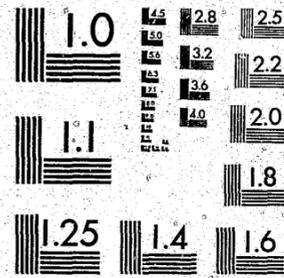


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**Questions and Answers
on Legal Liability Issues
in Probation and Parole**

Handbook for Probation/Parole Officers



QUESTIONS AND ANSWERS ON LEGAL LIABILITY

ISSUES IN PROBATION AND PAROLE

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INTRODUCTION

This handbook provides a general overview of legal liability issues that could potentially confront probation and parole officers. The questions and answers provided here are culled from a larger volume, Potential Liabilities of Probation and Parole Officers, which provides more in-depth discussion as well as case citations where applicable. The volume was prepared with the help of surveys of state attorneys general and legal counsels, and probation/parole administrators and field officers.

It cannot be overemphasized that the information provided here and in the larger volume was prepared for a national audience; individual probation/parole workers must ascertain their state and local laws, regulations, and court decisions to best determine their positions and proper courses of action. To this end, 32 questions are included at the end of this handbook to assist probation/parole officers in obtaining more specific guidance for their jurisdiction.

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GENERAL CONSIDERATIONS

Q Is it true that courts are now accepting and deciding cases involving correctional officers, including those in probation and parole, that they did not accept before?

A Yes. Up until the mid-sixties, the courts had adopted a "hands-off" attitude toward allegations of violations of rights against correctional officers. Since then the courts have switched to a "hands-on" policy, which in turn has brought about a virtual "open door" policy in corrections law. Consequently, there has been a big increase in the number of lawsuits filed for alleged violations of various rights, particularly federal civil rights. This trend includes lawsuits filed against probation/parole officers.

Q Are all probation officers employed by judges and all parole officers under parole boards? If not, what is the general structure of probation/parole agencies?

A There is no single pattern of organization for either probation or parole. For a detailed discussion of the wide variety of organizational patterns, see State and Local Probation and Parole Systems (1978), prepared by the U.S. Department of Justice, Law Enforcement Assistance Administration.

Q I am a probation officer. Is my potential liability similar to that of a parole officer?

A Potential liabilities vary depending on organizational patterns. Probation officers are usually local employees and, in many cases, may be hired or fired by the judge. In these cases, they are considered as executive officers primarily (and therefore enjoy only qualified immunity), although a few courts have extended judicial immunity (absolute immunity) to probation officers when complying with the orders of the judge. Parole officers are almost always executive employees and therefore do not enjoy any type of judicial immunity. Here again, however, some courts have decided that parole board members enjoy absolute

immunity when making judge-like decisions. Parole officers are also usually state employees, but this simply means that although the state itself may not be sued because of sovereign immunity (unless immunity is waived by law or court decision), the parole officer may be sued and held liable in his individual capacity.

COURTS AND BASIC LEGAL CONCEPTS

Q Will cases decided by federal or state courts in other jurisdictions affect me?

A The rule is that a decided case does not have a direct effect on you if you are not from that particular jurisdiction. However, decisions in other jurisdictions sometimes have a persuasive effect in your own courts. Therefore your own courts may decide a similar case in the same way another jurisdiction has, particularly if no prior case involving similar facts has been decided in your jurisdiction. Additionally, decisions in other jurisdictions may establish a trend that your own court may want to follow. For these reasons, you need to know how other courts have decided certain issues.

Q Are decisions of federal courts binding on state courts and vice versa?

A Generally, except for U.S. Supreme Court decisions -- which are binding on all courts throughout the country -- decisions by other federal courts have no binding effect on state courts and vice versa. The only exceptions to this are cases involving a constitutional question where decisions by federal courts do have a persuasive effect on state courts.

Q I am informed that I can be exposed to a number of possible cases arising out of the same act. What cases are filed in federal courts? In state courts?

A It depends on the law being invoked. If the case alleges a violation of federal law, it is normally filed in a federal court. If a state law violation is alleged, it is filed in a state court. Tort cases are usually filed in state courts because they are based on state tort law, whereas civil rights cases are usually

filed in federal courts because of an alleged violation of federal law.

Q I constantly receive administrative rules and regulations from my superiors or board. What is their legal effect on me?

A Rules and regulations issued pursuant to law have the force and effect of law and are binding on you, your agency, and its officers, unless declared illegal or unconstitutional by the courts. The same is true, although to a lesser extent, with agency policies, guidelines, and administrative directives. Failure to follow agency regulations or guidelines may lead to administrative action, or civil liability. Conversely, compliance with agency regulation may well exempt you from civil liability.

Q What constitutional rights are commonly used by plaintiffs in suits against probation/parole officers?

A The usual liability suit alleges violations of one or more of the rights guaranteed in the U.S. Constitution. The rights most commonly used are: freedom of speech, prohibition against unreasonable searches and seizures, right against self-incrimination, right to the assistance of counsel, right against cruel and unusual punishment, rights to due process and equal protection.

PRE-SENTENCE/PRE-PAROLE INVESTIGATIONS AND REPORTS

Q Can I be held liable for the content of my report?

A Yes, if it contains inaccuracies or omissions involving bad faith, malice, or willful neglect.

