DOCUMENTATION AND TESTIFYING IN JAIL LITIGATION

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I. CIVIL SUIT PROCESS

A. Inmate files complaint

1. The person who is suing is the plaintiff. The person being sued is the defendant.

2. The complaint may be filed in state court or federal court. Most suits against jails and jail healthcare professionals are filed in federal court.

   i. Claims brought under state law are usually claims of medical malpractice. These claims are subject to a statutory cap on the amount of damages a plaintiff can recover, and the attorney representing the plaintiff is not entitled to make the defendant pay for his fees.

   ii. Suits in federal court allege constitutional and civil rights claims. These claims are not subject to any cap on the amount of recoverable damages and the plaintiff's attorney is entitled to recover his or her fees if s/he prevails.

3. Many inmates are unrepresented (pro se) in civil lawsuits against jails and jail healthcare professionals. There are some procedural differences when an inmate is pro se but otherwise the claims are treated no differently.

4. When a pro se inmate files a complaint in federal court, the court will first review the allegations to see if they state a legal basis upon which relief may be granted. In a screening order, the court will dismiss any claims that cannot proceed. The remaining claims will be allowed to continue and the parties being sued (defendants) will be served with the complaint.

5. If you are served with a complaint or legal documents (e.g. a request to waive service), immediately contact your supervisor who will then be able to contact the employer's attorney.

6. You will be provided an attorney through your employer or employer's insurer. The attorney will file all necessary documents on your behalf. The attorney may meet with you in person or contact you by phone or email to discuss the allegations.

B. Litigation Continues - Discovery

1. Discovery is the fact-finding phase of a lawsuit.

2. During discovery, you may be asked to obtain certain records from your files. You may need to review answers prepared by your attorney to written questions (interrogatories) and confirm they are accurate.

3. During this phase, you may have to attend a deposition and be deposed. A deposition is a process in which you are asked questions by the plaintiff's attorney. Your testimony is given under oath and recorded by a court reporter. You will be represented at the deposition by your attorney, who will object to any objectionable questions. You will also meet with your attorney before the deposition and s/he will prepare you for the process and tell you what, if anything, you should review.

C. Motion Practice

1. In many cases, defenses are available to the claims against jail and jail healthcare providers that can be raised in a dispositive motion. This type of motion is called a motion for summary judgment. If you succeed on this kind of motion, some or all of the claims are dismissed. If all of the claims are dismissed, the case is over (other than possible post-judgment motions or an appeal).

2. Your attorney will write a brief and gather all supporting evidence needed to support the motion. This may include your affidavit or declaration regarding certain facts. You will need to review your affidavit or declaration for accuracy and sign it.

3. Some courts take several months to decide motions. The entire litigation process is slow and may take more than a year depending on the court.

D. Trial

1. Any claims that are not dismissed through a motion for summary judgment will proceed to trial. You may have to testify at trial. Your attorney will again prepare you for this process and will have you review any testimony that you gave at your deposition.

2. If your case is in federal court, your trial will take place at the U.S. District Court for the Western District of Wisconsin or the Eastern District of Wisconsin. If you are in the Western District, the trial will be in Madison. If you are in the Eastern District, your trial will either be in Milwaukee or Green Bay.

3. At any point up until and even during trial, the case can settle. Your attorney will negotiate on your behalf and discuss any settlement demands with you.

E. No Personal Liability

1. When being sued for work performed in the course and scope of your employment, a finding of liability is not assessed against you personally.

2. Your employer and/or its insurer will be providing you with a defense attorney and paying for that representation. Your employer and/or its insurer will pay for any judgment against you.

3. The main exception to this rule is if the claim against you is based on alleged actions that were not taken in the course or scope of your employment. (e.g. sexual contact with an inmate)

II. LEGAL LIABILITY - MEDICAL CARE IS REQUIRED

A. The Sheriff shall provide appropriate medical care or treatment in the jail, Wis. Stats. § 302.83; *Swatek v. Dane County*, 192 Wis. 2d 47, 531 N.W.2d 45 (1995).

1. Jails are required to provide care for inmates in both emergency situations (i.e. heart attack, suicides) and to treat chronic conditions (i.e. asthma).

B. The requirement for the Sheriff to provide medical care to jail inmates may include the hiring of medical professionals (i.e. nurse, doctor, mental health worker) and the contracting for professional services (i.e. Crisis Center, physicians, hospitals).

