

Chapter Five: How to Protect Your Freedom to Take Legal Action

Just like people on the outside, prisoners have a fundamental constitutional right to use the court system. This right is based on the First, Fifth and Fourteenth Amendments to the Constitution. Under the First Amendment, you have the right to “petition the government for a redress of grievances,” and under the Fifth and Fourteenth Amendments, you have a right to “due process of law.” Put together, these provisions mean that you must have the opportunity to go to court if you think your rights have been violated. Unfortunately, doing legal work in prison can be dangerous, as well as difficult, so it is important to **KNOW YOUR RIGHTS!**

A terrible but common consequence of prisoner activism is harassment by prison officials. Officials have been known to block the preparation and filing of lawsuits, refuse to mail legal papers, take away legal research materials, and deny access to law books, all in an attempt to stop the public from knowing about prisoner issues and complaints. Officials in these situations are worried about any actions that threaten to change conditions within the prison walls or limit their power. In particular, officials may seek to punish those who have gained legal skills and try to help their fellow prisoners with legal matters. Prisoners with legal skills can be particularly threatening to prison management who would like to limit the education and political training of prisoners. Some jailhouse lawyers report that officials have taken away their possessions, put them in solitary confinement on false charges, denied them parole, or transferred them to other facilities where they were no longer able to communicate with the prisoners they had been helping.

With this in mind, it is very important for those of you who are interested in both legal and political activism to keep in contact with people in the outside world. One way to do this is by making contact with people and organizations in the outside community who do prisoners’ rights or other civil rights work. You can also try to find and contact reporters who may be sensitive to, and interested in, prison issues. These can include print newspapers and newsletters, broadcast television and radio shows, and online sites. It is always possible that organizing from the outside aimed at the correct pressure points within prison management can have a dramatic effect on conditions for you on the inside.

Certain court decisions that have established a standard for prisoner legal rights can be powerful weapons in your activism efforts. These decisions can act as strong evidence to persuade others that your complaints are legitimate and reasonable, and most of all, can win in a court of law. It is sometimes possible to use favorable court rulings to support your position in non-legal challenges, such as negotiations with prison officials or in administrative requests for protective orders, as well as providing a basis for a lawsuit when other methods may not achieve your desired goals.

This Chapter explains your rights regarding access to the courts. This includes your right to:

- (1) File legal papers, and to communicate freely about legal matters with courts, lawyers, and media;
- (2) Reasonable access to law books;
- (3) Obtain legal help from other prisoners or help other prisoners; and
- (4) Be free from retaliation based on legal activity.

A. THE RIGHT TO FILE PAPERS AND COMMUNICATE WITH COURTS, LAWYERS, LEGAL WORKERS, AND THE MEDIA

In 1977, the Supreme Court held in a case called *Bounds v. Smith*, 430 U.S. 817 (1977), that prisoners have a fundamental constitutional right of access to the courts. This right of access requires prison authorities to help prisoners prepare and file meaningful legal papers in one of two ways. They can give you access to a decent law library **OR** they can hire people to help you with your cases. The prison gets to choose which way they want to do it. However, that ruling was changed by a later Supreme Court case, *Lewis v. Casey*, 518 US. 343 (1996), which held that prisoners have to show an “actual injury” and the existence of a “non-frivolous legal claim” to win an access to the courts case. In other words, even if your prison isn’t allowing you to use the law library and isn’t giving you legal help, you still can’t necessarily win a lawsuit about it. To win, you would also have to show that you have a real case that you lost or had problems with because of your lack of access to the law library or legal assistance. Courts do not agree on exactly what constitutes “actual injury” and it is not yet clear whether you need to show actual injury if prison officials have actively interfered with your right of access, like by stopping you from mailing a complaint.

For a few different takes on these questions, compare *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001) and *Tourscher v. McCollough*, 184 F.3d 236, 242 (3d Cir. 1999).

