DEFAMATION LAW

A guide for consent activists

FULL CIRCLE KINK

IMPORTANT DISCLAIMERS

1. We are not lawyers

We have extensively researched this class and believe it to be accurate. But we are not lawyers and have no formal training or credentials that are relevant to defamation law.

2. This is not legal advice

This class provides general information about US defamation law. It is not legal advice and does not cover all relevant issues. You must consult a lawyer about the specifics of your situation.

3. Consent activism is risky

Consent activism always involves legal risk. This class can help you manage your risk but cannot eliminate it.

4. Liability Disclaimer

We accept no responsibility or liability for the consequences of your actions.

By taking this class or continuing to read the class materials, you agree to accept all responsibility and liability for the consequences of your actions.

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ACKNOWLEDGEMENTS

We are indebted to Bruce Johnson of Davis Wright Tremaine, who has generously shared his decades of experience practicing defamation law with us. This guide would not have been possible without his guidance and technical advice.

Any remaining mistakes are ours.

WHY THIS CLASS?

Why is a kink organization teaching a class on defamation law? And how is it relevant to you?

We believe in a future where excellent consent is the norm throughout the kink world, but defamation lawsuits stand between us and that future.

It is increasingly common for predators and abusers to use defamation lawsuits to silence their accusers. This abuse of the legal system can be devastatingly effective: even a groundless lawsuit can cost upwards of $10,000 to defend against. Defamation lawsuits have become a serious threat to anyone who does consent activism as well as anyone who simply wants to name their abuser.

This class will help you navigate this dangerous terrain:

Defamation law. We can't fix the US legal system, but we can help you understand it. Chapters one and two will explain the basics of defamation law and talk about what happens during a lawsuit.

Risk-Aware Activism. Just as Risk-Aware Consensual Kink is a helpful framework for navigating the risks associated with kink, Risk-Aware Activism will help you make smart choices about managing your legal risk. Chapters three and four offer best practices for responding to threats and making good call outs.

Finally, the work of building a better world can't fall solely to survivors and activists. Chapter five presents concrete steps we can take as a community to keep each other safer.

We're teaching this class because we believe we can win this fight. Together, we can fight back against abusive lawsuits and take a big step toward the world we all want to live in.

We hope you'll join us.

Content note

Consent work frequently involves dealing with cases of sexual assault, which can be triggering for some people. In the interest of accessibility, all the fictional examples in this guide will involve yoga instructors who injure their students rather than kink educators who assault their students.

CHAPTER 1
UNDERSTANDING THE LAW

"Everything should be made as simple as possible, but not simpler."
-Attributed to Albert Einstein[1]

Defamation law is notoriously complicated—we have made it as simple and accessible as possible, but this is a complex subject. There are exceptions to almost every rule and many important questions don't have definitive answers. The law is often ambiguous: the court will interpret the law based on context and prior case law and it can be very hard to guess how they will rule on any given question.

The law varies significantly from state to state: don't assume that what is true in one state is true in yours. We have taken the liberty of discussing the details of Washington law because we happen to live in Washington. We have focused exclusively on American law: defamation is treated very differently in many countries, including most of Europe.

Some aspects of the law may seem nonsensical or unjust to you. You may be right, but cases are decided by what the law actually says, not what it ought to say.

1. It's probably a paraphrase, not a quote. See fullcirclekink.com/x119

BASIC LEGAL PRINCIPLES

We can't pack three years of law school into this document, but here's an overview of some basic legal principles.

Civil law and the standard of proof

There are two main kinds of law, each with its own standard of proof.

Criminal law deals with crimes that are prosecuted by the state. Theft is a criminal charge: the police may arrest the alleged thief, the state may bring charges against them, and if they are convicted they may go to jail. In criminal law, the standard of proof is **beyond reasonable doubt**: "proving" something means showing it is true beyond reasonable doubt.

Civil law deals with lawsuits brought by one person against another. The police and the jail system are generally not involved in civil cases. In civil law, the standard of proof is **preponderance of evidence**: "proving" something means showing it is at least 51% likely to be true.

Defamation is governed by civil law, so when we talk about "proving" something in a defamation case we mean showing it is at least 51% likely to be true.

Who's who?

In a civil lawsuit, the **plaintiff** is the person who filed the lawsuit.

In a civil lawsuit, the **defendant** is the person who is being sued. In a criminal case, the defendant is the person who is charged with a crime.

The statute of limitations

The **statute of limitations** puts a time limit on when criminal charges or a civil lawsuit can be filed. Different crimes and types of lawsuits have different statutes of limitations: more severe offenses generally have a longer time limit.

The statute of limitations for defamation is generally one to three years, beginning with the first publication of the defamatory statement. Republishing the same statement usually does not restart the timer: if a publisher prints a second edition of a defamatory book, the statute of limitations would be based on the first edition.

There is one important exception: the "discovery exception" means the statute of limitations might begin when the plaintiff first discovered the defamatory statement, not when it was first published.

Torts

A civil lawsuit seeks to obtain compensation for harm the defendant has caused the plaintiff. The harm that forms the basis of the lawsuit is referred to as a **tort**.

There are many kinds of tort—injuring someone in a car accident and saying something defamatory about them are two examples.

Jurisdiction

Different states and countries have different laws and precedents that affect how the law is interpreted. **Jurisdiction** refers to the location where a lawsuit will be tried, which determines the laws and precedents that will guide the trial.

Jurisdiction can be very important. If Morgan (who lives in Oregon, where the statute of limitations is one year) wants to sue you (who live in Washington, where the statute of limitations is two years) 18 months after you made a defamatory statement about them, whether the lawsuit can proceed will depend on which state has jurisdiction.

Which locale has jurisdiction when a defamatory statement was published on the internet? It's complicated, but jurisdiction will usually be the location where the plaintiff's reputation would be most impacted—often their place of residence.

International lawsuits

Many countries are less protective of free speech than the US: what happens if you're sued by someone who lives in a country with unfavorable defamation laws? The **SPEECH Act** provides significant protection against foreign libel laws: in many cases, it makes foreign libel judgments unenforceable in US courts.

Absolute and qualified privilege

For our purposes, a **privilege** is a legal protection that applies to certain kinds of speech. Establishing privilege can be very important when defending against a defamation lawsuit.

A statement protected by **absolute privilege** cannot be defamatory under any circumstances. Truth is an absolute privilege, so a true statement is never defamatory.

