Prison Break
Correctional Liability Update
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Burke, Williams & Sorensen, LLP offers the expertise, depth, breadth, and quality service you need in the area of Correctional Litigation through the specialized knowledge of our featured attorneys.

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Colors: Why We Can't Let Inmates Fly Their Flags
By Susan E. Coleman

Roses are red, violets are blue ... but Bloods and Crips wear those colors too. Gang members fly or “floss” their colors as a way to publicly identify themselves and the gang with which they are affiliated, and to intimidate others. The most commonly known gang colors are blue and red. “Bloods” are known for wearing the color red, while “Crips” wear the color blue. Nortenos (allied with Nuestra Familia) also identify with red, and surenos (allied with the Mexican Mafia) use the color blue. These colors are displayed by gang members in clothing, hats, and bandannas.

To discourage gang activity, the colors of inmate clothing are regulated, with colors like red and blue prohibited within our federal and state prisons. The California Department of Corrections, in its title 15 regulations (54030.17.1), prohibits clothing in any shade or tint of green, black, brown, tan, red, or blue. (Green is associated with the Emerald City Bloods and the Lincoln Park Bloods; tan and orange have also been associated with Bloods, to represent “dried” blood; and black is associated with the Black Guerrilla Family prison gang.)

Even parolees with gang restrictions are prohibited from wearing gang colors, in their special conditions of parole (CDCR Form 1515). The Bureau of Prisons allows pastel green, gray, black, and white clothing (with colors specified for each item, such as boxers or briefs only allowed in white), but it does not permit red and blue, or any other colors for clothing. Most counties have similar restrictions on the color of inmate clothing, with minor variations.

Of course, inmates have other ways to show their affiliation, such as tattoos, hand signals, wearing sagging pants or sideways hats, word of mouth, and acts committed in support of the gang. Some of these methods may also be restricted. For example, tattooing paraphernalia is prohibited in prison, as are violent or illegal acts. Gang activity is also prohibited, and inmates may be written up and disciplined for knowingly promoting, furthering, or assisting any gang. While an inmate with a red shirt might not be written up for gang activity, the shirt can be confiscated as contraband and the inmate should be written up for possession of contraband.

While restricting the colors that prisoners wear may not significantly decrease gang activity, it sends a message that flaunting gang colors is not acceptable. It demonstrates that custody controls the prison. It also provides an environment for inmates who want to program safely. But how does this policy work if some institutions don’t enforce the ban?

At the California Men’s Colony (CMC) in San Luis Obispo, inmates until recently were given red shirts to wear during intramural games. Although they had to change out of the shirts and return them to the coach after the game, allowing inmates to wear prohibited colors -- even temporarily -- undermines the Department of Corrections’ prohibition on wearing gang colors. Although CMC does not house
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- Education Law
- Labor & Employment
- Litigation
- Public Law
- Real Estate & Business Law

maximum security prisoners, or have a Security Housing Unit, it undoubtedly houses inmates with current and/or former street gang affiliations. Institutions should uniformly prohibit gang colors, in order to promote consistency and discourage gang activity.

The new religious personal property matrix (revised as of 1-05-12) for the Department of Corrections allows beads in colors of orange, brown, turquoise, purple, yellow, white, or gray. But some of these colors are also associated with gangs. Orange is associated with multiple street gangs in Orange County, and purple is associated with the Grape Street Crips from Watts. Although Native American inmates making beaded items may not be purposely making pro-gang items, their possession of items in gang colors creates a host of security concerns. Trade of items in gang colors could create an underground market for contraband. Inmates with certain beaded items could become victims of gang violence, at the hands of inmates seeking to acquire those colors.

Maybe Sheriff Arpaio in Maricopa County, Arizona has the right idea, requiring inmates to wear pink underwear. Due to the feminine associations with the color pink, the Crips aren’t likely to claim pink as a watered-down version of red. Limiting the color choices for clothing to white and pink would at least eliminate one way for inmates to display their gang affiliation.

