



## GUIDELINES FOR THE RIGHT TO PROTEST

### Introduction

The following are general guidelines regarding the rights of protesters. Since all such issues are very fact specific none of these answers can be considered legal advice and you should consult with an attorney if you have specific legal questions.

While there will no doubt be questions left unanswered, you should realize that, as a practical matter, many problems involved in planning protests can be solved by contacting government officials as far in advance as possible. Often times police will realize that the fears they had regarding an event were unfounded once they hear what organizers have planned. Additionally, often times protesters and officials can reach mutually agreeable solutions to problems.

### Public Sidewalks

Sidewalk, streets, and parks are what are known as traditional forums and “have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Hague v. CIO, 307 U.S. 496, 515 (1939). The government cannot deny the public access to a traditional public forum nor can it regulate use of the forum based on the content of one’s speech. Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). However, the government is permitted to impose “reasonable time, place, and manner restrictions” within a public forum so long as the regulations are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” Id. In short, the government may set reasonable rules in a public forum, those rules can be no more expansive than is necessary to accomplish the government’s purpose and such rules can not be used to completely deny access to the traditional public forum.

Thus, the government may be able to prevent protesters from completely blocking a thoroughfare to traffic, such as a street or sidewalk, but cannot curtail any more speech than is necessary to accomplish that goal. Similarly, government can regulate use of sound amplification equipment, such as limiting the decibel level and requiring a permit, but would normally not be able to bar use of amplification equipment entirely. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

While certain basic free speech activity is almost always permissible in a traditional public forum, such as leafleting or protests involving a small number of people, it is generally advisable to check applicable regulations before hand. For instance, sound amplification equipment will often require a permit as might a demonstration involving a large number of people. To find out what regulations exist you should contact the municipality where you intend to demonstrate.

## **Public Roadways**

As noted above, public streets are traditional public forums and therefore are open for expressive purposes such as marches. Of course, public streets are also used for cars, buses, and other vehicles. Therefore, municipalities usually impose reasonable time, place, and manner restrictions on the use of streets for speech purposes. These regulations generally involve a permit requirement, advance notice, time limitations, and some sort of police presence to close the street or a portion of the street to traffic during the march. Many municipalities try to also impose an insurance requirement to indemnify the city. Insurance requirements to use a traditional public forum are almost always unconstitutional. Municipalities are, however, allowed to charge a nominal fee to cover the cost of processing permit applications.

If you choose to ignore reasonable time, place, and manner restrictions and block traffic on public thoroughfares you can be arrested (or at the very least ticketed). There is nothing unconstitutional about the enforcement of generally applicable laws so long as they are enforced equally and not on the basis of the speaker's message. Indeed, equality under the law requires that generally applicable laws be enforced uniformly even if the violators believe they had a good purpose for their action.

## **Government Buildings**

Government owned property that is not a traditional public forum can be either a designated public forum or a nonpublic forum. If the government property is considered a nonpublic forum the government can impose significant restrictions on speech. For instance, a courtroom is a quintessential nonpublic forum in which protest may be prohibited. The Supreme Court has held that protecting the judicial process from interference is a legitimate government interest that would support a ban on picketing at a state courthouse. Cox v. Louisiana, 379 U.S. 559 (1965). However, even if the government has a legitimate purpose, its regulations must be narrowly drawn. In United States v. Grace, 461 U.S. 171 (1983), the U.S. Supreme Court struck down a statute that prohibited all protesting on the sidewalk in front of the Supreme Court building.

As for actual court proceedings, I know of no cases that have found a right to protest in a court building itself. While individuals do not have the right to protest during court proceedings, court proceedings are generally required to be public and individuals do have the right to attend such proceedings so long as they are not disruptive. During trials and other proceedings, judges have broad powers to protect the integrity of the proceedings and would probably be entitled to prohibit expressive clothing, such as t-shirts, and expressive paraphernalia, such as ribbons, buttons, or angel lapel pins.