The “actual injury” requirement in *Lewis v. Casey* also applies if you are seeking damages for a past injury. In another recent Supreme Court case, *Christopher v. Harbury*, 536 U.S. 403 (2002), a woman who wasn’t a prisoner claimed that she had been denied access to the court because the U.S. government had withheld information from her about her husband’s torture by Guatemalan military officers in the pay of the CIA. The Court dismissed her claim because she still had a way to get damages. The Court explained that to get damages for a past denial of court access the plaintiff must identify a remedy that is presently unavailable.

- ❑ **IMPORTANT:** Keep the *Lewis v. Casey* “actual injury” requirement in mind as you read the rest of this chapter. It may or may not apply to *all* of the following rights related to access to the courts, and it means that many of the cases cited in this chapter from before 1996 are of somewhat limited usefulness. For this reason, it is very important for you to find out how the courts in your circuit interpret *Lewis v. Casey*.

1. Attorney and Legal Worker Visits

Your right of access to the courts includes the right to try to get an attorney and then to meet with him or her. For pretrial detainees, the Sixth Amendment right to counsel protects your right to see your attorney. However, even prisoners without pending criminal cases have a due process right to meet with a lawyer. In a case called *Procunier v. Martinez*, 416 U.S. 396 (1974), the Supreme Court explained that not only do you have a right to meet with your attorney, but you also have a right to meet with law students or legal paraprofessionals who work for your attorney.

However, you should be aware that prisons can impose reasonable restrictions on timing, length, and conditions of attorney visits. For example, the right to meet with legal workers and lawyers does not necessarily mean that you have a right to meet them in a contact visit. Most courts have held that you do have the right to a contact visit with your attorney. On the other hand, other courts have held that a prison may be able to keep you from getting a contact visit if there is a legitimate security reason. For more about contact visits with attorneys, compare: *Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1990) and *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

2. Legal Mail

Mail that is sent to you from attorneys, courts, and government officials is protected by the First and Sixth Amendments. This means that prison officials are not allowed to read or censor this type of incoming mail. However, they can open it and inspect it for contraband as long as they do it in front of you. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Mail you send to attorneys and courts is also privileged and may not be opened unless prison officials have a special security interest that must meet certain Fourth Amendment requirements. *Washington v. James*, 782 F.2d 1134 (2d Cir. 1986); *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976).

3. Media Mail

Mail to and from reporters is treated much the same way. Mail you send to reporters usually may not be opened or read. Incoming mail from the press can be inspected for contraband, but only in front of you. *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976). However, requests from news media for face-to-face interviews can be denied, since the press does not have a special constitutional right of access to jails and prisons any more than the average person does. *Pell v. Procunier*, 417 U.S. 817 (1974).

4. The Prison Law Library

If your prison decides to have a law library to fulfill their requirements under *Bounds*, you can then ask the question: Is the law library adequate? A law library should have the books that prisoners are likely to need, but remember, under *Lewis v. Casey*, you probably can’t sue over an inadequate law library unless it has hurt your non-frivolous lawsuit. The lower courts have established some guidelines as to what books should be in the library.

Books Required to be Available in Law Libraries:

- ❑ Relevant state and federal statutes
- ❑ State and federal law reporters from the past few decades
- ❑ **Shepards** citations
- ❑ Basic treatises on habeas corpus, prisoners’ civil rights, and criminal law

For more detailed information on what must be available, you may want to read some of the following cases: *Johnson v. Moore*, 948 F.2d 517 (9th Cir. 1991); *Corgain v. Miller*, 708 F.2d 1241 (7th Cir. 1983); *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980) or take a look at the American Association of Law Libraries list of recommended books for prison libraries. This list is reprinted in the *Columbia Human Rights Law Review Jailhouse Lawyers' Manual*. Ordering information for the Columbia Manual is in Appendix E. However, you need to keep in mind the fact that these cases and lists have limited value today, and must be understood in connection to *Lewis v. Casey*.

