

**An Environmental
Advocate's
Guide to Avoiding
Defamation
and Other Publication
Lawsuits**

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Environmental advocacy organizations frequently speak out against polluters, developers and other private entities whose practices degrade the environment. These organizations publish newsletters and websites, send out email alerts, submit public comments during regulatory processes, engage in public relations campaigns, speak to the press, and picket and demonstrate. The rapid evolution of mass communications technology has enabled environmental advocates to produce sophisticated professional-quality publications and websites and thus reach very wide audiences directly, instead of relying on professional media outlets to get these messages out.

This increased capacity for mass communication is accompanied, however, by an increased risk of being sued. Indeed, environmental advocates now face substantially the same risks historically encountered by media outlets. And unfortunately, environmental advocates too often lack the professional journalistic standards (perhaps most importantly the desire to report without bias) and the understanding of law regarding publication liability, that protect the media against many of these lawsuits.

This guide is designed to provide a basic understanding of the law regarding publication liability – most notably defamation law – and offer a set of best practices to help environmental advocacy organizations avoid being sued and respond appropriately if they are sued. It is not a substitute for legal advice. Environmental advocacy organizations should strongly consider consulting with a First Amendment attorney before releasing publications or embarking on public relations campaigns.

A PRIMER ON PUBLICATION LIABILITY

DEFAMATION

Defamation Defined

Defamation is injury to reputation caused by the utterance or publication of false statements. *Defamation* includes *libel* and *slander*. *Libel* includes written or “permanently fixed” falsehoods. *Slander* includes spoken falsehoods. State law varies on whether or not it is important to distinguish between libel and slander. In many states, there is no difference at all. Some states, however, will have different statutes of limitations and different limits on recoverable damages, among other distinctions, for libel and slander. State law also varies with respect to whether statements made on radio or television or through various electronic media are considered libel or slander. *Trade libel* is the disparagement of the quality of a product or the services of a company as opposed to the disparagement of the company’s general reputation.

A plaintiff seeking to win a defamation lawsuit will have to prove the following:

1. That the defendant *published* the statement, that is uttered or distributed it to at least one person other than the plaintiff. There is no requirement that the statement be distributed broadly, to a large group or the general public. Moreover, it is enough that the defendant *re-published* another's false statements.

NOTE Very few states recognize a "neutral reportage privilege." That is, most commonly, a publisher can be liable for defamation even if she has only accurately and neutrally re-published another's statements. Publishers are responsible for all assertions of fact contained in their publication regardless of whether the statements are attributable to someone else.

2. That the statement was *false*. It is not enough that the statement is not accurate with technical precision. A statement is not "false" if it is "substantially true" or a "rational interpretation" of facts such that one reading or hearing the statement would get substantially the same impression.

However, the falsehood need not be directly stated; it is enough that the defendant has implied something false about the plaintiff.

3. That the statement is “of and concerning” the plaintiff. The plaintiff need not be named specifically. But it must be obvious from the context that the statement *identifies* the plaintiff. If the statement refers to a group of people, the group must be small enough, and the plaintiff’s association with it so well-known, such that the injury to the plaintiff’s reputation is readily perceived.
4. That the statement is *injurious to the plaintiff’s reputation* such that the plaintiff’s professional or public reputation has been tarnished or he or she has been shunned by friends or family. Some statements are considered so obviously harmful to one’s reputation that they are acknowledged as being *defamation per se* or *defamation on its face*. These includes statements accusing the plaintiff of criminal activity, professional incompetence or unethical or morally bankrupt behavior. In such situations, the plaintiff need not prove that his or her reputation was in fact injured. In other situations, defamatory nature of the statement may be less obvious or require additional knowledge about the plaintiff. In such cases, a court may ask if the statement is “capable of a defamatory meaning.” The plaintiff may need to prove that the members of the plaintiff’s community, family or profession actually have a diminished opinion of the plaintiff because of the statement.
5. That the statement was published with some level of *fault*. Under U.S. constitutional law, there is no strict liability for defamation. Depending on the circumstances, the plaintiff will either need to prove that the defendant acted negligently, that is merely made a mistake, or acted intentionally and knowingly published the falsehood.

In defamation law, the publication of a false statement with actual, subjective knowledge that the statement is false or with a reckless disregard of an actual and serious suspicion that the statement is false is known as *actual malice*. Actual malice refers to the publisher's degree of knowledge, that is, to the publisher's attitude toward the truth of the statement. It does not refer to the publisher's feelings about the plaintiff. Whether the publisher harbors "malice," that is, ill-will or is seeking to hurt the plaintiff is irrelevant. Proof of "actual malice" must be by "clear and convincing evidence," a much more demanding showing than "the preponderance of the evidence" typically required in civil litigation.

