

AN ACTIVIST'S GUIDE:

REDUCING EXPOSURE TO SLAPP LAWSUITS

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Disclaimer: This document does not provide you with legal advice. Each SLAPP case is unique, and each state's laws are unique. If you face the threat of a SLAPP, we strongly recommend that you hire a lawyer to help you understand the specifics of your situation.

INTRODUCTION

The Protect the Protest task force was created in 2018 by a coalition of public interest organizations committed to ending the threat posed by “[Strategic Lawsuits Against Public Participation](#)” (or SLAPPs).

Although you might not recognize the term “SLAPP,” you have probably heard about lawsuits that are used to bully and silence those who speak truth to power: A large company sues an environmental activist who has exposed a pollution scandal, hoping that the lawsuit will scare away other activists. A powerful business person sues a journalist for defamation after being named in a truthful, hard-hitting corruption story. A real estate developer uses the threat of a lawsuit to silence community opposition to a new building project. And on and on.

This guide has been prepared for the Protect the Protest task force by the Civil Liberties Defense Center, EarthRights International, the First Amendment Project, and Greenpeace USA.

For more information, please visit our website at www.protecttheprotest.org or contact us at info@protecttheprotest.org.

WHAT IS A SLAPP?

Free speech and free association are critical to our democracy and our work as activists, journalists, and community organizers. If you are reading this guide, you have probably spoken up about some matter of public concern – environmental pollution, community health, working conditions, or corruption, to name just a few. As part of your campaign, you might have written an article for the newspaper, shared a message on social media, organized a protest, sent a letter to an elected official, or expressed your views in some other way.

The First Amendment of the U.S. Constitution protects your right to speak out on matters of public interest, and to join together with others in advocacy. But those in power who wish to silence your work have found an effective way to do so—by manipulating weaknesses in the U.S. court system that favor wealthy and powerful actors over those who have less resources.

A SLAPP masquerades as a civil lawsuit, but its true goal is to silence your constitutionally protected free speech. A judge will usually dismiss these lawsuits, because you cannot be held liable for exercising your First Amendment rights. But that is not how a SLAPP bully wins.

A SLAPP bully wins by silencing you. A lawsuit can drag on for years, even if it is eventually dismissed. During the litigation, SLAPP bullies will often demand access to your emails, your computer files, and other details of your personal life. A SLAPP can force you to pay thousands of dollars in legal fees, while you have to worry endlessly about going bankrupt if the other side wins. People who were previously supportive of your work might begin to question your credibility. You might waste years of time defending yourself from the lawsuit, rather than working on the issues that you care about. In the end, you—like many others—might agree to end your campaign.

Sometimes SLAPP bullies will use a “loud” strategy. They will design the lawsuit to make an example of you, and to send a warning message to others. The lawsuit will be accompanied by a public relations blitz that aims to damage your or your organization’s credibility. They hope that by suing you, everyone will shut up and go home.

In other cases, the SLAPP bully will use a “quiet” strategy. The public never learns that a SLAPP has taken place. You might feel compelled to settle the lawsuit, even if you don’t believe you’ve done anything wrong. You might sign a settlement agreement with the SLAPP bully, voluntarily giving up your First Amendment rights to speak out on the issue, and even admit to wrongdoing, in order to make the lawsuit go away.

SLAPPs often target people who do not necessarily see themselves as activists and who are not deeply involved in political matters. This might be the first time you and your fellow community members are speaking up on an issue of public concern. You might not have easy access to a lawyer. You might worry that the SLAPP bully will go after your personal assets and leave you bankrupt.

To make matters even more challenging, SLAPPs do not always come in the form of lawsuits. SLAPP bullies have also used other legal tactics, like subpoenas. With a subpoena, a SLAPP bully might try to access your emails, your computer files, the names of your supporters, and details of your personal life without actually suing you.

We believe that the courts should not be used in this way, as a tool of harassment by the wealthy and powerful. SLAPPs are, in essence, an egregious misuse of the judicial system. When you face a SLAPP, it’s important to continue your advocacy work and fight back against being silenced.

To read some examples of SLAPPs, please visit the Protect the Protest task force’s [website](#).

THE TELLTALE SIGNS OF A SLAPP

The person or company trying to intimidate you will never say they are filing a “SLAPP” against you. Rather, the SLAPP will masquerade as a legitimate lawsuit. Most often, the SLAPP bully will accuse you of a tort – such as [defamation, racketeering, interference with economic relations, or copyright infringement](#).

Not every lawsuit or legal action that you face is a SLAPP. Civil lawsuits are an important part of the justice system. Civil lawsuits – when legitimate – allow people and companies to obtain damages for harm caused to them, as well as injunctions and other types of court orders. For example, you could be held liable for defamation if you intentionally spread harmful lies about someone.