1. A municipality cannot shield itself from liability by contracting with a third party to provide medical care. A municipality may give the contractor final authority to make decisions about inmates' medical care, but that will not insulate the municipality from liability. *See King v. Kramer*, 680 F.3d 1013 (7th Cir. 2012). If the municipality contracts with a third-party, it should still maintain oversight to ensure proper services are being provided.

2. The Seventh Circuit has expressed concerns about jail physicians who are located a significant distance from the facility that they serve. *See King*, discussing physician located in another state 300 miles away and whether he was able to properly evaluate and change an inmate's medications.

3. The jail always wants to ensure that there are policies for inmates to access medical and that procedure is clear to the inmates. The jail policies also should be consistent with the policies of the medical provider as to procedure to access medical care and the responsibilities of the parties.

4. Indemnification agreements may exist between the municipality and the contracted medical provider. Some of these agreements state that the medical provider will indemnify the jail for the negligence of the medical staff.

5. Contracts may include provisions as to training, reporting, meetings, staffing, complaint process, and staff changes.

C. Inmates in municipal lockup are entitled to medical and mental healthcare. Wis. Admin Code DOC 349.09.

1. This may include emergency dental care DOC 349.09(2).

2. This may include prescribed medications DOC 349.09(3).

D. Medical care is required when mandated by a physician or when it is so obvious that a lay person could recognize the necessity, *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997).

E. The failure to provide dental care that causes unnecessary pain is actionable. *McGowan v. Hulick*, 612 F. 3d 636 (7th Cir. 2010). Failure to refer to dentist can be deliberate indifference, *Berry v. Peterman*, 604 F.3d 435 (7th Cir. 2010).

F. May not withhold necessary medical care based on ability to pay.

III. COMMUNICATION AND DOCUMENTATION

A. Symptoms that may be of obvious significance to the medical staff might not be to laypersons. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

B. Every decision made to dispense or forego healthcare should be recorded.

1. Correctional personnel and healthcare professionals who administer medication should only document the delivery after mediation is given (not before it is handed out) and should note if the inmate refused.

2. Records should show what care offered as alternatives to that requested. *Flores v. O'Donnell*, 36 Fed. Appx. 204 (7th Cir. 2002).

C. Changes in a medical condition may suggest a need to review and re-evaluate, *Dunigan v. Winnebago County*, 165 F.3d 587 (7th Cir. 1999); *Mombourquette v. Monroe County*, 469 F. Supp. 2d 624 (W.D. Wis. 2007).

1. Whether an inmate's condition has changed may be a medical decision (i.e. if an inmate can be taken off of 15 minute watches).

2. Corrections staff cannot rely entirely on the opinions of health care providers but must use their own judgment as to whether the condition appears to be worsening. *Mombourquette v. Monroe County*, 469 F. Supp.2d 624 (W.D. Wis. 2007).

D. Officers must consider whether a delay will make a difference in the condition or will it continue pain longer than may be necessary, *Lewis v. Cooper*, 771 F.2d 334 (7th Cir. 1985); *Dockerty-Bostron v. Waukesha County*, 744 F. Supp. 877 (E.D. Wis. 1990).

1. Asking an inmate whether they can "wait" until medical staff is on duty may not be enough.

2. Even though a health care provider may have seen an inmate earlier, if there is a change of circumstances, officers must consider the impact of a delay in seeking additional medical attention.

E. Issues/Practical Considerations.

1. Officers and health care staff should routinely document inmate problems, concerns and observations, telephone calls with physicians and appointments made for inmates. Odd or bizarre behavior should also be relayed to medical staff (especially if there was already a safety or mental health concern).

2. The correctional and medical file should reflect contacts between Officers and the medical staff regarding an inmate's well-being or concerns. Even if officers are not recording contacts, medical staff should do so.

3. The correctional and medical files should reflect contact with other health care providers, including ER visits, Crisis/mental health visits along with the reason for contact and the findings or recommendations of that health care provider.

4. Discharge instructions from the emergency room or recommendations from other health care professionals may need to be documented and disclosed to the medical staff and other correctional. (i.e. if the instructions were to watch out for certain symptoms, both the medical and correctional staff must be aware of this information—especially if there is not 24 hour medical staff).

5. Communications from family as to medical or mental health care concerns may need to be available to both correctional staff and health staff.

6. Healthcare information should be summarized for receiving facility when inmates are transferred, Wis. Stats. § 302.388.

