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## Title: § 1983 Action Checklists: Don't Leave Home Without 'em!

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## INTRODUCTION

As presentations and supporting papers go I guarantee that this one will accomplish two things. First, it will give you a few practical tidbits to take back to your practice and second, you will never confuse me for a legal scholar!

I have practiced in municipal law, in particular police and employment matters pursuant to 42 U.S.C. § 1983, for close to twenty years. Whew, that's a long time! What I discovered early on was that there was very little in the way of practical tools to communicate basic information to clients about their role as defendants my role as their attorney, and the monetary exposure that they faced. Remembering that necessity is the mother of invention, I designed a few of my own forms and letters. I did so over the years by cobbling bits and pieces of information from a variety of sources, some published but most not. In short, it was trial by fire, the school of hard knocks. What you'll find in this paper is the by-product of those early day struggles. I hope it helps.

With that said, let me provide a brief explanation of these materials. For years I noticed that clients had the same questions, and lack of understanding, about the litigation that caused me to darken their doorway and that was so deeply focused on their behavior. They were scared, defensive and not all pleased at being named as defendants in a lawsuit seeking money, sometimes from their personal bank accounts. I'm sure many you've faced some of the same issues. Here are some of the more frequently asked, or yelled, questions:

- Why am I being sued?
- What does that @#$%&*! want from me?
- Why does the complaint say individual and official capacity and what the heck does that mean?
- Who are you? (Referring of course to me, the attorney assigned by the risk management pool that their employer participates in.)
- Is insurance (Yikes, the word sends shivers up and down my spine!) going to pay for any judgment or settlement?
- What are punitive damages and why is that low life !@#$%^% asking a jury to give them to him and why isn't your lame insurance (ouch that word again!) company going to pay them?!

Bring back memories?!

I also noticed that as the litigation ensued, often lasting months if not years, those same clients continued to have the same questions, over and over again. Poor memory on their part perhaps, but I also began to question whether I was communicating effectively. In fact, sometimes I wondered whether I had dreamed a conversation with my clients given their complete lack of understanding about a particular issue less than two or three months after having explained it to them in a three or four hour meeting. It was

frustrating to say the very least and from that frustration was born the idea of telling my clients, in no uncertain terms and on regular basis, exactly what the plaintiff was after and what my role, and the risk management company's role, would be in the litigation. As with any good idea, it took time to develop. Over a period of years, I created checklists to make sure I said and did the same thing every time I met with a new client or prepared one for deposition. As new questions and issues arose, I tweaked the various lists to ensure that I was meeting my clients' needs and not committing malpractice!

What follows is the fruit of that labor, although in abbreviated form in order to comply with IMLA's page limit requirements for reproduction at this seminar. By clicking on the following link you will have access to this paper and the full forms and papers referenced herein. http://publications.arml.org/publications/index.html All of my checklists and "client handouts" are available for your review and use in PDF format.

The first things you'll find are a few of the American Bar Association model rules that deal with client communications and preparing clients for giving testimony. Please pay particular attention to them. Unfortunately, or fortunately depending upon how you want to look at it, there is very little "academic" help out there on these issues. There's also very little in the way of case law. So it seems that when it comes to determining what's appropriate attorney behavior, particularly for preparing a client to provide testimony, we are somewhat on our own. Thus, the model rules provide a good starting point.

After the model rules, you will find an initial client interview checklist. This covers everything from introducing yourself to explaining insurance/risk management coverage, potential or actual conflicts, etc. It's designed to give the client a level of comfort in the relationship with their new attorney and to educate them about the judicial system generally and litigation in particular.

Next are my thirty rules for giving testimony, particularly during depositions. Too many you say?! You're probably right but I just don't have the heart to cut them back. Likely you've seen them all before in various articles and presentations. All I've done is put them in one list. Again, more detailed versions are available by going to the link noted above.

Last, but certainly not least, is an outline for taking a plaintiff's deposition in a police or employment case brought under 42 U.S.C. § 1983 or similar state civil rights statute. Again, no particular magic here but it's a good starting point, with a collection of all your old favorites including inquiries on felony convictions and arrests, jobs in the past decade, medical releases, etc.

