Handling Your First Section 1983 Pro Bono Case

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So, you have just been appointed to your first Section 1983 pro bono matter. Now what? Once the initial excitement wears off, the feeling of draft and overwhelm may rush in. But fear not. Litigating a Section 1983 case is just like any other case on your docket: you are in the best position to advocate for your client when you take ownership of the litigation. To help you get started, I have put together a roadmap for navigating the essentials.

1. Get your Bearings: Read the Pleadings and Understand the Law

This may sound obvious, but before you do anything, dive into the pleadings. A lot has gone down before the case lands in your lap. Many 1983 cases remain pending for years before counsel is appointed. Most often, you will be appointed after a motion for summary judgment has been denied. Take time to understand the procedural posture and read any opinions. Orient yourself before you do anything else.

Relatedly, you will want to become well-versed in the law on Section 1983 and the accompanying constitutional claims relevant to your case. Most importantly, you want to know the elements of your client's claims, the evidence you will need to prove those claims, and determine the scope of damages available to your client upon a finding of liability. If this is your first Section 1983 case, I recommend creating a case chart outlining the elements and the evidence needed so you can stay on track and feel confident in your approach as you move forward. If you do not know where to start, find a law review article or CLE paper that covers the fundamentals of Section 1983 litigation. The Federal Judicial Center also puts out written material to assist the courts and law clerks on common types of cases. Consult those resources to understand the court's point of view.

Finally, reach out to other attorneys in your area who have handled similar 1983 cases! It is not uncommon for young associates at other firms in Houston to reach out to me and my colleagues at Beck Redden, several of whom have handled or are actively handling 1983 cases. These cases come with a unique set of challenges and seeking guidance and bouncing off ideas with those who have handled similar cases will pay dividends.

2. Meet Your Client

Once you have absorbed the general factual and legal background of the case, it is time to make contact. If you are handling a case involving an inmate, chances are they are being held at a state prison facility. For example, Texas plaintiffs will be housed at a Texas Department of Criminal Justice (TDCJ) facility. Given the logistical hurdles with communicating with your client who may be incarcerated—and your client's obvious lack of access to confidential electronic communication sources—I recommend starting by sending your client a letter. You can find your client's mailing address by finding them on the prison agency's website. Mail the letter the client's unit and be sure to mark it as "Legal Mail." In the letter, introduce yourself and inform the client that the court has just assigned you to their case. Consider attaching the court's order assigning you so your client can trust the information they are receiving.

After the initial letter, follow up with a phone call. To contact your client by phone, you will need to follow unit-specific contact protocols. You'll likely be dealing with a law librarian or a similar officer that is tasked with facilitating attorney-client communication at that unit. To ensure your calls remain confidential, be sure to use the secure attorney-client phone call procedure. If your client moves to another prison unit during the pendency of the litigation, you will be required to repeat the process at the subsequent unit. Though the process for requesting phone calls may seem tedious, you will need to be well-versed in it, especially for gaining client consent on litiga-

tion decisions that do not warrant an in-person discussion with your client. Many units also have an e-mail like system where inmates can receive electronic messages. For example, in Texas the system is referred to as "JPay" and offers a quick way to send a note to your client for a nominal "postage" fee. This method of communication, however, should be reserved for logistical updates and scheduling, but not for confidential attorney-client communications as the communications are not protected.

If your client is housed at a unit near you, go meet your client in person—more than once if possible. There is simply no substitute for face-to-face interaction when it comes to building rapport and understanding your client's needs. I recommend meeting your client at the outset of your representation so you can get the full download of facts, history, evidence, and to discuss case strategy. You should also be prepared to visit your client prior to trial or any deposition to prep them for their testimony. After COVID, several units have begun offering Zoom or video conferencing for attorneys. Check with the unit's warden for availability of this technology.

For contact visits, be aware that some units may require advanced notice or court order to have a "contact visit" with your client. This type of visit allows the attorney and client to meet in person in a private area, without being separated by a physical barrier and with the ability to freely exchange and review documents.

Another thing to keep in mind is any unit-specific rules applicable to visitors. For example, some units do not permit attorneys to bring in any electronics including cell phones or laptops, so you will want to come prepared with physical copies of any necessary case documents and a notepad to take notes.

3. Send Your Client Filings Throughout the Case

Do not assume your client has access to the docket or filings. They probably do not, especially if they are incarcerated. It is, thus, your responsibility to make sure your client is in the loop. Keeping them informed isn't just good practice—it's your ethical duty as an attorney.

Get in the habit of periodically sending your client file-stamped copies of any orders or filings in the case. It will serve you well to have a client who feels that you have kept them abreast of the litigation and involved them in the case strategy. I recommend getting a routine in place with your legal assistant to get filings to your client as they happen.

Relatedly, it is advised to plan ahead when filing something on behalf of your client. You will need to bake in time to set up calls and discuss motions or briefing and may even want to facilitate your client being able to review a draft before filing.

4. Obtain Discovery

Let's be real—discovery in these cases is usually slim to none. At most, you may have initial disclosures filed by the defendant(s) at the outset of the litigation and a smattering of documents. Do not expect much to be handed to you. You will need to go pursue the evidence your client says may/should exist.

Procedurally, if the court has not already granted you leave to conduct discovery, you'll need to request it. Ask the court for a new Discovery Control Order (DCO) that will outline discovery and pretrial deadlines.

Consider setting up a site visit of the unit where the events of your client's case occurred—even if your client is no longer housed at that unit. Your opposing counsel, usually a member of the state's Attorney General's office, may be able to facilitate this process, but you may otherwise need to send a request to prison agency directly. For example, requests in Texas may be sent to the Texas Department of Criminal Justice directly. While there, request that photos of relevant areas be taken and produced in the litigation. Keep in mind that, for security reasons, the prison agency may be the one who takes the actual photos and will have discretion to redact any portions thereof that may constitute security risks.

5. If the Agency Is Not a Party, Send a Subpoena for Documents and other Discovery

If the prison agency is not a defendant, you will have to deal with them directly. Generally, your opposing counsel will likely be an attorney working in the Attorney General's office. Though opposing counsel's *office* may represent TDCJ, *opposing counsel* does not. Thus, do not assume that you can simply obtain documents under the care, custody, and control of agency from an individual defendant who works for the agency. You will need to serve both the agency and the individual defendant with discovery requests to get the information you need. Be sure to follow the Federal Civil Rules of Procedure when serving a subpoena on a governmental agency.

And yes, you can and should take depositions. Often, it is unclear the bounds of litigation in Section 1983 cases. This is because we are typically unaware of what we can and cannot do. Let me tell you: litigate this case as you would any other case. Plan on deposing the defendant to get their side of the story. (Be aware that your client may be deposed as well.) If your budget allows, consider deposing other key witnesses who you may need to call at trial including corporate representatives of the prison agency or wardens of the unit at issue.

Remember that as a litigator, you have a set of transferrable skills in your toolbox to help you navigate this case. You can and should use what you have learned in your general litigation practice to advocate for your client in this civil rights matter. ☉

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Special thanks to my friend and colleague Cassie Maneen for her thoughtful comments to this article. Cassie and I tried our first case to verdict together in federal court in Galveston, Texas, which happened to be a Section 1983 pro bono matter. While the jury's verdict was not in our client's favor, we were able to give our client his day in court. And now, we pay it forward.