NOTE A plaintiff cannot prove actual malice merely by demonstrating that the publisher failed to investigate the matter adequately. Rather, the plaintiff must prove that the defendant "in fact entertained serious doubts" as to the truth of the publication, had "a high degree of awareness" of falsity, or made an affirmative effort to avoid learning and reporting the truth. Relevant to this determination may be the time available for research and fact-checking, any indications of unreliability of a source, and the inherent probability of the assertion.

Damages

There are three types of damages recognized by defamation law:

- “*special*” damages include actual, provable monetary losses and compensation for an identifiable injury to reputation;
- “*general*” or “*presumed*” damages are those damages a jury may assume a plaintiff has suffered because of the per se defamatory nature of the falsehood, that is, every person will be damaged by such statements and the plaintiff need not demonstrate any particular monetary loss or incidence of damaged reputation;
- a plaintiff may also recover “*punitive*” or “*exemplary*” damages to punish the most egregious behavior.

Defamation lawsuits are about monetary compensation. It is extremely rare, if possible at all, for a successful defamation plaintiff to get injunctive relief, that is an order preventing the defendant from publishing or speaking in the future. However, in practice, those suing environmental advocacy organizations for defamation will commonly offer to dismiss the lawsuit without any monetary payment in exchange for the defendant’s promise to never publish anything about the plaintiff again. A defendant confronted with this option should very carefully consider relinquishing its First Amendment rights with respect to the plaintiff in perpetuity. Even if the plaintiff wins the lawsuit it is extremely unlikely that it would ever obtain such expansive relief against the defendant.

Actual Malice

Under U.S. constitutional law, a plaintiff must prove actual malice in three situations. The first is when the plaintiff is either a *public official* or *public figure* and the statement pertains to a matter of *public interest*.

The second is when the plaintiff is a private person but the statement pertains to a matter of public interest and the plaintiff seeks presumed damages. Third, actual malice must be proven when trade libel is alleged. Some states provide a greater degree of protection for speakers and publishers than required by the First Amendment. Thus in some states, including Colorado, actual malice must be proven in all defamation actions.

A *public official* is one with significant control of governmental operation. This will include most elected officials, but will not likely extend to all minor, unelected governmental administrators. Courts vary widely on this. For example, most courts agree that a high school principal is a public official. But courts disagree about whether a vice-principal or athletic team coach is a public official.

A *public figure* is one who has achieved a high level of notoriety. Some people are so famous that they are public figures for all statements made about them. Some people, however, are well-known only with respect to a particular issue. These people, known as *limited-purpose public figures*, have typically voluntarily participated in or have sought to influence the resolution of a particular public controversy or issue. They are considered public figures with respect to statements made about that particular issue.

A matter of *public interest* is one that is considered to be generally newsworthy or to have some relevance to the public beyond the immediate participants. Most statements about public officials and public figures will be considered matters of public interest. And most of the issues addressed by environmental advocacy organizations will be considered public issues as well.

Colorful Language and Exaggerations

As a general principle, a statement will be considered defamatory only if a reasonable reader would perceive the statement to be one stating literal fact. Thus imaginative rhetoric, hyperbole and parody most commonly will not be considered defamatory. Publishers and speakers generally have a lot of leeway to use colorful and exaggerated language that is neither capable of being proven false nor which could reasonably be interpreted as being a literal characterization of the subject. A publisher or speaker must be careful, however, in using the rhetoric of criminal activity merely for emphasis. For example, one should avoid calling one a “criminal” or “extortionist” or “thief.” These characterizations are readily capable of being proven false.

EXAMPLE Oakville, Missouri resident Tom Diehl opposed the proposed building of a trash transfer station in his community. In opposing the project he distributed leaflets encouraging local residents to “fight the trash terrorists.” The trash company behind the proposal sued him for \$5 million claiming it had been libeled by his charge that it was a terrorist organization. The Missouri Court of Appeals, finding that the phrase was obviously mere rhetoric and not an actual accusation of terrorism, reversed a trial court determination that the suit could go forward. The case is currently before the Missouri Supreme Court.

Opinion

One of the biggest misconceptions about defamation law is that one cannot be liable for merely stating an opinion. This is not true. A statement of opinion that a reasonable reader may perceive as being based on undisclosed “facts” will be considered as defamatory as a direct statement of a falsehood. For example, the statement, “I believe she’s a fraud,” implies that the speaker has some knowledge of fraudulent activity by the subject. A publisher or speaker cannot avoid defamation liability merely by prefacing a statement with conditional language such as “in my opinion” or “I think.” Thus, it is important to disclose the underlying facts that form the basis of any opinion. This will insure that no other “facts” are unintentionally implied and allow the reader to consider the facts and draw her own conclusions.

