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Section 1983: Pre-Answer Considerations in Section 1983 Litigation

by Practical Law Government Practice

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A Checklist that covers considerations for municipal counsel preparing the municipality's initial response after being served with a Section 1983 action.

This Checklist discusses the preliminary steps that municipal counsel should generally take on receipt of a Section 1983 case. Counsel should consider these issues before submitting a response to the complaint. These tasks may take anywhere from a few hours to a few months to resolve depending on:

- The municipality's particular size and structure.
- The legal and practical relationship between municipal counsel and municipal employees.
- Municipal counsel's resources and internal practices.

Learn About the Parties

Research the Plaintiff

- On receipt of the complaint immediately identify the plaintiff and their pedigree information. Counsel should also determine if:
  - the plaintiff is an individual; or
  - a group. If a group, determine whether the individuals are related, members of the same organization, or simply all present at the same incident.
- In a case involving a death, consider:
  - If the plaintiff is suing in a representative capacity, the relationship to the decedent and if the plaintiff is the proper party to bring a representative action; and
  - if the plaintiff is bringing any direct claims under Section 1983, whether these claims are permissible based on the plaintiff's familial relationship to the deceased in that jurisdiction.
- Look into whether it may be appropriate to move to dismiss on either of these grounds immediately.

Research the Municipal Defendants

- Verify whether all the individual defendants were employed by the municipality and in what capacity, at the time of the incident alleged in the complaint.
- Review the complaint to determine whether:
  - the individual defendants are being sued in their individual or official capacity (individuals being sued in their official capacity may be interpreted as a claim against the municipality and should be treated as such);
  - the municipality is named as a defendant and whether the plaintiff has alleged any *Monell* claims;
  - any agencies or subdivisions of the municipality are named as a defendant (such as the police department, department of children's protective services, and so on). Determine if these agencies are distinct legal entities or are they simply considered political or administrative subdivisions of the municipality; or
  - the state or any state employees are named as defendants.

Research Opposing Counsel

If unfamiliar with opposing counsel:

- Review the plaintiff's attorney's professional credentials and practice area with local bar association and other lawyer databases.
- Review the plaintiff's firm's professional website.
- Run a Westlaw search for the plaintiff's counsel and Section 1983 and look for their involvement in reported cases to determine their experience in this Section 1983 litigation.

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- Run a Westlaw search for the plaintiff's counsel (regardless of the type of case) and the assigned judge and magistrate to determine counsel's history appearing before the assigned judge (there is no need to do deep research into these cases and decisions at this time, unless a pre-answer motion is considered).

Research the Assigned Judge and Magistrate

- Pull the assigned judge and magistrate (if assigned) courtroom rules, which are generally available on the court's website.
- Determine if assigned judge and magistrate have specific rules regarding:
  - conferencing with the court and scheduling orders;
  - communication with the court, such as no phones to chambers, all applications by letter motion except dispositive motions, and so on;
  - automatic extension of certain other statutory deadlines, for example the answer; and
  - special procedures for Section 1983 cases, such as the plaintiff must provide releases of certain categories of information pre-answer like criminal and medical records.
- Run a Westlaw search for the assigned district judge on Section 1983 to see:
  - how many previous Section 1983 cases the judge has handled; and
  - any relevant prior Section 1983 rulings.
- Run other searches to see how the assigned judge has ruled in past cases on other relevant legal issues like:
  - bifurcation of discovery between individual and institutional defendants;
  - bifurcation of liability and damages discovery; and
  - potential discovery concerns, such as disclosure of police personnel and disciplinary records and the admissibility of the plaintiff's criminal history.

Take Note of Immediate Deadlines

- Pull the court's docket sheet.
- Calendar all relevant deadlines, such as:
  - answer or 12(b)(6) motion;
  - FRCP 26(f) conference;
  - standing discovery orders (either district wide or judge specific);
  - any contractual or statutory deadlines regarding informing individual defendants about municipality's determination to provide representation; and
  - Rule 26 disclosures.
- Review local rules and the assigned judge's rules to see if there are any standing orders generally in civil litigation or specific to Section 1983 actions. These may be automatic extensions of time to respond to the complaint or requirements to produce certain categories of documents.
- Consider making a request on behalf of defendants (particularly the municipality) for additional time to answer or otherwise respond to the complaint (beyond the statutory 20 days). This request can be based on various factors including:
  - counsel's need to investigate the claims of the case and locate relevant documents; and
  - if appropriate, to determine if a conflict of interest exists that may preclude municipal counsel from providing representation to the individual defendants (refer to contract, statutory provisions, and so on) and allow the defendant to secure new counsel, if needed.