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The Disadvantages of Appointing Inmates with "Pro Bono" Counsel

By Kristina Doan Gruenberg

If you have ever been sued by an inmate, there is a good chance that he was representing himself. In 2011, ninety-two percent of prisoner cases filed in federal court were filed by pro se litigants. Although individuals filing civil suits do not have a constitutional right to counsel, in contrast to criminal cases, these litigants may file a motion for the court to appoint pro bono counsel. Recently, federal courts have been granting motions for appointment of counsel with alarming frequency. In prisoner cases, the appointment of counsel has many negative ramifications.

According to the Ninth Circuit, district courts have the discretion to appoint counsel for indigent civil litigants upon the showing of “exceptional circumstances.” A finding of exceptional circumstances requires an evaluation of both the “likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.” This means that courts may appoint counsel if an inmate has an insufficient grasp of his case or the legal issues involved, such as in complex medical malpractice cases. Conversely, the courts have denied requests for counsel by inmates who simply claim that they do not have legal training, or allege that they do not have enough time to work on their complaint due to limited law library access.

The courts may not force an attorney to take a case nor do they pay the attorney; instead, the case will be referred to the pro bono panel. This panel includes attorneys who seek to gain trial experience, as well as large law firms who seek to curry favor with judges while providing their associates with litigation experience. Pro bono counsel can seek reimbursement for their costs, such as filing fees, transcripts of depositions, and with leave of court, for expert witness fees.
In 2011, the Southern District of California adopted General Order 596: Plan for the Representation of Pro se Litigants in Civil Litigation. The plan gives judges broad discretion in deciding whether to appoint counsel anytime during the course of litigation. The order states that an assigned judge in a civil case filed by an indigent pro se litigant will determine whether the case is appropriate for appointment of pro bono counsel upon consideration of factors such as the ability for the party to obtain counsel, the nature of the claim, and the degree to which “ends of justice will be served by appointment of counsel, including the extent to which the court may benefit from the appointment.” Additionally, the Order notes that counsel will be appointed “as a matter of course” in pro se inmate civil rights cases following the summary judgment stage.

Possibly as a result of this general order, the Southern District has been appointing counsel to inmate litigants more frequently and during earlier stages of litigation.

For example, one judge referred a typical deliberate indifference to medical needs case to the pro bono panel before any discovery had taken place. In the case, the inmate alleged he suffered a fracture in his face after he ran into the food cart and that the prison staff delayed his treatment by two days. It is unclear what exceptional circumstances existed, nor did it appear that the inmate was unable to articulate his claims. In another case, the judge granted an inmate’s request for counsel even though the inmate already had his in forma pauperis status revoked because he had six cases dismissed for failure to state a claim or as frivolous. In another case, involving an inmate who claimed his food was being tampered with, the court appointed pro bono counsel to help with an “emergency” motion for injunctive relief. Months after having the parties prepare for evidentiary hearings, conduct onsite inspections, and file dozens of pleadings, the court has yet to rule on the emergency motion.

Pro bono counsel can be helpful in cases because these attorneys can clarify unintelligible pleadings and are less likely to pursue frivolous causes of actions. On the other hand, bringing in counsel, especially at the earlier stages of the case, typically increases costs for both the court and defendants for several reasons.

First, if a pro bono attorney wins on a civil rights claim, he or she may seek to recover attorney’s fees from defendants under the Prison Litigation Reform Act. Inmates who represent themselves cannot recover fees, even if they win. Second, most attorneys who are on pro bono panels do not have experience with 1983 civil rights claims and/or are attorneys without much courtroom experience, and therefore may engage in unnecessary litigation. Third, attorneys are more likely to propound discovery and take depositions than pro se litigants, particularly knowing that they can recoup out of pocket expenses such as deposition transcripts from the court. Finally, appointing counsel can encourage more inmates to file lawsuits in the long run if they believe they can get appointed free counsel to do their work.

