IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al.,	)	
	)	
Plaintiffs,	)	Case No. CIV 91-299-S-LMB
	)	
v.	)	ORDER
	)	
JAMES SPALDING, et al.,	)	
	)	
Defendants.	)	

Currently pending before the Court are Plaintiffs' Motion to Alter or Amend (Docket No. 612), Defendants' Motion for Amendment of Findings of Fact, Conclusions of Law and Judgment (Docket No. 614), Defendants' Motion to Dismiss (Docket No. 619), Defendants' Motion to Compel Responses to Discovery Requests (Docket No. 621), Defendants' Motion to Shorten Time to Hear Motion to Compel Responses to Discovery Requests (Docket No. 623), Plaintiffs' Motion for Protective Order (Docket No. 629), Plaintiffs' Motion for Extensions of Time for Filing Response Briefs and Reply Brief (Docket No. 632), Plaintiffs' Motions to Withdraw Motion to Authorize Limited Discovery (Docket Nos. 641 and 650), Defendants' Motion to Dismiss or for Summary Judgment (Docket No. 651), and Defendants' Motions for Protective Orders (Docket Nos. 654, 657 & 664).

Having reviewed the record, and otherwise being fully advised, the Court enters the

680

following Order.

1. **Plaintiffs' Motion to Alter or Amend (Docket No. 612)**

On March 16, 1999, the Court entered its Findings of Fact, Conclusions of Law, Memorandum Decision and Order relating to Plaintiffs' claims of unlawful retaliation. In that decision, the Court concluded that although members of Plaintiffs' class had been subjected to unlawful retaliatory conduct, the unlawful conduct did not pervade the class to support prospective class-wide injunctive relief. Thereafter, on March 22, 1999, the Court entered a Judgment in which Plaintiffs were awarded equitable relief which declared that Defendants had engaged in unlawful retaliation against members of the class of inmate plaintiffs while such inmates were engaged in the exercise of federally guaranteed rights. However, pursuant to the Judgment of the Court, prospective injunctive relief was not awarded.

On March 30, 1999, Plaintiffs moved the Court to alter or amend the Findings of Fact, Conclusions of Law, Memorandum Decision and Order to the extent that prospective individual injunctive relief be awarded, based upon the instances of retaliation which the Court concluded had occurred, in order to remedy the effects of the unlawful retaliation and to protect the individuals against the reoccurrence of such retaliation. Plaintiffs move the Court to alter or amend the March 16, 1999 Order as well as the Judgment to award prospective individual relief with respect to those inmates who continue to remain under the control of the Idaho Department of Corrections. They include three class representatives, Lee Hays, Bob Jones and Alfredo Roman, as well as three class members, Wayne Olds, Thomas Sanger and Carl Shively.

Defendants oppose Plaintiffs' instant motion to alter or amend the Court's prior rulings to include prospective individual injunctive relief. According to Defendants, the instances of retaliation found by the Court may not serve as a basis to award prospective equitable relief inasmuch as past violations may not provide the requisite element of standing necessary for the Court to award the injunctive relief requested by Plaintiffs.

Plaintiffs now move the Court, pursuant to Federal Rule of Civil Procedure 59, to alter or amend the Findings of Fact, Conclusions of Law, Memorandum Decision and Order to the extent that the March 16, 1999 Order reflects that individual Plaintiffs are entitled to prospective injunctive relief and to direct the entry of a new judgment consistent with such amended findings of fact and conclusions of law. Fed. R. Civ. P. 59(e); 52(b).

The United States Court of Appeals for the Ninth Circuit has held that in determining whether to grant a motion for reconsideration "the major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989). According to Plaintiffs, an injustice would occur to the extent that the Court, having already concluded that unlawful retaliation occurred against individual inmates, failed to award individual injunctive relief in order to remedy past wrongs incurred as a result of such retaliation and to protect against the reoccurrence of the unlawful conduct. Thus, Plaintiffs assert that the requested amendment is required to prevent manifest injustice. As a result, the Court shall limit its review of Plaintiffs' motion to alter or amend the Judgment to whether the requested amendment would prevent manifest injustice.