Research Law of Alleged Causes of Action

- Identify causes of action.
- Conduct initial legal research on any unfamiliar claims.
- Determine if there are any changes in the law that may affect the case. The most common causes of action in a Section 1983 case are:
  - unreasonable or excessive force claims under the Fourth Amendment;
  - claims of false arrest, improper detention and impermissible searches under the Fourth Amendment;
  - malicious prosecution under the Fourth Amendment;
  - wrongful conviction under the Fourth and Fourteenth Amendment;
  - unreasonable or excessive force claims under the Eighth Amendment;
  - conditions of confinement claims under the Eighth Amendment;

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  - denial of procedural due process claims;
  - denial of substantive due process clams;
  - violations of the Equal Protection Clause of the Fourteenth Amendment;
  - First Amendment claims; and
  - uncompensated takings claims under the Fifth Amendment.

Investigate the Plaintiff's Factual Allegations

- Consider issues that may prevent municipal counsel from being fully informed of the facts on receipt of the complaint, such as:
  - the individual defendant is likely the best source of information. However, counsel should not speak to the individual defendant until there is a basic understanding of the facts and the defendant's actions, to avoid any conflict-of-interest issues that may arise between the defense of the municipality and the individual defendant; and
  - the municipalities' own records of the underlying incident (likely the arrest and subsequent criminal records) may be sealed and therefore not accessible even by the municipality itself.
- Obtain the following documents and information, as soon as possible, on receipt of the case to conduct an initial assessment:
  - records of any internal police department, municipal, or civilian investigations of the underlying incident;
  - try to speak directly to the investigators handling any underlying investigation;
  - determine if police officers must give statements to the police department regarding these investigations and, if so, obtain the recordings;
  - publicly available criminal records of the plaintiff;
  - related state court actions, filings, and public record requests;
  - prior unrelated lawsuits involving the plaintiff or individual defendants;
  - news or media coverage of the underlying incident; and
  - social media posts related to the incident by the plaintiff, the defendants, and any known witnesses.
- Seek a release from the plaintiff or court order, as soon as possible, to get all the sealed records (this may include records from the police department, the criminal court, the prosecutor's office, corrections, and parole).
- Become familiar with the records and categories of records typically created during the standard course of doing business in the municipality. For example learn:
  - the records police officers create during an arrest;
  - the records detectives create during an investigation;
  - the records created regarding vouchering evidence to maintain the chain of custody;
  - the records typically in the prosecutor's office file; and
  - the records that are generally found in a criminal court file.
- Learn the official and shorthand names or other identifiers of the specific records used by the municipality and its agencies and employees.
- Understand the municipality's (or the individual agencies within) record keeping practices and their designated custodian of records.
- Create a uniform workflow or process for obtaining documents.

Determine Responsibility for Providing Defense to Municipal Employees

- Make a preliminary evaluation regarding which defendants municipal counsel may be responsible for defending.
- Identify the individual defendants and their relationship to the municipality (employee, supervisor, agency director or leader, elected official, contractor, or private person acting on behalf of the municipality).
- Determine what legal obligation the municipality has, if any, to provide legal representation to each defendant (based on their relationship) and the source for that responsibility, including:
  - statutory mandates;
  - common law;
  - contractual provisions;
  - collective bargaining agreements;

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  - an unofficial practice; or
  - case by case determinations.
- Do not contact the individual defendants immediately, in case there is a conflict-of-interest issue that may later preclude municipal counsel's participation as counsel in this case.
- Determine if there is any action or procedure (such as a formal request for legal representation by the individual defendant) that triggers municipal counsel's legal obligation to provide representation. If so, ensure that the defendant has access to this information or process so that they can make the request. Do not discuss the facts of the case at this time.