In order to balance the benefits and drawbacks of appointing counsel, the courts should follow the Eastern District of California’s approach. The Eastern District Pro Bono Panel website states: “the court typically would only assign cases where the prisoner has already survived
summary judgment or where the legal importance or difficulty of the summary judgment issues are evident.” This way, pro bono counsel is reserved for cases that may have merit, and inmates bear the responsibility of pursuing cases they choose to file, at least until it becomes clear that the case will likely go to trial. Appointing counsel at a later stage, if at all, can theoretically help to streamline the trial and limit evidence to relevant issues.

If the court does decide to appoint counsel prior to summary judgment, it should be in truly exceptional cases, such as when the prisoner has demonstrated that he is in imminent harm or lacks the mental capacity to prosecute his case. Finally, the courts should consider whether the inmate has a history of filing frivolous cases, and be disinclined to appoint counsel to those vexatious litigants.

Overall, there is a limited number of attorneys on pro bono panels, who are also needed in other types of civil cases (with non-felon clients) such as complex foreclosure cases, adoption proceedings, and child custody disputes. Therefore, the courts should be cautious in appointing inmates pro bono counsel because it can drain judicial resources, raise the costs of litigation, and give other inmates unrealistic expectations of obtaining counsel in their lawsuits.

**Feeding Warlocks and Monks:**

**Religious Diets for Alternative Religions**

*By Mitch Wrosch*

In 1987, the Ninth Circuit Court of Appeals held that “inmates have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion.” Back then, before the rise of numerous alternative religions in the prison, courts were primarily concerned with whether kosher food was available to Jewish inmates. Since 1987, the demographics and religious dietary habits of California’s inmates have changed drastically, which imposes a unique set of challenges and financial burdens on an already financially beleaguered state.

Muslim inmates are currently the leading recipient of modified meal plans within the California Department of Corrections, and, like Jewish inmates, courts have established that Muslim prisoners are entitled to diets consistent with their beliefs. In recent years, there has been an influx of lawsuits filed by Wiccans, Odinists, Messianic Christians, Native Americans, Buddhists, and members of the House of Yahweh, who have all requested or demanded food consistent with their beliefs.

The following is a chart of dietary restrictions alleged by inmates in lawsuits:
<table>
<thead>
<tr>
<th>RELIGION</th>
<th>DIETARY RESTRICTIONS</th>
</tr>
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<tbody>
<tr>
<td>Wicca</td>
<td>Traditional vegetarian diet (but requirements are specific to the coven the inmate belongs to).</td>
</tr>
<tr>
<td>Odinist/Asatru</td>
<td>No particular diet requirement. Mead is drunk in some ceremonies, and pork is considered sacred to the God Frey.</td>
</tr>
<tr>
<td>Messianic Christian</td>
<td>Diet identical to Jewish kosher diet. Meat and poultry slaughtered under rabbinic supervision; prohibition of seafood and pork; separation of meat and dairy; food prepared in facility separate from where non-kosher food is prepared.</td>
</tr>
<tr>
<td>Native American (Pomo)</td>
<td>Food not touched by a menstruating woman. Food not exposed to strawberries. Occasional turkey products are desirable.</td>
</tr>
<tr>
<td>Theravada Buddhism</td>
<td>Vegan diet, with vegan food prepared in a vegan kitchen, with cooking supplies that have not been used in the production of non-vegan foods.</td>
</tr>
<tr>
<td>House of Yahweh</td>
<td>Diet identical to Jewish kosher diet. In addition, they request only produce that has been picked from a tree of at least three years of age.</td>
</tr>
<tr>
<td>Islam</td>
<td>A halal (permitted) diet. Meat must be slaughtered in accordance with halal standards (regarding the method of animal slaughter). No pork products or alcohol.</td>
</tr>
<tr>
<td>Judaism</td>
<td>Meat and poultry slaughtered and processed under rabbinic supervision; prohibition of various animals and seafood; strict separation of milk and meat, including separate cooking facilities and utensils.</td>
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</tbody>
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Currently, the California Department of Corrections offers four meal options: (1) a pork-free program; (2) a vegetarian meal program; (3) a religious meat alternative “halal” (Muslim diet); and (4) Jewish kosher. The costs of regular meals are approximately $2.90 per day, whereas vegetarian meals cost $2.62, religious meat alternative meals cost $3.20 each, and kosher meals cost $7.97.