Federal courts have also required that prisons libraries provide tables and chairs, be of adequate size, and be open for inmates to use for a reasonable amount of time. This does not mean that inmates get immediate access, or unlimited research time. Some cases that explore these issues are: *Shango v. Jurich*, 965 F.2d 289 (7th Cir. 1992); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851 (9th Cir. 1985); *Cepulonis v. Fair*, 732 F.2d 1 (1st Cir. 1984).

Inmates who cannot visit the law library because they are in disciplinary segregation or other extra-restrictive conditions must have meaningful access some other way. Some prisons use a system where prisoners request a specific book and that book is delivered to the prisoner's cell. This system makes research very hard and time-consuming, and some courts have held that, without additional measures, such systems violate a prisoner's right to access the courts. See, for example, *Marange v. Fontenot*, 879 F. Supp. 679 (E.D. Tex. 1995).

5. Getting Help from a Jailhouse Lawyer

You have a limited constitutional right to talk with other prisoners about legal concerns. You have a right to get legal help from other prisoners unless the prison "provides some reasonable alternative

What if I don't have a law library?

Many prisons have either closed their law library or not re-stocked it with new material in years. If this is the case in your law library and you or someone you know on the outside has access to a lawyer, you can try and bring suit against the prison for not complying with *Bounds*. If not, you could try publicizing the fact that your prison is failing to comply with a Supreme Court ruling by sending press releases to various media outlets, like newspapers, television, and the internet.

to assist inmates in the preparation of petitions." *Johnson v. Avery*, 393 U.S. 483, 490 (1969). This means that if you have no other way to work on your lawsuit, you can insist on getting help from another prisoner. In *Johnson*, the Supreme Court held that the prison could not stop prisoners from helping each other write legal documents because no other legal resources were available.

If you have other ways to access the court, like a law library or a paralegal program, the state can restrict communications between prisoners under the *Turner* test if "the regulation... is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Supreme Court has held that jailhouse lawyers do not receive any additional First Amendment protection, and the *Turner* test applies even for legal communications. Therefore, if prison officials have a "legitimate penological interest," they can regulate communications between jailhouse lawyers and other prisoners. *Shaw v. Murphy*, 532 U.S. 223, 228 (2001).

Courts vary in what they consider a "reasonable" regulation. *Johnson* itself states that "limitations on the time and location" of jailhouse lawyers' activities are permissible. The Sixth Circuit Court of Appeals said that it was OK to ban meetings in a prisoner's cell and require a jailhouse lawyer to only meet with prisoner-clients in the library. *Bellamy v. Bradley*, 729 F.2d 417 (6th Cir. 1984). The Eighth Circuit Court of Appeals upheld a ban on communication when, due to a transfer, a jailhouse lawyer is separated from his prisoner-client. *Goff v. Nix*, 113 F.3d 887 (8th Cir. 1997). However, the *Goff* court did require state officials to allow jailhouse lawyers to return a prisoner's legal documents after the transfer. *Id.* at 892.

6. Your Right to Be a Jailhouse Lawyer

The right to counsel is a right that belongs to the person in need of legal services. It does not mean that you have a right to be a jailhouse lawyer or **provide** legal services. *Gibbs v. Hopkins*, 10 F.3d 373 (6th Cir. 1993); *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996). Since jailhouse lawyers are usually not licensed lawyers they *generally* do not have the right to represent prisoners in court or file legal documents with the court, and the conversations between jailhouse lawyers and the prisoner-clients are not usually privileged. *Bonacci v. Kindt*, 868 F.2d 1442 (5th Cir. 1989); *Storseth v. Spellman* 654 F.2d 1349, 1355-56 (9th Cir. 1981). Furthermore, the right to counsel does not give a prisoner the right to choose whom he wants

as a lawyer. *Gometz v. Henman*, 807 F.2d 113, 116 (7th Cir. 1986).

Some courts require a jailhouse lawyer to get permission from prison officials before helping another prisoner. For example, a New York state court held that the prison could punish a prisoner for helping another prisoner by writing to the FBI without first getting permission. *Rivera v. Coughlin*, 620 N.Y.S.2d 505, 210 A.D. 2d 543 (App. Div. 1994).