Q Can I be held liable if I disclose the report to an unauthorized person or if I inadvertently disclose a confidential source or reveal confidential information?

A Yes to both questions. The general rule is that if done in bad faith, there is significant exposure.

When inadvertent, there may be some tort exposure in damages. Be sure you know whether volunteers and other persons you might work with outside your agency are entitled to access to these reports.

Q Can I get into trouble for failing to disclose the report to anyone?

A Yes, if a duty to disclose exists; otherwise there is no liability. You must be aware of who has a right to all or a portion of the report, who has no right to access, and what may or must be kept confidential.

Q If I make a mistake in my report, will it make any difference if my act was intentional or unintentional?

A Yes. Unintentional errors may support a good faith defense if you are sued for a civil rights violation. Intentional errors may establish bad faith.

Q Can I report rumors, uncorroborated information, speculative information, and hearsay in my report?

A Yes, as long as they are labeled as such.

Q Can I include suspected criminal involvements where there has been no prior conviction? How about acquittals, reversed prior convictions, and evidence that has been excluded at the trial or previous trials on constitutional grounds?

A In general, the answer is yes, but state rules vary.

Q Are there any areas of the defendant's personal life that cannot be included in the report?

A No, but irrelevant, prejudicial matters might support the client's claim that you are biased.

Q Am I vouching for the accuracy of the reports of others in a pre-parole report?

A Yes, unless you clearly attribute the information to other sources.

Q Can I be held legally responsible for my recommendations about the suitability of parole or probation for the individual? How about for my recommendations for special conditions of parole or probation?

A In general, no. The key to any decision on these questions is whether your recommendations were made without bias and in good faith. Conversely, if bias or bad faith is involved, you may be held legally responsible.

Q In interviewing a defendant or inmate in the preparation of a pre-sentence or pre-parole report, do I have an obligation to advise him on how to "put his best foot forward" at the sentencing or parole hearing? If so, what are the limits of my assistance?

A Generally, you are not obligated to provide such assistance unless the terms of your employment require it. If you assume such a function, you may be liable for doing it wrong. Under no circumstances should you act in such a manner as to appear to be giving legal advice.

SENTENCING AND PAROLE RELEASE HEARINGS

Q Can a probation officer at a sentencing hearing or a parole officer at a parole hearing be held liable for a recommendation on sentencing/parole or special conditions?

A No, unless the officer's actions were such as to amount to bad faith.

Q Do I have the obligation to advise an offender about the sentencing or parole hearing process? Can I be sued if my advice is in error?

A If the terms of employment create the obligation, you must fulfill it; otherwise, you will be liable for failure to discharge your duty. If you take the

function upon yourself in the absence of an obligation, you may be liable for doing it wrong.

Q Should I explain the sentencing or parole guidelines to the individual before the hearing? What is my exposure?

A Again, if the terms of employment create the obligation, you must do so. If you undertake it without that obligation, you may be liable for doing it wrong.

Q When a person is denied parole, should I as an institutional parole officer advise the individual as to what I believe the board would want him to do to improve his chances next time around?

A If the terms of employment create the obligation, you must fulfill it; otherwise, you will be liable for failure to discharge your duty. If you take the function upon yourself in the absence of an obligation, you may be liable for doing it wrong.

CONDITIONS

Q Am I allowed to add or modify conditions of probation or parole?

A You may "add" only emergency conditions or modifications if the court or parole board has given you the authority. Only the court or board, however, may permanently add or modify conditions.

Q Does it make any difference whether the probationer/parolee agrees with the emergency change in conditions?

A You are best protected if you obtain the client's consent in writing pending a formal request to the court or board for any substantive changes. While the client's agreement is not essential, notice to him of the change is absolutely necessary.

Q In my jurisdiction, I complete a risk/needs assessment for each client and base my level of supervision on this assessment. Might I be liable to the probationer or a third party if a problem arises from my assessment or level of supervision?

A To the client, a good faith issue may arise with too close a supervision. To a third party, too loose supervision may generate liability based upon negligence.

Q Should I try to avoid "blank check" type of conditions from the judge or board?

A Yes, but if you are saddled with them, limit your exposure through a procedure to permit review of your actions by your supervisor.

Q Is it ever permissible to impose a condition that seriously infringes on a fundamental right of the probationer/parolee?

A Yes, but only when such a condition reasonably contributes to his rehabilitation and/or the protection of society.

Q Is a condition that calls on the individual to waive his rights under the fourth amendment valid for frisks, searches of his person, searches of his vehicle, searches of his home?

A There is no firm answer to this question because the law seems to be in a state of flux. General waivers of rights are strictly scrutinized by courts and are becoming disfavored. Do not confuse visitation rights in a home with the authority to search a home, vehicle, or person. You may have a right to visit a home, but not to search it.

Q Can a probationer/parolee exclude me from his home or place of employment?

A Probably not, but there could be liability exposure for lack of good faith on your part.

Q What conditions might validly infringe on the rights of persons other than the probationer/parolee?

A There are such conditions as a limitation on the right to marry without permission or a requirement that would affect his family (e.g., that the client abstain from living in a certain area). You are best protected by having the condition in writing, acknowledged by the client, and by providing a grievance review procedure if the client objects to the enforcement of such a condition.

