLP in Itasca, Illinois.
- "Has the Illinois Structural Work Act Been Preempted by OSHA?" paper and lecture presented at the Fall 1993 seminar in Galena, Illinois, sponsored by the Illinois Association of Defense Counsel.

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