A statement protected by **qualified privilege** may be defamatory but requires proving a higher degree of fault. Common interest privilege is a qualified privilege, so a statement protected by common interest privilege is only defamatory if it was made with actual malice rather than mere negligence. What do all those words mean? See Element Two: Fault (p. 13).

WHAT IS DEFAMATION?

Defamation is the legal term for a false statement that harms another person. It covers both **slander** (spoken defamation) and **libel** (written defamation). To win a defamation case, a plaintiff must prove three things:

1. **Falsehood**: you made a false statement of fact about them
2. **Fault**: you were at fault when you made the statement
3. **Harm**: they suffered specific harm as a result

We'll take a detailed look at each of those elements (they're more complicated than they sound) and finish by reviewing some other laws you should be aware of.

ELEMENT #1: FALSEHOOD

The three elements of defamation are falsehood, fault, and harm. Falsehood sounds simple: defamation involves a false statement. If what you said was true, it wasn't defamatory.

If only it were that simple...

Only verifiable statements of fact can be false

A statement is only false if it makes a factual claim that can be objectively proven or disproven:

- *Morgan is 37 years old.*
- *Morgan has seriously injured four students.*

Statements that are not verifiable cannot be defamatory:

- *Morgan is a jerk.*
- *Morgan's classes aren't interesting.*

Substantial truth

A statement is not false if it is **substantially true**: minor factual errors are permissible so long as they don't change the gist of the statement. This is highly subjective—here are some examples of statements that courts have found to be substantially true:

- Saying someone had beaten his dogs with metal rods when in fact he had beaten them with wooden rods[2].
- Saying someone was sentenced to death for six murders when in fact he was sentenced to death for one murder[3].

Hyperbole is not defamatory

Hyperbole is an extreme exaggeration that is understood to be rhetorical rather than a factual statement. Hyperbole is generally not defamatory:

- *Morgan can injure a student just by looking at them.*
- *Morgan is the worst teacher in the entire world.*

Even though hyperbole is technically not defamatory, we recommend avoiding it. Sticking to the facts is safer and more ethical.

2. People for Ethical Treatment of Animals v. Berosini, 895 P.2d 1269 (Nev. 1995)
3. Stevens v. Independent Newspapers, Inc., 15 Media L. Rep. 1097 (Del. Super. Ct. 1998)

Pure opinions are not defamatory

Opinions are not defamatory because they are not statements of fact. A **pure opinion** expresses your personal belief about a subjective matter:

- *Morgan seemed really careless to me.*
- *I found Morgan's class boring.*

A statement that expresses a personal interpretation of true facts is very likely an opinion:

- *Because Morgan has injured three students, I think they're unsafe.*
- *Because Morgan isn't a certified yoga instructor, I think they're a bad teacher.*

You cannot turn a factual statement into an opinion just by saying "It is my opinion that…". These are statements of fact, not opinions:

- *I believe Morgan has injured three students.*
- *It is my opinion that Morgan is not a certified yoga instructor.*

An opinion must not imply untrue facts. Saying *"it is my opinion Morgan has a bad safety record"* implies you have heard compelling evidence to that effect. If that isn't the case, the statement is likely defamatory.

See Use Pure Opinion (p. 37) for practical applications.

Quoting a defamatory statement

Pay attention! This is surprising to a lot of people and it's easy to make a mistake here. **Quoting a defamatory statement is usually defamatory, even if the quote is accurate:**

- *Blair says Morgan has injured three students.*

Even if Blair really said that, the statement would be defamatory if Morgan hadn't injured three students. However…

Neutral report privilege

Neutral report privilege allows the media to quote prominent sources when making an unbiased report about a public controversy, even if those sources are wrong. The law around neutral report privilege is complicated and not fully resolved: tread carefully here.

In the context of consent activism, it isn't clear how the courts would define "media", "prominent sources", or "public controversy".

Fair report privilege

Just to keep you on your toes, **fair report privilege** is completely different from neutral report privilege. It is a narrow but solidly established privilege that protects the media when they report on or republish official government statements or proceedings.

Fair report privilege may provide important protection for reporting someone's criminal history, but is otherwise of limited relevance to consent activism. Fair report privilege is an absolute privilege in Washington.

ELEMENT #2: FAULT

The second element of defamation is fault: the plaintiff must prove you were at fault when you made the defamatory statement. There are two kinds of fault:

Negligence means you should have known the statement was false.

Actual malice means you either knew the statement was false or you acted with a reckless disregard for the truth. Actual malice is much harder to prove than negligence.

Which level of fault must the plaintiff prove? It depends on whether they're a "public figure" or a "private figure", and whether certain kinds of privilege apply.

Public and private figures

The law grants private individuals more protection from defamation than public individuals. In general, a plaintiff who is a private figure only has to prove the defendant was negligent in making a false statement about them, while a plaintiff who is a public figure has to prove actual malice.

There are actually three types of plaintiff:

- **Public figures** are individuals who are widely known and whose lives are matters of general public interest. The bar for being a public figure is quite high: well-known celebrities are probably public figures, but minor celebrities probably aren't.
- Most people are **private figures**, whose lives are not of general public interest.
- **Limited purpose public figures** are private figures who have voluntarily thrust themselves into a public debate related to the subject of the lawsuit.

The criteria for limited purpose public figures are particularly unclear. The idea is that limited purpose public figures have significant prominence in a particular debate and have voluntarily participated in it to shape public opinion. It is the opinion of our defamation expert that kink educators and leaders are probably not limited purpose public figures with regard to kink and consent issues, but this is far from certain.

Litigation privilege

Litigation privilege is a broad privilege that protects statements made in connection with legal action. It covers communication between a laywer and their client, testimony during a trial, and related communications like demand letters.

Litigation privilege is an absolute privilege in Washington and many other states.

Common interest privilege

Common interest privilege applies to a statement made to a limited group to advance the common interest of that group. It is a qualified privilege, so the plaintiff must prove actual malice even if they are a private figure. Common interest can be useful for consent activists but it is complicated and has important limitations.

When deciding if common interest privilege applies to a particular statement, the court will consider:

- Was the statement made to a closed group with a common interest?
- Was the common interest clear and compelling?
- Was the statement directly in service of the common interest?
- Were there ulterior motives? The courts are often skeptical about derogatory statements made about competitors.