SUPERVISION

Q Could I be found liable for carrying out the direct order of the judge or board if the condition that I am enforcing turns out to be illegal?

A Probably not, since you can invoke the good faith defense in the case. A possible exception is if the condition is blatantly and obviously illegal.

Q Can I be sued by a victim of a crime who claims that my supervision of the offender was too lax or that I failed to inform third persons of a dangerous situation involving potential harm by my client?

A No special duty is owed to the public at large. If, however, the offender has known or strongly suspected criminal tendencies, those who are likely to be victims and who come into close, regular contact with him because of employment, etc., may have a "special relationship" requiring that they be told of the individual's status as a probationer or parolee.

Q Can a probationer/parolee hold me liable on the ground that my supervision was too tight?

A No, unless your intent was to cause harm to the client (i.e., when your actions constitute bad faith).

Q Do I have a duty of confidentiality to my client?

A No court decision that we are aware of has established such a duty, but neither have there been many challenges on this issue. As of now, the limitations to disclosure are basically ethical, unless such duty is mandated by state confidentiality laws. If your state has a confidentiality law, it must be followed.

Q What are the limits in my frisking a client or searching him, his vehicle, or his home?

A State laws and regulations defining the role of the officer control these situations, and they vary among states. The issue is generally cast in terms of whether the probation officer has more, less, or the same authority as a law enforcement officer. Where probation officers are peace officers, they have at least as much authority as police. Where they are not peace officers, it would appear that they have little if any authority. Although some jurisdictions have justified intrusions beyond the scope of police authority on the basis of "waiver" or "rehabilitation," the case trend is to the contrary.

Q If a person is to be the beneficiary of community service work that will be performed by the probationer/parolee, do I have a duty to advise that third person as to his legal liability if the probationer/parolee injures himself or others while performing the task?

A You should consult your agency legal counsel for jurisdictional rules in this area. In general, consider the existence of special relationships and, when in doubt, seek specific instruction from the court.

Q If I have a right to search a client under certain circumstances, can I enlist the aid of the police to carry out the search?

A Generally, yes, but you should avoid being used as a subterfuge by the police for what might otherwise be an illegal search.

Q Can the police enlist my aid in carrying out a search of the client?

A Generally, no.

Q Could I be taking a legal risk by either encouraging or discouraging a client about being a police informant?

A Although every citizen has an obligation to aid the police, that obligation never extends to the point of putting a person in physical danger. Another consideration is the effect on the rehabilitative function. The stake is often so high in this situation that you should consult with the judge or board on a case-by-case basis. The statutes of some states prohibit a parolee from acting as an informant.

Q Can a judge delegate the responsibility of assessing restitution to me?

A No.

Q Am I liable for making sure the appropriate victim receives the restitution?

A Yes, if you are responsible for disbursements.

Q Do I have a responsibility to the client to challenge what I feel are excessive restitution claims from a victim?

A Yes, since the primary purpose of restitution is rehabilitation.

Q When might my help to a client be construed as giving legal advice, and what kind of difficulty am I in if my actions are found to be such?

A Generally, when your advice or action on a legal issue is given within your official capacity, it may be construed as legal advice. It is a crime to practice law without a license. A probation/parole officer risks exposure when his advice comes within the ambit of:

assessing the government's case on the defendant's chances of winning; advising the client on how to plead; advising the client whether to testify or otherwise proceed in court. In short, you can give information but not advice.

Q Is it advisable for me to avoid all non-professional contact with the client?

A It is a good practice to avoid such contact to minimize allegations of conflict of interest.

REVOCAION

Q What is my real role in revocation proceedings? Am I an investigator, complainant, witness, prosecutor, law enforcement agent, therapist?

A You may be all of the above, but not an attorney.

Q Am I permitted to interrogate the client concerning the alleged violation?

A Yes.

Q Is my liability for a revocation report the same as for a pre-parole report? How about my field records?

A With reference to the revocation report, no, as it is the charge upon which revocation is to be based. Good faith controls. In all other respects, state laws and rules control.

Q Can I be required to give sworn testimony at a revocation hearing?

A Yes, you can be a witness for either side.

Q Can evidence that would be inadmissible in court be allowed at a revocation hearing?

A The U.S. Constitution does not prohibit this; however, local law or policy may not allow the practice.

Q Could a victim sue me for not commencing revocation proceedings?

A Probably not. However, if state law or agency policy requires the commencement of revocation proceedings, liability may ensue for negligent failure to properly perform your job.

Q Could the client successfully sue me for not revoking him sooner in order to prevent his current problem?

A There are no litigated cases on this issue; however, we believe the answer is no.

Q Can I withhold the identity of a confidential source from my reports, from the client, from the court or board?

A There is no case law on this. State laws control.

CHANGES IN STATUS

Q As an institutional parole officer, am I held to the same standards of proof and due process in parole rescission as in revocation?

A No, the standards are not as stringent in most states. However, there is a minority position that would extend Morrissey procedures to rescission.

Q May parole or probation be extended?

A A sentence may not be extended. If, however, a motion to revoke or an arrest warrant is issued prior to expiration of the sentence and the subject absconds, the parole or probation authorities retain jurisdiction past the date of expiration.

