

LITIGATING CIVIL RIGHTS CASES

PART THREE: DUE PROCESS AND STATE LAW CLAIMS IN STATE OR FEDERAL COURT

WEBINAR – FEBRUARY 3, 2021



Federal Bar Association
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GOVERNMENT LAWYER SECTION

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Litigating Civil Rights Cases

Part Three: Due Process and State Law Claims in State or Federal Court

February 3, 2021

Panelists

- U.S. District Judge Rodolfo Ruiz
- Judge Miguel de la O, Eleventh Judicial Circuit
- John Bajger, Chief Assistant Attorney General, Office of the Attorney General, State of Florida
- Ashley Drumm, Carlton Fields
- Anne Flanigan, Weiss Serota Helfman Cole & Bierman
- Daniel Tilley, Legal Director, American Civil Liberties Union of Florida
- Erica Zaron, Assistant Miami-Dade County Attorney

Agenda

- **12:30** Opening remarks: **Judge Ruiz**
- **12:40** Complaints and overview **Judge de la O/Daniel Tilley**
 - Plaintiffs and overview of types of claims
 - Defendants
 - Relief available
- **12:55** Defending claims against law enforcement and state officials **John Bajger /Anne Flanigan/ Erica Zaron**
 - Sovereign immunity
 - Claims against prosecutors or state judges
 - Considerations when litigating state and federal claims in a case
 - Eliminating frivolous cases and recovering fees & costs
- **1:25** Practical tips for proving a plaintiff's case **Ashley Drumm**
- **1:45** Trials **Judge Ruiz/Judge de la O/Erica Zaron**
 - Federal vs. state court jury trials (including COVID-19 issues)
 - Common evidentiary and witness issues
 - Verdict Forms
- **2:15-2:30** Q&A

Welcome!

Questions During the Webinar?
Please submit questions to the Q&A

Technical Assistance Needed?

Email: tpsarras@carltonfields.com or call 8 1 3 - 2 2 9 - 4 1 1 4

Claims under the Due Process Clause

Daniel Tilley
ACLU of Florida

Due Process Clause - Text

- State Constitution

- Fla. Const., Art. 1 § 9: “No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.”

- Federal Constitution

- 5th Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

- 14th Amendment, Section 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Due Process Clause – Use of State vs. Federal?

- State courts frequently look to decisions concerning the federal DPC to interpret state DPC
 - “While there is no laundry list of specific procedures that must be followed to protect due process guarantees, an analysis of the United States Supreme Court's prior decisions identifies certain procedures that are typically required before an individual can be deprived of a property or liberty interest. In all situations, the Court has required fair procedures and an unbiased decisionmaker. Additionally, the Court has also required notice of the government’s action and an opportunity to respond before termination of the interest.”

J.B. v. Fla. Dep’t of Children & Family Servs., 768 So. 2d 1060, 1064 (Fla. 2000)

- No mention of federal constitution until conclusion: “the trial court deprived the father of the due process of law guaranteed by the Florida and federal constitutions”
- State courts frequently speak of the provisions as co-extensive
 - [T]he due process clause requires that a defendant be put on clear notice of all crimes for which he or she is in jeopardy of being convicted and punished. U.S. Const. amend. XIV, § 1; art. I, § 9, Fla. Const.”

Anderson v. State, 291 So. 3d 531, 535 (Fla. 2020)

Due Process Clause – Elements

- Deprivation?
- of life, liberty, or property?
 - What counts as a “liberty” interest? (examples)
 - Freedom from physical restraint
 - Parental rights
 - Freedom from deportation
 - Free exercise of religion
 - Reputation + tangible detriment? (*Owen v. City of Independence*)
 - Designation as a “sexual predator” (*State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004))
 - What counts as a “property” interest? (examples)
 - Government employment? (*Bishop v. Wood*)
 - Government benefits
 - Economic benefits (*Goldberg v. Kelley*)
 - Driver’s license (*Bell v. Burson*)
 - Continued receipt of public education once begun (*Goss v. Lopez*)
- without due process of law?

Due Process Clause – What is “due process of law”?

- Where does the doctrine come from?  judge-made
 - “That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it ‘due process of law?’ The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law,’ by its mere will.”