A manager sharing information about an employee's performance with their employer would likely be protected by common interest privilege. Publication is restricted to the employer and manager, they have a clear common interest in managing the employee, and the information is in clear service of that interest.

Common interest privilege is fairly narrow. It would likely apply to:

- The staff of a venue discussing whether to ban someone for a consent violation.
- A mailing list for sharing information about dangerous educators, which is limited to people who produce kink events.
- A mailing list for sharing information about harmful rope tops, which is limited to rope bottoms.

Common interest privilege probably would not apply to any social media post or to a mailing list that was open to the general public.

Incidentally, "common interest privilege" can also refer to a kind of client-attorney privilege.

See Use Common Interest (p. 42) for practical applications.

Consent to publication

Consent to publication is an absolute defense against defamation: if the plaintiff agreed to let you make a statement, they cannot sue you for making it.

ELEMENT #3: HARM

The third element of defamation is harm: the plaintiff must prove they suffered tangible harm as a result of being defamed. If you said Morgan has three eyes, they can prove falsehood (they don't have three eyes) and fault (you obviously know they don't have three eyes). However, they probably can't show they were harmed by your statement.

Harm can be financial (the plaintiff lost their job because of the defamation) or non-financial (they experienced emotional suffering). If the plaintiff is able to prove harm, the court can order you to compensate them by paying three types of **damages**:

- **Damages for past harm**. If the plaintiff lost a teaching job because you defamed them, the court could award them an amount of money equal to what they would have earned from the job.
- **Damages for future harm**. If you harmed the plaintiff's reputation, the court might award damages based on their likely future losses.
- **Punitive damages**. If your conduct was particularly heinous, the court might award punitive damages, which are mean to punish you and to deter others from following your example.

Punitive damages may not be available in some situations. In Washington, punitive damages are usually not available in civil litigation.

Per se defamation

Certain kinds of defamation are considered so obviously egregious that the plaintiff doesn't have to prove harm, although they still have to prove falsehood and fault. **Per se defamation** includes:

- Saying someone committed a crime
- Saying they have certain contagious diseases
- Saying they engaged in immoral or disreputable sexual conduct
- Saying they engaged in unprofessional conduct that could harm others

RELATED LAWS

If someone is going to sue you because of what you said about them, they will probably file a defamation lawsuit. In some less common cases, they might instead pursue one of these related torts.

False light

False light is similar to defamation but differs in three ways:

- A false light claim can apply to a statement that was technically true but misleading. If you illustrated a story about yoga injuries with a photo of Morgan, they could sue you for false light even if you didn't say they had injured anyone.
- A false light claim is based on emotional suffering, while a defamation claim is based on reputational harm.
- A false light claim always requires the plaintiff to prove actual malice.

The difference between defamation and false light is subtle and many states do not recognize false light as a distinct claim. False light claims are rare.

Publication of private facts

An individual can sue you for **publication of private facts** if you publicly disclosed information about them that was:

- private,
- previously not publicly known,
- highly offensive to a reasonable person, and
- not of legitimate public interest

The law isn't clear, but it in the #metoo era it is likely that non-consensual sexual misconduct would be considered a matter of legitimate public interest, especially if the person in question is a prominent figure like an educator or leader.

Unlike defamation, publication of private facts applies to true statements as well as false ones. Publication of private facts claims are rare.

Parallel legal claims

The United States places great value on free speech—consequently, defamation lawsuits are hard to win. People sometimes try to get around that by reframing defamation claims as other kinds of claims that have less stringent requirements. That strategy has found little success: the courts have generally ruled that any claim that has defamation at its heart must meet the requirements of a defamation claim, no matter how it is presented.

Parasitic torts

A **parasitic tort** is a tort that is appended to a primary tort. For example, someone might file a defamation suit with **intentional infliction of emotional distress** appended as a parasitic tort.

Generally speaking, a parasitic tort cannot stand on its own: if the primary tort fails, the parasitic tort will be dismissed.

BLACKMAIL AND EXTORTION

Extortion is a crime that can carry significant prison time. It is possible for either the plaintiff or the defendant in a defamation case to inadvertently commit extortion, so tread carefully.

You should also know when you might be able to press charges against someone for extortion.

What is extortion?

Extortion is a crime in which the perpetrator obtains something from the victim through coercion. These are all forms of extortion:

- Demanding "protection fees" from a business to make sure nothing happens to them.
- Threatening to tell someone's employer they're kinky if they make a consent allegation against you.
- Threatening to publicly expose someone's consent violations unless they stop teaching.

What's the difference between extortion and blackmail?

Blackmail is a specific type of extortion that involves threatening to publish harmful information about someone if they don't meet your demands. In some states, blackmail is prosecuted under extortion laws.

Truth is not a defense against blackmail or extortion: threatening to reveal true information about someone if they don't meet your demands is a crime.

Extortion and litigation privilege

Extortion and litigation privilege (p. 13) intersect in complicated ways.

Generally speaking, communications made in connection with legal action are subject to litigation privilege. However, litigation privilege may not apply if someone is threatening to use legal action to obtain a concession in an unrelated area.

Probably protected by litigation privilege:

- *If you make a public statement about me, I'll sue you for defamation.*

Probably not protected by litigation privilege:

- *If you make a public statement about me, I'll sue you for injuries from that car accident last year.*

CHAPTER 2
LAWSUITS

"The only thing worse than a battle lost is a battle won."
-Arthur Wellesley, first duke of Wellington

Like wars, lawsuits are great fun to daydream about. Nothing is as sweet as the quick, easy victory that will surely be yours when the hostilities start. And like wars, lawsuits are terrible when they actually happen. No matter who ultimately prevails, everyone involved will be bloodied before it's over.

In this chapter we'll talk about what happens during a lawsuit and explore some options for fighting back if you're the victim of a malicious suit.

OVERVIEW OF A LAWSUIT

If you learned about lawsuits from TV, you may expect a lawsuit to be quick and exciting. You may even have the quaint belief that lawsuits reliably deliver justice. In reality, lawsuits are slow, boring, and expensive. And justice is one possible outcome, assuming you can afford it.

Since you may find yourself dragged into a suit against your will, let's look at what to expect.

How much will it cost?

More than you think. A simple defamation suit will likely cost at least $10,000 to defend against. If things get complicated, the cost could be much greater. You probably won't be able to recover your costs even if you win the suit.

How long will it take?