7. Intake Screening should include questions on mental health and should be done by someone trained on medical/mental health issues.

8. A procedure should be in place as to how Inmate Request forms are documented and relayed to the appropriate personnel to handle. Copies of the Request forms should be maintained in an Inmate's file.

IV. STANDARDS FOR LIABILITY-FEDERAL

A. A claim may be brought under the Fourth Amendment, Eighth Amendment and the Fourteenth Amendment, depending on the status of the inmate.

1. **Arrest without warrant/No probable cause hearing**. The Fourth Amendment's "objectively reasonable" standard applies.

2. **Pretrial Detainee**. The higher standard of the Fourteenth Amendment, "deliberate indifference," applies.

3. **Sentenced inmate**. The Eighth Amendment's "deliberate indifference" standard applies.

B. Healthcare providers in a correctional setting are generally subject to the deliberate indifference standard because they are treating pretrial detainees and sentenced inmates.

1. An inmate who is arrested and booked into jail but who has not yet had a probable cause hearing is subject to the Fourth Amendment's "objectively reasonable" standard.
2. Depending on the time of booking (e.g. late night or the weekend), the timeframe within which the Fourth Amendment applies may be multiple days and the inmate may require medical care during that time.

C. The Eighth Amendment prohibits "cruel and unusual punishments" and inmates have a constitutional right to be protected from harm, including self-inflicted harm. *Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992); *Sanville v. McCaughtrv*, 266 F.3d 724 (7th Cir. 2001).

1. The Eighth Amendment's prohibition of cruel and unusual punishment extends to the denial of both medical and mental health care. *Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976); *Sanville v. McCaughtrv*, 266 F.3d 724, 733-34 (7th Cir. 2001).

2. When a Sec. 1983 claim is made by an inmate, the standard is whether the actions of the correctional staff amounted to deliberate indifference to an inmate's medical or mental health needs. *Mathis v. Fairman*, 120 F.3d 88, 91 (7th Cir. 1997); *Sanville v. McCaughtrv*, 266 F.3d 724, 733-34 (7th Cir. 2001).

D. In order to establish a cause of action under Section 1983, two factors must be established: (1) that the harm to the inmate was objectively, sufficiently serious and a substantial risk to his or her health and safety; and (2) that the individual defendants, based on the information in their possession, were deliberately indifferent to the inmate's health and safety. *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994); *Collins v. Seeman*, 462 F.3d 757 (7th Cir. 2006). *Riccardo v. Rausch*, 375 F.3d 521, 525 (7th Cir. 2004).

1. Deliberate indifference is demonstrated by evidence that officials knew of and disregarded serious risks to the inmate's needs. *Estate of Novack v. County of Wood*, 226 F.3d 525, 529 (7lh Cir. 2000); *Sanville v. McCaughtrv*, 266 F.3d 724, 733-34 (7th Cir. 2001); *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006).

2. Deliberate indifference cannot be based on claims that the officer or provider ''should have known" or "should have been aware" of a significant risk of harm or injury. *Estate of Novack v. County of Wood*, 226 F.3d 525, 529 (7th Cir. 2000); *Collins v. Seeman*, 462 F.3d 757, 761 (7th Cir. 2006).

3. Negligence, gross negligence, medical malpractice or lack of due care is insufficient to establish deliberate indifference. *Duane v. Lane*, 959 F.2d 673, 677 (7th Cir. 1992); *Estate of Cole v. Fromm*, 94 F.3d 254, 259 (7th Cir. 1996) (requiring proof of "deliberate indifference" and rejecting proof merely of "negligent treatment"); *Cavalieri v. Shepard*, 321 F.3d 616, 626 (7th Cir. 2003) ("deliberate indifference cannot rest on negligent actions or inactions, but instead must rest on reckless indifference to the plight of an inmate").

E. Objective Prong: Serious Medical Need

1. Normal aches and pains are not actionable under § 1983. *See Gutierrez v. Peters*, 111 F.3d 1364, 1372-73 (7th Cir. 1997)(stating that failure to treat a common cold does not support a deliberate indifference claim); *see also Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996)(stating that a prison medical staff's refusal to treat minor "ailments for which many people who are not in prison do not seek medical attention-does not by its refusal violate the Constitution.")