Q Is it my duty to apply for restoration of civil rights for the parolee after parole has expired?

A No. That is the duty of the ex-parolee.

STATE TORT LAW AND NEGLIGENCE

Q What is a tort? May I be liable for it in connection with my work?

A A tort is a legal wrong in which the action or inaction of one person causes injury or harm to the person or property of another, in violation of a legal duty imposed by law. Yes, a probation/parole officer may be liable for it. Torts may be intentional or unintentional. Examples of intentional torts are: assault and battery, trespass, libel, slander, false arrest, false imprisonment, and emotional distress. Unintentional torts normally involve negligent conduct.

Q How does a tort case differ from a criminal case? Can a tort case and a criminal case be filed for the same act?

A The main difference is that a tort case is a civil action for money damages -- therefore the plaintiff needs only a "preponderance of the evidence" to win -- whereas a criminal case, being a criminal action, needs proof "beyond reasonable doubt" to convict and usually results in the imposition of a fine or imprisonment. Both parties in a civil case are usually private individuals, whereas in a criminal case one party is the state and the other a private individual. A tort case and a criminal case may be filed for the same act. This is allowable because one is a civil case and the other is criminal; hence there is no double jeopardy.

Q Can I violate someone's rights merely by being negligent? If so, what is negligence?

A Yes, you may be liable for negligence. Negligence is generally defined as the "doing of that thing which a reasonably prudent person would not have done, or the failure to do that thing which a reasonably

prudent person would have done in like or similar circumstances; it is the failure to exercise that degree of care and prudence that reasonably prudent persons would have exercised...in like or similar circumstances." Negligence cases are usually filed under state law.

Q Can I be sued for negligence under Section 1983 (Federal Civil Rights Law)?

A There is disagreement among the courts, but most courts have decided that negligence can be the basis of a suit under Section 1983. A few courts, however, have held that Section 1983 covers only intentional acts and cannot therefore be used for negligence cases. In the absence of any decision in your state, it is better to assume that you may be sued for negligence under Section 1983.

Q Is there any difference between a negligence suit brought under state tort law and one brought under Section 1983? May both be filed against me for the same act?

A A negligence suit filed under state tort law will be heard in state court, whereas one filed under Section 1983 will be heard in federal court. There may also be variations in procedure, in the definition of negligence, and in defenses. A state tort case and a Section 1983 case may be filed against you for the same act, provided all the necessary elements are present.

Q I am a parole board member. May I be held liable if a person I agreed to release later commits a crime and causes death or injury to another?

A Recently decided cases strongly indicate that although suits by victims of crime challenging release decisions usually do not succeed, liability may be found in cases of negligent release when such negligence is gross or reckless. Mere negligence is not enough. What constitutes gross or reckless negligence depends on the facts of each case, although the standard far exceeds ordinary negligence.

Q Suppose my state legislature passes a law granting public officers immunity from liability for acts done while performing their duties. Will that law be constitutional and therefore protect me?

A Yes, the law is constitutional and will protect you at least from state tort claims. The U.S. Supreme Court, in *Martinez v. California*, decided that the California immunity statute is valid when applied to defeat a tort claim arising under state law. Whether that law will protect you in a Section 1983 suit has not been decided, although it probably will not. It is in the interest of probation/parole officers to work for the passage of a similar statute in their states.

Q I am a probation/parole supervisor. Do I have any potential liability for failure to train my subordinates?

A Yes. While there are no significant probation/parole cases on this issue, decided cases involving police and prison supervisors indicate that mere negligence does not lead to liability. There must be action on the part of the supervisor amounting to personal involvement for liability to ensue. The failure to train must be so severe as to reach the level of gross negligence or deliberate indifference on the part of the supervisor.

Q I am a probation/parole supervisor. Do I have any potential liability for failure to supervise my subordinates?

A There are no significant probation/parole cases on this issue either. However, the principle enunciated in police and prison cases is that without some degree of personal participation, a supervisor cannot be held liable for failure to supervise. There is liability if the supervisor directed, participated in, approved, was present at, or had knowledge of a subordinate's misconduct, or if his negligence caused or contributed to the misconduct. Your responsibility as supervisor may be summarized as follows: "You cannot shut your eyes and avoid responsibility for the acts of your subordinates if you are in a position to take remedial action and do nothing."

FEDERAL AND STATE LIABILITIES

Q In general, what liabilities may I be exposed to in connection with my work?

A You may be liable under both federal and state law for both civil and criminal liabilities.

Q Is it true that the illegal search of a client, for example, can expose the officer to at least four kinds of law suits?

A Yes, if all the elements are present. The officer may be liable under the following:

- Under federal law: Civil liability under 42 U.S. Code, Section 1983.
- Under federal law: Criminal liability under 18 U.S. Code, Section 242.
- Under state law: Civil liability under state tort law.
- Under state law: Criminal liability under a special statute or the state penal code.

However, it is unlikely that all of these avenues would be pursued in an individual case.

Q Can both the state and federal courts try me for the same alleged criminal act?