The Federal Bureau of Prisons also allows a religious diet program, called the Alternative Diet Program, which consists of two components: (1) one component provides for religious dietary needs through self-selection from the mainline, which includes a meat free option, and access to the salad/hot bar (where available); (2) the other component accommodates dietary needs through nationally recognized, religiously certified processed foods.

So what should institutions do when inmates request religious diets outside of the scope of the currently available meal options?

First, the Messianic Christians and members of the House of Yahweh should not be provided with kosher food, as they do not meet the requirements for kosher food. Currently, the state prisons only allow Jewish inmates to participate in the Jewish kosher meal plan, and the cost of kosher meals is prohibitively high. However, a California Court of Appeals has recently held that a Messianic Christian inmate at Mule Creek State Prison must be provided kosher food. As discussed in our February 2012 newsletter, the case seems to have been wrongly
Burke’s Correctional Litigation Team routinely deals with the following issues:

- First Amendment
- Fourth Amendment claims of unlawful search and seizure
- Eighth Amendment excessive force and deliberate indifference to safety or medical needs
- Fourteenth Amendment due process
- Religious claims under the First Amendment and RLUIPA
- Section 1983 claims of all types
- Torts including negligence, wrongful death, assault and battery, conversion, Bane and Unruh Act claims
- Class action litigation
- Parole and probation issues
- Employment issues

decided, because the Court did not consider the prison’s arguments that it had a compelling governmental interest in reducing costs, and that providing non-Jewish inmates with kosher food would be prohibitively expensive and require further training of staff, as well as additional space to prepare the food. This case may have been decided differently in federal court.

Second, Native American and Buddhist dietary requests should be denied. Courts are reluctant to force prisons to provide inmates with “individualized diets.” Thus, if attorneys representing the prison or jail administrators can show that the inmate is simply requesting a diet which he believes is required for his faith, but is not an established tenet of the religion, the case will likely be dismissed. In one case involving a Theravada Buddhist at Mule Creek State Prison, the inmate requesting a special diet is the only person seeking this diet, which appears individualized. The same is true for the inmate requesting the Native American Pomo diet, because he is the only inmate at Tehachapi who has requested it.

Examples of cases where the Courts have found dietary requests were improperly “individualized” and not based on religious requirements include:

- A Buddhist inmate’s request that his food not come into contact with “pungent vegetables” such as garlic
- A request for an Ital Rastafarian diet where the requirements vary from sect to sect
- A diet for a non-Jewish inmate who requested food be prepared with utensils not used in the preparation of pork products
- A request for distilled water
- A Buddhist request for organic produce

Third, in addition to finding unique dietary requests to be “individualized,” courts have been receptive to considering evidence that the inmate has purchased incompatible foods from vendors. For example, vendor receipts belonging to a House of Yahweh member showed that he ordered pork sausage on numerous occasions; similarly, vendor receipts belonging to the Pomo Native American inmate showed that he ordered numerous processed items from vendors, such as Cup O’ Noodle, which would be impossible for him to prove were not handled by a menstruating woman.

The best defense to these lawsuits may be to provide inmates with only two options: a regular meal, or an alternative kosher-vegan meal. Because kosher food has the strictest standard, conceivably all other religious diets would be satisfied with the plan, including Muslims. Further, Jewish inmates are not required by their religion to eat meat, and vegan meals can provide a nutritious alternative. Additionally, eliminating the variety of meal options would streamline food services, and save costs by no longer providing meat in any meal plan other than the regular meal.
Nutraloaf (Part II) – The Continuing Saga of Cruel and Unusual Tasting Punishment

By Martin Kosla

Last year, in our July 2011 newsletter, we wrote an article about the constitutionality of placing inmates who have been placed in disciplinary segregation on a nutraloaf diet. For those who missed the article, nutraloaf is a loaf-shaped meal that is packed with protein, fat, carbohydrates, and with 1,000 or more calories in a loaf. It can contain everything from cabbage and carrots to kidney beans and raisins, plus various other uncertain ingredients such as “dairy blend.” As we noted, inmates are outraged because nutraloaf has little taste, and has been found to be uniformly unappetizing to those who have tasted it.