2. *See Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997); *Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999). A medical need is "sufficiently serious" if the need is one that:

   a. has been diagnosed by a physician as mandating treatment;

   b. is so obvious that a layperson would easily recognize the need for medical care;

   c. is such that if untreated could result in further significant injury or unnecessary and wanton infliction of pain;

   d. is such that a reasonable physician or layperson would find worthy of comment or treatment;

   e. is such that it significantly affects inmates daily activities; or

   f. features chronic and substantial pain.

F. Subjective Prong: Deliberate Indifference

1. To satisfy the subjective component of medical care claim, prisoner must show that officials acted with a "sufficiently culpable state of mind" – officials must know of and disregard an excessive risk to prisoner health. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Greeno v. Daley*, 414 F.3d 645, 652-53 (7th Cir. 2005).

2. Medical providers' differing opinions as to best treatment for prisoner do not amount to deliberate indifference. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996).

3. An inmate's mere disagreement with his treatment or medication regimen is insufficient to prove deliberate indifference. *Johnson v. Doughty*, 433 F.3d 1001 (7th Cir. 2006).

4. "To infer deliberate indifference on the basis of a physician's treatment decision, the decision must be so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." *Norfleet v. Webster*, 439 F.3d 392, 397 (7th Cir. 2006) (citing *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996). It is wantonness, not inadvertence or error in good faith that characterizes conduct prohibited by the Eighth Amendment. *Oliver v. Deen*, 77 F.3d 156, 161 (7th Cir. 1996).

5. The Eighth Amendment does not permit a doctor to knowingly choose ineffective causes of treatment over effective ones, or to simply continue with a course of treatment that he knows is ineffective in treating an inmate's condition. *Gulley v. Ghosh*, 864 F. Supp. 2d 725, 730-31 (N.D. Ill. 2012).

6. The length or delay in treatment that is tolerable depends on the seriousness of the condition and the ease of providing treatment. *Flourney v. Ghosh*, 881 F. Supp. 2d 980, 987 (N.D. Ill. 2012).

7. Inmate does not need to show his requests for medical attention or medical needs were literally ignored to prevail on claim. *Greeno v. Daley*, 414 F.3d 645, 653-54 (7th Cir. 2005); *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000).

G. Corrections officials can reasonably believe that inmates are in capable hands when in the care of medical experts; it is an appropriate division of labor relating to inmate life. *Greeno v. Daley*, 414 F.3d 645, 656 (7th Cir. 2005) (quoting *Spruill v. Gillis*, 372 F.3d 218, 236 (3rd Cir. 2004)).

H. A staple of liability for an individual under 42 U.S.C. § 1983 is personal involvement. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

1. An individual defendant cannot face liability "unless he (or she) caused or participated in an alleged unconstitutional violation" *McBride v. Soos*, 679 F.2d 1223, 1227 (7th Cir. 1982).

2. The key is specificity; the plaintiff must identify specific conduct on the part of each individual defendant that is linked to or directly caused the

plaintiff's harm—generalities are insufficient. *See Wolfe-Lillie v. Sonquest*, 699 F.2d 864, 869 (7th Cir. 1983).

I. A plaintiff asserting a claim of deliberate indifference must establish causation. The plaintiff bears the burden of proving that the alleged harm sufferance was the result of the defendant's supposedly insufficient treatment. *Talifierro v. Augle*, 757 F.2d 157, 161-62 (7th Cir. 1985).

V. FEDERAL CASE EXAMPLES

A. No deliberate indifference where physician determined soft-soled shoes and medications no longer needed for arthritic prisoner after receiving differing opinions in four-month period. No deliberate indifference by physician's assistant who made prisoner wait at least 10 days for refill per policy. *Norfleet v. Webster*, 439 F.3d 392 (7th Cir. 2006).

B. No deliberate indifference where jail medical staff failed to give arrestee a certain pain medication prescribed at hospital. Although failing to follow instructions received from outside health care experts can amount to deliberate indifference, in this case the hospital only told jail staff to send arrestee back to the hospital to have staples on his scalp removed. After jail's physician examined arrestee, the physician exercised his professional medical judgment in prescribing a different pain medication than that prescribed by the hospital. A difference of medical opinion does not amount to deliberate indifference. *Cacciola v. McFall*, 561 Fed. Appx. 535, 539 (7th Cir. 2014) (unpublished).

C. Prolonged and severe pain can amount to a serious medical need. *Walker v. Benjamin,* 293 F.3d 1030, 1039-40 (7th Cir. 2002).