Where can a publisher be sued?

Generally, a publisher can be sued in *any* state in which her publication is widely distributed regardless of whether the statement pertains to a resident of that state. For websites, it is not enough that the website may be accessed world-wide. There must also be some purposeful effort to interact through the website with residents of the state in which the lawsuit is filed. The law in this area is still developing.

Generally, a publisher who makes allegedly defamatory statements about one known to be a resident of another state may be sued in that state if there is “something more,” including minimal distribution of the publication in that state, fundraising efforts directed at that state, or a membership presence in that state.

Protections for Statements Made to Public Agencies and During the Course of Litigation

Historically, statements made in the course of official governmental proceedings were absolutely protected from defamation liability. This "*litigation privilege*" is recognized by most states and codified by most state legislatures. The privilege includes, for example, statements made during the course of litigation, complaints to governmental agencies, and public comments submitted during regulatory proceedings. State law varies however, on to what extent statements made among private persons in preparation for, or following up on, a more formal petition to the government fall within this privilege.

Protections for Repeating the Statements Made to Public Agencies in Other Forums

Historically, reports of statements made in the course of official governmental proceedings were protected from defamation liability subject to two qualifications. First, the statements must be a "fair and true report" of the statements made in the official proceeding. That is, the statements need not be the verbatim recitation of the statements to the government, but they must express the same "gist and sting" of the original statements. Second, the statements must be made without "malice" as we ordinarily understand the word, that is, without ill will and an intent to harm the subject. This "*reporter's privilege*" has also been recognized and codified by most states. However, state law varies significantly regarding the reach of this privilege. Some states, for example, limit it to publication in "public journals," a term which generally is not precisely defined.

INTERFERENCE WITH BUSINESS ADVANTAGE AND CONTRACT

Plaintiffs filing defamation lawsuits against environmental advocacy organizations will frequently also state claims for intentional interference with business relationship, contract or economic or prospective advantage. Although the names vary, these actions are all based on the defendant's conduct in acting to purposefully scuttle a commercial project. However, when the defendant's allegedly "interfering" conduct is speech, publication or other activity protected by the First Amendment, these lawsuits cannot be successful. Environmental advocates should thus act carefully to ensure that all such conduct is protected by the First Amendment.

For example, a local environmental group pickets a development site to discourage potential home buyers from purchasing homes to be built on environmentally sensitive lands. The group sets up its pickets on public property along side a county road and is careful not to disrupt the free flow of traffic on the road or distract drivers in such a way as to create a safety hazard. The group is sued by the developer for interfering with its business relationship with these customers. The lawsuit will almost certainly be unsuccessful.

If, however, the group sets up its pickets on the developer's private land that is not generally open for public access, the groups' First Amendment rights to protest there will be greatly diminished. In such a situation, the lawsuit seeking compensation for the canceled business deals will have a much greater chance of success.

INVASION OF PRIVACY

Invasion of Privacy Defined

Next to defamation law, publishers face the most significant risk of being sued for invasion of privacy, that is, the discovery and publication of another's private information or conduct. Because environmental advocacy organizations most typically deal with newsworthy, public issues, the risk here is somewhat diminished. Nevertheless, it is important to have a basic understanding of privacy law.

Invasion of privacy lawsuits generally take one of four forms: intrusion, publication of private facts, false light publication, and misappropriation.

- Almost all states allow lawsuits for *intrusion upon one's seclusion or solitude or into one's private affairs*. The lawsuit is not based on the publication of any information. Rather it is based on newsgathering activity. To win an intrusion case, a plaintiff will have to show that it had a reasonable expectation of privacy in either a place or a body of information that was invaded by way of highly offensive conduct. Intrusion may thus be an alternative to a trespass action, for example, when one enters another's property without consent to test for on-site contamination or source emissions. Intrusion includes not only physical invasions but sensory ones such as by camera or microphone.

- Almost all states also recognize lawsuits based on the *publication of embarrassing private facts*. To win a public facts lawsuit, a plaintiff must prove that there was a widespread, public revelation of non-newsworthy facts not generally known by others, the publication of which would be offensive to a reasonable person. Importantly, this action applies to the publication of *truthful* information. Environmental advocates should be aware of private facts liability when publishing information about an opponent's personal life that does not directly pertain to a matter of public concern.
- Many states also allow lawsuits for the *misappropriation of another's likeness or personality for commercial purposes*. The most pertinent application of this tort to environmental advocates would be the unauthorized use of a celebrity's persona for a fundraising campaign or as part of a campaign to discourage others from buying someone else's products or services.
- A few states allow lawsuits based on *publicity that places one in a false light in the public eye*. These lawsuits are virtually indistinguishable from defamation lawsuits and are subject to the same actual malice requirements as defamation actions. Lawsuits based on the mis-captioning of a photograph are frequently brought as false light actions.