Longer than you think. A case that goes to trial will probably take at least six months and could easily drag on for several years.

What are the phases of a lawsuit?

The exact process will vary from state to state, but most lawsuits look something like this:

The complaint

The lawsuit begins when the plaintiff files a formal **complaint** with the court. The complaint lays out the facts that underly the lawsuit, establishes the harm the plaintiff has suffered, and says what remedies they are seeking. In some states, the complaint is delivered by a formal process known as **service**.

The response

Soon after receiving the complaint, you must file a formal **response** (formally known as a **responsive pleading**). Your response lays out your version of the facts and says how you intend to defend yourself.

If you don't file a response by the deadline, the plaintiff may win the case by default. The deadline can be very short: in Washington, you must respond within 20 days.

Discovery

Both parties engage in **discovery**, the formal process of obtaining evidence before the trial. Discovery can include asking formal questions of the other party, questioning witnesses under oath, and getting court-ordered access to the other party's email or other documents.

Mediation
Many states require mediation before a case goes to trial. Mediation is typically a formal process conducted by a professional mediator.

Settlement
A formal **settlement** can end a lawsuit before it goes to trial. A settlement might involve paying damages, issuing an apology or retraction, or any other negotiated resolution.

Trial
If the case is not resolved by mediation, settlement, or some other means, it will go to trial. Defamation trials typically last somewhere between one day and two weeks, but that varies widely depending on the complexity of the case. The case might be tried by a jury (a **jury trial**) or just a judge (a **bench trial**).

Judgment
The final result of a trial is the **judgment**, which determines who prevailed on each point and awards damages if appropriate.

Appeal
The losing party can **appeal** the judgment to a higher court if they believe the trial was mishandled or there was an error in the judgment. You can't appeal a case just because you disagree with the outcome.

AVOIDING A TRIAL

If you can avoid a trial, we highly recommend doing so. Many cases are terminated before trial for a variety of reasons:

- At any time before the case goes to trial, the parties can agree to a **settlement**, which ends the lawsuit.
- Many states require **mediation** before a suit goes to trial. If mediation is successful, no trial will be necessary.
- **Anti-SLAPP** legislation may provide a mechanism for terminating a frivolous lawsuit. See Recovering Your Costs (p. 24)
- A **motion to dismiss** is usually filed early in the process and asks the court to terminate the suit on technical grounds. Perhaps the statute of limitations has expired, or the complaint doesn't assert any actionable claims. This is a fairly rare outcome.
- A motion for **summary judgment** is filed after discovery is complete. It argues that all relevant facts have been established and the outcome of the trial is not in doubt. If the motion succeeds, the judge can issue a judgment without a trial.

RECOVERING YOUR COSTS

We wish we could assure you that the law provides powerful protection for victims of malicious defamation lawsuits. Unfortunately, that isn't the case. You do, however, have a few options for fighting back and perhaps at least recovering your legal expenses.

Anti-SLAPP legislation

A **SLAPP** (Strategic Lawsuit Against Public Participation) is a meritless lawsuit intended to intimidate or silence critics. Anti-SLAPP legistlation provides strong protection against lawsuits that target discussion of matters of public concern or public interest. If you're lucky enough to live in a state with anti-SLAPP legislation, that is likely your best option.

A typical anti-SLAPP statute requires the defendant to show that the lawsuit has no meaningful chance of succeeding at trial. If you succeed, the judge can immediately terminate the lawsuit and require the plaintiff to pay your legal expenses.

Filing an anti-SLAPP motion typically halts any further discovery until the motion has been resolved. In addition, anti-SLAPP legislation typically provides the right to an immediate appeal if the initial motion is not successful.

Washington passed new anti-SLAPP legislation in 2021, thanks in part to the efforts of our legal advisor, Bruce Johnson. Thank you for making us all safer, Bruce!

Recovering costs

Unlike most other countries, the United States generally does not require the losing party in a lawsuit to pay the prevailing party's legal expenses. This means that if you don't live in a state with anti-SLAPP legislation, being sued is very expensive even if you win.

Other than using anti-SLAPP legislation, there are three tools that might allow you to recover your costs:

- Many states have a **frivolous claims** statute that allows the defendant to recover their costs in a frivolous lawsuit. Proving a lawsuit was frivolous can be difficult, however.
- Federal rule 11 may allow you to recover your costs if you are the target of a frivolous lawsuit. In Washington, Civil Rule 11 serves a similar purpose.
- In Alaska, Civil Rule 82 may allow you to recover some or all of your expenses.

Insurance coverage

Many umbrella, homeowners, and renters insurance policies cover defamation cases. If you think you're at risk of being sued for defamation it's worth checking your policy and possibly switching to a policy that provides defamation coverage if your current one doesn't.

Be careful, though: many insurance policies are very restrictive and only cover "unintentional" defamation that was made while you were inside your house.

Punitive damages

In some states, you may be able to seek punitive damages under certain conditions. Washington does not generally allow punitive damages in tort cases.

Malicious prosecution

In very rare cases, you might be able to counter-sue the plaintiff for malicious prosecution after you win the original suit. You will need to prove that:

- the lawsuit had no reasonable chance of succeeding, and
- it was filed maliciously

Washington is fairly restrictive: malicious prosecution is only available as a tort claim in cases where someone was arrested or property was seized.

Criminal prosecution

It occasionally happens that information surfaces during a lawsuit that can subsequently be used to support criminal charges:

- During discovery, the court might allow you to search the plaintiff's email or other documents for material that is relevant to the lawsuit.
- During the trial, both parties can be required to testify under oath about the subject of the suit.

There are some complicated issues here, including the 5th amendment protection against self incrimination.

CHAPTER 3

RESPONDING TO THREATS

The remainder of this class will discuss practical strategies for consent activists. We call our approach Risk-Aware Activism, by analogy to the common practice of Risk-Aware Consensual Kink (RACK). Risk-Aware Activism has three core principles:

Understand the risks. To make good decisions about risk, you need to have a clear understanding of the risks you're facing. Chapters one and two should have provided you with a solid layperson's understanding of some of the legal risks you face.

Manage your risk. You can't eliminate the risks associated with consent work, but you can manage your risk by being thoughtful and adhering to best practices for risk reduction. The rest of this class will give you concrete tools for managing your risk in some common situations.

