

Nate Lindell's Guide on How to Sue the WI D.O.C. for Their Theft of Prisoners' Funds & Racketeering

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<http://betweenthebars.org/blogs/540/>

Because I'm not licensed to practice law, it would be a crime for me to give non-prisoners (I am allowed to litigate for prisoners & have won cases for them*) legal advice. Do not construe this as legal advice, but as my explanation of what I would do if I was you & why. So, when I say "you" in here, I'm talking to myself (ain't the first time!)

You should verify the validity of legal information anyone gives you, even an attorney with a license. So, do so regarding my thoughts, using: wisbar.org/ (lets you see cases, statutes, etc.), wcca.wicourts.gov (look up cases in county courts), ca7.uscourts.gov (look up federal appeals for our Circuit), wicourts.gov (look up state court appellate - & supreme-court decisions), legis.wisconsin.gov (look up statutes & administrative codes)

Step One: Letter to D.A.I. Administrator

Get the ball rolling by writing D.A.I. Admin. Jim Schwochert, in which you'll explain how what he's doing is illegal & ask him to stop.

This is for two reasons: 1) so he can't pretend that he doesn't know he incited a host of illegal activities, & 2) so you prisoners can file a complaint with the Inmate Complaint Review System (I.C.R.S.) when he refuses to correct himself. Non-prisoners with loved ones in prison can & should also write such a letter, just modify it as appropriate, so it's written from their perspective on behalf of their loved one in prison.

A copy of such a letter, as I'd write for myself, is included as Attachment A, at the end of this guide. You'll notice that I give

*. Two cases I litigated & won are: Koutnik v. Berge, 2004 U.S. Dist. LEXIS 13926 (W.D. Wis. 2004) & Wesley v. Grams, 10-CV-459-slc (settled out of court)

six ways that the practices of taking money from prisoners incited by Schwochert are illegal. Even if one or more of those ways doesn't apply to your situation, I'd still put them in the letter, make it harder for him to play stupid with other guys.

To get Schwochert found guilty of violating Stat. § 946.12(a), he must knowingly act beyond the scope of his authority. He got where he is by being a good butt-licker & I assure you he'll plead stupid, rollover & lick the D.A.'s & the judge's butts to try & get out of the charge. Make it impossible for him to plead ignorance.

Brackets in the sample letter need your specific info, which is explained in the brackets. Alter the letter as needed - it's just an outline.

Keep at least one copy of the letter. Have your people share copies with the press, so Schwochert can't hide from the issue. Here's some media contacts who'll care to know:

blueders@gmail.com jsmetro@jrn.com wsjcity@madison.com
wisconsinwatch.org wpt.org/HereandNow

It'd be a good idea to e-mail a copy of the letter (not as an attachment, but typed out in the e-mail - people don't open attachments from strangers, as they could be viruses) to the Assembly Corrections Committee, these core members:

rep.schraa@legis.wisconsin.gov (the chairman)
rep.hutton@ (vice chair) rep.goyke@ (Democrat, very active)

It'd be a good idea to e-mail all of the above & suggest that they view this post on my blog, as then they needn't fear a virus & everything is laid out as to how what's going on is illegal.

Step Two: Inmate Complaint (I.C.)

Attachment B, a sample complain, shows how I'd write the I.C. Short & sweet, as all the info is in the letter you sent to Schwochert, which you attach to the I.C.

You only have 14 days to file an I.C. from the time of the incident you're complaining about. WI Admin. Code § DOC 310.09(6). The incident you'll be complaining about is Schwochert's refusal/failure to grant

you the relief sought in your letter, so, if you don't get that relief within 11 days of you sending him your letter, file your I.C. the night of the 11th day.

You don't need to, but you can file a group complaint. § DOC 310.10(a) authorizes this, + § DOC 303.24(a)(c) notes that doing so doesn't violate the prohibition on "group resistance + petitions." Doing a group complaint will save a bunch of prisoners from needing to write Schwochert themselves + filing their own I.C.s. If you do a group I.C., you might as well start gathering signatures on the I.C. form (you may need extra forms if you get a lot of signatures, which you can do — just mark the page #s on top of each form, such as "1 of 16," etc.) as soon as or before you mail Schwochert your letter, + gathering those prisoners' documents that reveal that their # was illegally taken; that way you'll be ready to file on night 11.