The United States Supreme Court has stated that once a federal court determines that a constitutional violation has occurred, the court "should make every effort" to remedy the violation. *Davis v. Board of School Comm'rs of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292 (1971). Thus, "in the event of a constitutional violation 'all reasonable methods be available to formulate an effective remedy,' ... and that every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of (relief), taking into account the practicalities of the situation.'" *Hills v. Gautreaux*, 425 U.S. 284, 297, 96 S.Ct. 1538, 1546 (1976) (quoting *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586, 589

(1971); *Davis*, 402 U.S. at 37, 91 S.Ct. at 1292). As a result, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276 (1971). However, the Supreme Court has instructed that any equitable relief awarded "must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 2183 (1996).

The Ninth Circuit has also stated that "[i]njunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation," and that "[i]n fashioning a remedy for constitutional violations, a federal court must order effective relief." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986) (citing *Milliken v. Bradley*, 433 U.S. 267, 280, 97 S.Ct. 2749, 2757 (1977); *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980)). "However, [the] goal [of a federal court] is to cure only constitutional violations, [and not] a 'general assignment to go about doing good.'" *Toussaint*, 801 F.2d at 1087 (citing *Swann*, 402 U.S. at 16, 91 S.Ct. at 1276; and quoting *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978)). Further, in fashioning any prospective individual injunctive relief, the Court must follow the requirements of the Prison Litigation Reform Act which provides that the Court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998) (quoting 18 U.S.C. §3626(a)(1)).

Based upon the evidence received during the extensive trial conducted in the instant action, the Court concluded that representative inmates, as well as inmates within the applicable class of plaintiffs, were subjected to unlawful retaliation, which took "the form of prison transfers, firing inmates from prison employment, disassembling of prisoner's files," as well as the issuance of Disciplinary Offense Reports. Findings of

Fact, Conclusions of Law, Memorandum Decision and Order, p. 32 (Docket No. 608). Plaintiffs now seek an amendment to the Judgment that, in addition to declaring that such retaliation occurred, enters individual injunctive relief to remedy the effects of the unlawful conduct as well as to prevent such retaliation from reoccurring.

Inasmuch as Plaintiffs established that Plaintiff Alfredo Roman received a DOR in retaliation for the exercise of protected activities, Plaintiffs argue that the Court should award Plaintiff Roman equitable relief in the form of an injunction requiring Defendants to strike the unlawful DOR from his institutional file and ensure that the improper DOR does not have any adverse impact upon inmate Roman, especially with respect to his opportunity for parole. Further, because the Court concluded that inmates Thomas Sanger and Carl Shively were subjected to retaliatory firings from their employment as recreation department janitors as a result of the exercise of federally protected rights, Plaintiffs assert that the Court should enter an injunction requiring their reinstatement to their positions of employment and to require Defendants to expunge all record of the unlawful firings from their institutional files. Further, Plaintiffs assert that, to the extent that inmates Sanger and Shively achieved a certain pay level for inmate employment based upon the number of years they worked in the recreation department, the Court should enter an injunction providing that these inmates are not required to begin at the bottom of the inmate pay scale for future positions as a result of the retaliatory firings.

Although Plaintiff Roman's inmate file does contain a record of the retaliatory DOR, Defendants assert that the possibility that this DOR, in light of numerous other DORs in his record, would affect a parole decision which he is not eligible for until April 29, 2009, is completely speculative. Because Plaintiffs are unable to establish that Plaintiff Roman is subject to an immediate and concrete threat of injury to his opportunity to receive parole from his incarceration, Defendants maintain that Plaintiff Roman is not entitled to an award of injunctive relief.

This Court has noted that "it is very clear that during this entire litigation

Defendants have attempted to trivialize virtually every claim made by Plaintiffs, including those several incidents which were in fact retaliatory in nature and did not advance legitimate penological goals." Findings of Fact, Conclusions of Law, Memorandum Decision and Order, p. 34. A review of Defendants' opposition to Plaintiffs' instant motion to alter or amend appears to indicate to the Court that Defendants not only continue to trivialize Plaintiff Roman's retaliation claim but also have given little regard to an Order of this Court declaring that Plaintiff Roman was subjected to unlawful retaliation in the form of a retaliatory DOR.