SLAPPs can sometimes be difficult to distinguish from legitimate lawsuits, which is part of the reason they are so intimidating. One telltale sign of a SLAPP is when the “wrongful” activity of which you are accused is really an activity protected under the First Amendment of the Constitution (see the next section). For example, they might try to label your legitimate advocacy as wrongful defamation or racketeering.

A second telltale sign is when the person or company filing the lawsuit does not provide any real evidence that you have engaged in wrongful behavior. For example, a company might accuse you of spreading lies about it, but not provide any evidence that what you are saying is untrue.

A third telltale sign is the behavior of the company or person who has sued you after the lawsuit is filed. SLAPP bullies will often try to drag out the case as long as possible, drive up your costs, embarrass you in public, or bankrupt you.

KNOW YOUR RIGHTS: THE FIRST AMENDMENT

For the most part, speaking up as an activist or community organizer on a matter of public interest, and joining together with others in a campaign, is protected under the First Amendment of the U.S. Constitution as “free speech” and “free association.” If you are worried about whether your activity is protected, consult a lawyer.

The First Amendment is broad. It includes your right to gather together, your right to protest, your right to speak about any topic. It includes yelling, profanity, and symbolic speech like burning the American flag. These activities are protected under the law. You cannot be convicted for these types of activities, nor can someone legitimately sue you for conducting these types of activities.

But the First Amendment doesn't protect ALL types of speech. As an activist, community organizer, or journalist, it's important for you to know where the line is drawn between *protected* and *unprotected* speech. If you choose to use unprotected free speech in your public interest work, you should do so intentionally and fully aware that you might face consequences. If you are unsure about whether your planned activity is protected, we recommend that you consult a lawyer.

Here are some of the most common limitations on free speech:

- **Defamation** – Defamation, also known as libel and slander, is when you say something untrue about someone or something that causes reputational damage or economic harm. But if you're speaking about a public controversy, the First Amendment protects even false statements unless you *know* (or have reason to know) that it's false.

●**Fighting words** – Speech delivered in-person that is “personally abusive,” or that would immediately incite violence, is not protected under the First Amendment. Historically, this has been applied to Ku Klux Klan rallies and lynchings.

●**True threats** – If you threaten someone with harm or violence, your speech is not protected. This applies when the speaker means to communicate an intent to commit an act of violence to an individual or group. An example is burning a cross on someone’s lawn. If you are calling out a corporate CEO, be careful of the words you use, because it’s up to the listener to determine if the threat was intended to place them in fear of bodily injury or death. Be careful of sarcasm that might not play well in court documents.

All in all, these restrictions on the First Amendment are quite narrow. You’re likely to avoid them just by using common sense. Remember that no one, not even the government, can restrict public interest advocacy. We should strive not to draw ourselves back from the line of expansive First Amendment rights; we often self-censor ourselves more than necessary. And that is what SLAPP filers hope to encourage when they threaten to drag you into expensive litigation.

Finally, if the police arrest you for civil disobedience and charge you with a crime, this would not be a SLAPP. There is no First Amendment protection for criminal activities, such as trespass on private property, blockading a street, or vandalizing equipment. Your legal defense strategy would be different. For more information on your rights when engaging in civil disobedience, please read this [“Know Your Rights” brochure](#) and watch this [training](#) by the Civil Liberties Defense Center. If you’re going to engage in civil disobedience, recognize that it could put others at risk, as well. So do it mindfully, carefully, and with training, and be prepared for the consequences.

For more information on your rights under the First Amendment of the U.S. Constitution, please visit the [“Freedom of Expression” page](#) of the ACLU’s website.

PREVENTION: REDUCING THE RISK OF LIABILITY

It is difficult to prevent someone from filing a SLAPP against you, but you can reduce your overall exposure to civil lawsuits. If you are confident that you are operating within your First Amendment rights, you will be better prepared to fight against SLAPP threats. Here are a few tips to get you started.

Be scrupulously honest and accurate in your communications to the public. Don't make yourself an easy target. Disclose the facts that form the basis of your opinions. Vet your sources. Keep records of where you obtained your information. For more information, we recommend that you read this [factsheet developed by the First Amendment Project](#).

Be careful when talking about companies. When discussing a company's finances, manufacturing processes, or labor practices, be sure to cite your statements extensively and verify that your sources are unimpeachable.

Likewise, if you have inside knowledge about a company's operations, be careful not to reveal any trade secrets. First Amendment law does not protect against revealing trade secrets. There are narrow exceptions, such as when the secret information also concerns a matter of public interest. So be sure to speak with an expert if you think you're going to be disclosing trade secrets, violating a confidentiality agreement, or speaking out as a whistleblower.