Keep copies of everything you send ^{to} or receive from the I.C.R.S.. Per Stat. § 801.02(7)(c), if you seek waiver of pre-payment of fees needed to sue in state court, you must include those documents with your Petition to Waive Pre-Payment. This means, unfortunately, also the documents for your co-complainants; so, if you'll need to get a fee-waiver to sue, then you might only wanna do an individual I.C.

There's a good chance your I.C. will be rejected by the I.C.F., likely for being beyond the 14-day time limit, as they'll claim the policy is the issue + it was created months ago. Appeal any rejection, on time, + stress that your I.C. is about your letter, which occurred within 14 days, + that it took you this long to research how the policy is illegal. They believe that by rejecting complaints they can block your suit; +, under the federal exhaustion requirement, that may be true. See Woodford v. Ngo, 126 S.Ct. 2378, 2386 (2006) ("Proper exhaustion demands compliance with an agency's deadlines and other... procedural rules..."). Or it may not be true. See Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006)

"Prison officials may not take unfair advantage of the exhaustion requirement... + a remedy becomes 'unavailable' if prison employees use affirmative misconduct to prevent a prisoner from exhausting"

You shouldn't be faulted for not immediately realizing their policy was illegal — they should be faulted for trying to sneak it by us!

Anyway, our state's supreme court ruled in State ex rel. L' Minggio v. Gamble, 263 Wis.2d 55,65 (2003) that even if our I.C.s are dismissed for being late, so long as we appeal the dismissal & "exhaust" the process, we've satisfied the state's exhaustion requirement & can sue. The federal courts haven't addressed it yet, but, since they must respect our supreme court's interpretation of state law, see Johnson v. Fankell, 117 S.Ct. 1800, 1804 (1997) (including procedural requirements, id.), then Woodford v. Ngo shouldn't apply to us.* By filing in state court you ensure that L' Minggio will be applied & you can sue.

If your complaint isn't rejected but is dissed, appeal that too; just make rational arguments against whatever excuses they gave for dismissing it. The main thing is to exhaust the process & "reaffirm the arguments" made in your letter to Schwochert. That is one issue, by the way — Schwochert's refusal to grant your letter's request, which you should argue if they reject your I.C. for having "more than one issue."

Step Three: Notice of Claim (N.O.C.)

For anyone to be allowed to sue state employees or agents under state law (e.g. a tort for battery or theft), that person(s) must properly write & serve/file a N.O.C. & Injury form, both under §893.80 & §893.82, Stats. A sample for such a form is provided as Attachment C.

Note: those are two different statutes with two different requirements as to what they state & how they must be filed/served. The sample N.O.C. & Injury I'm providing contains all the info you need to satisfy both statutes content requirements. However, you must file/serve them differently. Of course you'll want to revise the form so it addresses your specific needs.

* I tried to raise this issue in a Certiorari petition to the U.S. Supreme Court. They ordered the A.G. to reply, a rarity, but instead of my case took the Woodford case & issued a crappy decision.

5 of 31
5
Stat. §893.80(1)(a) requires you to serve the N.O.C. on each state employee or agent you intend to sue and the agency, within 120 days of the incident (i.e. Swochert's denial of your letter, or the final decision to deny your I.C. - your choice). This is supposed to be served just like a lawsuit, personally, by someone other than you who is over 18 years of age; so, as I have previously done, you can have another prisoner serve the N.O.C. on any defendants in your prison (he'll need to write the I.C.E. + the warden, request that they send someone to accept service, +, if that doesn't work, give it to the Records Dept. supervisor + say, "You've been served in proxy of [names of staff there you're serving]") + provide you an affidavit saying the time + date he served it + who he served it on. Now, this requirement is not strictly enforced - sub. (a) will let you slide if you can prove the "agency had actual notice of the claim" and the lack of proper service "has not been prejudicial to the defendant." Thus you can "serve" the defendants in Madison via certified mail + personally deliver it to defendants in your prison + probably* be alright (keep the Certified-Mail receipt do not pay extra for a Return receipt - it's not needed). Sub. (b) requires the N.O.C. also be "presented" to the "person who performs the duties of... secretary for the... agency," which, to be safe, I'd take to me the secretary for the prison that stole your money and the WDOC secretary, Jon Litscher - certified mail probably will do.