Accordingly, due consideration having been given to the positions taken by the respective parties, the Court concludes that Defendants' opposition is without merit and, because the Court has concluded that violations of federal rights occurred, it is appropriate to enter an Order requiring Defendants to eradicate all adverse consequences of the unlawful retaliation Plaintiffs have established. In this regard, Plaintiffs' motion to alter or amend is granted to the extent that the Court shall enter an order requiring Defendants to expunge all reference to the retaliatory DOR in Plaintiff Roman's institutional record and eradicate all adverse consequences resulting from the unlawful DOR. Further, Plaintiffs' motion is also granted to the extent that inmates Sanger and Shively's institutional files shall be amended and cleared of all record, notation, history or referencing to the firings the Court has declared were unlawful and retaliatory. In this regard, Defendants shall eradicate all adverse consequences resulting from the unlawful firing, including any adverse consequence which relates to the employment pay level Sanger and Shively may be entitled to receive in the event they are able to secure future prison employment.

Accordingly, pursuant to this Order, as well as an Amended Judgment that shall be entered, Defendants are hereby required to provide notice of compliance, including copies of the institutional records of Plaintiff Roman, inmate Sanger and inmate Shively, to counsel for Plaintiffs within sixty (60) days after the date of the Amended Judgment.

Further, to the extent that such notice of compliance is not timely provided, or Defendants fail to comply with this Court's order requiring eradication of all adverse effects resulting from Defendants' prior unlawful conduct as noted in this and the prior order, the Court shall impose pecuniary sanctions against Defendants for each day that such notice remains delinquent.

In addition to the equitable relief designed to correct present adverse effects caused by past illegal conduct, Plaintiffs request the Court enter individual prospective injunctive relief designed to mitigate the chilling effect of Defendants' unlawful retaliatory conduct by prohibiting unlawful retaliation from occurring in the future and allowing Plaintiffs the opportunity to enforce the injunction through a civil contempt proceeding. Based upon the nature of their confinement, Plaintiffs assert that the unlawful retaliation the Court concluded they were exposed to is likely to occur again in the future.

Defendants take the position that Plaintiffs have not established that prospective individual injunctive relief is appropriate, inasmuch as Plaintiffs have not established a significant possibility of future harm. In this regard, Defendants argue that the establishment of past constitutional violations does not support an award of prospective equitable relief. In support of this position, Defendants cite the Court to *San Diego County Gun Rights v. Reno*, 98 F.3d 1121 (9th Cir. 1996). In that action, the Ninth Circuit discussed the general requirements upon plaintiffs to establish standing to sue in federal court. 98 F.3d at 1126. In addition to the general requirements imposed upon plaintiffs in all actions, when "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury." 98 F.3d at 1126 (citing *Bras v. California Pub. Util. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996)).

The Supreme Court has held that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if

unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 496-97, 94 S.Ct. 669, 676 (1974). However, the Supreme Court has also indicated that past violations of federally guaranteed rights or "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." 414 U.S. at 497, 94 S.Ct. at 676.

The harm that Plaintiffs seek to prevent through the equitable powers of this Court is the possibility of a future chilling effect that may occur to the extent that they are subject to a reoccurrence of retaliatory conduct the Court has concluded took place in the past. As noted by the Ninth Circuit, with respect to First Amendment cases, "the Supreme Court has recognized 'chilling' effect as an adequate injury for establishing standing because the alleged danger ... is, in large measure, one of self-censorship." *San Diego Co. Gun Rights*, 98 F.3d at 1129. As a result, Plaintiffs maintain that, due to retaliatory transfers, disassembly of legal files, as well as retaliatory conduct aimed at decreasing the effectiveness of IDOC's prison grievance procedure, the Court may properly award injunctive relief to individual Plaintiffs to remedy the continuing adverse effect or injury that has resulted in chilling the exercise of rights guaranteed by the First Amendment.

In this Court's March 16, 1999 Order, the Court noted that it was:

> [C]oncerned about the injuries caused by retaliatory transfers resulting from the exercise of protected rights. The Court notes that IDOC officials testified at trial that they have not created a rule which prohibits individual officers from improperly asserting influence upon a transfer coordinator in order to include a burdensome and litigious inmate on the list of inmates that are to be transferred. Based upon the evidence presented at trial, the Court has concluded that the absence of a rule prohibiting retaliatory transfers has allowed such retaliation to occur.