1. Steadily worsening toothache deemed to be objectively serious. *Berry v. Peterman*, 604 F.3d 435 (7th Cir. 2010). In Berry, the doctor was not entitled to summary judgment where he would not refer a prisoner to a dentist unless he was infected or had an emergency and where prisoner complained medications did not resolve pain because jury could infer that doctor was expecting prisoner to endure pain for several weeks before transfer to state prison system where he would receive dental care.

2. Inmate alleged sufficient facts to state a claim of deliberate indifference by alleging that he went without medical attention for five days in the county jail after suffering injuries to his head, eyes, and back in an attack by another inmate. *Smith v. Knox County Jail*, 666 F.3d 1037 (7th Cir. 2012).

2. An ear infection, though a "common malady," could be deemed objectively serious where it "inflicted prolonged suffering" and

required extensive treatment. *Zentmeyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000).

D. A jury could infer deliberately indifferent conduct where plaintiff's evidence showed that correctional facility's physician treated recurring ear infections with antibiotics and pain medication, but repeatedly refused plaintiff's request to see an outside medical specialist over a course of seven years due to cost concerns. *Maldonado v. Powers*, No. 12-cv-773-JPG-PMF, 2014 WL 2926522 (S.D. Ill June 27, 2014).

E. Delay in receiving care may be actionable if delay is deliberately indifferent and results in "substantial harm." *Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995); *Anderson-EI v. O'Keefe*, 897 F. Supp. 1093 (N.D. Ill. 1995). However, where overall course of treatment is continuous, isolated delays in care may not establish deliberate indifference. *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997).

1. Nurse was not deliberately indifferent to prisoner's serious back pain, even if she delayed for a few hours in providing prisoner a non-prescription pain reliever, where nurse allowed prisoner to remain in the infirmary and receive treatment there until he was ready to return to his cell. *Brown v. Darnold*, 505 Fed. Appx. 584 (7th Cir. 2013).

2. A cause of action for deliberate indifference is established when an inmate alleges that prison physicians failed to alter treatment that, over a number of years, had proved to be an ineffective way to treat a hernia. *Gonzalez v. Feinerman*, 663 F.3d 311 (7th Cir. 2011).

F. No deliberate indifference where correctional center's medical director did not prescribe a specific medication upon inmate's request, but within the first six months of treatment reevaluated the inmate's medication several times, performed tests not performed by other doctors, and sent inmate to a specialist. *Willis v. Loftin*, No. 11 C 1315, 2014 WL 3821977 (N.D. Ill Aug. 4, 2014).

1. An inmate does not show deliberate indifference by claiming he wanted specific type of treatment and foolproof guarantee against further disease or medical trauma. *See Forbes v. Edgar*, 112 F.3d 262 (7th Cir. 1997).

2. The question of whether additional diagnostic techniques or forms of treatment are necessary is an example of medical judgment, and generally does not represent a constitutional violation. *Walker v. Peters*, 989 F. Supp. 971 (N.D. Ill. 1997).

G. Failing to make officials aware of need for care or refusal to accept treatment presented may preclude claim of deliberate indifference. *Vance v. Peters*, 97 F.3d 987 (7th Cir. 1996).

1. Refusal to cooperate with health care providers may prohibit claim. *McNeil v. Redman*, 21 F. Supp. 2d 884 (C.D. Ill 1998).

H. It may be deliberate indifference to fail to treat pre-existing and chronic conditions, such as hypertension, hepatitis, asthma, emphysema, and heart conditions. *McNeil v. Redman*, 21 F. Supp. 2d 884 (C.D. Ill. 1998).

I. Failure to provide translator where language barrier exists may lead to misdiagnosis and pain and suffering may be deliberate indifference. *Qian v. Kautz*, 168 F.3d 949 (7th Cir. 1999); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983).

J. Genuine issue of material fact existed regarding whether a nurse was deliberately indifferent to a prisoner's medical needs where the nurse left prisoner suffering from back pain to climb a ladder-less bunk bed and prisoner fell. *Withers v. Wexford Health Sources, Inc.*, 710 F.3d 688, 689-90 (7th Cir. 2013).

K. In some circumstances, the denial of medication can violate the Eighth Amendment, but such a denial of medication must be gratuitous and without reason. If the denial of medication is justified by the greater course of treatment and if the prisoner's medical care is otherwise reasonable, then there is no Eighth Amendment violation. *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003).