Know your risk profile. You need to make your own decision about the extent to which you're willing to accept different types of risk. You might decide, for example, that you are willing to accept the risk of being outed but you want to minimize your risk of being sued.

Let's begin by talking about what to do if someone threatens you.

ASSESSING LEGAL THREATS

Threatening to sue someone is a cheap and easy way to intimidate them—consequently, legal threats are popular tools of bullies and abusers. If you do a lot of consent activism, it's probably only a matter of time before someone threatens to sue you. Trust us on this one.

When someone threatens to sue you, start by evaluating the situation:

- Assess the threat: is this empty bluster or a serious statement of intent?
- Assess your legal exposure: have you said anything that might be defamatory?
- Assess the strategic situation: are you ready to go to court? Is your opponent?

Assess the threat

We assess threats based on their specificity. The more specific a threat is, the more likely it is that your opponent will follow through on it.

A **casual threat** is vague and non-specific: "you better get yourself a lawyer". In our experience, casual threats are usually an attempt to intimidate rather than a statement of serious intention. Nonetheless, you should still take them seriously.

A **specific threat** usually involves some kind of ultimatum: "I will sue you if you tell anyone what happened on Saturday night".

A **demand letter** is a letter from a lawyer that threatens to sue you unless you meet a specific demand. Demand letters typically specify a legal rationale for suing you. If someone has gone to the trouble and expense of hiring a lawyer to write a demand letter, they are more likely to actually sue you.

Assess your legal exposure

Next, assess your legal situation and see whether you've said anything that might be defamatory. You can be sued even if you haven't done anything wrong, but it's important to know where you stand.

It is hard to objectively assess your own actions when you're feeling hurt and defensive: consider getting help from someone who is detached from the situation. In some cases, you may want to hire a lawyer for this part.

You should review everything you've said or written about the person who is threatening you, looking for any statements that a hostile lawyer could argue were defamatory. It's important that you look at what you've said from the perspective of someone who's trying to find fault with it, not from a perspective of justifying your actions.

If you feel confident that everything you've said was true and appropriate, your opponent can still sue you, but you are in a strong position to navigate whatever comes next.

On the other hand, if you've said some regrettable things you are in a much more complicated position. You should probably get a lawyer and think about backing down (p. 29).

Assess the strategic situation

We hope you realize by now that the legal system is only partly about justice. In addition to understanding your legal exposure, you also need to take a hard look at the strategic situation. Having the law on your side does you no good if you can't afford to go to court.

Consider these questions about yourself and your opponent:

- Can I / they afford the expense of a lawsuit?
- Can I / they afford the publicity that might accompany a lawsuit?
- Will a lawsuit cause me / them an intolerable level of emotional distress or activate existing trauma?
- Do I / they have anything to hide?
- Would discovery uncover damaging information about me / them?
- Can I / they find allies in the fight?
- How would a lawsuit affect my / their reputation? Beware of winning the battle and losing the war.

When your opponent is a lawyer

Lawyers are subject to specific ethical guidelines that prohibit them from abusing the legal system. If the person who is threatening you is a lawyer, it is possible that in some extreme cases you might be able to file an ethics complaint with their state bar association.

In very extreme cases, you might be able to file an ethics complaint against your opponent's lawyer. That's very rare: lawyers are given considerable latitude when acting on their client's behalf.

HOW TO RESPOND

Once you're taken stock of the situation, you need to decide how to respond to a legal threat. Broadly speaking, you have three options:

- Ignore it
- Back down
- Prepare for a fight

Ignore it

In many cases, you will decide the threat is not credible and requires no action on your part. You should probably cut off contact (p. 30) with the person who threatened you.

Back down

In some cases, the most prudent or ethical course of action is to swallow your pride and back down. You might do that because you were in the wrong, because you want to avoid a lawsuit, or simply because it's the safest way to exit a bad situation.

The correct course of action will depend on your circumstances—consider getting legal advice if your situation is complicated. Possible options include:

- Make a formal apology. A sincere apology can go a long way toward de-escalating a situation.
- Issue a public retraction of whatever you said. In some situations, issuing a retraction may reduce your legal liability.
- Pursue mediation. A trained mediator may be able to help you and your opponent find an acceptable settlement that avoids a trial.

Prepare for a fight

If you are in the right and are comfortable with your strategic situation, you may choose to fight. See If Someone Sues You (p. 31).

We are big fans of taking a brave stand against injustice, but a legal battle is not something to undertake lightly. Make sure you have a realistic understanding of what you're getting into before you commit to a fight.

CUT OFF CONTACT

The world is full of people who are dangerous, abusive, or aggravating. You are allowed to cut those people out of your life and you will be happier if you do.

Litigious people are bullies

Lawsuits cause great harm: people who file frivolous lawsuits are deliberately harming other people for their own benefit.

Legal threats are distressing and intimidating: people who make gratuitous legal threats do so in order to bully and intimidate others.

Like most bullies, litigious people often try to pretend they aren't *actually* attacking others. Don't fall for it: saying "you might want to get a lawyer" is like saying "you better watch your back". It's a blatant attempt to intimidate another person and the person making the threat knows exactly what they're doing.

How to cut off contact

We learned how to respond to legal threats in the corporate world and we've found the same strategy works just as well in consent work.

When someone makes even a casual legal threat against you, they have escalated their relationship with you into a legal conflict. You shouldn't have direct contact with someone with whom you're in a legal conflict for exactly the same reasons you shouldn't make public statements when you're in a lawsuit (p. 31).

Here's the language we use:

"Because you threatened to sue me, I am unable to have any further contact with you except through counsel. If you need to communicate with me, your lawyer may ask me for my lawyer's contact information."

Don't give them your lawyer's contact information: make them get a lawyer and have their lawyer ask for it. There is no legitimate reason for them to communicate directly with your lawyer at this time and it is inappropriate for them to do so.

From this point on, you should not respond to any further communication from that person. Don't be surprised if they contact you repeatedly, trying to get you to respond to them.

IF SOMEONE SUES YOU

If you are being sued, you have our sympathy. We can't offer you specific legal advice because we aren't lawyers and we don't know the specifics of your situation. But these three guidelines are appropriate to almost any lawsuit.

Take a deep breath
This is a scary situation. You're probably afraid, angry, and confused. You probably have a lot of ideas about how you want to respond right this moment. Take a deep breath and don't do anything rash.

This is likely to be a long and grueling process. Focus on self care and start thinking about what kind of support you will need from friends and family.