Findings of Fact, Conclusions of Law, Memorandum Decision and Order, p. 33.

After carefully and thoroughly reviewing the positions taken by the respective parties in light of controlling authority cited, the Court concludes that Plaintiffs' motion to alter or amend the Judgment to include individual prospective injunctive relief should be granted with respect to potential retaliatory transfers of Plaintiffs Lee Hays and Bob Jones as well as inmate Wayne Olds. Important to the Court's consideration in this regard are the circumstances surrounding the determination that inmates had been subjected to unlawful retaliatory transfers as a result of Defendants' failure to create a prison rule prohibiting undue influence from being exerted by IDOC personnel in the creation of transfer lists and the chilling effect that such transfers caused and contributes to a real and immediate threat of further chilling of federally protected rights. Accordingly, Plaintiffs' motion to alter or amend the Judgment is granted to the extent that Defendants shall be required to submit a proposed remedial plan which is designed to ensure that the inmates subjected to retaliatory transfers will not again be subjected to that same retaliatory conduct. Defendants shall submit the proposed remedial plan to the Court, and opposing counsel, within thirty days after the receipt of this Order.

However, to the extent that Plaintiffs seek prospective individual injunctive relief tailored to prevent future retaliatory conduct similar to those instances the Court concluded had occurred, Plaintiffs' motion to alter or amend is denied.

2. **Defendants' Motion for Amendment of Findings of Fact, Conclusions of Law and Judgment (Docket No. 614)**

Pursuant to Federal Rules of Civil Procedure 52(b) and 59(a)(2), Defendants move to amend the Findings of Facts, Conclusions of Law, Memorandum Decision and Order, as well as to amend the Judgment entered in the instant action. According to Defendants, the Court committed numerous instances of error in reaching the factual findings and legal conclusions discussed in its Memorandum Decision and Order.

Having carefully considered each of the numerous grounds asserted by Defendants to be in clear error, in light of the positions taken by the respective parties with respect to

the instant motion and controlling legal authority, the Court concludes that Defendants' motion is without merit and is therefore denied.

3. **Defendants' Motion to Dismiss (Docket No. 619)**

Defendants motion to dismiss pursuant to Rule 12(b)(1) based upon an assertion that Plaintiffs have failed to sustain their burden to establish all the necessary elements to maintain standing under Article III of the United States Constitution is denied.

4. **Defendants' Motion to Compel Responses to Discovery Requests (Docket No. 621)**

A review of the record indicates that Plaintiffs have asserted that their opportunity to access the courts has been limited as a result of Defendants' targeting and surveillance of ACLU attorneys and their clients through the compilation of visitation lists as well as contention that Defendants have been opening privileged correspondence between inmate Donald Day and counsel for Plaintiffs. On February 1, 1999, Plaintiffs moved the Court to authorize limited discovery regarding these allegations. *See* Docket No. 589. Also pending before the Court was Plaintiffs' motion for leave to file an amended complaint to allege claims that Defendants had impeded Plaintiffs' ability to access the court system through the implementation of an access to court policy. *See* Docket No. 543. Finally, on February 18, 1999, Plaintiffs moved the Court to order certain Deputy Attorneys General to show cause why they should not be sanctioned for professional misconduct as a result of interference with privileged legal correspondence.

On March 23, 1999, the Court issued a Memorandum Decision and Order in which Plaintiffs' motion for leave to file an amended complaint was granted to the extent that Plaintiffs were given leave to file an amended complaint seeking relief "under the new access to courts policy now in place based upon alleged inadequate legal forms and failure to provide legal assistance to inmates," but denied leave to amend in all other respects. Memorandum Decision and Order, p. 19 (Docket No. 610). Also, pursuant to that same Order, the Court granted Plaintiffs' motion "to conduct limited discovery

regarding actions undertaken by IDOC officials in forwarding inmate visitation lists to counsel in the Attorney General's Office, as well as to discover information pertaining to alleged unauthorized reading of protected attorney-client correspondence." *Id.* at p. 42, ¶ I. In this regard, the Court determined that Plaintiffs' motion for sanctions against counsel for Defendants would be resolved within this instant action and concluded that Plaintiffs should be allowed the limited discovery they sought to conduct, not to develop an independent claim for relief, but to determine whether issues relating to visitation lists and alleged unauthorized interception, retention and reading of privileged communication materials were a continuation of inappropriate and unprofessional conduct in which Plaintiffs allege that counsel for Defendants have engaged. To that limited extent, the Court allowed both Plaintiffs and Defendants to engage in limited discovery.