With all that said, I hope these check lists and ideas are of some help in you day to day practice. Good luck to you and your local government clients!

## AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

### Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

*Comments:*

- In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly-admitted lawyer can be as competent as a practitioner with long experience.
- A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject

### Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

*Comments:*

- Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.
- Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

**Rule 3.4: Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

*Comments*:

- Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

**Rule 5.3: Responsibilities Regarding Non-lawyer Assistant**

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Comments:*

- A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.
- Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct.

## MRPC 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

## INITIAL CLIENT MEETING AND INTERVIEW

CASE STYLE:_____

_____

ANSWER DUE:_____

## CLIENTS

**Client No. 1 Name:**_____

Adress:_____

City, State, Zip:_____

Work Phone:_____ Home Phone:_____ Cell Phone_____

Email Adress:_____Fax_____

Date of Service:_____

Capacity: Individual Official Both

## OTHER DEFENDENDANTS

**First Separate Defendant's Name:**_____

Adress:_____

City, State, Zip:_____

Work Phone:_____ Home Phone:_____ Cell Phone_____

Email Adress:_____Fax_____

Attorney:_____

Capacity: Individual Official Both

## ATTORNEY INFORMATION

**Separate Defendant's Attorney:** _____

Firm Name: _____

Address: _____

City, State, Zip: _____

Work Phone: _____ Home Phone: _____ Cell Phone: _____

Email Address: _____Fax: _____

**Plaintiff's Attorney: _____**

Firm Name: _____

Address: _____

City, State, Zip: _____

Work Phone: _____ Home Phone: _____ Cell Phone: _____

Email Address: _____Fax: _____

## INITIAL CLIENT MEETING OUTLINE

### I. RETAINED ATTORNEY

**a. Retained by Municipal Legal Defense Program (MLDP)**

**b. Office located at Arkansas Municipal League building**

**c. Business card**

1.) Phone collect

2.) Phone at anytime

3.) Your spouse may call at any time

**d. Attorney-Client Relationship**

1.) Attorney-client privilege

2.) You may hire a different attorney at your own expense

3.) My educational background

4.) My experience

5.) My references are available

### II. MUNICIPAL LEGAL DEFENSE PROGRAM

**a. Copies of program**

**b. Terms of program**

1.) Compensatory damages

2.) Punitive damages

3.) Police

4.) Employment

- Discharge
- Promotion
- Work environment
- Other

5.) Land use

6.) Illegal exaction

7.) ADEA

8.) Title VIII

9.) ADA

10.) FMLA

11.) FLSA

12.) Negligent v. Intentional Torts

**c. Attorneys for all parties**

1.) City Attorney

2.) Individual defendants

3.) Plaintiff / _____

**d. Program's reservation of right to settle per authority of administrator**

1.) Contractual alternative: remove coverage but continue defense

2.) Can demand settlement

**e. Retained counsel's responsibility per MLDP:**

1.) Monthly procedural status updates and case classification to MLDP administrator**.**

2.) In conjunction with subsection (d) above, reports on potential liability and settlement (requests for settlement monies are made whether receiving client authority or qualified by receiving client authority.)

**f. Coverage letter**

1.) Review the coverage

2.) PD's

3.) Costs of defense

- Depositions
- Expert witnesses
- Other

## III. CORRESPONDENCE

a. Reiterate attorney-client relationship

b. All letters refer to confidential communications

c. Arkansas Freedom of Information Act and its consequences

d. Client responses to my correspondence

e. If I write you READ!