Resolve Any Conflict-of-Interest Issues

- Identify and address any potential conflicts of interest before meeting with the individually named defendants. Conflicts in the legal defense of the municipality and the individual defendant in a Section 1983 action can typically arise when:
  - the municipality disciplined the employee for the actions that gave rise to the litigation;
  - the employee knowingly and willfully disobeyed municipal policy; or
  - the employee was subject to criminal sanction for the actions that gave rise to the litigation.
- Understand that violations of department policy, even if it results in discipline, do not necessarily equate to a violation of the law by the individual officer and may not present a conflict of interest between representation of the individual and the municipality.
- If there is a violation of policy, analyze whether counsel can defend the individual defendants' actions, while also defending the municipalities position without conflict.
- If waiver of an existing or potential conflict is possible:
  - determine the extent of the conflict; and
  - identify the potential parties required for consent of the waiver.
- Notify the defendant and explain the conflict. If the defendant agrees to waive the conflict:
  - determine whether all affected parties agree to waive the conflict;
  - secure the informed consent of all affected parties; and
  - if required, obtain a signed conflict waiver.
- Take all other required steps for addressing the conflict, including for example, ensuring that confidentiality and privileges are protected.
- If waiver of an existing conflict is not possible, decline or terminate the potential representation via a letter, typically called a non-engagement letter.
- Continue to look for, be aware, and reevaluate conflict of interest issues throughout the litigation, especially if new facts surface.

Timing of Meeting and Speaking with Individual Defendants

- Meet with and discuss all aspects of the case with the individual defendants, as soon as possible after resolving any conflict-of-interest issue.
- Advise the defendant that should a conflict arise during the course of the litigation the municipal counsel may revisit the issue of representation.
- Obtain all copies of relevant documents in the defendants' direct possession.
- Review allegations in the complaint and potential responses.

Evaluate Potential Pre-Answer Dispositive Motion or Answer

- Determine whether it is strategically better to answer or move to dismiss.
- Consider if:
  - there is sufficient time to move;
  - there is sufficient information to move;
  - the motion disposes of the case entirely;
  - any defendants are dismissed from the action completely:
  - the motion does not dispose of the entire case or remove any defendants from the action, is it a proper use of time and resources.

Possible Grounds for Motion to Dismiss

- Assess whether there are good faith arguments for a motion to dismiss or is it simply a pro-forma, first strike litigation tactic.

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- Consider a motion to dismiss based on qualified immunity:
  - in most instances municipal counsel should raise qualified immunity defenses at the earliest possible convenience, as the defense should act as a shield to protect against litigation as opposed to a sword; and
  - consider that certain judges require that a motion to dismiss based on qualified immunity be made pre-answer, otherwise leave to move must be granted by the court.
- When contemplating a qualified immunity 12(b)(6) motion, think about:
  - whether qualified immunity disposes of the entire case;
  - does qualified immunity address any specific claims against all defendants;
  - what the motion for qualified immunity was based on; and
  - are there enough fact alleged in the complaint to argue a viable qualified immunity motion (an experienced plaintiff's attorney knows how to plead a complaint to allege just enough facts to survive a 12(b)(6) for failure to state a claim but not enough make out a QI defense).
- Think about other common arguments in pre-answer motions, including that the judge should dismiss the claims:
  - against the municipal defendant for failure to state a claim on which relief can be granted under *Monell*. While a heightened pleading standard is not required, many courts have held that simply pleading that a municipality has a policy, practice, and custom in violation of the Constitution is not sufficient. The plaintiff must actually plead evidence of any policy, practice, and custom; and
  - because they are beyond the statute of limitations. In most instances the statute of limitations for Section 1983 are the same as the corollary state law claim, which varies among jurisdictions. Ensure the plaintiff has complied with the applicable state of limitations. Often plaintiffs name John Does and, depending on when the case was filed, the plaintiff may no longer have sufficient time to amend the complaint to name individual defendants. So even though the case was timely filed, the plaintiff cannot name any individual defendants and the court may dismiss the case in its entirety.

Consider Possible Affirmative Defenses in an Answer

- Consider the viability of certain Section 1983 specific affirmative defenses (in addition to any standard affirmative and non-affirmative defenses available to the defendant) in an answer to the complaint, including that:
  - the defendant has not violated any established right under the Constitution or laws of the US or any political subdivision or any act of Congress providing for the protection of civil rights;
  - the plaintiff's injuries resulted from their own culpable or negligent conduct in resisting arrest;
  - the municipal defendant and its employees acted in the lawful exercise of their discretion, and as a result the defendant municipality is entitled to governmental immunity,
  - there was probable cause for arrest, detention, and prosecution;
  - there was reasonable suspicion or probable cause or both for any searches; and
  - the individual defendants have not violated any clearly established constitutional or statutory rights that a reasonable person is likely to have known and therefore they are entitled to qualified immunity.

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