## **Nongovernment Buildings**

The First Amendment of the United States Constitution only prohibits the government from interfering with individuals' free speech, it does not place any affirmative obligation on nongovernment entities to accommodate other people's speech. The New Jersey Supreme Court has held that New Jersey's constitution provides greater free speech protection than does its federal counterpart. For the most part this broader protection has been limited to areas that look like traditional public forums but happen to be privately owned. For instance, in Coalition Against the War v. J.M.B. Realty, 138 N.J. 326 (1994), the Court held that New Jersey's free speech protections protected leafleting in shopping malls because shopping malls had become, in essence, the new "downtown." Similarly, in State v. Schmid, 84 N.J. 535, 563 (1980), the Court held that Princeton University could not ban leafleting on

its quad. There is some indication from lower courts that these same sorts of free speech rights would apply in the context of gated communities and condominiums.

There is not any case law, however, that would extend these sorts free speech rights to expressive activity in private office buildings or businesses. Conducting a sit-in or similar demonstration at a private building could constitute trespassing or a similar offense and protesters may be subject to arrest.

## **General Questions**

Questions involving defamation are generally very fact specific. You should know, however, that companies can and do sue individuals for claims of defamation. As a general rule, there is no basis for suing someone who has merely stated an opinion. Thus, the more factual a statement is the more likely it is to provide the basis for a defamation claim. If a derogatory comment is presented as a statement of fact about a company that could be proved either true or untrue that statement could form the basis for a defamation suit. In a defamation action truth is a defense, so if an individual is able to prove that the derogatory remark they made was in fact true he or she should win the lawsuit. It should be noted that the question of who has the burden of proof on the issue of truth will depend on who is claiming they were defamed. If the plaintiff is a public figure, such as a politician, and the statement is on a matter of public concern than they have the burden of proving that the defendant made the statement knowing it was false or with a reckless disregard for the truth. If the plaintiff is simply a private individual, the defendant will have the burden of proving that their statement is true. Some courts have held that publicly traded companies are to be considered public figures in this context, but the determination is highly fact specific and different courts may reach different results.

## **Harassment and Other Overbearing Regulations**

As noted above, government officials are permitted to impose certain time, place, and manner restrictions even in traditional public forums. For instance, some demonstrations may require permits as might the use of sound amplification equipment. Additionally, government officials are permitted to charge a nominal permit application fee; however, that fee should only be to defer the administrative costs of processing the permit, it can not be to defray the cost of the actual event.

Many municipalities attempt to impose a liability insurance requirement on demonstrations and marches. These requirements are unconstitutional prior restraints on speech for a number of reasons. First, the cost of obtaining the insurance would often be quite high and would thus deter small and poorly financed individuals and groups from speaking. Second, these sorts of restrictions are content-based restrictions on speech because controversial speakers will have to pay more for insurance or may be unable to obtain it at all.

As for post-event clean up, the issue does not appear to have been addressed squarely by the courts. It is clear that government officials can not prohibit leafleting based on a concern for the litter it may create, thus it could be argued that event organizers should not be responsible for a normal amount of litter generated at a demonstration in a traditional public forum. If, however, there was something about an event that would create an unusual amount of litter it may be reasonable to expect the organizers to help with the clean up. Of course, individuals are not excused from the general prohibition against littering simply because they are engaging in expressive activity and should be encouraged to “put litter in its proper place.”

## **Civil Disobedience**

Individuals can, of course, be prosecuted for breaking generally applicable content neutral laws, such as trespass and disturbing the peace, even if they do so for expressive purposes. This is a different situation than where individuals break laws because they consider the laws themselves to be unconstitutional or otherwise illegal (e.g. sitting at a segregated lunch counter). In many of this latter category of civil disobedience cases an individual's actions can be defended based on the argument that the law the individual broke was itself illegal.

As for the former category of cases, the motive for breaking the law is irrelevant to whether the individual is punished. Individuals who have broken laws as part of expressive activity are entitled to equal protection and due process. Therefore, any punishment should be proportional to that which any other similarly situated offender would receive and should not be increased in an attempt to chill expressive activity. On the other hand, this means that protesters should not expect lighter penalties because they were engaged in expressive activities. Indeed, in many cases a judge may have no discretion over the punishment, such as in the case of an individual with a previous criminal record who may automatically receive a harsher penalty.

## **Conclusion**

These are intended to be general responses to your questions about free speech in general. This is not intended to be legal advice. Obviously, the answer to any legal question turns on the facts and circumstances of the given case. Therefore, you should consult with a lawyer should specific legal questions arise.

**AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

P.O. Box 750, Newark, NJ 07101

973 642 2084

[info@aclu-nj.org](mailto:info@aclu-nj.org)

[www.aclu-nj.org](http://www.aclu-nj.org)