Murray’s Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1855)

- Procedural Due Process (PDP)
 - About procedures to be followed
 - Examples
 - Notice
 - Opportunity to be heard
 - Impartial decision
 - “no laundry list”: *J.B. v. Fla. Dep’t of Children & Family Servs.*, 768 So. 2d 1060, 1064 (Fla. 2000)
 - » Check caselaw in the relevant area
 - Violation occurs when the state fails to remedy the procedural deprivation (*McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc))
- Substantive Due Process (SDP)
 - Whether government has adequate reason for depriving you of life, liberty, or property
 - Adequacy of justification will depend on the level of scrutiny used
 - Rational basis
 - Very deferential
 - Strict Scrutiny
 - Very non-deferential
 - Implicated (usually) by “fundamental rights”

Due Process Clause – Fundamental Rights

- Source
 - Due Process Clause
 - whether the government's interference is justified by a sufficient purpose
 - Equal Protection Clause
 - Privileges of Immunities Clause
- “Strict scrutiny” applies (usually but not always)
 - Interference must be necessary to achieve a compelling government purpose
 - Narrowly tailored to achieve that purpose
 - Uses least restrictive means
- Elements reformulated
 - Is there a fundamental right?
 - Was it infringed?
 - Is there a sufficient justification for the infringement?
 - Are the means sufficiently related to the purpose?

Due Process Clause – Examples of Fundamental Rights

- Family autonomy
 - Right to marry (*Zablocki v. Redhail*)
 - Right to custody of one's children (*Santosky v. Kramer*)
 - Right to keep family together (*Moore v. City of East Cleveland*)
 - Right to control upbringing of your children (*Pierce v. Society of Sisters*)
- Reproductive autonomy
 - Right to procreate (*Skinner v. Oklahoma*)
 - Right to purchase and use contraceptives (*Griswold v. Connecticut*)
 - Right to abortion (*Planned Parenthood v. Casey*) – standard?
- Sexual activity (*Lawrence v. Texas*)
- Refusing medical treatment (*Cruzan v. Director, Missouri Dept. of Health*)
- Informational privacy? (*Whalen v. Roe*)
- Interstate travel (*Saenz v. Roe*)
- Voting – standard?
- Access to Courts
 - *E.g.*, filing fees, right to appeal, prisoner access
- Right to bear arms (*D.C. v. Heller*) – standard?

Due Process Clause – interplay between PDP and SDP

- Right of parents to custody of their children

–PDP

- Notice
- Hearing
- Impartial decisionmaker
- Sufficient quantum of evidence

–SDP

- Fundamental right implicated
- Must show terminating custody is necessary to achieve a compelling purpose (*e.g.*, the need to prevent abuse or neglect of the child)

Sovereign immunity-the King can do no wrong

- Extends from English common law
- First recognized in the state of Florida in 1822
- 1868 version of FL Constitution gave the legislature the right to waive it through “general law,” but the state didn’t exercise that power right away; Fla. Const. art. X, § 13
- 1973, Fla. Stat. § 768.28 is enacted, waiving sovereign immunity for tort actions only

CONTRACTS

Through various statutes, the Florida Legislature recognized that the state and its agencies can enter into contracts, which amounts to an implied waiver for express, written contracts, *Pan-Am Tobacco Corp. v. Dep’t of Corrs.*, 471 So. 2d 4, 5 (Fla. 1984)

Also strictly construed, and work performed outside the terms of a contract will be protected by sovereign immunity, *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (1997)

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○ **Waiver in the State of Florida: § 768.28**

Strictly Construed!

Sovereign immunity, not the waiver, is seen as the rule, not the exception, *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268, 1272 (Fla. 5th DCA 2009)

It is an immunity from suit, therefore must be resolved at the earliest opportunity, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)

In accordance with s. 13, Art. X of the State Constitution, **the state**, for itself and for its **agencies or subdivisions**, hereby waives sovereign immunity for **liability for torts**, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for **injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant**, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Monetary limitations

- \$200,000 per person
- \$300,000 per incident or occurrence
- No punitive damages

Discretionary Function

- Regardless of statutory waiver, government remains immune for “discretionary” functions, *Commercial Carrier Corp. v. Indian River Cty.*, 731 So. 2d 1010 (Fla. 1979)
- Is a direct function of the separation of powers found in the Fla. Const. art. II, § 3
- “Judiciary is ill-equipped to interfere in the fundamental processes and legislative branches,” meaning that “there remains a sphere of governmental activity immune from suit.” *Kaisner v. Kolb*, 543 So. 2d 732, 733 (1989)

Trianon Factors

Categories of Governmental Functions

- (I) Legislative, permitting, licensing, and executive officer functions;
- (II) Enforcement of laws and protection of public safety
- (III) Capital improvements and property control operations
- (IV) Providing professional, education, and general services for the health and welfare of the citizens