If you use the company's trademarks, or if you reproduce documents belonging to the company, such as documents that someone leaked to you, be cautious about violating copyright and trademark protections. The law recognizes the right of people to comment on, parody, and criticize copyrighted material, as well as trademarks, but you're walking on somewhat thinner ice when you do that.

For more information, please visit this [overview of copyright and trademark law](#) prepared by the Civil Liberties Defense Center.

Remember that you can be liable for “re-publication” of a defamatory statement. If you repeat someone else’s defamatory statement, you can be held liable. Again, however, if you’re talking about a matter of public concern, you can only be held liable if you have reason to know that the statement is false.

Consider pre-publication review for major reports and controversial statements. If you plan to make a public statement that criticizes a company or individual, ask a First Amendment lawyer to review the draft before it is published.

Develop relationships with “movement” lawyers. Not all lawyers will have experience with the First Amendment and defending people from SLAPPs. Likewise, not all lawyers will understand (or support) your advocacy goals. Take time now to find and develop relationships with the right lawyers, so that when something happens, you can go to them right away.

Check your insurance coverage. Many community organizers and activists don’t have the resources to buy insurance. But if you do have it, look at what it covers. Would it cover you if you’re sued for defamation or racketeering or other common claims? Would it cover defending against a harassing subpoena?

Have a document retention policy. Aside from specific contexts like company finances, there is no general requirement that people and organizations need to keep documents for any period of time. The more documents you have, the more time-consuming and expensive it may be to search through them if you receive a subpoena. Thus, it may help to have a document destruction and retention policy that dictates how long certain documents (in any electronic or written form) should be retained and when they should be destroyed, as long as you follow the policy across the board.

Document retention policies should also consider the importance of saving certain documents to protect you if you are sued. This might include, for example, source files for publications to defend against defamation allegations.

The goal of a document retention policy is not to hide information, but to reduce the potential burden of searching through decades of material. Once you are threatened with a lawsuit, it is illegal for you to destroy any documents that might be relevant to the lawsuit; furthermore, you should not selectively destroy documents that you think are problematic.

The Civil Liberties Defense Center has additional resources on [document destruction and retention policies](#).

RESPONSE: WHAT TO DO IF YOU'RE THREATENED

Even the threat of a lawsuit can be extremely intimidating. Often, a SLAPP filer will send you a “cease-and-desist” letter, demanding that you remove content, retract statements, apologize publicly, or take some other sort of action. If this happens, get a lawyer as soon as possible. Do not respond to the threat until you have checked in with your lawyer.

If you act quickly enough, you might be able to divert the SLAPP before it’s filed. A lawyer can help you draft a stiffly worded letter, explaining to the would-be SLAPP bully that you will not be intimidated, and that this tactic will backfire on them and draw more attention to your work.

Under the guidance of your lawyer, fix any mistakes. If you accidentally made a statement that you now know is wrong, you can sometimes negate the threat by issuing a retraction.

Let your colleagues know about the threat. Be sure that your colleagues are aware of the threat. If relevant, let your employees know that the organization will provide legal defense for them.

Notify your insurance carrier, if relevant. Check your insurance coverage. If you have insurance, you are often required to notify them at this point.

Preserve your documents. Once the threat of a lawsuit has come, do not destroy any documents or communications. Doing so can be obstruction of justice.

Begin gathering records to defend yourself. Pull together records of your materials and sources, so you’re in a better position to demonstrate that your statements were accurate.

DEFENSE: WHAT TO DO IF YOU'RE SUED

If you are sued, you will need to act as quickly as possible. Find a lawyer, and file your response with the court. Most courts provide only a 30-day timeframe in which to file a response to the complaint. If 30 days go by and you don't respond, you might lose your right to assert certain legal defenses that could get the lawsuit thrown out.

You will want a lawyer who has expertise in SLAPP defense, which is a subset of First Amendment law. Ideally, you should look for a “movement” lawyer – one who works closely with public interest advocates – because you will want someone who understands your campaign, your advocacy goals, and your line of work.

Here are some other key elements of a SLAPP defense:

Check whether the lawsuit has been filed in a state that has an anti-SLAPP statute. Some states have laws that help defendants to get SLAPP lawsuits dismissed quickly and to recover lawyer fees and other costs from the SLAPP filer. In many cases, however, your anti-SLAPP motion needs to be filed early in the case. For example, a motion in California needs to be filed within 60 days of the complaint. Consult with your lawyer to see if anti-SLAPP protections apply.