L. Prison physician did not display deliberate indifference to inmate's condition of shoulder pain although inmate did not receive MRI scan he wanted, because physician diagnosed inmate with arthritis and did not believe MRI scan would help in treatment, inmate received frequent examinations, x-rays, and painkillers. *Ray v. Wexford Health Services*, 706 F.3d 864, 866 (7th Cir. 2013).

M. Summary judgment granted to defendant jail officials and independent medical care providers for claims based on mistaken referral where, because inmate was not seen in timely fashion by shoulder specialist, he lost the opportunity to have shoulder repair surgery. *Shields v. Illinois Dep't of Corrs.*, Nos. 12–2746, 13–1143, 2014 WL 949950 (7th Cir. March 12, 2014).

VI. STANDARDS FOR LIABILITY – STATE

A. State Standards § 302.38 Medical care of prisoners. If a prisoner needs hospital or medical care or is intoxicated by alcohol the sheriff, superintendent or other keeper of the jail shall provide appropriate care or treatment and may transfer the prisoner to a hospital or to an approved treatment facility. Wis. Stat. § 302.38.

B. Officials may be liable in negligence for failing to obtain medical attention for an inmate where the need is apparent and the inmate suffers serious illness or injury. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 514 N.W.2d 48 (Ct. App. 1994)

(applying ordinary care standard to duty to arrange for care in first instance).

C. Inmates need not expressly request care or voice complaints for duty to be triggered. *See* Wis. Admin. Code § DOC 350.18 (care includes affirmative assessment of needs on intake and needs for routine and emergency medical attention, as well as care provided upon inmate request).

D. Must provide "necessary" medical care (including mental health treatment) and "emergency" dental care. Wis. Admin. Code § DOC 350.09(1).

E. Must have provision for segregating mentally ill inmates where appropriate. Wis. Stat. § 302.36.

F. Officials may be immune from civil liability if prisoner refuses appropriate treatment and:

1. The official arranges for a health care professional to observe the inmate;

2. The professional informs the inmate of the availability of care; and

a. The professional indicates on records kept by the jail that appropriate care was offered and refused.

b. Wis. Stat. § 302.384.

G. Medication distribution system allowing correctional officers without medical training to distribute prepared blister packs containing inmate medication does not show deliberate indifference, even where occasional minor mistakes are made. *Davis v. McCaughtry*, 222 Wis. 2d 218, 587 N.W.2d 214, 1998 WL 635526 (Ct. App. 1998) (unpublished).

H. Failure to transfer inmate with ALS (Lou Gehrig's Disease) to facility equipped to provide appropriate medical care and assistance is deliberate indifference to medical needs. *Santiago v. Leik*, 179 Wis. 2d 786, 797-80, 508 N.W.2d 456 (Ct. App. 1993).

VII. SUICIDE/SELF HARM AND OTHER MENTAL HEALTH CONCERNS

A. It may be difficult to differentiate mental health concerns given that abnormal behavior is common in jails and prisons. *Jutzi-Johnson v. United States*, 263 F.3d 753, 757 (7th Cir. 2001). Corrections staff "must discriminate between serious risks of harm and feigned or imagined ones, which is not an easy task given the brief time and scant information available to make each of the many decisions that fill every day's work." *Riccardo v. Rausch*, 375 F.3d 521, 525 (7th Cir. 2004).

B. Suicide has been found to be an objectively serious harm. *Sanville v. McCaughtrv*, 266 F.3d 724, 733 (7th Cir. 2001); *Matos v. O' Sullivan*, 335 F.3d 553, 556 (7th Cir. 2003).

C. Bizarre behavior is not necessarily notice of suicide risk, *Estate of Novack v. Wood County*, 226 F.3d 525 (7th Cir. 2000); *Jutzi-Johnson v. U.S.*, 263 F.3d 753 (7th Cir. 2001).

1. Mood swings alone insufficient, *Estate of Frank v. C. of Beaver Dam*, 921 F. Supp. 590 (E.D. Wis. 1996).

2. Odd behavior, however, may be a factor that has to be considered by the correctional or health care staff when assessing whether there is a mental health concern or if additional evaluation is necessary.

D. Prison psychologists found not deliberately indifferent to the serious medical needs of an inmate who suffered from significant mental illness. Psychologists placed inmate on behavior action plan that included removing inmate's personal property from cell and placing inmate in segregation from general population. During plan, psychologists monitors inmate's access to property he could use to harm himself and repeatedly placed inmate on observation status to ensure his safety when he was suicidal. *Townsend v. Cooper*, 759 F.3d 678 (7th Cir. 2014).