These actions will be subject to the same privileges as defamation actions.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP)

SLAPP is the term used to describe lawsuits filed against those who exercise their First Amendment rights that are primarily for the purpose of discouraging public advocacy by imposing litigation burdens on the defendant.

The term “SLAPPback” describes a lawsuit you file back against the entity which filed the SLAPP against you after you defeat the SLAPP. These lawsuits typically take the form of malicious prosecution actions. SLAPPbacks may be a way to recover attorneys fees and other expenses incurred having to defend the SLAPP.

Many states have special laws that define SLAPPs and provide procedural and substantive protections for SLAPP defendants. Most typically, these laws will allow for early dismissal of these lawsuits and the collection of attorneys fees by the defendant.

BEST PRACTICES FOR
AVOIDING PUBLICATION LIABILITY

1. **Be scrupulously accurate.** Choose your language carefully. Check and double-check all facts. Do not publish anything about which you have doubts as to its truthfulness. If you make a mistake, correct it immediately.
2. **Disclose all underlying facts, details and context.** Avoid merely stating your conclusions. Include as much factual support for your conclusions as possible. Write in a manner that is persuasive but provides enough information so that a reader has the ability to draw her own conclusions.
3. **Watch the hyperbole.** Colorful rhetoric is acceptable, even encouraged. But it does attract litigation. Avoid using language that is unnecessarily inflammatory, disproportionately derogatory compared to the message you want to send, or implies criminal conduct.
4. **Keep thorough records.** Retain all notes of factual investigation so that if sued you will be able to prove that your statements are true or that, at least, you actually believed them to be true. Make it a practice to keep records of phone conversations and interviews.

5. **Investigate your sources.** Be satisfied that a source is reliable or seek corroborating evidence before publishing.
6. **Present all sides.** As an advocate, your role is much different than a traditional journalist. Nevertheless, whenever possible you should present all sides of a controversy. When possible, consider asking your opponent to respond to statements. Present facts that do not support your conclusions and explain why they do not change your views.
7. **Consider pre-publication review.** Have a lawyer familiar with First Amendment issues review your publications and publicity campaigns before they are launched. Pre-publication review is a standard practice in journalism especially when there are concerns about a specific story.

WHAT TO DO IF YOU ARE SUED

1. **Find a lawyer with the appropriate expertise.** It is important to be represented by an attorney who has experience and expertise in this highly specialized area of law. Unfortunately, it can be difficult to find pro bono counsel. If your state has an anti-SLAPP provision, you may be able to find lawyers willing to represent you on a contingency basis.
2. **Consider contacting your insurer.** Your organization's general liability insurance policy may provide coverage and/or a legal defense. Consult with your attorney about whether you should put your insurer on notice of the lawsuit. Your insurer will likely want to retain a lawyer for you of its own choosing. Your lawyer can request to be appointed as counsel or you can request that the appointed lawyer have the appropriate expertise. If you are unhappy with your appointed counsel, you will need to decide whether or not to accept coverage under your insurance policy.
3. **Organize your records.** Identify and secure all of the supporting information you have regarding the allegedly defamatory, or otherwise offending, statements. Make sure the material you may need to prove the truth of your assertions, or at least your actual belief in the truth of your assertions, is retained and readily accessible. Create a timeline of all relevant events.
4. **Consider corrective measures if appropriate.** If you determine that you have made an error, and inadvertently published a falsehood, consider and discuss with your lawyer what type of corrective measures you can take.

5. **Consider a publicity campaign about the lawsuit against you.**
Many times, an environmental advocacy organization will be sued in order to shut it up. Don't give them what they want. Consider publicizing the lawsuit against you as a direct attack on your First Amendment rights. By generating negative publicity against your opponent, and demonstrating that you will not be silenced, you may discourage your opponent from pursuing the lawsuit.

6. **Avoid settlements that place restrictions on future publications.**
There may be many good reasons to settle a lawsuit. But it is almost never advisable to agree in a settlement to refrain from future speech or publication. Indeed, many times, lawsuits are filed against environmental organizations with the express purpose of obtaining a promise to cease all future advocacy. Such agreements are enforceable; *you can waive your First Amendment rights by contract*. If you do agree to refrain from speaking about your opponent in the future, and then are sued for statements you do make, you will no longer have the benefit of the constitutional protections. Instead, you will be have to rely simply on the language of the settlement agreement.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.