## IV. GENERAL LEGAL INFORMATION AND POTENTIAL CONFLICTS

a. Review complaint

b. 42 U.S.C. 1983

c. State torts

1.) Negligent

2.) Intentional

**d. Actual conflicts**

1.) Individual Defendant v. Individual Defendant

2.) Individual Defendant v. City Defendant (or non-defendant, or individual policy maker)

3.) Any combination thereof

4.) Separate attorneys will be required

## V. ATTORNEY/CLIENT EXPECTATIONS AND REQUIREMENTS

a. Immediate and definitive response to all communication

b. Complete truthfulness from initial interview forward

c. Continual updates of relevant information

**d.** Previous litigation

## VI. DOCUMENTS: POLICE CASES

a. Public police reports, including but not limited to A.D.R., ticket, incident reports, letters, and statements

b. Internal Affairs file, including but not limited to all statements, additional reports, disciplinary analysis, and final disposition correspondence (complete copy of file).

c. Investigative file, including but not limited to statements, incident reports, letters, and final disposition

d. Personal personnel file

1.) Training

2.) Disciplinary action

3.) Hiring

e. Certified copies of final disposition of criminal charges

f. Police department rules and regulations

**g.** Civil Service Commission rules and regulations

## VII. DOCUMENTS: EMPLOYMENT CASES

a. Plaintiff's personnel file- from all sources

b. Other employee personnel files- from all sources

c. Employee handbooks or manuals

d. Ordinances or resolutions stating employee practices or rules

e. At will employment statements (just cause, contracts for time)

f. Memoranda or writings including positions relevant to claims

g. Civil Service Commission rules and regulations

h. Collective bargaining agreements

i. Consent decrees

j. Other court orders relevant to claims

## DEPOSITION PREPARATION

1. Tell the TRUTH.
2. Do not ingest intoxicants before you testify.
3. Do not smoke or chew gum during your deposition.
4. Analyze documents thoroughly before answering questions about them.
5. Ask your attorney what materials you need to review prior to deposition.
6. Review the materials that you asked your attorney about and do it before the deposition.
7. Make sure you understand the question before answering.
8. Think through your answer before speaking.
9. Don't accept opposing counsel's statements of fact or anything else for that matter.
10. Don't play lawyer.
11. Focus on the question.
12. Do not hesitate to answer "I don't know" or "I can't remember."
13. Do not interpret diagrams, documents, or pictures that you did not prepare or that aren't familiar to you.
14. Do not volunteer information. Answer only the question asked of you.
15. Pay no attention to the tone of voice or attitude of the questioner.
16. Pay attention to what the questioner is asking.
17. Be cooperative.
18. Do not argue.
19. Never lose your temper.
20. Speak clearly.

21. Be patient: your deposition may last longer than you expect.

22. Don't be afraid, but a little nervous is okay.

23. Correct mistakes in your deposition testimony, regardless of when you realize you've made a mistake.

24. Only testify to facts within your own knowledge.

25. You can estimate but never guess.

26. If you are required to make an assumption, qualify your answer accordingly.

27. If the attorney interrupts you during your answer, politely ask permission to finish your answer.

28. Do not let the questioner restrict your explanation of your answer.

29. Be consistent. Repeat: be consistent.

30. If you become tired or sick, say so and request a recess.

***See Rule Number One: Tell the <u>Truth</u>!***

## GENERAL OUTLINE FOR PLAINTIFF'S DEPOSITION

**I. INTRODUCTORY MATERIAL**

a. Introduction of attorneys and parties
b. General purpose of deposition
    i. Understanding an personal knowledge that can be given at trial
    ii. Verbal responses are required
c. Witness should make sure they understand the question
    i. Request clarification if needed
d. Assume if a question is answered, that the question was understood
    i. Can we have that agreement?
e. Assume that what will be said at deposition is what will be said at trial
    i. Can we have that agreement?
f. State full name
    i. Aliases
g. Under medication or drugs that will affect testimony
h. Signed medical release
i. Signed worker release
j. Other: _____