Defendants now move the Court to compel Plaintiffs to fully respond to outstanding discovery requests propounded pursuant to the Court's March 23, 1999 Memorandum Decision and Order which are designed to discover information relating to Plaintiffs' assertion that attorney-client communications have been chilled and the extent of the injury resulting from the limitations on inmates' ability to access the courts. Defendants seek information relating to the amount of attorney fees Plaintiffs will seek in relation to their motion for sanctions, the dates and times that ACLU attorneys visited with inmates at IMSI and ISCI during the pendency of the instant action, a description of the factual basis for any "chilling" of attorney-client communications, the names of inmates alleged to have suffered injury as a result of "chilled" communications and information that was withheld from inmate clients as a result of counsel's fears that the communications would be intercepted. Defendants also seek the production of all correspondence in the possession of the ACLU attorneys which relates to visits between counsel and inmates at all IDOC institutions, all documents relevant to the claims of access to court interference resulting from visitation lists and privileged mail referenced in Plaintiffs' motion for limited discovery and all letters between counsel for Plaintiffs

and inmate Day which Plaintiffs allege were opened and copied by IDOC.

Federal Rule of Civil Procedure 26 provides that a "[p]art[y] may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. ... [and that t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The sole remaining issue to be decided by the Court in this instant action relates to whether ethical duties of professional conduct were breached by counsel for Defendants during the pendency of this instant action and, if so, the extent to which an appropriate sanction should be imposed. Accordingly, to the extent that the parties seek information that is designed to lead to the discovery of admissible evidence relating to whether the visitation lists and recent interference with privileged material amounts to a continuation of alleged professional misconduct during the instant dispute, such material is relevant for purposes of discovery and shall be provided. However, discovery requests that are not designed to determine whether there has been a continuation of professional misconduct during the instant action is irrelevant and shall not be allowed.

A review of the discovery information and material requested by Defendants indicates that they are not reasonably calculated to lead to the discovery of admissible evidence relating to the sole issue remaining before the Court. Accordingly, Defendants' motion to compel is denied.

5. **Defendants' Motion to Shorten Time to Hear Motion to Compel Responses to Discovery Requests (Docket No. 623)**

Defendants' motion for an order shortening the time within which the Court would resolve Defendants' motion to compel is moot.

6. **Plaintiffs' Motion for Protective Order (Docket No. 629)**

Plaintiffs move the Court for a Protective Order prohibiting Defendants from deposing counsel for Plaintiffs. As noted above, the limited discovery that the Court has

allowed relates to whether the allegations contained in Plaintiffs' motion for limited discovery constitutes a continuation of professional misconduct alleged to have been committed by counsel for Defendants during the pendency of the instant action by the interception, retention and reading of privileged mail. Defendants now seek to depose Plaintiffs' counsel, Stephan Pevar, in light of the discovery that the Court has allowed to be conducted. Defendants have not indicated what personal knowledge Pevar may possess which relates to whether Defendants' counsel committed professional misconduct or how his deposition is reasonably designed to lead to admissible evidence relating to Plaintiffs' motion for sanctions currently pending before the Court. Rather, the Court is of the opinion that the only reason Pevar has been scheduled for deposition is because Plaintiffs want to take the depositions of Defendants' counsel. A *quid pro quo.* However, Defendants have not established good cause or indicated what personal knowledge counsel for Plaintiffs could testify to regarding any alleged professional misconduct committed by counsel for Defendants, Plaintiffs' motion for Protective Order is granted.

7. **Plaintiffs' Motion for Extensions of Time for Filing Response Briefs and Reply Brief (Docket No. 632)**

Plaintiffs move the Court to extend the time within which they may file certain memoranda with the Court. After reviewing Plaintiffs' motion, and Defendants' non-opposition to the relief requested, the Court concludes that Defendants are deemed to have agreed to the motion and, further, good cause exists. Accordingly, Plaintiffs' motion is granted.

