

ME TOO BACKLASH: What Is It And How Can We Help Our Clients?

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How big is the problem?

- Colby Bruno, Victim Rights Law Center, Boston
> 5 to 50% of the case load

> Buzz Feed News, Dec. 5, 2017 - Entitled: As More College Students Say “Me Too,” Accused Men Are Suing for Defamation

- Gambacorta, David, Tribune News Service - Entitled: How the powerful can use SLAPP lawsuits and muzzle free speech for about \$300

- **SAVE - Stop Abusive & Violent Environments**

SAVE is working for effective and fair solutions to sexual assault and domestic violence. Victims are being turned away, the innocent are being falsely accused, and families are being harmed. At the heart of the problem is a system that is based more on ideology than science or common sense. The system is not victim-centered, and it has created broad definitions, weakened due process, and removed the presumption of innocence.

Appellate Court Decisions for Allegations of Campus Sexual Misconduct, 2013-2018

1. *I.F. v. Administrators of Tulane Educational Fund*
2. *John Doe v. University of Southern California*
3. *John Doe v. Columbia University*
4. *Abdullatif Arishi v. Washington State University*
5. *In the Matter of John Doe v. Skidmore College*
6. *John Doe v. University of Cincinnati*
7. *John Doe v. University of Southern California*

- **FACE - Families Advocating For Campus Equality**

The mission of FACE is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and influence campus culture through outreach and education.

FACE understands the importance of and provides resources and support to college students wrongfully accused of Title IX violations on their campuses and their families. We hold meetings twice a year for families to connect and hear from experts in their fields, and provide other ways for families and students to connect on national and regional bases.

► CLAIMS

1. Defamation/Slander

Restatement (2d) of Torts, § 574 (1977) – Slander Imputations of Sexual Misconduct

One who publishes a slander imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm.

Restatement (2d) of Torts, § 577 (1977) – What Constitutes Publication

- (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
- (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

2. Libel

Restatement (2d) of Torts, § 568 – Libel and Slander Distinguished

- (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
- (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).
- (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

3. False Light/Invasion of Privacy

Restatement (2d) of Torts, § 652(D) (1977) – Publicity Given To Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

4. Business Torts

5. Malicious Prosecution/Abuse Of Process

6. Intentional Or Negligent Infliction Of Emotional Distress

► DEFENSES

- Immunity

RCW 4.24.500 - Good faith communication to government agency—
Legislative findings—Purpose

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal. App. 4th 435 (2d Dist. 2011)

Hodo v. Cheryl R., 2004 WL 308667 (Cal. App. 4th Dis. 2004)

O’Gara v. St. Germain, 91 Mass. App. Ct. 490 (2017)

Mass. Gen. Laws Ann. Ch. 231, § 59H.

- Privileges

Absolute CA Civil § 47 Privileged Publication or Broadcast

> Judicial

> Litigation

> Witness

Alzugaray v. Kiesel, Boucher & Larson,

2007 WL 258454 (Cal. Ct. App. Jan. 31, 2007)

Fair Report

Colt v. Freedom Communications, Inc., 109 Cal. App. 4th 1551 (2003)

- Conditional

Family Restatement § 597

Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015)

Common Interest

Hitter v. Bellevue Sch. Dist. No. 405, 66 Wn. App. 391, 832 P.2d 130 (1992)

AV Light Foundation v. San Juanita Garibay, 2007 WL 4465207 (Cal. App.2d Dist. 2007)

► Anti- SLAPP –

- **California**

Cal. Civ. Proc. Code § 425.16(b)(2)

Dickson v. Cosby, 17 Cal. App. 5th 655 (2017); see also *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017)

Wentworth v. Bennett, 2018 WL 3521340 (Cal. Ct. App. July 23, 2018)

Wentworth v. Hemenway, 2019 WL 2368520 (Cal. Ct. App. June 5, 2019)

Application of Anti-SLAPP, 85 A.L.R. 6th § 475

- **Texas**

TEX Civ. Prac. & Rem. Code Ann. § 27.002 et. seq.

Vander-Plas v. May, 2016 WL 5851913 (Tex. App. Oct. 4, 2016)

- **Washington**

RCW 4.24.525

Davis v. Cox, 351 P.3d 862, 875 (2015)

- **British Columbia**

2019 Protection of Public Participation Act

- **Solutions?**

10 Del.C. § 8136 - Actions involving public petition and participation

Sherwin, Robert T., Evidence? We Don't Need No Stinkin' Evidence ...

(40 Colum. J.L. & Arts 431 (2017)) - <https://www.psychologytoday.com/us/blog/the-homework-myth/201504/evidence-we-dont-need-no-stinkin-evidence>

Anti-SLAPP Status and Commentary

<http://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1>

► **ADVICE TO CLIENTS** (most defensible “publications” to least)

- Lawsuit
- Statement to Police
- Reports to Human Resources
- Statements to Title IX Investigators
- Press Releases
- Websites “Make Them Scared”

§ 27.002. Purpose**V.T.C.A., Civil Practice & Remedies Code § 27.002****Citation: TX CIV PRAC & REM § 27.002****Effective: June 17, 2011**

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

§ 27.003. Motion to Dismiss**V.T.C.A., Civil Practice & Remedies Code § 27.003****Citation: TX CIV PRAC & REM § 27.003****Effective: September 1, 2019**

(a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The parties, upon mutual agreement, may extend the time to file a motion under this section or the court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

(d) The moving party shall provide written notice of the date and time of the hearing under Section 27.004 not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or an order of the court.

(e) A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.

§ 27.004. Hearing**V.T.C.A., Civil Practice & Remedies Code § 27.004****Citation: TX CIV PRAC & REM § 27.004****Effective: June 14, 2013**

(a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

§ 27.005. Ruling
V.T.C.A., Civil Practice & Remedies Code § 27.005

Citation: TX CIV PRAC & REM § 27.005
Effective: September 1, 2019

- (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.
- (b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:
- (1) the party's exercise of:
 - (A) the right of free speech;
 - (B) the right to petition; or
 - (C) the right of association; or
 - (2) the act of a party described by Section 27.010(b).
- (c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.
- (d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law .

§ 27.006. Proof
V.T.C.A., Civil Practice & Remedies Code § 27.006

Citation: TX CIV PRAC & REM § 27.006
Effective: September 1, 2019

- (a) In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.
- (b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

§ 27.007. Additional Findings
V.T.C.A., Civil Practice & Remedies Code § 27.007

Citation: TX CIV PRAC & REM § 27.007
Effective: September 1, 2019

- (a) If the court awards sanctions under Section 27.009(b) , the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.
- (b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

§ 27.008. Appeal
V.T.C.A., Civil Practice & Remedies Code § 27.008

Citation: TX CIV PRAC & REM § 27.008
Effective: June 14, 2013

- (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.
- (b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.
- (c) Repealed by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 5.

(a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court :

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action ; and (2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.