Organize your records. As discussed above, gather the records you will need to defend yourself. If you have been sued for defamation, you will need to prove that what you said was true. Similarly, begin to preserve documents relevant to the lawsuit; it is a crime to destroy these documents.

Decide how to use your insurance coverage. Familiarize yourself with your insurance policies, including the requirements for notifying your insurer of legal claims against you. Failure to do so might result in loss of coverage for legal fees and damages. In order to cut costs, insurance companies often want to appoint one of their own attorneys.

Unfortunately, these attorneys might not have experience with SLAPPs or understand the importance of continuing to speak out about the issues for which the plaintiff is trying to silence you.

There might also be pressure to agree to an unfavorable settlement to end the expenses of the lawsuit, even if it is detrimental to your larger campaign goals. For these reasons, consider negotiating with your insurance company for permission to obtain legal representation of your own choosing at an agreed upon rate for the attorney fees.

Don't become silent. Get louder. Many lawyers recommend that their clients stay quiet and avoid talking to the press during a lawsuit. With SLAPPs, we generally recommend the opposite. You can help to make a SLAPP ineffective at silencing you by continuing to do your advocacy work.

But first, check your facts: be very careful that you are not repeating any claims alleged to be false, unless you have ironclad proof that they are true. Then once you are assured that the threat is indeed a SLAPP, we recommend publicizing it.

Having a strong communications strategy is important. Some SLAPP bullies will wage a public relations campaign against you, in an attempt to damage your credibility or your brand. You will need to defend yourself “in the court of public opinion.”

Here are some factors to consider when designing a communications strategy:

- **Get media coverage.** The first days after the filing of the SLAPP are the easiest time to get media coverage. We recommend that you push yourself, your colleagues, and your lawyers to issue more than a “no comment,” because it might be harder to get your statement out at a later date.

- **Label it.** Immediately put out a statement calling the lawsuit a SLAPP. Labeling it early helps to keep the public narrative focused on the SLAPP bully’s wrongdoing, rather than the accusations against you. Make sure you define what a SLAPP is – an attack on free speech, designed to intimidate.

- **Communicate your vision.** SLAPP bullies hope that the lawsuit will distract you from your public interest work. Keep the public focused on your campaign goals and your positive vision of societal change.

- **Get organized.** Work with lawyers to put together communications guidelines. Establish a sign-off procedure. In all of your communications, be sure to name your values and why you do the work you do.

- **Find validators.** One of the goals of a SLAPP is to isolate you from your allies and supporters. Be sure that you are not fighting this fight alone. Find people who can speak up publicly in your defense.

Be careful about settling with the “bad guys.” Some SLAPP bullies try to keep the lawsuit in court for as long as possible, in order to exert maximum pressure on you, but others will try to settle the lawsuit. The settlement will be an attempt to gag you from talking about your campaign; the SLAPP bully might also demand that you admit to wrongdoing.

Once you get the SLAPP dismissed, consider seeking penalties. After the court dismisses the SLAPP, you might be able to file a “malicious prosecution” (or “SLAPP-back”) lawsuit against the SLAPP bully, or target the opposing lawyers for sanctions. Keep in mind that there are many strategic considerations when deciding whether to pursue penalties. For example, you will need to decide if you really want to spend more time in litigation.

In either case, we recommend that you conduct a far-reaching communications campaign to publicize your victory over the SLAPP bully. This is a moment to celebrate, and also to share your lessons learned with the broader movement.

For more information on what to expect during a SLAPP lawsuit, please read [“Guarding Against the Chill: A Survival Guide for SLAPP Victims”](#) by the First Amendment Project.

CONCLUSION: HOW TO GET HELP

The Protect the Protest task force provides pro bono support for public interest advocates facing SLAPPs. We provide three types of support:

- **Preemption.** If you are planning a campaign or publication and are worried about a potential SLAPP, contact us and we will put you in contact with a pro bono lawyer from the coalition who can provide you with tailored advice. We encourage you to contact us early in the process.
- **Legal defense.** If you have been threatened with a SLAPP or have been sued, we can help to connect you with a pro bono or low-cost lawyer. If you already have a lawyer, we can provide other forms of legal support, such as amicus briefs. Please note that each case undergoes a vetting process, as we can only provide legal support for SLAPP cases. We encourage you to contact us as quickly as possible once the threat arises.
- **Campaigns support.** SLAPPs are not just fought in the courts, but also in the courts of public opinion. We are available to provide advice on how to communicate publicly about SLAPPs. In certain cases, we can also mobilize members of the Protect the Protest task force to amplify your messages and help generate attention to your campaign.

To request support from the Protect the Protest Task Force, please fill out the form on our [“Get Help” page](#). You can also contact us through our website, www.protecttheprotest.org.