Categories (I) and (II) always implicate governmental activities

Categories (III) and (IV) must be analyzed individually

Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (1985)

Examples of Discretionary Activities

Planning/Policy-Making:
An exercise of executive or legislative power

Allocation of resources

Which laws to enforce and how

Police deployment tactics

Official Immunity: 768.28(9)(a)

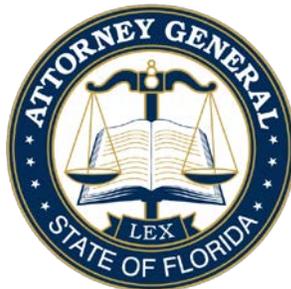
No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

- Immunity from liability and suit, which means the benefit is lost if individual is forced to go to trial
Furtado v. Yun Chung Law, 51 So. 3d 1269, 1277 (Fla. 4th DCA 2011)

- No evidence of bad faith, then trial court can enter judgment for individual as a matter of law, *Furtado*

Immunity Defenses

Suits against Judges, Prosecutors and Public Defenders



John J. Bajger

Chief Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL

Absolute Immunities

Key concepts:

Rationale for immunity:

- Protects judges and prosecutors from unwarranted intrusion in their discretionary functions.

Functional approach:

- Whether immunity applies is determined by the *functions* of the job, not the title or the person.

Absolute immunity vs. qualified immunity:

- If it applies, absolute immunity is all-encompassing.
- Qualified immunity protects public officials from personal liability so long as they do not violate clearly established federal law.



Judicial Immunity

Statement of the rule:

- Judges who are sued under § 1983 are absolutely immune from individual liability for monetary relief for their “**judicial acts**” so long as they do not act in the “**clear absence of all jurisdiction.**” Stump v. Sparkman, 435 U.S. 349, 356-57 (1978).
- They are immune from injunctive relief under the Federal Courts Improvement Act of 1996.



Judicial Immunity

Judicial act:

- The type of functions normally performed by a judge.
- The parties dealt with the judge in her judicial capacity.
- What matters is the nature of the act, not the act itself.
- Administrative decisions are not judicial acts.



Judicial Immunity

Relief covered:

- Monetary damages.
- See 1996 amendments to sections 1983 and 1988:
 - § 1983: injunctive relief may not be granted against a judicial officer “unless a declaratory decree was violated or declaratory relief was unavailable.”
 - § 1988(b): attorney's fees may not be awarded, unless the officer's conduct was in clear excess of the officer's jurisdiction.



Judicial Immunity

The exception:

- *Clear* absence of jurisdiction.
- Subject matter jurisdiction, not personal jurisdiction (Dykes v. Hosemann, 776 F.2d 942 (11th Cir. 1985)).
- Once a court has subject matter jurisdiction, how it's exercised is irrelevant to immunity.



Prosecutorial Immunity

Overview:

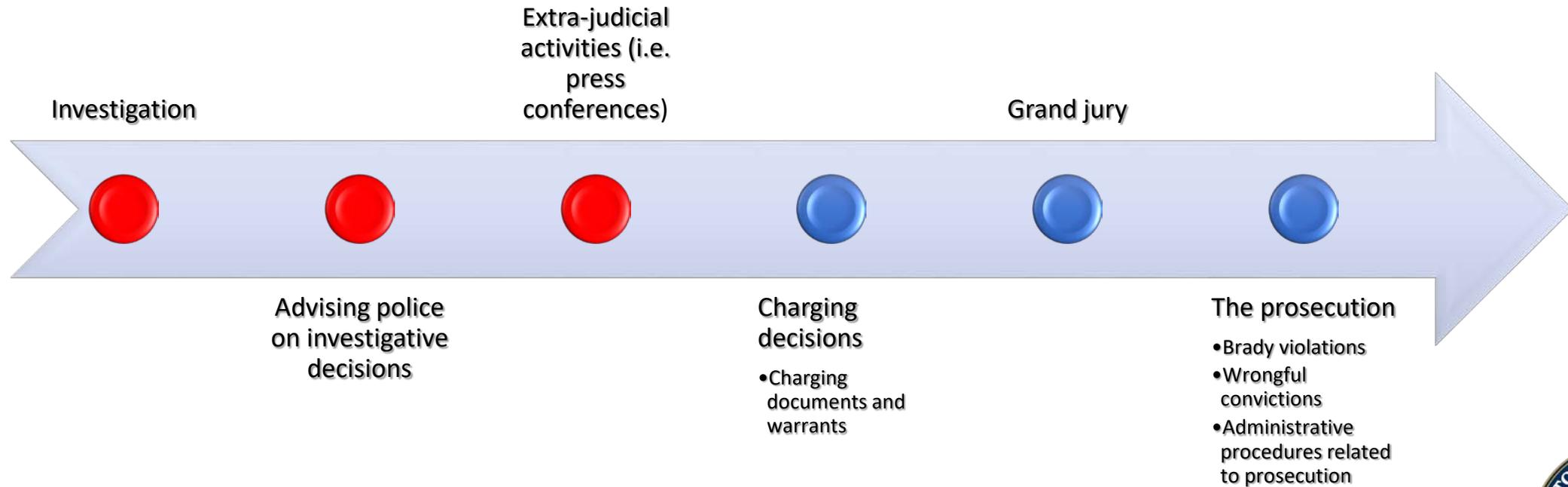
- Doctrine:
 - Prosecutors are absolutely immune from § 1983 monetary liability for “initiating a prosecution and in presenting the State's case” and for all activities “intimately associated with the judicial phase of the criminal process. . . .”
- Rationale:
 - “[C]oncern that harassment by unfounded litigation would cause a deflection of the prosecutors' energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by this public trust.”
- Scope:
 - Applies regardless of whether prosecutor engaged in wrongdoing.

