

THE PRESIDENT'S PERSONAL INJURY

TRIAL ATTORNEY SEMINAR

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Houston, Texas 77002

BEING A TRIAL ATTORNEY IN OKLAHOMA, TEXAS

AND BEYOND

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I. What is attractive about a 1983 suit?

A. In a civil setting, you are representing someone who has been accused or convicted of a crime – and there are often other unattractive issues about the client – and you are facing a governmental entity. This sounds more like the beginnings of a kick in the teeth than an attractive lawsuit. Most state law remedies are either limited or not available at all due to issues of sovereign immunity. But before you hang up on that client, consider:

- i.** Unlike most state-law based options in these situations, there is no “cap” on 1983 verdicts
- ii.** Successful 1983 verdicts, even when small, carry with them statutorily mandated attorney fees.
- iii.** Civil rights judgments are generally not subject to discharge in bankruptcy.

B. Isn't this what you became an attorney to do – make money helping those who have nowhere else to turn?

II. What do *good* claim facts look like?

A. Express

The Reconstruction Civil Rights Acts, enacted just after the Civil War, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in more limited situations, by private parties acting alone. The most important of these statutes is Section 1983, which creates no substantive rights, but instead creates a vehicle for enforcing existing federal rights. The statute 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.

The courts have taken these claims in a roundabout fashion, making some of the basic issues counterintuitive. For instance:

- i. Section 1983 plaintiffs need **not** exhaust state procedures or remedies.
- ii. The Courts have found that rights that are intended to convey a benefit to the plaintiff are what can be enforced. Rights not intended to benefit the plaintiff can't be enforced. Confused?
- iii. The Eleventh Amendment and qualified immunity can sometimes thwart what you might otherwise believe is – or should be – a very good claim – because there isn't a viable defendant.

B. Substantive

The Fourteenth Amendment prohibits any state from depriving “any person of life, liberty, or property, without due process of law.” Claims under this provision are a staple of Section 1983 practice. Procedural due process addresses the right to notice and hearing before (or after) particular deprivations can take place. Substantive due process concerns governmental deprivations of life, liberty, or property stemming from particularly outrageous governmental actions. The Supreme Court has developed a number of guidelines on the use of Section 1983 to

raise claims founded on alleged deprivations of due process. These analyses are sometimes arduous and usually hang on less-than-obvious facts.

i. Establishing a “Property” Interest

The Supreme Court defines the property interest protected by the Fourteenth Amendment as a “legitimate claim of entitlement” to the item or benefit in question. Such “entitlements” are “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ...”

ii. Establishing a “Liberty” Interest

When a plaintiff was *not* in custody, liberty interests are described as follows:

Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

Board of Regents v. Roth. Fundamental liberty interests, however, are limited to those that are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed,” or that are “deeply rooted in this Nation’s history and tradition.”

III. Which defendants are more attractive?

- A. The 11th amendment bars suits against the State asking for money damages
- B. Private prison facilities, while they still enjoy some protection of the Governmental Tort Claim variety, are usually the best insured defendants. They also usually enjoy the least affection of a jury.

C. County prison facilities usually invoke a suit against the Sherriff, whom we have learned often has little control over his jail, although it is his duty.

D. City governments are also viable defendants

IV. What are the limits regarding defendants?

A. No punitive damages

Governmental defendants *are* immune from a claim of punitive damages. Punitive damages are available in a Section 1983 action *against an individual defendant* on a showing of subjective ill will or malice.

B. The Requirement of a Custom, Policy or Practice

Unlawful actions by governmental employees **cannot** be imputed to the agency, and do not give rise to *agency* liability under Section 1983, because a city, county, or similar governmental agency is only liable for the deprivation of federal rights caused by its own "custom, policy or practice." The government is only liable for actions for which it is directly responsible.

C. No Governmental "*Respondeat Superior*" Liability

The Supreme Court clearly rejected *respondeat superior* liability for government agencies, reasoning that "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation."

V. What do you need to prove?

An unwritten "standard operating procedure" can amount to a "custom, policy or practice", for purposes of a 1983 suit, *if* carried out with the acquiescence of the agency heads. An unwritten custom of racial discrimination can "caused the deprivation of rights at issue by ... acquiescence in a long-standing practice or custom...."

To establish a "policy or practice" in the absence of a formal agency rule or guideline will usually require proof of repeated incidents suggesting a pattern or practice. "[T]he scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful action of a single city employee not authorized to make city policy." However, a single decision made by the "final policy making authority," such as the governing body of an agency or one having the power to finally decide on its behalf, can constitute a "policy" under Section 1983.

D. Liability for Inadequate Training

Often, however, the problem is with not the "policy" of the agency, but that agency employees are ignorant of the policy. In some narrow circumstances, the agency's failure to train its employees to comply with agency policy can lead to liability if, as a result of employee ignorance or inadequate training, a plaintiff is deprived of federal rights.