Lawyer up
We can't emphasize this enough: **you need a lawyer**. We know a lot about defamation law and we would never consider trying to defend ourselves without a lawyer.

You need to act quickly: in many states, you lose a lawsuit by default if you don't file a formal response within a short timeframe. In Washington, the deadline is only 20 days.

What if you can't afford a lawyer? You're in a tough place and we regret that we don't have any good advice for you. We live in a country where access to justice costs money and the legal system reinforces patterns of structural inequality. It's worth seeing if you can find someone who will take your case pro bono (for free), but that can be hard to do.

Let your lawyer do the talking
Here's your new mantra: "my lawyer has advised me not to comment on pending litigation".

When your case goes to trial, your lawyer will tell the court your side of the story. They can't lie on your behalf, but they will present you in the best possible light. If you shoot your mouth off on Facebook, you can easily undermine your case.

Let's say Morgan is suing you for saying they're an unsafe yoga instructor. You have compelling evidence that Morgan injured Blair during a class and you believe but can't prove that Chris developed back problems because of taking classes with Morgan. You and your lawyer decide to focus on what happened to Blair, because that is what you have the strongest evidence for.

If you go on Facebook and rant about how angry you are about Morgan injuring Chris, you're giving Morgan's lawyer ammunition to use against you. They can use your post to shift the focus of the case to Chris, and to argue that you acted rashly and with insufficient evidence.

It's important that you keep your message simple and consistent. And the best way to do that is to shut up and let your lawyer do the talking.

CHAPTER 4
MAKING A STATEMENT

"The wicked are always surprised to find that the good can be clever."
-Luc de Clapiers

Consent activism frequently involves making statements about bad actors. Perhaps you've decided you need to publicly call out a predator in your community, or you need to let a venue owner know that one of their instructors has a history of consent violations. Or perhaps you just want to warn your community about someone who harmed you.

Statements are a powerful tool for change, but they involve considerable legal risk. The time to think about that risk is when you're writing a statement, not when someone is threatening to sue you for a statement you've already made.

Even private text messages have a way of finding their way into the wrong hands: keep defamation risk in mind every time you make a derogatory statement about another person.

The three elements of a defamation case are falsehood, fault, and harm. It may not be possible to make an effective statement about someone without harming them, but you should ensure every statement you make is proof against falsehood and fault. In particular:

- Only say things that are true
- Don't be negligent
- If possible, obtain qualified privilege

You'll notice a recurring theme throughout this chapter: reducing your legal risk goes hand in hand with being scrupulously ethical.

PICK YOUR BATTLES

Consent work frequently involves situations that hurt, offend, or outrage us. It is easy to be reactive and feel you have to Do Something about every bad actor you encounter, but resist the urge. You will be safer and more effective if you slow down and make careful, deliberate choices about which battles to fight.

1. Assess the situation

Before acting, we ask ourselves three questions:

What are my goals?

Start by identifying specific goals. This isn't a specific goal:

- Morgan is a dangerous instructor: I need to Do Something!

These are specific goals:

- Stop Morgan from injuring students during classes
- Warn people that Morgan's online yoga videos are unsafe

How can I best accomplish each goal?

Identify the most effective strategy for accomplishing each goal. If your goal is to prevent Morgan injuring students during classes and there are only two yoga studios in your city, you might be able to accomplish that goal via a private conversation with the studio owners.

On the other hand, if you want to warn people about Morgan's videos, you'll probably need to make a public statement.

How risky is each goal?

Different courses of action entail different levels of risk. Making a public statement about Morgan is riskier than having a private conversation with two studio owners:

- Morgan is more likely to sue you and more likely to win a lawsuit.
- Morgan is more likely to retaliate against you (and perhaps against their past victims).
- You are more likely to generate conflict in your community.

2. Pick your battles

Once you understand the situation, you can decide how to proceed. Your decision should be based on how much time and energy you can invest, how much risk you're willing to take on, and how important each goal is to you. In this case, there are three reasonable strategies:

Go all in

Make a public statement about Morgan and talk to the studio owners about them. This is the most time-consuming and risky strategy, but it most comprehensively addresses all your goals.

Focus on stopping Morgan from teaching

You may decide that stopping Morgan from teaching in person accomplishes your most important goals and is safer and more feasible than making a public statement. Focus on talking with the studio owners.

Do nothing

It is completely legitimate to decide that this is a fight you aren't able or willing to take on.

Are you liable for any harm Morgan causes if you don't take action to prevent it? Probably not in most cases, unless you are directly involved (for example, if you hire Morgan to teach a class and they injure someone in that class). But as always, you should consult a lawyer if you aren't sure.

3. Focus!

Once you've picked your goals, focus relentlessly on them. If your goal is to stop Morgan from teaching dangerous yoga classes, focus on that.

If you also happen to feel that Morgan plays distracting music during classes, let it go. Bringing up peripheral issues dilutes your message, makes you look petty and vindictive, and creates additional areas for Morgan's lawyer to attack.

If you're aware of two serious, well-substantiated injuries in Morgan's classes and one alleged injury, focus on the two clear-cut incidents.

Victory comes from focus.

TELL THE TRUTH

The most important thing you can do to protect yourself is to be scrupulous about telling the truth. Falsehood is the foundation of defamation, so sticking to the truth greatly reduces your legal exposure. It's also the right thing to do.

Now might be a good time to review the legal definition of falsehood (p. 10).

Understate, don't exaggerate
It is human nature to want to spin the facts and dial up your language to make your case more compelling. Resist the temptation: it is safer and more ethical to understate your case than to exaggerate it.

Don't imply the existence of non-existent facts
If you summarize evidence or offer an opinion based on it, make certain the evidence supports your claim. Don't say "based on witness accounts, we believe Morgan injured Blair" unless you've heard witness accounts that unambiguously support that conclusion.

Be careful of words with specific legal meanings
Everyone has the right to interpret their experiences however they choose: if someone experienced a consent violation as rape, you should respect that.

But when making a formal statement about an incident, remember that words like "rape" have specific legal meanings. It is safer to only use those words in their formal legal sense.

Don't quote defamatory sources
A core principle of consent work is to believe people who have been harmed and amplify their voices. Legally, however, quoting a defamatory statement is defamatory. Unless you're absolutely certain about what happened, it may be prudent to avoid repeating specific allegations and focus instead on the big picture.