Imbler v. Pachtman, 424 U.S. 409, 423 (1986)



Prosecutorial Immunity

Defining the prosecutorial function:



Public Defenders

Overview:

- No immunity. Polk County v. Dodson, 454 U.S. 312 (1981).
- When acting on behalf of a client, they are not state actors. Id.
- May be considered state actors if conspiracy with other public officials is alleged. Tower v. Glover, 467 U.S. 914 (1984).
- Consider non-merits defenses (Younger, Heck, Res Judicata).



Removal of State Court Actions

- 28 U.S.C. § 1441 – Removal of civil actions where original jurisdiction arises
- 28 U.S.C. § 1442 – Removal where a federal officer or agency is sued
- 28 U.S.C. §§ 1446, 1447 – Procedures for removal
- Federal Rule of Civil Procedure 81
- Remand Considerations

State Court Claims in Federal Court

- Supplemental Jurisdiction, 28 U.S.C. § 1367
 - Discretionary – the district court may decline to exercise supplemental jurisdiction when the supplemental claim(s):
 - Raises a novel or complex issue of state law;
 - Substantially predominates over the jurisdiction-conferring claim; or
 - Other exceptional circumstances.
 - Tolling provisions following remand

Immunity and State Appellate Considerations

- Florida Rule of Appellate Procedure 9.130(a)(3)(F)(i), (ii), (iii)
 - Permits interlocutory appeals of nonfinal orders that deny a motion that asserts entitlement to:
 - (i) absolute or qualified immunity in a civil rights claim arising under federal law;
 - (ii) immunity under section 768.28(9), Fla. Stat.; or
 - (iii) sovereign immunity.
 - See *Fla. Hwy. Patrol v. Jackson*, 288 So.3d 1179 (Fla. 2020) and *In re Amendments to Fla. R. App. P. 9.130*, 289 So.3d 866 (Fla. 2020).

Immunity and Federal Appellate Considerations

- Interlocutory Appeals of Qualified and Absolute Immunity Denials - 28 U.S.C. § 1291
 - At the motion to dismiss stage – *Behrens v. Pelletier*, 116 S. Ct. 834 (1996)
 - At the summary judgment stage – *Mitchell v. Forsyth*, 472 U.S. 511 (1985)
- No Interlocutory Appeals of Florida sovereign immunity – *Parker v. Am. Traffic Solutions, Inc.*, 835 F.3d 1363 (11th Cir. 2016)
- Staying Trial Court Actions, Pending Interlocutory Appeal
 - Bifurcation of Case
 - Judicial Resources
 - Immunity Implications

Other Recent Procedural Considerations

- Changes to the Florida's summary judgment standard, based on *Celotex Corp v. Catrett*, 477 U.S. 317 (1986)
- New rule effective May 1, 2021 – currently undergoing public comment
 - See *In re Amendments to Florida Rule of Civil Procedure 1.510*, No. SC20-1490 (Fla. Dec. 31, 2020) and *Wilsonart LLC, et al. v. Miguel Lopez, et al.*, No. SC19-1336 (Fla. Dec. 31, 2020)

