

# Module 16



## Legal Actions

Some say litigation is the lowest form of discourse. Whether or not you agree with that statement, it certainly is the *slowest* form of discourse. But sometimes it is the only recourse.

### Guide to Citizen Litigation

#### Goals:

Litigation employs one of the three governmental checks and balances: The courts. (The other two are the executive branch – governors and president, and the legislative branch). Like "rock, paper, scissors," one can trump another. When a public official doesn't do what you want, theoretically litigation is the way a citizen can trump the public official.

#### Go in with your eyes open

Before taking legal action, remember that the legal process is most often slow and tedious and can be costly.

- In the end, many cases are dismissed before you get a chance to present evidence
- If your case is deemed to be frivolous, you can be asked to pay the costs, which can be substantial.
- There is no such thing as a slam dunk case. If your opponents have more money than you do, you might be the one that gets slammed even if you're in the right.
- This information is not meant to discourage you, but rather to give you a realistic understanding of how the judicial system works.

### **Types of litigation that may apply to elections:**

- Writ of mandamus: To force an official to comply with a law
- Injunction: A preliminary order to prevent something from being done if you can show evidence that it is likely to cause harm
- Civil rights: A lawsuit based on violations of your rights
- Constitutional: A lawsuit based on violations of the state or federal constitution
- Elections contest: A lawsuit by a candidate or, in some jurisdictions, a citizen's group contesting results or procedures in an election.
- *Qui Tam* (false claims): A lawsuit filed by a whistleblower when taxpayer funds are expended on goods or services based on false claims by the vendor
- *Pro Se*: A lawsuit brought by a citizen on their own behalf, without a lawyer
- Unfair business practices: A lawsuit against a vendor based on unfair practices, which can include false advertising
- RICO suit: A lawsuit alleging a pattern of fraudulent conduct, racketeering
- Antitrust: A lawsuit alleging collusion between vendors to gain inappropriate control over the market
- Stockholders lawsuit: A lawsuit by stockholders of a corporation alleging that the corporation misled, withheld information, and damaged them economically
- Class action: A lawsuit by a class of injured parties against the entity that damaged them.
- These are just a few of the kinds of cases that can apply to elections and voting system manufacturers. All of the above kinds of cases, except perhaps the class action suit, have been tried in recent efforts to clean up elections with varying success.

### **Obstacles to successful lawsuits:**

- The single biggest obstacle to citizen lawsuits to clean up elections is the issue of "standing." In order to bring a case, you must be deemed to have a right to sue.
- Surviving the "standing" test is surprisingly difficult for citizens. When it gets to the courtroom, voters have very few rights.
- Surviving dismissal may prove to be your most difficult challenge.
- Another challenge is the assignment of the judge. No matter how good your case, if you draw an unfriendly judge you may be dismayed at the result.

### **Strategic use of litigation:**

- The elections industry shares some traits with the tobacco industry. Fighting an elections-related lawsuit can involve confrontation with powerful vested interests. One of the strategies that worked with tobacco litigation was having several different kinds of small lawsuits in different venues, and cooperating to share items obtained in discovery and collaborate and expand on successful tactics.
- Another strategic use of litigation is the discovery process itself. If the litigant can survive dismissal, the action moves to discovery. This process compels information to be provided, of great value for a situation where the public interest is held hostage to nondisclosed software, personnel, and financial dealings.
- An additional advantage to litigation is that it helps the media to cover the issue. There are always two sides to litigation, and there is always evidence of the argument (the filing papers). That makes the story "safe." Because controversy sells, the press has a good probability of covering the issue through coverage of lawsuits.

### **Choosing a lawyer:**

- Pro bono (free) lawyers are hard to come by. Even if you do find one, you have no guarantee they are good lawyers, and when it comes to litigation, the best lawyers with the most financial resources are far more likely to prevail than weak or poorly funded attorneys who are "right."
- Look for attorneys with a practice that includes the type of case you want to file.
- If you are a candidate, have an attorney in the wings *before* the election, because you have only days to file a contest after the election.
- One of the first things a law firm must do is a "conflicts check" to make sure they haven't been representing any entity that could have a conflict of interest with you. If you plan to embark on litigation against a government agency or a large company, allow ample time for this. Big government and big companies tend to do business with lots of law firms, and it can take more time than you expect to go from one law firm to the next as they discover they can't represent you due to conflicts.
- You'll need an attorney who knows the local lay of the land. Besides the issue of being licensed to practice in your jurisdiction, out of town attorneys may not have a feel for the personalities of the judges and local customs.

### **The equalizer**

The courts are one of the few remedies available to put ordinary citizens on an equal playing field. Going to court can give you the ultimate David and Goliath moment.

Unfortunately, the playing field may be "equal" but it is also tilted. If you choose to litigate, prepare to run uphill against an opponent who has deeper pockets and more players than you do.

# Your Own Additions to the Legal Actions Module

You can share your ideas by sending to [crew@blackboxvoting.org](mailto:crew@blackboxvoting.org)



What worked well?

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What new ideas did you come up with?

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Was there anything that didn't work very well?