**5.2**

**Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Claim – Prisoner Alleging Retaliation or Denial of Access to Courts**

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, violated [his/her] rights under the First Amendment to the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant] violated [his/her] constitutional right of access to the courts by [describe defendant’s conduct, *e.g.*, by making a disciplinary report against [him/her]] because [he/she] [attempted to use the legal system] [communicated an intent to use the legal system] about [describe plaintiff’s grievance, *e.g.*, concerning [his/her] continuation in a close-confinement status].

A convicted prisoner loses some constitutional rights, such as the right to liberty, after being convicted of a criminal offense. But the prisoner keeps other constitutional rights. One of those retained rights is the First Amendment right of access to the courts to challenge the lawfulness of [name of plaintiff]’s conviction and the constitutionality of [his/her] confinement conditions. If [name of plaintiff] had no right to go to court to address these claims, the Constitution’s guarantees would have no meaning, because there would be no way to enforce the guarantees.

The Constitutional right of access to the courts means that a prisoner has the right to file claims and other papers with the court, and the exercise of that right, or plan to exercise that right, cannot be the basis for a penalty or further punishment. This is true because, once again, if [name of plaintiff] could be punished for exercising a constitutional right or for giving a good-faith notice of intent to do so, the right itself would be meaningless.

But to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions on the exercise of constitutional rights.

[The prohibition against prisoners making written threats is one reasonable restriction on the exercise of First Amendment rights. And, in this case, [name of defendant] claims that [name of plaintiff]’s communication to [him/her/it] about a lawsuit was nothing more than a written threat intended to harass prison officials—not a good-faith notice of intent to sue that was given in an effort to reach a settlement in a pending, legitimate dispute.]

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [attempted to use the legal system] [communicated [his/her] intent to use the legal system to [name of defendant]];

Second: That [name of plaintiff]’s [attempt to use the legal system] [communication to [name of defendant] of [his/her] intent to use the legal system] was made in good faith as an exercise of [his/her] First Amendment rights and was not a bad-faith threat intended as an act of harassment;

Third: That [name of defendant] intentionally retaliated against or punished [name of plaintiff] because of [his/her] [attempt to use the legal system] [communication of [his/her] intent to use the legal system to [name of defendant]]; and

Fourth: That [name of defendant] acted under color of law when [he/she] retaliated against or punished [name of plaintiff]. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the third element, [name of defendant] “retaliated against” [name of plaintiff] if [name of defendant]’s actions would likely deter a similarly situated reasonable person in [name of plaintiff]’s position from exercising First Amendment rights.

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts “under color” of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, then you must consider [name of defendant]’s contention that [he/she] would have [describe defendant’s alleged retaliation or punishment] anyway. To succeed on this contention, [name of defendant] must prove by a preponderance of the evidence that [he/she] would have done the same thing if [name of plaintiff] had not [describe attempt to use the legal system or communication of [his/her] intent to use the legal system to [name of defendant]].

If you find [name of plaintiff] has proved each of the facts [he/she] must prove and if you find that [name of defendant] has not proved [his/her] contention, you must then decide the issue of [name of plaintiff]’s damages. However, if you find that [name of plaintiff] did not prove each of the facts [he/she] must prove, or if you find that [name of defendant] proved [his/her] contention, then you must find for [name of defendant].

**NOTE:** Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.