Defense tactics for eliminating frivolous litigation

Florida's PLRA, sanctions for frivolous inmate claims and vexatious litigators



John J. Bajger

Chief Assistant Attorney General

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Florida's PLRA: Purpose

Ch. 96–106, preamble, Laws of Fla:

WHEREAS, frivolous inmate lawsuits congest civil court dockets and delay the administration of justice for all litigants, and

WHEREAS, each year self-represented indigent inmates in Florida's jails and prisons file an ever-increasing number of frivolous lawsuits at public expense against public officers and employees, and

WHEREAS, state and local governments spend millions of dollars each year processing, serving, and defending frivolous lawsuits filed by self-represented indigent inmates, and

WHEREAS, the overwhelming majority of civil lawsuits filed by self-represented indigent inmates are frivolous and malicious actions intended to embarrass or harass public officers and employees, and

WHEREAS, under current law frivolous inmate lawsuits are dismissable by the courts only after considerable expenditure of precious taxpayer and judicial resources....



Florida's PLRA: Overview

Key components of section 57.085:

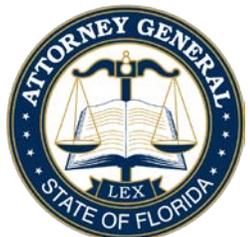
- 57.085(5): applies to “prisoners” found to be indigent.
- 57.085(6): presuit screening.
- 57.085(7): requirement to obtain leave of court.
- 57.085(8): early termination of lawsuits.



Florida's PLRA: Pre-suit Screening

Mandatory pre-suit screening:

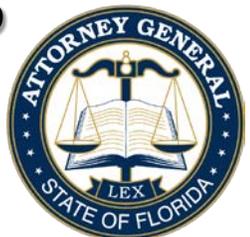
- Failure to state a claim.
- Defendants are immune from suit.
- Mental and emotional damages without physical injury.
- Suit is frivolous, malicious or intended to harass.



Florida's PLRA: Leave of Court Requirement

Obtaining leave of court:

- Prisoner must do so if inmate declared indigent twice in the preceding three years in State or Federal court.
- Prisoner must list all actions in the past five years.
- Note: copy requirement is unconstitutional. Mitchell v. Moore, 786 So. 2d 521, 525 (Fla. 2001).



Florida's PLRA: Early Termination

Dismissal at any time if:

- Claim of indigence is false or misleading.
- Provided false information about another proceeding.
- Failure to pay court costs despite an ability to pay.



Florida's PLRA: Early Termination

Dismissal if action is frivolous or malicious:

- no arguable basis in law or fact;
- claim reasonably appears intended solely to harass a party filed against;
- claim is substantially similar to a previous claim in that it involves the same parties or arises from the same operative facts as a previous claim;
- little likelihood of success on its merits; or
- the allegations of fact in the prisoner's claim are fanciful or not credible.



Statutory Sanctions

§ 944.279:

- Court may determine at any time that action is frivolous or that prisoner submitted false information.
- If so, court may refer prisoner to FDC for disciplinary proceedings.

§ 944.28:

- Prisoner may forfeit gain time if court finds that he brought frivolous action
- Or submitted false information.