**II. GENERAL INFORMATION**

a. Address and phone
    i. Home
        1. Own or rent?
        2. Chronological listing of residences
    ii. Work
b. Previous depositions
    i. Nature of case
    ii. Who, what, where, when, and how?
c. Sued or been sued
    i. Who, what, where, when, and how?
    ii. Disposition
    iii. Attorney and court
d. Date of birth
e. Social security number
f. Driver's license number
    i. Ever held a driver's license in another state?
g. Marriage/Divorce
    i. Who, what, where, when and how?
    ii. Names
    iii. Chronology
    iv. Reason for divorce
    v. Address
h. Children
    i. Who, what, when, where, and how?
    ii. Mother

iii. Number
iv. Name
v. Address

i. Education
    i. Chronology
    ii. High school
    iii. Vo-Tech
    iv. College
    v. Post-college
    vi. Continuing education, trade schools, etc.

j. Employment
    i. Who, what, where, when, and how?
    ii. Chronology
    iii. Supervisor
    iv. Responsibilities
    v. Rate of pay
    vi. Benefits
    vii. Reason for departure

k. Alcohol/Drug abuse, mental health
    i. Who, what, where, when, and how?
    ii. Chronology
    iii. Doctors/counselors/others
    iv. Address
    v. Location
    vi. Treatment
    vii. Prognosis
    viii. Diagnosis
    ix. Personal description of problem

l. Alcohol
    i. Who, what, where, when, and how?
    ii. Average per day
    iii. Average per week
    iv. Average per month
    v. Last time intoxicated
    vi. First time intoxicated
    vii. Blackouts/memory loss
    viii. Last consumed
    ix. Incident consumption

m. Drug use (prescription or otherwise)
    i. Who, what, where, when, and how?
    ii. Average per day
    iii. Average per week
    iv. Average per month
    v. Last time intoxicated
    vi. First time intoxicated
    vii. Blackouts/memory loss

viii. Last consumed
ix. Incident consumption

n. Arrest
    i. Who, what, where, when, and how?
    ii. Misdemeanor
    iii. Felony
    iv. Attorney and court
    v. Charges
    vi. Disposition

o. Convictions
    i. Who, what, where, when, and how?
    ii. Misdemeanors
    iii. Felony
    iv. Department of corrections
        1. State
        2. Identification number
        3. Facility
    v. Charges
    vi. Disposition

p. Familial relationships
    i. Describe marriage/family
    ii. Separated
    iii. Problems
    iv. Counseling
    v. State agency involvement

q. Domestic abuse
    i. Who, what, where, when, and how?
    ii. Government agency
    iii. Nature of Complaint
    iv. Outcome

r. Physical altercations
    i. Who, what, where, when, and how?

s. Military
    i. Chronology
    ii. Rank in/out
    iii. Charges
        1. nature
        2. disposition
    iv. Type of discharge
    v. Why enlisted
        1. legal problems
        2. financial problems

t. Jail time
    i. Number of times in jail
    ii. Identification of jails

iii. Reason for jailing (cross check against felonies and misdemeanors listed above).

u. City of _____
   i. Personal knowledge of
      1. City policies
      2. policy maker
      3. management
      4. training
      5. supervision
      6. internal affairs
      7. policies and customs
      8. form of government
   ii. Incidents or personal involvement
      1. who, what, where, when and how?
      2. outcome
      3. satisfied or not
   iii. Incident where family or friends are involved
      1. who, what, where, when, and how?
      2. outcome
      3. satisfied or not

## III. INCIDENT(S) LEADING TO LITIGATION

a. Date of incident(s)
b. Plaintiff(s)' version
   i. Who, what, when, where, and how?
c. Witnesses
d. Video or audio
e. Statements given
f. Exhibits

## IV. REVIEW OF ALL CLAIMS IN COMPLAINT

a. What facts support
b. Who, what, when, where, and how?

## V. DAMAGES

a. Review prayer complaint
b. Request Plaintiff to justify numbers
c. Documentary proof of damages
d. Non-documentary proof of damages
e. Medical bills
   i. Who, what, where, when, and how?
   ii. Doctor
   iii. Prognosis
   iv. Diagnosis
   v. Medical certainty
f. Wages

i. Who, what, when, where, and how?
ii. Mitigation
    1. Applications filed
    2. Jobs applied for
    3. Current employment

g. Other