E. There is no constitutional right to be protected from suicide. An officer's or nurse's failure to recognize the potential in an inmate is not actionable, *Hinkfuss v. Shawano County*, 772 F. Supp. 1104 (E.D. Wis. 1991); *Boncher v. Brown County*, 272 F.3d 484 (7th Cir. 2001).

F. To be liable of deliberate indifference, an officer or jail healthcare employee must know of the suicide risk or at least information that would suggest this risk. *Matos v. O'Sullivan*, 335 F.3d 553 (7th Cir. 2003); *Collins v. Seeman*, 462 F.3d 757 (7th Cir, 2006).

1. "Deliberate indifference to a substantial risk of suicide by an inmate, even a completely sane and rational inmate constitutes a violation of the inmate's constitutional rights. It therefore follows that the fact that Taylor was not mentally ill is irrelevant to this claim." *Taylor v. Wausau Underwriters*, 423 Supp.2d 882 (E.D. Wis. 2006).

G. There may not be liability for failure to place an inmate who later committed suicide into a facility which may have been better equipped, *Payne v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), cert, denied. 527 U.S. 1004.

H. Siblings of inmate who committed suicide adequately alleged that institute's staff members were subjectively aware that inmate was at suicide risk, fulfilling

requirement to allege deliberate indifference to inmate's serious medical condition. The inmate refused to take court-ordered medications the night he died, had a well-documented history of suicidal behavior, and was housed in a unit for inmates in need of greater supervision. *Estate of Miller v. Tobiasz*, 680 F.3d 984 (7th Cir. 2012).

I. While prisoners have a "significant liberty interest" in not taking unwanted antipsychotic medications, this interest may be overcome where a medical decision is made that the prisoner has a serious mental illness, is dangerous to others, and treatment is in the prisoner's best interest. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

VIII. MEDICATION DISTRIBUTION TO INMATES

A. No prescriptions may be administered unless prescribed by a physician.

1. Jails (DOC 350.09); Municipal Lockups (DOC 349.09)

2. Approval of outside medications: Make sure no unreasonable delay in getting approval of medications. Document when medication was received and all measures to get approval.

B. Medication distribution and refusals documented. Jail: DOC 350.20; Municipal Lockup: DOC 349.19.

C. Registered nurses may delegate authority to administer medication to jail staff and supervise same where:

1. Educational preparation and demonstrated abilities of staff warrant it;

2. Nurse provides direction and assistance to those supervised;

3. Nurse observes and monitors those supervised; and

4. Nurse evaluates the effectiveness of acts performed.

Wis. Adm. Code § N 6.03.

D. Medications may need to be distributed by nurses where there is a pattern of past errors by corrections officers, *Flynn v. Doyle*, 630 F. Supp. 2d 987 (E.D. Wis. 2009).

E. No deliberate indifference where correctional center's medical director did not prescribe a specific medication upon inmate's request, but within the first six months of treatment reevaluated the inmate's medication several times,

performed tests not performed by other doctors, and sent inmate to a specialist. *Willis v. Loftin*, No. 11 C 1315, 2014 WL 3821977 (N.D. Ill Aug. 4, 2014).

F. Failure to administer medications can be a violation on proof the correctional staff knew serious injury or pain results. *Zentmeyer v. Kendall County*, 220 F.3d 805 (7th Cir. 2000) (the failure to correctly dispense ear drops and antibiotics every day as prescribed could be shown to prolong the infection and lead to permanent hearing loss).

G. Nurse was not deliberately indifferent to prisoner's serious back pain, even if she delayed for a few hours in providing prisoner a non-prescription pain reliever, where nurse allowed prisoner to remain in the infirmary and receive treatment there until he was ready to return to his cell. *Brown v. Darnold*, 505 Fed. Appx. 584 (7th Cir. 2013).

H. A jury could infer deliberately indifferent conduct where plaintiff's evidence showed that correctional facility's physician treated recurring ear infections with antibiotics and pain medication, but repeatedly refused plaintiff's request to see an outside medical specialist over a course of seven years due to cost concerns. *Maldonado v. Powers*, No. 12-cv-773-JPG-PMF, 2014 WL 2926522 (S.D. Ill June 27, 2014).