Now for §893.82, stats., which, at sub. (2m), requires you to "strictly comply." If you fail to do so, you won't be able to sue. see Yotvat v. Roth, 95 Wis.2d 257, 270 (Ct. App. 1980), + New Kirk v. D.O.T., 228 Wis.2d 830, (Ct. App. 1999). Per sub. (3) + (5), you must send to the WI A.G. (Brad Schimel) at 114 East State Capital (Madison, 53707), using Certified Mail (again, no Return Receipt is needed, which costs extra), the N.O.C., containing "the time, date, location + the circumstances of the event giving rise to the claim... + the names of the state... employe or agent involved" (emphasis mine). So, it's more specific

* As with any ideas stated herein, do your own research to confirm whether or not my "probabilities" are sound.

info than is required by Stat. §893.80.

Attachment C is written so that it satisfies both statutes.

Both statutes give you 120 days to file your N.O.C., from the date of the occurrence. I suggest that you wait at least 20 days after you mail Schwochert his letter, so you can cite any response as the occurrence. You can wait until your I.C. is dismissed too, along with the appeal, so you can add those occurrences too & their dates, so long as you don't wait so long that you don't mail it to the A.G. within 120 days of any denial by Schwochert.

Then, 120 days after you've mailed the A.G. his N.O.C., you can sue for state law claims, for sure, per §893.80(1) & (1g) & §893.82(3). You have 6 months from the end of that 120 days to get your suit filed. §893.80(1g).

Unlike the "exhaustion" requirement discussed under Step One, which only prisoners need worry about, both non-prisoners & prisoners must comply with the N.O.C. requirement.

However, you may be able to immediately sue (after exhausting the I.C.B.S., if you're a prisoner) for injunctive & declaratory relief, as was approved in Lewis v. Sullivan, 188 Wis.2d 157, 169 (1994), even though Lewis didn't file a §893.82 N.O.C. This is a may because, as stated in Lewis v. Sullivan at fn. 9, the court noted it had recently ruled that §893.80 applied to suits that didn't seek money as well as suits that did seek money. But, recall that §893.80 has some flexibility, as long as those you intend to sue had knowledge of your claim & aren't prejudiced by your not serving the N.O.C. My suggestion is to be safe, file the N.O.C., wait 120 days, then sue.

- Who Can Sue? -

You'll notice that the forms/Attachments are written for prisoners. But they are not, I believe, the only ones who can sue. To sue you must have "standing", be or have been harmed by the sued-over action. Those who send prisoners money so the prisoner can take care of himself, get phone calls & pictures with the sender, yet have that money illegally taken, such people I believe can possibly sue. It's worth such people looking into. This guide would offer those people some guidance too; with slight

modification, the sample letter to Schwobert, N.O.C., lawsuit, summons could be used by such non-prisoners to sue.

Such non-prisoners should find & consult a lawyer through wisbar.org. Ask for that attorney's assessment of this guide & the forms included in it, & if they may or should be used in altered form by you.

Step Four: The Lawsuit

Attachment D is how I'd write the lawsuit. Again, in it are many bracketed areas - you'll need to put in the info stated within the brackets. There are also my "(s)" & "(es)" & words slashed between singular & plural versions, which you will have to decide if or not to use, depending on whether or not you are filing a lawsuit with you alone as the plaintiff or with other prisoners or those who send you gift funds as co-plaintiffs. There's nothing stopping you and a bunch of prisoners from filing one lawsuit, paying one filing fee, although the federal courts would make you pay one whole filing fee each.

Attachment E is the form for a summons. By using this type of summons, approved by Stat §801.095, you'll not have to spend tons of \$ making multiple copies of the lawsuit & serving them + the summons on the defendants. The A.A.G. who'll represent them will answer the summons & you'll only have to provide her/him one copy of the lawsuit. Saves a pile in postage too!