If you aren't certain of the truth of an allegation, it is safer to link to it than to quote it directly.

Beware of exaggerating adjectives
Adjectives are a powerful tool for making language more expressive and compelling. But be careful not to overstate your case by using overly strong adjectives unless the facts support them:

- **convincing** evidence
- **heinous** misconduct
- **severe** infraction

Adjectives should make your writing clearer, not make it more punchy but less accurate.

BE FAIR AND REASONABLE

One of the best ways to produce an effective, lawsuit-resistant statement is to meticulously check the style of your writing. Your message should consistently come across as reasonable and fair, with no trace of pettiness or vindictiveness.

Why does style matter?

First, because the style of your statement is important if you get sued. Element 2 of defamation is fault: if your statement reads as petty and vindictive, it is easier for your opponent to argue that you were motivated by malice.

Second, because style and content often go hand in hand. If a paragraph sounds petty and vindictive, that's a warning sign that the content may be inaccurate and unfair. Reviewing your style is an important tool for finding and correcting problematic content.

Finally, because reasonable statements are more effective. Your goal in making a statement is to convince your audience of a set of facts and persuade them to take certain actions. You will be more persuasive if you come across as fair and reasonable.

USE PURE OPINION

Because pure opinion is not defamatory, it is a powerful tool for making defamation-resistant statements. See Pure opinions are not defamatory (p. 11) for details about how pure opinion works.

Here are four specific techniques for using pure opinion to craft statements that are both effective and lawsuit-resistant (remember, no statement is lawsuit-proof).

Make a value judgment, not a factual statement
It is very tempting to discuss the details of what someone did wrong. Giving details helps your community understand the situation and provides context for any additional action you are taking. But making specific allegations can expose you to liability if the fact pattern isn't absolutely certain. Your best course of action may be to offer an opinion about the situation in general rather than making specific allegations.

Higher risk: *We are firing Morgan because they injured three students.*
Lower risk: *We are firing Morgan because we feel they do not meet our safety standards.*

Emphasize the uncertainty
It may be safer to express your concerns as a lack of confidence that conduct was appropriate, rather than a statement that conduct was definitely inappropriate:

Higher risk: *We are firing Morgan because of their pattern of causing injuries.*
Lower risk: *We are firing Morgan because we lack confidence in their safety practices.*

Focus on the response, not the incident
Sometimes the details of an incident are unclear but you have solid information about how someone responded to it. In those cases, it may be best to focus on the response rather than the original incident:

Higher risk: *We are firing Morgan because they injured Blair.*
Lower risk: *We are firing Morgan because they did not respond appropriately to Blair's injury.*

Express an opinion based on true facts
If you are confident about the truth of certain factual claims, an excellent way to present an opinion is to present the facts and express an opinion based on those facts.

Higher risk: *We think Morgan is an unsafe teacher.*
Lower risk: *Because Morgan has injured three students, we think they are an unsafe teacher.*

PRE-PUBLICATION REVIEW

Pre-publication review should be an integral part of your process for making any public statement about a consent incident. A good review process will help ensure that everything in your statement is fair and accurate and will help protect you in the event of a lawsuit.

You can do your own review but it's best to have a lawyer do it, especially in high risk situations.

Pre-publication review consists of making a detailed pass through your draft statement and identifying every factual claim, opinion, or call to action. For each one, you should document in writing your rationale for saying what you said. Once the process is complete, keep a written copy in your files.

To win a defamation case, the plaintiff must at a minimum prove you were negligent—that you should have known what you said wasn't true. By documenting the care you took to ensure everything was true, you create a powerful rebuttal to the negligence argument.

A note about safety

In some cases, it may be very important to protect the anonymity of your sources. Your pre-publication review notes may end up in court: don't put anything in them that could compromise someone's safety.

CHAPTER 5
CONSENT IS A TEAM SPORT

"I am no longer accepting the things I cannot change. I am changing the things I cannot accept."
-Angela Davis

Defamation lawsuits are a community-level problem: solving them will require a community-level action. It isn't fair to expect survivors and activists to carry the load alone, and it won't work.

In this module we'll look at some three strategies that don't require great effort or bravery by any individual, but which can have a huge impact if we all adopt them.

DON'T USE DEFAMATION SUITS

The first version of this class proposed a set of guidelines for using defamation lawsuits in an ethical manner. Based on further experience, we no longer believe that's possible. Instead, we believe the best path forward is for the kink world to agree to completely relinquish the use of defamation lawsuits and to sanction individuals who use them.

We acknowledge that there are rare cases when it's ethical to use a defamation lawsuit. The harm caused by defamation suits, however, is enormous. In addition to the direct harm caused to people who get sued, these suits have a chilling effect on the entire kink world.

It isn't possible to create an enforceable community norm that rejects defamation lawsuits except in rare cases when good people really need to use them. As a community, we must choose to continue living with the harm caused by defamation suits, or else reject them entirely. We believe we're all better off if we reject them entirely.

USE COMMON INTEREST

Common interest privilege grants qualified privilege to statements made to a private group of people who share a common interest. This is a complicated legal area: you might want to review Common Interest Privilege (p. 14).

You should consider using this strategy if you've decided your goals are best served by sharing information with a limited group of people. Unfortunately, the relevant law is both murky and unforgiving: a court may decide you are not eligible for the privilege if you aren't fully in compliance with the requirements, but the requirements are somewhat vague. Here are some things to keep in mind:

Publication must be narrowly restricted
The most important requirement is that publication must be restricted to a narrow group. Ideally, it would be a formal group with clear written guidelines for membership.

The group must have a compelling common interest
This is a very subjective question. Common interest privilege would likely apply to a private mailing list of event producers sharing information about educators. It probably would not apply, however, to a private mailing list of people discussing kink in general.

Publication must serve the common interest of the group
Common interest privilege only applies to statements that directly advance the group's common interest. You probably would not be eligible for privilege if you made derogatory comments about your internet provider to a group of event producers.

It's good practice to have a written policy that specifies what kinds of discussions are permitted and to discourage any discussions that do not directly serve the group's common interest.

NO MORE SECRETS

Abusers are only able to teach and hold leadership positions within the kink world by hiding their history from students, producers, and venues. The most powerful thing we can do to stop them is to shine a light into those dark corners.

A simple step toward doing that is for producers, venues, and even students to do a better job of vetting instructors. This set of questions is designed to do exactly that. It's short and simple, with objective questions that don't involve a judgment call.