I. Jail officers not deliberately indifferent to inmate's seizures, which may have caused his death, where they were not responsible for medical care and immediately notified nursing staff and monitored inmate while awaiting a nurse to arrive. *King v. Kramer*, 680 F.3d 1013 (7th Cir. 2012). Court subsequently held that the county was not liable for death of the pretrial detainee absent evidence that county had an official custom or policy in place to deprive inmates of their prescribed medications. *King v. Kramer*, 763 F.3d 635, 649 (7th Cir. 2014).

J. Pre-existing and chronic conditions must be treated, *McNeil v. Redman*, 21 F, Supp. 2d 884 (C.D. Ill 1998) (hypertension, hepatitis, asthma, emphysema, heart condition).

IX. INVOLUNTARY MEDICAL CARE

A. An inmate's need and not a request for care is what triggers the duty of care, Wis Admin Code DOC 350.18.

B. Although Wisconsin Statutes provide immunity from suit if inmate refuses medical treatment (per Wis. Stats., § 302.384) that may not bar a federal suit.

1. Officers should consider an Involuntary Detention under Chapter 51 if there is a concern that the inmate is in immediate danger of harm.

2. All refusals should be documented.

C. Medical care directed by healthcare staff may be carried out even if involuntary where adverse health consequences could result if not done, *Sullivan v. Bornemann*, 384 F. 3d 372 (7th Cir. 2004).

D. For claims that involuntary administration of medical care violated prisoner's rights, courts consider:

1. whether there is a valid, rational connection between the prison regulation and legitimate governmental interest put forward to justify it;

2 . whether there are alternative means of exercising the right that remain open to prison inmates;

3. the impact accommodation of the asserted constitutional right will have on guards and other inmates, and the allocation of prison resources; and

4. whether there is a ready alternative to the policy that fully accommodates the prisoner's rights at minimal cost to valid penological interests

5. *Russell v. Richards*, 384 F.3d 444 (7th Cir. 2004); *Turner v Safley*, 482 US 78 (1987).

X. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

A. Federal Court.

1. The Prison Litigation Reform Act requires exhaustion of administrative remedies. *Santiago v. Ware*, 205 Wis. 2d 295 (Ct. App. 1996); *Perez v. Wisconsin Dep't of Corrs.*, 182 F.3d 532 (7th Cir. 1999). Prisoners must exhaust internal prison grievance procedures before they file suit in federal court. 42 U.S.C. § 1997e(a).

2. "To exhaust remedies, a prisoner must file complaints in the place, and at the time, the prison's administrative rules require." *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002).

3. Administrative requirements must be clear. Where prison review board did not have clear rule requiring personal appearance of prisoner and prisoner alleged he was not informed the board wanted him to appear, dismissal of his lawsuit for failure to exhaust administrative remedies was inappropriate. *Carroll v. Yates*, 362 F.3d 984 (7th Cir. 2004).

4. If administrative remedies are unavailable, the exhaustion requirement is met. *Lewis v. Washington,* 300 F.3d 829, 833 (7th Cir. 2002).

5. Failure to respond to inmate grievances renders remedies unavailable. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002).

6. "An inmate's perception that exhaustion would be futile does not excuse him from the exhaustion requirement." *Thornton v. Snyder*, 428 F.3d 690, 694 (7th Cir. 2005)(citing *Booth v. Churner*, 532 U.S. 731, 741 (2001)).

7. PLRA mandates exhaustion "regardless of the relief offered through administrative procedures." *Booth v. Churner*, 532 U.S. 731, 741 (2001).

8. A state prisoner complained about his medical treatment. He did not fail to exhaust administrative remedies based on failure to file additional grievances regarding officials' failure to respond to first complaint or to transfer him to hospital after the prisoner's artery burst due to alleged failure in medical care. Complaining about medical personnel's failure to transfer him to a hospital would not have supplied relief because he had already incurred the harm that he alleged resulted from the delay. Thus, there was no available administrative remedy to exhaust. *Gabby v. Meyer*, 390 F. Supp. 2d 801 (E.D. Wis. 2005).

9. "[A] remedy is not "available" within the meaning of the Prison Litigation Reform Act to a person physically unable to perform it." *Hurst v. Hantke*, 634 F.3d 409, 412 (7th Cir. 2011)(discussing prisoner's inability to complete grievance procedure following a stroke that left him 'almost totally incapacitated' for longer than the time limits in the grievance procedure), *cert. denied*, No. 10-10753, __ S. Ct. __, 2011 WL 4531218 (Oct 03, 2011).