8. **Plaintiffs' Motions to Withdraw Motion to Authorize Limited Discovery (Docket Nos. 641 & 650)**

Plaintiffs move the Court to withdraw its motion to authorize limited discovery. However, as previously indicated, the Court granted that motion and allowed the parties an equal opportunity to seek factual discovery. Having entered an Order granting the

relief requested, Plaintiffs may not unilaterally withdraw the relief requested in the earlier motion in the event that Defendants seek to conduct the limited discovery the Court has allowed. Accordingly, Plaintiffs' motions to withdraw the relief requested and subsequently granted by the Court are denied. However, the parties are free to reach an informal agreement as to the discovery allowed by the Court.

9. **Defendants' Motion to Dismiss or for Summary Judgment (Docket No. 651)**

Defendants move the Court to enter an Order dismissing Plaintiffs' claims set forth in its motion to authorize limited discovery, that Defendants improperly monitored visits between ACLU attorneys and inmates as well as improperly read privileged mail between counsel for Plaintiff and inmate Day. As noted above, the Court had determined that Plaintiffs' motion for sanctions should be resolved during this instant action. To that end, and pursuant to a motion to conduct discovery, the Court has allowed the parties to engage in limited discovery to determine the extent to which the alleged professional misconduct complained of in Plaintiffs' motion for sanctions continued to occur through the more recent allegations of misconduct relating to attorney visitation monitoring and interference with privileged mail. Inasmuch as claims premised upon alleged improper monitoring of ACLU attorney visits and interference of privileged mail are not before the Court, Defendants' motion to dismiss or for summary judgment is denied as moot.

10. **Defendants' Motions for Protective Order and to Quash Notices of Depositions (Docket Nos. 654, 657 & 664)**

Pursuant to their motions, Defendants request the Court enter an Order prohibiting Plaintiffs from taking the depositions of Kevin Burnett and Debbie Shields, employees of the Idaho Department of Corrections, as well as Deputy Attorneys General Stephanie Altig and Timothy McNeese, in addition to high ranking attorneys within the Attorney General's Office, namely Michael Henderson, David High and John McMahon.

Plaintiffs oppose Defendants' motions by asserting that the Court has allowed the

filing of a motion for sanctions to be imposed against Altig and McNeese for alleged professional misconduct during the existence of the instant action and, as a result, discovery is necessary to determine the extent to which any professional violations occurred, if at all. Plaintiffs maintain that they do not seek to violate any privileged attorney-client communications or other privileged information but instead seek to conduct the depositions in order to determine the factual support for assertions that Defendants made in opposition to the motion for sanctions. Any attempt to discover the factual support for the assertions is related, according to Plaintiffs, to the motion currently pending before the Court and not in order to gain a tactical advantage in any potential subsequent lawsuit.

Federal Rule of Civil Procedure 26 provides that, upon a showing of good cause, "the court in which the action is pending or alternatively, on matters relating to a deposition, ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). It is also a well established principle that a federal "court has the duty and responsibility to supervise the conduct of attorneys who appear before it." *Terrebonne, Ltd. of California v.* Murray, 1 F.Supp.2d 1050, 1054 (E. D. Cal. 1998) (citing *Erickson v. Newmar Corp.*, 87 F.3d 298, 301 (9th Cir. 1996)). "The district court's power to sanction derives from several sources: federal statute, Local Rules of Court, and its inherent power." *Id.* In this regard, the Ninth Circuit has stated:

> Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession.

Gas-A-Tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1324-25 (9th Cir.), *cert. denied*

sub nom., 429 U.S. 861, 97 S.Ct. 164 (1976). The United States Supreme Court has held that a determination to impose sanctions against an attorney who "has abused the judicial process ... may be made after the principal suit has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456 (1990).

In order to determine whether sanctionable conduct has been committed by an attorney, the Court must provide that attorney an opportunity to respond to the allegations of misconduct as well as a hearing. *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1082 (9th Cir. 1988). Further, when "the conduct giving rise to the imposition of sanctions occurred outside the presence of the court, counsel should be provided an opportunity to explain his conduct." *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

Thus, it is well established that the Court has the authority to conduct an evidentiary hearing to determine the extent, if any, to which misconduct has occurred in an action pending before it. During that hearing, those who allegedly committed the acts forming the basis of Plaintiffs' motion for sanctions should have an opportunity to explain their conduct to the Court. Based upon the circumstances surrounding the conduct which Plaintiffs claim was inappropriate and forms the basis of their motion for sanctions, the Court concludes that it would promote the effectiveness of such a hearing to allow Plaintiffs the prior opportunity to conduct the depositions that they seek.