A Yes, you can be charged separately in state and federal courts for the same criminal act. This is because the two are separate jurisdictions; therefore the constitutional prohibition against punishing a person twice for the same offense (double jeopardy) does not protect you. As a matter of policy, however, prosecutors rarely resort to double prosecution.

Q Do laws on civil and criminal liabilities apply only to me as a probation/parole officer, or do they apply to public officers in general?

A Laws on liability are not aimed only at probation/parole officers. They apply to public officers in general. This means that you have similar exposure in your performance of duties as police officers, jailers, prison officials, and just about any other public officer.

Q What are my possible civil liabilities under federal law?

A Three possible areas of liability exist, namely:

- Civil Action for Deprivation of Civil Rights - 42 U.S. Code, Section 1983.
- Civil Action for Conspiracy - 42 U.S. Code, Section 1985.
- Equal Rights Under the Law - 42 U.S. Code, Section 1981.

Q What are my possible criminal liabilities under federal law?

A Three possible areas of liability exist, namely:

- Criminal Liability for Deprivation of Civil Rights - 18 U.S. Code, Section 242.
- Criminal Liability for Conspiracy to Deprive a Person of Rights - 18 U.S. Code, Section 241.
- Violation of Federally Protected Activities - 18 U.S. Code, Section 245.

Q What are my possible civil liabilities under state law?

A Generally, this would be for monetary damages under state tort law if your actions cause injury or harm to the person or property of another, in violation of a legal duty imposed by law. This includes intentional and unintentional torts.

Q What are my possible criminal liabilities under state law?

A In some states, the penal code contains provisions specifically prohibiting certain acts by government officials. For example, a section in the Texas Penal Code, punishes official oppression by public officers. Moreover, as any other citizen, you are also subject to prosecution for other crimes under your state's penal code, such as assault and battery, larceny, trespass, etc.

Q It looks to me that due process rights are so vague that I suffer exposure for just about anything I do.

A Yes, the term "due process" is vague. It does not lend itself to a single definition and varies according to the type of proceeding involved. In its broadest sense, however, due process means fundamental fairness. What fundamental fairness means is decided by the courts based on the nature of the case and the circumstances thereof. It is true that probation/parole officers suffer exposure for just about anything they do. But to be liable under Section 1983 (the federal law), the violation of a right must reach constitutional level (generally meaning serious violations). It is also consoling to know that "good faith" is a valid defense in civil liability cases.

SECTION 1983 CIVIL RIGHTS CASES

Q What suit might likely be brought against me as a probation/parole officer?

A Chances are that it would be a Section 1983 suit. This is a suit, usually seeking monetary damages, based on a federal law enacted in 1871, alleging that you deprived someone of civil rights. Estimates are that civil rights suits now constitute about one-eighth of all civil cases in federal courts. These suits may be brought against almost every type of government official, from a cabinet member of the United States on down to state and local personnel, and for a variety of alleged civil rights violations.

Q What are the elements of a Section 1983 suit?

A As gathered from the law itself and from court decisions, there are four elements, all of which must be present for a Section 1983 suit to succeed.

- The defendant must be a natural person or a local government.
- The defendant must be acting under "color of law."
- The violation must be of a constitutional or a federally protected (as opposed to state-protected) right.
- The violation must reach constitutional level.

Q Can a Section 1983 suit be brought against a state? If not, does this mean that I cannot be sued if I am a state employee?

A A Section 1983 damage suit cannot be brought against a state unless that state has waived its sovereign immunity by law or court decision. However, a state employee can be sued for damages in his capacity as a private individual. In addition, although the state cannot be sued directly for damages without a waiver, it may be prohibited by the court from performing certain acts in the future.

Q I am a probation officer under county or city payroll. Can I be sued under Section 1983? How about the city or county?

A Yes, you can be sued. The city or county, since 1978, can be sued along with you. Both you and the city or county may be held liable for damages. Prior to 1978, cities and counties enjoyed immunity and could not be sued.

Q Who can be sued along with me in a civil rights suit?

A Usually your supervisor, agency head, the agency, the board, or the local government (if you are a

local government employee). Most plaintiffs use the "shotgun" approach when deciding whom to sue, mainly because the more defendants held liable, the better the chances of recovering assessed damages.

Q As a probation/parole officer, when am I acting under color of state law?

A As a general rule, anything you do in performance of your regular duties and during the usual office hours is considered under color of state law. Conversely, what you do as a private citizen during your off-hours falls outside the color of state law. However, a number of gray areas involving collateral activities during work hours or quasi-official activities during off-hours are difficult to classify. In these cases, the court makes a determination on a case-by-case basis.

Q I am a federal probation/parole officer. Can I be sued under Section 1983?

A The U.S. Supreme Court, in 1971, in effect said yes. It stated that a cause of action derived from the Constitution itself exists in favor of victims of federal officials' misconduct. In addition, a federal officer can be sued directly under Section 1983 if he assists state officers who act under color of state law.

Q Are all violations of rights by probation/parole officers punishable under Section 1983?

A No. Only those violations that reach constitutional level -- meaning generally serious violations such as illegal arrests or searches -- are punishable. Less serious violations are not punishable. These include mere harsh words, threats, a push, a shove, simple negligence, or name-calling.

Q Why have Section 1983 suits increased dramatically since the mid-sixties?