This list is far from comprehensive, but in our experience it will flag many of the educators with the most egregious consent histories.

Note that "yes" answers are not disqualifying, but rather serve to identify information that needs to be publicly disclosed and conversations that need to happen.

Please describe in detail every time you:

1. Were convicted of any non-consensual sexual crime.
2. Were convicted of any crime against an intimate partner.
3. Were the subject of a restraining order.
4. Were required to surrender your firearms.
5. Were formally sanctioned by any organization.
6. Refused to participate in an accountability process.
7. Filed or threatened to file a defamation lawsuit.
8. Used or threatened to use a lawsuit or other legal device to prevent anyone from sharing information about you.

GLOSSARY

Actual malice: the highest level of fault: you said something you know was false or you acted with reckless disregard for the truth. See Element #2: Fault (p. 13)

Appeal: asking a higher court to re-hear a case because of an error in the original trial. See Appeal (p. 22)

Bench trial: a trial with a judge but no jury. See Trial (p. 22)

Beyond reasonable doubt: the standard of evidence in a criminal case. See Civil law and the standard of proof (p. 7)

Blackmail: the crime of threatening to expose information about someone if they don't comply with your demands. See Blackmail and Extortion (p. 18)

Civil law: the part of the legal system that deals with lawsuits brought by one person against another. See Civil law and the standard of proof (p. 7)

Common interest privilege: a privilege granted to statements made to members of a group to advance the interest of that group. See Common interest privilege (p. 14) and Use Common Interest (p. 42)

Complaint: the formal court filing that initiates a lawsuit. See The complaint (p. 21)

Counsel: a fancy word for lawyer.

Criminal law: the part of the legal system that deals with crimes that are prosecuted by the state. See Civil law and the standard of proof (p. 7)

Damages: a court-ordered payment by the defendant to compensate the plaintiff for harm. See Element #3: harm (p. 15)

Defamation: a tort based on false statements made by the defendant. See What is Defamation? (p. 9)

Defendant: the person who is being sued (in a civil suit) or prosecuted (in a criminal suit).

Discovery: the phase of a lawsuit where both parties obtain evidence to use during the trial. See Discovery (p. 21)

Extortion: the crime of obtaining something through a threat. See Blackmail and extortion (p. 18)

Fair report privilege: a privilege granted to the media when reporting on official government proceedings. See Fair report privilege (p. 12)

False light: a tort based on a statement that causes emotional harm by misrepresenting another person. See False light (p. 16)

Hyperbole: a statement that is so exaggerated that it is not considered to be factual. See Hyperbole is not defamatory (p. 10)

Intentional infliction of emotional distress: a tort based on outrageous or abominable action that impacts another person's mental health.

Judgment: the final ruling in a lawsuit, which establishes who prevailed on each point and awards damages if appropriate. See Judgment (p. 22)

Jurisdiction: the locale where a case will be tried, whose laws will determine the course of the case. See Jurisdiction (p. 8)

Jury trial: a trial with a judge and a jury. See Trial (p. 22)

Libel: written defamation. See What is defamation? (p. 9)

Limited-purpose public figure: a figure who is normally a private figure but has voluntarily thrust themselves into a public debate. See Public and private figures (p. 13)

Litigation privilege: a privilege granted to statements made in the conduct of a court case. See Litigation privilege (p. 13)

Mediation: a formal process in which both parties attempt to reach a pre-trial settlement. See Mediation (p. 22)

Negligence: the lower level of fault: you said something you should have known was false. See Element #2: Fault (p. 13)

Neutral report privilege: a privilege granted to unbiased media reporting on a matter of public interest. See Neutral report privilege (p. 11)

Parallel legal claims: legal claims that attempt to reframe a defamation case as some other tort. See Parallel legal claims (p. 16)

Parasitic torts: secondary torts appended to the primary basis of a lawsuit. See Parasitic torts (p. 17)

Per se defamation: defamation so severe that harm is assumed to have occurred and need not be proven. See Per se defamation (p. 15)

Plaintiff: the person who files a civil lawsuit against the defendant.

Preponderance of evidence: the standard of evidence that applies in a civil lawsuit. Requires showing that a claim is at least 51% likely to be true. See Civil law and the standard of proof (p. 7)

Private figure: a person who is not a public figure and has a reasonable expectation of privacy. See Public and private figures (p. 13)

Privilege: legal protection granted to a statement. See Absolute and qualified privilege (p. 8)

Privilege, absolute: a statement protected by absolute privilege cannot be defamatory. See Absolute and qualified privilege (p. 8)

Privilege, qualified: a statement protected by qualified privilege may be defamatory, but requires the plaintiff to prove actual malice rather than merely negligence. See Absolute and qualified privilege (p. 8)

Pro bono: a lawyer who takes a case for free is working pro bono (for the public good).

Public figure: a well-known person whose life is a matter of public interest. See Public and private figures (p. 13)

Publication of private facts: a tort based on publishing previously unknown private facts about a person. See Publication of private facts (p. 16)

Punitive damages: damages in excess of actual damages, which are awarded to punish the defendant and to deter others from following their example. See Element #3: harm (p. 15)

Pure opinion: a statement that reflects a personal interpretation of the facts. See Pure opinion (p. 11) and Use Pure Opinion (p. 37)

Responsive pleading: a formal response to a complaint. See The response (p. 21)

Service: the process of delivering a complaint to the defendant. See The complaint (p. 21)

Settlement: a formal agreement between the defendant and the plaintiff which ends a lawsuit. See Settlement (p. 22)

Slander: spoken defamation. See What is defamation? (p. 9)

SLAPP: Strategic Lawsuit Against Public Participation. A frivolous lawsuit intended to intimidate and silence critics. See Anti-SLAPP legislation (p. 24)

SPEECH act: a federal law that protects statements made in the US against foreign defamation suits. See International lawsuits (p. 8)

Standard of proof: the standard required to "prove" something in a court case. See Civil law and the standard of proof (p. 7)

Statue of limitations: the time limit on filing a lawsuit in a civil case, or prosecuting a crime in a criminal case. See The statute of limitations (p. 7)

Substantial truth: a statement is substantially true if it accurately captures the gist of a matter, even if it contains minor mistakes. See Substantial truth (p. 10)

Tort: the basis for a civil lawsuit. See Torts (p. 8)