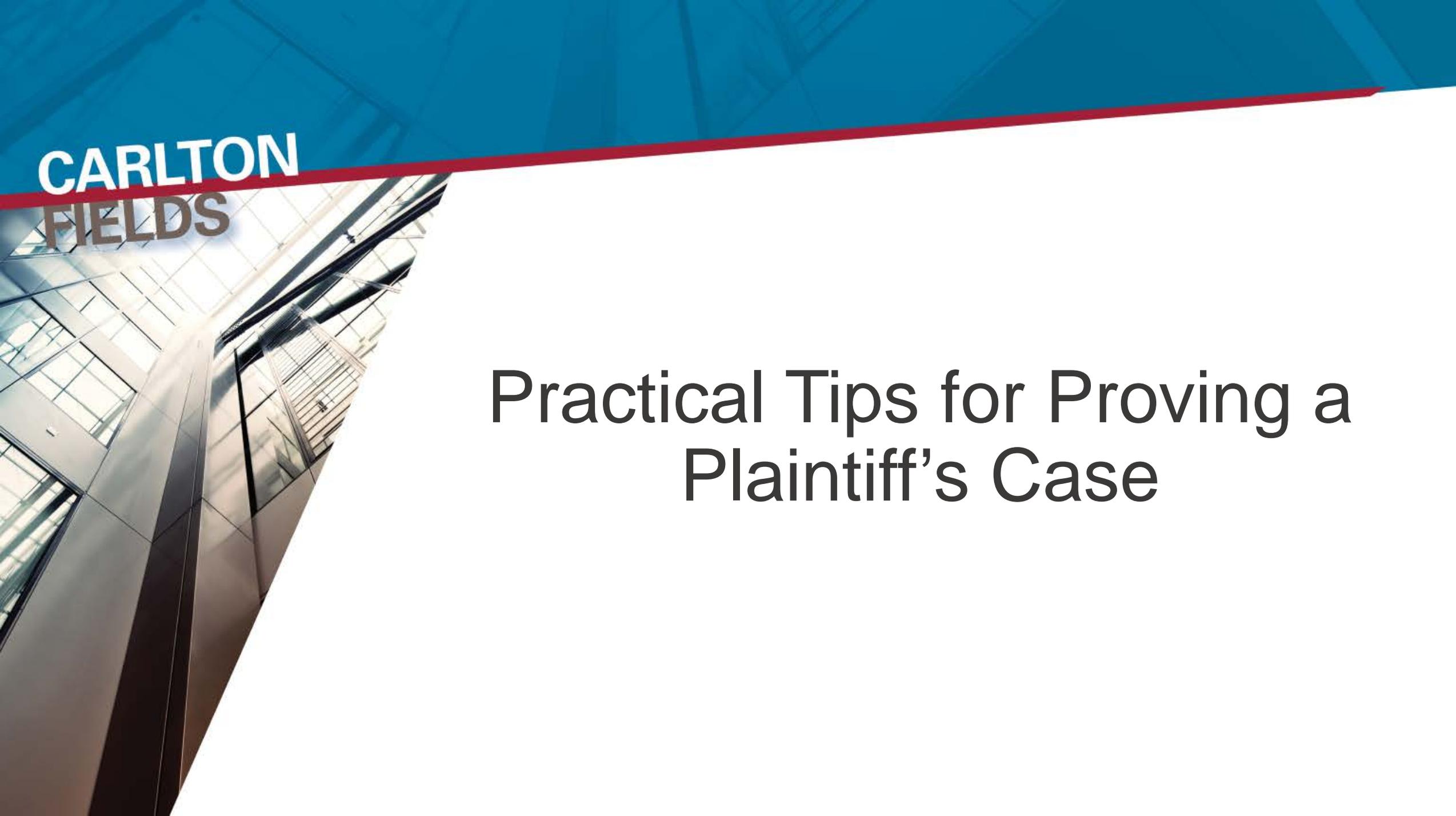


Vexatious Litigants

§ 68.093:

- 5 in 5: applies to pro se litigants who file 5 or more civil actions that are decided against them in the past 5 years.
- Court can require litigant to post security.
- Action is stayed until security posted.
- If not posted, dismissal with prejudice.





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Practical Tips for Proving a Plaintiff's Case

Why take a pro bono case? (And what to do once you take one)

- There is a need.
- It is a service to the Court.
- You may get trial experience.

Before You Commit: Things to Do

- Run conflicts
- Assess time commitment
- Check to see if trial is set

- Bookends

- Opening a matter:

- Engagement Letter

- Scope of representation

- Trial only?

- Trial and appeal?

- Meet client (phone or in person, if safe), understand client goals (Resolve? Try case at all costs?)

- Closing a matter: *Easy to forget in the glow of victory*

- Disengagement Letter

- Motion to Withdraw

- Based on your client's goals for the case, explain types of relief available and any limitations for relief under relevant statutes
 - Prospective relief - primarily an injunction or declaratory judgment
 - Nominal Damages – if no more than minimal physical injury
 - Compensatory Damages – for actual injury
 - Punitive Damages
 - Attorneys' Fees – Determine whether you need to move to amend for attorney fees

- **Burdens of Proof**
 - **Identify early; read applicable jury instructions**
 - **Outline the evidence you have; assess the remaining evidence you need; and make a plan for how you will get it admitted at trial**

Tips to Make a Trial Run More Smoothly

- Trial subpoenas
- Petition for Writ of Habeas Corpus Ad Testificandum
- Motions to bring electronics into the courtroom (If federal court)
- Establish clear line of communication with client's Classification Officer
- Create a J-pay account to email with client
- Inform client to contact you as soon as possible after move to SFRC (or equivalent)
- Schedule in-person meeting at SFRC (or equivalent)
- Consider whether you want client to be in civilian clothing at trial
- Move to limit or conceal client restraints in courtroom

Questions?