Nor will being a jailhouse lawyer protect you from transfer, although the transfer may be unconstitutional if it hurts the case of the prisoner you are helping. For more on this, compare *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978) with *Adams v. James*, 784 F.2d 1077, 1086 (11th Cir. 1986). The prison may reasonably limit the number of law books you are allowed to have in your cell. Finally, jailhouse lawyers have no right to receive payment for their assistance. *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

Do Other Prisoners Have a Right to Have You as Their Jailhouse Lawyer?

In some parts of the country, jailhouse lawyers do not have a “right” to help others. However, if the other prisoner can’t possibly file a claim without you, the **he or she may have a right to your assistance**, *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993). Prisoners are guaranteed “meaningful” access to the courts, so if the person you are helping can’t file their claim because he or she doesn’t speak English or is locked in administrative segregation without access to the law library, their rights may be being violated.

B. DEALING WITH RETALIATION

If you file a civil rights claim against the warden, a particular guard, or some other prison official, there is a chance that they will try to threaten you or scare you away from continuing with your suit. Retaliation can take many forms. In the past, prisoners have been placed in administrative segregation without cause, denied proper food or hygiene materials, transferred to another prison, and had their legal papers intercepted. Some have been physically assaulted. Most forms of retaliation are illegal, and you may be able to sue to get relief.

In many states, you may be transferred to another correctional facility for any or no reason at all. *Olim v.*

Wakinekona, 103 S.Ct. 1741 (1983). However, you cannot be put into administrative segregation solely to punish you for filing suit, *Cleggett v. Pate*, 229 F. Supp. 818 (N.D. Ill. 1964). Nor can you be transferred to punish you for filing a lawsuit. Of course, there are other, more subtle things that officers can do to harass you. Perhaps your mail will be lost, your food served cold, or your turn in the exercise yard forgotten. One of these small events may not be enough to make a claim of retaliation, but if it keeps happening, it may be enough to make a claim of a “campaign of harassment.” *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

To prove that the warden or a correctional officer has illegally retaliated against you for filing a lawsuit, you must show three things:

- (1) You were doing something you had a constitutional right to do, which is called “protected conduct.” Filing a Section 1983 claim is an example of “protected conduct.”
- (2) What the prison official(s) did to you, which is called an “adverse action,” was so bad that it would stop an “average person” from continuing with their suit, and
- (3) There is a “causal connection.” That means the officer did what he did because of what you were doing. Or, in legal terms: The prison official’s **adverse action** was directly related to your **protected conduct**.

If you show these three things, the officer will have to show that he would have taken the same action against you regardless of your lawsuit.

- **Example:** An officer learns that you have filed suit against the warden and throws you into administrative segregation to keep you away from law books or other prisoners who might help you in your suit. The “protected action” is you filing a lawsuit against the warden; the “adverse action” is you being placed in the hole. You would have a valid claim of retaliation unless the officer had some other reason for putting you in the hole, like you had just gotten into a fight with another prisoner.

It is possible -- but not easy -- to get a preliminary injunction to keep correctional officers from threatening or harming you or any of your witnesses in an upcoming trial, *Valvano v. McGrath*, 325 F. Supp. 408 (E.D.N.Y. 1970). Also remember that groups of

prisoners are allowed to bring class action suits if many of them are regularly deprived of their constitutional rights. You have strength in numbers – it cannot hurt to enlist the help of friends inside and outside prison. If you can get somebody on the outside to contact the media or the prison administration on your behalf, it may remind the powers that be that others are out there watching out for you, and it may scare them away from engaging in particularly repressive tactics.

□ **REMEMBER!** Even when you think it would be pointless for you to try to talk to a guard's superior or go through the prison's formal complaint system, the PLRA still requires you to do so. If you complain and a guard or someone else threatens you, you still have to go through all available procedures before the court will consider your Section 1983 claim. *Booth v. Churner*, 532 U.S. 731, 740 (2001).