A They have increased for a number of reasons, among which are: they seek money damages from the defendant; they may be filed as class action suits where, if successful, they affect a whole group rather

than specific individuals; they are heard in federal courts where judges are perceived to be more detached and liberal; and, since 1976, the prevailing plaintiff can recover attorney's fees from the defendant.

Q If I am a defendant in a Section 1983 suit, what defenses can my lawyer raise for me?

A The two most widely used defenses are immunity and good faith.

Q What is the immunity defense in Section 1983 suits?

A There are two types of immunity:

- Governmental immunity -- this means that the government cannot be sued except if it waives immunity by law or judicial decision. This immunity does not apply to individuals or local governments.
- Official immunity -- this means that some officials are immune from liability because of the nature of the work they are doing. This applies to public officials in varying degrees.

Q What are the types of official immunity?

A Three types of immunity are applicable to government officials:

- Absolute -- enjoyed by judges, legislators, and prosecutors.
- Qualified -- enjoyed by most officials of the executive department, including probation/parole officers.
- Quasi-judicial -- enjoyed by some officials. This means that these officials have absolute immunity when performing certain functions and only qualified immunity in other functions.

Q What type of immunity do probation/parole officers enjoy?

A Probation/parole officers enjoy only qualified immunity. Some courts have decided, however, that probation officers enjoy judicial (absolute) immunity when performing functions ordered by the judge, such as preparing a pre-sentence report. Most federal courts of appeals have ruled that parole boards enjoy absolute immunity when performing judge-like functions (such as conducting a parole revocation hearing), but only qualified immunity for functions that are administrative in nature.

Q Do I take advantage of the judge's immunity when I am following his orders? What about the board's orders?

A Although this has not been decided by the U.S. Supreme Court, the Fifth Circuit Court of Appeals held in 1979 that a probation officer is entitled to the absolute immunity that judges enjoy when preparing and submitting a pre-sentence report in a criminal case. Other courts of appeals have not decided the issue. Chances are that even if the officer does not enjoy absolute immunity, following the judge's orders enables him to invoke the good faith defense; this exempts him from liability except when those orders are clearly illegal or void on their face. Probation/parole boards, however, do not have absolute immunity (except perhaps when making judge-like decisions), so this does not extend to probation/parole officers following their orders. The good faith defense, however, is also available if the officer follows the board's orders, unless the order is illegal or void on its face.

Q If I fail to carry out the order of a judge because I feel that it would leave me open to a lawsuit, could I be subject to disciplinary proceedings or contempt of court?

A This is a very difficult situation. Yes, you may be open to administrative disciplinary proceedings in an extreme situation, or held by the judge in contempt of court for failure to follow orders. In either case, the consequences are direct and real. Your justification for not following the order may not be persuasive to the judge, who naturally would feel his orders have a legal basis. On the other hand, carrying out an order that is

clearly illegal or void leaves you open to a lawsuit. The judge can always rely on judicial immunity; you cannot. In these situations, it may be best to bring your predicament to the attention of the judge, who will hopefully understand. If not, consult with your agency legal advisor or a private lawyer.

Q What difference does it make whether I enjoy absolute or qualified immunity?

A There is a big difference. If you enjoy absolute immunity (which you do not as a probation/parole officer, with some possible exception), any civil liability case brought against you will be dismissed outright without going into the merits of the allegations. If you enjoy only qualified immunity (which you do as a probation/parole officer), you may have to present a valid defense, such as good faith.

Q What is the good faith defense? What are its elements?

A The good faith defense states that a public officer is not civilly liable if the act complained of was done with honest intentions, under the law, and in the absence of fraud, deceit, collusion, or gross negligence. For the good faith defense to succeed, two elements must be proved:

- The officer was acting sincerely and with a belief that what he was doing is lawful.
- The judge or jury must be convinced that such belief was reasonable.

Q Can I be held liable for an action that I did not know violated a probationer's or parolee's rights when committed?

A Chances are yes, if you reasonably should have known that the action you took violated the constitutional rights of another. The old adage, "Ignorance of the law excuses no one," has some applicability here. You have an obligation to keep up with the law and know the rights of your probationers or parolees.

Furthermore, you need a constant update because this area of law is changing fast. In case of doubt, consult your agency legal advisor.

Q A Section 1983 lawsuit has been filed against me. The plaintiff has alleged that I violated his rights when I revoked his parole without a preliminary hearing. My defense is that I did it in good faith. Must he prove that I acted in bad faith, or is it for me to prove that I acted in good faith?

A Under a recent U.S. Supreme Court decision, the burden is on you to prove that you acted in good faith. It is now sufficient that the plaintiff proves that his rights were violated. He does not have to prove bad faith on your part, something that is difficult for him to do. You must therefore stand on the strength of your own case.

Q I am a probation officer. A probationer filed a Section 1983 suit against me and the county seeking damages. Can I invoke good faith as a defense? Can the county?

A Yes, you can certainly invoke the good faith defense. As for the county, the U.S. Supreme Court in Owens v. City of Independence, decided in 1980, said that a municipality cannot invoke the good faith defense when sued under Section 1983. There is good reason to believe that this ruling applies also to counties.

Q Will the government pay for my lawyer in a state tort suit, a civil rights suit, or a criminal suit?