The Court is mindful of Defendants' concerns regarding the proposed depositions of Burnett and Shields, but concludes that it would be inappropriate to deny discoverable information relating to Plaintiffs' motion for sanctions on the grounds that a potential lawsuit may be filed sometime in the future. Further, the Court notes that both Burnett and Shield may assert relevant privileges in response to deposition questions. Finally, the scope of the depositions is strictly limited to an inquiry relevant to the Court's determination of the motion for sanctions, which is based upon an allegation that Deputy Attorneys General Altig and McNeese engaged in professional misconduct, and not

whether Burnett or Shields independently violated any IDOC rules or otherwise infringed upon any rights held by inmates held within IDOC custody.

With respect to Deputy Attorneys General Henderson, High and McMahon, Altig and McNeese's supervisors in the Attorney General's Office at the time, the Court notes that Plaintiffs seek only to inquire as to the timing that Altig and McNeese consulted with these supervisors, what questions were posed to the supervisors, the information they were given and the response the supervisors gave and when, etc. The Court concludes that it is neither necessary nor appropriate that Henderson, High or McMahon provide evidence or submit affidavits at this time. Therefore, any subpoenas or notices for their depositions are hereby quashed and Plaintiffs' motion in this regard is denied without prejudice. The depositions of Deputy Attorney Generals Altig and McNeese, and Kevin Burnett and Debbie Shields shall be conducted prior to the June 28, 1999 evidentiary hearing.

Defendants have requested that the Court directly attend and supervise the depositions that Plaintiffs will be allowed to conduct. According to Defendants, the Court's direct involvement is necessary as a result of "the hostility of the parties and the acrimonious nature of this matter." Defendants' Reply Memorandum in Support of Defendants' Motion for Protective Order, p. 6, ¶ B (Docket No. 674). Regardless of the importance that either Plaintiffs or Defendants may attribute to this Court's direct involvement in the depositions that shall be conducted, the Court has no intention of sitting through depositions to any extent. Irregardless of the relationship existing between the parties, counsel are strongly reminded that they remain subject to all applicable rules of professional conduct and should conduct and appear at the scheduled depositions as professionals. Nothing more needs to be said on this issue.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion to Alter or Amend (Docket No. 612) is GRANTED IN PART AND DENIED IN PART. Plaintiffs shall submit a proposed Amended Judgment and remedial plan within thirty (30) days.
2. Defendants' Motion for Amendment of Findings of Fact, Conclusions of Law and Judgment (Docket No. 614) is DENIED.
3. Defendants' Motion to Dismiss (Docket No. 619) is DENIED.
4. Defendants' Motion to Compel Responses to Discovery Requests (Docket No. 621) is DENIED.
5. Defendants' Motion to Shorten Time to Hear Motion to Compel Responses to Discovery Requests (Docket No. 623) is DENIED AS MOOT.
6. Plaintiffs' Motion for Protective Order (Docket No. 629) is GRANTED.
7. Plaintiffs' Motion for Extensions of Time for Filing Response Briefs and Reply Brief (Docket No. 632) is GRANTED.
8. Plaintiffs' Motions to Withdraw Motion to Authorize Limited Discovery (Docket Nos. 641 and 650) are DENIED.
9. Defendants' Motion to Dismiss or for Summary Judgment (Docket No. 651) is DENIED AS MOOT.
10. Defendants' Motions for Protective Orders (Docket Nos. 654, 657 & 664) are GRANTED as to Henderson, High and McMahon, and DENIED as to Altig, McNeese, Burnett and Shields.

SO ORDERED this 17th day of June, 1999.

LARRY M. BOYLE
UNITED STATES MAGISTRATE JUDGE

CLERK'S CERTIFICATE OF MAILING

I hereby certify that a copy of the attached document was mailed to the following named persons:

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CAMERON S. BURKE, CLERK

By Lynette C. Case
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