As you are reading this on the internet, you can/should also go to www.countyofdane.com/clerk/court/, print off & send to your prisoner the "CHECKLIST OF WHAT IS REQUIRED WITH EVERY PRISONER FILING". Before any prisoner files anything they need to go down that checklist & make sure they've complied with each requirement.

There is, I think, one flaw with that forenoted checklist: its requirement at sub. 2 that you submit proof you exhausted administrative remedies, every document you gave to or you got from prison officials regarding your lawsuit's claim(s). That only applies, I believe, if you're filing a petition to waive pre-payment of the fees, as the statute supposedly supporting that requirement,

Stat. § 801.02(7)(c), states that such documentation must be "part of the initial pleading", but, the only consequence is specifically states - & by now you know that if a statute specifies one thing that may be done it precludes anything else from being done! - is that "[t]he court shall deny a prisoner's request to proceed without the prepayment of fees." WI's P.L.R.A. is based on the federal P.L.R.A., which doesn't require prisoners prove in their initial pleading/lawsuit that they exhausted the administrative remedies, rather defendants must prove that, Woodford v. Ngo, 126 S.Ct. 2378 (2006), which also supports my opinion. (I've argued with the clerk about this before, tell him I'll sue if he doesn't file my stuff - he filed it). Save & attach all such papers, if you wish.

If you're suing... six people, just to be safe, file the original suit & summons & six copies, so the clerk will authenticate & send them back to you for service (I file an original & one copy; when I get the one copy back I photocopy & serve the photocopies - saves postage). Do this even though you should end up filing/serving one copy on the A.A.G. who should answer the summons.

The filing fee for this (not all!) lawsuit is \$ 265.50

Stat. § 801.10(i) allows any adult Wisconsin citizen to serve the summons &/or complaint. So, another prisoner can serve staff at your prison (done that before) - so long as he's not part of the lawsuit. Have him write the warden, send his rep' for service. Then the server must write out an affidavit with the info in id., sub (4)(a), to prove service.

Step Five: Litigating the Lawsuit

If you think you can just "set & forget" a lawsuit, slap yourself.

Most prisoners' suits are dismissed because they think this.

Litigating the lawsuit is too complex & lengthy of a process for me to try & explain here, but you better be ready to do so.

For those who want my help in this regard, you will have to ensure I have the needed postage & paper. Write me & explain what you'd like me to help with & be prepared to respect my work/assistance.

Additional Information

While I was writing this I received info in Peg Swan's newsletter by two other prisoners as to how this money issue is illegal. Their positions are that

- Due Process prohibits the policy & statutes supposedly justifying them to be applied retroactively, to cases ^{from} prior to the policy's & statutes' creation, Matties v. Positive Safety Mfg., 244 Wis.2d 720 (2001) & Neiman v. American Nat'l Prop & Gas Co., 236 Wis.2d 411 (200)
- Retroactively applying the policy & statutes violates ex post facto law. Carmel v. Texas, 529 U.S. 513, 120 S.Ct. 1620 (2000)
- 50% deductions violate statutes (§973.045 & §DOC 309.465), thus the policy is illegal per stat. §227.10(2)

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Honestly, the way those two prisoners wrote their theories was difficult to clearly comprehend — judges don't like that! — but that is what I got out of it. (e-mail pgswan3@aol.com to get those guys' info)

You may want to incorporate those ideas into your letter to Schwochert. I incorporated the most valid ones into my sample lawsuit.

And, f.y.i., the U.S. Court of Appeals that sits over Wisconsin (ca7.uscourts.gov) just shafted me in Lindell v. Pollard, Appeal No. 16-1528, decided 17 March 2017. But, but — they also approved my Due Process claim over WDOC officials misusing state procedures to unjustifiably make me pay over \$1,000 in restitution, which is basically what this whole proposed suit is about. Your claims are rock solid my friend.

Attachment F is my Trust-Fund-Account statement, followed by an order form for items I don't have & pretty much need. Appreciate any donations you see fit to provide in consideration for my work. If you have it like that, I'm in solitary, without a radio or a T.V. Otherwise, a 5-pack of stamped envelopes is only 3.15. Do me right.

Nate