A This varies from state to state:

- Tort suits — most states provide for legal representation, provided the officer's act or omission occurred within the scope of employment. When the employee and the government are sued jointly, the government's lawyer usually also represents the employee, provided there is no conflict of interest. Representation is usually undertaken by the office of the state attorney general.

- Section 1983 suits — same as in tort suits.
- Criminal suits — about one-half of the states will not undertake the defense.

Q If the state gives me a lawyer who is also representing my supervisor, the agency, and the state, could a conflict of interest be involved? If so, should the agency give me a separate lawyer?

A Yes, there might be a conflict of interest involved. For example, your defense might be that you acted in good faith on orders of your supervisor or agency, something they might deny. Should this be the case, it is best to ask for a separate lawyer. Whether or not you should be given one depends on your state law or regulations, or, in the absence thereof, on the discretion of the agency that provides counsel (usually the state attorney general for state employees). If one is not provided, you may simply have to take your chances or hire a private lawyer at your own expense.

Q Is the state required to indemnify me for damages paid if I lose? If they are not required to do so, can they if they wish?

A A majority of the states provide for indemnification for civil liability for their public employees. The maximum amount varies considerably. The conditions under which the state will pay also vary and are sometimes unclear. In some states, the law requires that the state indemnify the employee. In other states, there is no such requirement, but the state may indemnify if it wishes.

Q If I am sued in a civil rights suit and found liable for a small amount, might I also be responsible for thousands of dollars for the other side's lawyer's fees?

A You certainly may be held responsible by the court for your opponent's lawyer's fees in civil rights suits, even if only a nominal damage of one dollar was assessed against you. A 1976 law provides that the court may award attorney's fees to the "prevailing party"

in a civil rights suit. The term "prevailing party" has been broadly applied by the courts.

Q Am I protected by liability insurance in my work? If not, should I acquire coverage on my own?

A At present, only a minority of states (25%) have purchased liability insurance for probation/parole officers. It may be advisable for you to purchase liability insurance in the face of mounting cases against probation/parole officers. You may negotiate for such purchase by your employer or arrange for self-insurance, perhaps taking advantage of group rates through your organization.

Q If I decide to appeal a civil judgment, do I risk incurring further expenses?

A Yes. Expenses for your own lawyer usually increase, and so will lawyer's fees for the other party. Should you lose an appeal in a civil rights case, you may end up paying for the attorney's fees of the other party as well. It is best to discuss the matter openly with your lawyer to determine if it may be in your best interest to go along with the judgment at that stage, particularly if the amount involved is not exorbitant and your chances of winning an appeal, in your lawyer's opinion, are uncertain.

Q If I lose a civil case under state tort law or Section 1983, what kinds of damages may be assessed against me?

A This is determined by the judge or jury, depending on the law in your state. In most states, you may be liable for nominal damages (a small, token amount), compensatory damages (damages actually incurred, such as medical expenses, lost wages, etc.), or punitive damages (damages imposed as punishment for the act committed, usually if the act is gross or blatant). You may also be ordered to pay interest on the money owed to the injured party.

Q Aside from making me pay damages, what can the judge order me to do if I lose a civil case?

A The judge may order you to pay interest on the monetary award owed to the plaintiff. You may also be ordered to carry out an order of the judge to benefit the injured party, such as stopping certain acts and practices that injure the plaintiff or changing policies and procedures that violate the plaintiff's rights.

Q What are my rights if the suit against me is frivolous?

A Many states provide for various tort remedies, such as suits for malicious prosecution, abuse of process, defamation, false complaints, invasion of civil rights, and invasion of privacy. Even with these remedies, it might be one thing to file a case and quite another to win it. The financial status of your prospective defendant ought to be considered -- many probationers/parolees are indigents. Note also that a counter-suit is not a Section 1983 lawsuit, and therefore lawyer's fees are usually borne by each party. You might want to weigh matters before you resort to any of your state's allowable remedies, if such remedies are available.

Q If I lose a civil suit, could someone get my house, bank account, wages?

A This is a complex area, generally governed by state law. Most states allow the winning party to attach properties to satisfy a judgment, but subject to certain exemptions. These exemptions vary greatly from state to state. Consult your agency legal advisor for the law in your state.

Q If there is a damage award against a number of us, how is the plaintiff paid?

A Laws vary from state to state. Most states hold defendants jointly liable, meaning that the award may be recovered from any or all of them. Other states hold the defendants proportionately liable, meaning that

they are liable for only their proportionate share of the damage award.

Q Should I consider putting all my properties in my spouse's name before it is too late?

A That idea may be of doubtful value. In the first place, there are states where property during marriage is considered communal and may therefore be reached even if in the spouse's name. Secondly, to paraphrase a legal wit, the chances of a public officer being sued and held liable in connection with his job are probably a thousand to one, whereas there is a one-in-three possibility that you will be involved in a divorce proceeding. Finally, attempts to hide assets may be illegal in certain situations.

TRENDS AND GENERAL ADVICE

Q What are some of the nationwide trends in the legal liability area?