The constitutionality of nutraloaf has been upheld in several states, including California. Even the traditionally liberal Ninth Circuit has held that the Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing. As such, the Ninth Circuit is of the opinion that serving an inmate nutraloaf for short periods of time, such as while in disciplinary detention, does not deprive an inmate of “basic human necessities,” and thus its use does not violate the Eighth Amendment.

Recently, however, in the case of Terrance Prude v. David A. Clark, Jr., the Seventh Circuit Court of Appeals issued a decision stating that the nutraloaf served to a Milwaukee inmate could violate the Eighth Amendment prohibition on cruel and unusual punishment.

In that case, inmate Prude was serving time in a Wisconsin state prison, but was transferred to the Milwaukee County Jail on several occasions, to allow him to go to court for his post-conviction petition for writ of habeas corpus. During Prude’s second and third trips to county jail, which lasted more than a week, he was fed with only nutraloaf. This was done because of policy adopted by the jail, making nutraloaf the exclusive diet of inmates who had been in segregated housing in prison at the time of their transfer to the county jail. Inmate Prude had a bad reaction to the nutraloaf, including stomach pains and vomiting. His weight fell from 168 to 154 pounds, a decline which a nurse called “alarming.” Prude also had other unusual symptoms (which he attributed to the meals), such as an anal fissure. Inmate Prude sued the Milwaukee County Sheriff, two county inspectors who worked at the jail, and a custody officer.

Although the district court granted summary judgment to the four defendants, the Seventh Circuit reversed the judgment, holding that the dismissal of the suit was premature. The court noted that the only evidence which the county jail defendants submitted in support of their motion for summary judgment was a “preposterous” affidavit from a sheriff’s department officer. In that affidavit, the officer stated that nutraloaf has been determined to be a nutritious substance for regular meals.” The Seventh Circuit disagreed with this conclusion, noting that nutraloaf isn’t a proprietary food like Hostess Twinkies but, like meatloaf, nutraloaf is a term for a composite food. The recipe of nutraloaf can vary from institution to institution, or even from day to day within an institution. Nutraloaf could meet the requirements for calories and protein one day, yet be poisonous the next day if the...
ingredients had spoiled. The Seventh Circuit went further by holding that even an affidavit from an expert who performed a detailed chemical analysis and stated that nutraloaf meets all dietary requirements would be worthless unless the expert knew and stated that nutraloaf invariably was made the same way in the institution. The Seventh Circuit concluded by holding that deliberate withholding of nutritious food, or substitution of tainted or otherwise sickening food, with the effect of causing substantial weight loss, vomiting, stomach pains, and possibly an anal fissure, or other severe hardships, would violate the Eighth Amendment.

The Prude case, however, should have very little impact on California facilities. Inmate Prude’s experience was very different from those inmates who have only complained about nutraloaf being tasteless. As we explained in our earlier article, the Ninth Circuit specifically distinguished the Supreme Court case of Hutto v. Finney, 437 U.S. 678, 686-87 (1978), where inmates lost weight after eating a tasteless food concoction called “grue,” which provided only 1,000 calories a day. In the leading Ninth Circuit case of LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993), the inmate who ate nutraloaf in an Oregon State Prison’s segregation unit gained around sixty pounds, demonstrating that he may have been deprived of flavor but not calories.

But one thing that prisons and jails should learn from reading the Prude case is that it may be worthwhile to have a procedure in place which documents the ingredients that go into nutraloaf when it is being made. Preferably, the recipe would be standardized, so that prison or jail administrators could prove that the nutraloaf served to one inmate has substantially the same nutritional value as the nutraloaf served to other inmates. This standardization of the recipe should allow jail and prison officials to fight off any challenges by inmates that nutraloaf does not meet their dietary requirements.