A The pattern of increased liability for all public officials is expected to continue in the immediate future. The same trend exists in the private sector, where professionals and practitioners in the fields of medicine, psychology, education, law, and religion have been sued in increasing numbers. The "hands-on" and "open door" eras are here to stay, with slight variations. Accountability, court scrutiny, and greater visibility are realities with which probation/parole officers will have to learn to live and cope.

Q What are the most important bits of legal advice you would give probation/parole officers to help them avoid or lessen possible legal liability in connection with their work?

A A questionnaire sent by the project staff to all offices of attorney generals in the United States asked the above question. Ranked in the order of response frequency, the top five answers were:

- Document your activities. Keep good records. (40%)

- Know and follow department rules and regulations and your state statutes. (35%)
- Arrange for legal counsel and seek legal advice whenever questions arise. (27%)
- Act within the scope of your duties and in good faith. (20%)
- Get approval from your supervisor if you have questions about what you are doing. (18%)

Q What are some of the specific areas with which I must be concerned in connection with my legal responsibilities and liabilities?

A You should immediately inquire into laws, regulations, and practices in your state or agency concerning legal representation, indemnification in case of liability, professional insurance, and whether your state has a law that extends immunity to probation/parole officers for certain acts done in the course of duty.

Q What are some important questions that probation/parole officers should ask and obtain answers to from their employers and legal advisors?

A This handbook, written for a national audience, merely gives generalized information. You need more specific information for your state on the issues addressed here. It is recommended that a seminar or workshop be arranged with your employers, legal advisors, or other knowledgeable persons who can provide authoritative answers to the following questions.

1. If I am sued in a criminal, tort, or civil rights action in state or federal court, will my agency or employer provide a lawyer to represent me?
2. If a parolee, probationer, or anyone else is contemplating suit against the agency, agency personnel, or me, and I am contacted by their lawyer, what should I do?

3. What specifically should I do if and when I am served with legal papers and/or court documents indicating that a lawsuit has been filed against me?
4. If there is a conflict between me and a co-defendant, or me and my agency, will the government appoint a different attorney for me?
5. Are there any special defenses available to me as a state probation/parole officer in a torts suit in which I am the defendant?
6. Are there any specific criminal laws in my jurisdiction that I must be aware of that apply specifically to probation and/or parole officers or public officials/employees?
7. Are there any decided cases in my state where a probation/parole officer has been held liable under state tort law to either the client or a third party?
8. What type of immunity, if any, do I enjoy as a probation/parole officer under my state's law?
9. Does my state have laws that would indemnify me if I am found liable in a state tort or a federal civil rights action? If so, how do these laws apply to me? Is the coverage mandatory or permissive?
10. What do I have to do to enhance my chances of indemnification if I am sued? What procedures must I follow?
11. What is the best way, consistent with the laws of my state, to protect my personal assets from seizure and execution for satisfaction of a judgement against me?
12. Is any kind of liability insurance available to me individually or as a member of a group, either through the government or privately?
13. Does my state have a state civil rights law that might affect me in my work? If so, how?

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14. Does my state have a law covering the issue of disclosure of information about my client to others -- for example, privacy laws, laws on confidentiality of criminal offender record information, and laws on the confidentiality of mental health, education, and vocational information? If so, how does this law apply to me, and what are the penalties and procedures for violations?
15. Does my state have a law that gives my client, his lawyer, his designate, or others access to information in my file or in my reports? If so, what are the specific requirements, and what are the penalties and procedures for noncompliance?
16. Does my state have an Administrative Procedure Act that applies to me? If so, how?
17. As a parole officer, what should I do if, at a revocation hearing, I feel that the hearing officer is denying the parolee his/her rights to due process under Morrissey?
18. Is there a compilation of regulations, policies, and directives that govern my conduct as an employee and relate specifically to my work with clients?
19. Who is my legal advisor? Is there any public official to whom I can turn who is obligated to advise me in legal matters and upon whose advice I am entitled to rely?
20. Am I a peace officer? What are my law enforcement powers vis a vis arrest, search, seizure, and ability to assist and be assisted by law enforcement officers? Am I empowered to carry a weapon?
21. Does my court or agency have any guidelines on arrest and search or frisk of clients and their homes and property?
22. Are there specific laws in my state that relate to my responsibilities and duties as a public employee and as a probation/parole officer in particular? What are they?

23. Are there specific laws in my jurisdiction that set out the rights and duties of my clients?
24. Do we have a written policy on assessment of restitution that will give the probationer access to a judicial determination in the event he disagrees with the amount claimed by the victim or assessed preliminarily by me?
25. Do we have a written policy on my imposing or modifying conditions of probation or parole that will give the client immediate access to the judge or board if he contests my action?
26. If I have a question about my implementation of any condition, can I have immediate access and written clarification from the judge or board?
27. What should I do about transporting clients in my private vehicle? What responsibility will my employer assume in the event of an auto accident?
28. Should I warn third persons if I believe the client presents a possible danger to them? If so, under what circumstances? If it is a close call, who should I contact for advice?
29. Do you want me to advise clients on procedure and on how to put their best foot forward when appearing before the court or board?
30. Do you want every violation reported to the court or board?
31. What do the terms "good faith" and "negligence" mean in my state?
32. How can I be sure that I am informed on an up-to-date basis regarding administrative rules, regulations, and decided cases affecting me?

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