



Election Year Do's and Don'ts

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"Democracy is not a spectator sport."
--Marian Wright Edelman

Special Note: This document uses the word "nonprofits" to mean those nonprofit organizations that are "organized and operated exclusively for religious, charitable, ... or educational purposes" and enjoy tax-exempt status under Section 501(c)(3) of the Tax Code (often called "charities" or "charitable organizations"). Different rules apply to private foundations and nonprofits that have tax-exempt status under other sections of the Tax Code, such as 501(c)(4)(civic organizations), 501(c)(5)(labor unions), and 501(c)(6)(chambers of commerce and professional associations).



Center for Lobbying in the Public Interest (CLPI) promotes, supports and protects 501(c)(3) nonprofit advocacy and lobbying in order to strengthen participation in our democratic society and advance charitable missions.

CLPI's goals are to:

Promote the participation of nonprofits in the public policy process by acting as a catalyst for nonprofit advocacy and lobbying;

Support the participation of nonprofits in the public policy process by providing tools, organizing networks to convey those tools, and building foundation support for advocacy; and

Protect and expand nonprofit lobbying rights.

<http://www.clpi.org>
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Nonprofit Voter Engagement Network (NVEN) is a national nonpartisan, nonprofit initiative dedicated to expanding the role of America's nonprofits in voting and elections. NVEN works with state nonprofit VOTE initiatives and its national website to provide resources and tools for 501(c)(3) nonprofits to help their communities participate and vote.

NVEN has launched a special web site to serve as a one-stop voter participation resource center for the 501(c)(3) sector. Its mission is to help you engage your clients in voting and democracy.

<http://www.nonprofitvote.org>
national office: 651-642-1904
Boston office: 617-357-8683

Tim Delaney is an attorney who serves as President of the Center for Leadership, Ethics & Public Service, a Phoenix-based independent nonprofit that has worked with more than 21,000 educators, judges, legislators, nonprofit leaders, philanthropists, state and local public officials, and other professionals from more than 30 states.

In championing positive ethics, advancing civic engagement, and promoting democracy, Tim draws on insights and foresight he gained as:

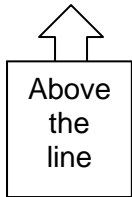
- ◆ a partner in a multi-state law firm (where he helped impeach a Governor, served as legal counsel for campaign committees for ballot measures and candidates – including two Members of Congress, and lobbied for Citibank, IBM, and various media interests);
- ◆ State Solicitor General (guiding his state to win four out of four cases in the U.S. Supreme Court);
- ◆ Chief Deputy Attorney General (the top staff position at the largest law firm in the state); and
- ◆ lead volunteer for several nonprofit organizations.

To help nonprofits, Tim – a graduate of Yale, the LBJ School of Public Affairs, and the University of Texas Law School – has been a Senior Advisor to the National Council of Nonprofit Associations, an adjunct professor teaching courses on "Leadership & Ethics in the Nonprofit Sector" to graduate students and practitioners, and author of a guidebook on nonprofit advocacy. He also serves as a national Training Fellow for the nonpartisan, D.C.-based Center for Lobbying in the Public Interest.

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Nonprofits & Elections: Where the Legal Lines Are Drawn

Do's

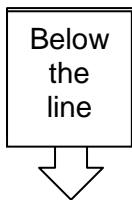


REWARDS for operating on this side of the line:

1. Strengthens your community, by allowing all voices to be heard
2. Breathes life into Abraham Lincoln's immortal words that "the great task remaining before us ... that government of the people, by the people, for the people shall not perish from the earth"



To be exempt from taxation under Internal Revenue Code § 501(c)(3), nonprofits must "not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office."



POSSIBLE PROBLEMS for operating on this side of the line:

1. Technically, charitable nonprofit could no longer qualify for tax exemption
2. Technically, if any nonprofit funds are spent, then the organization will be exposed to a 10% penalty on the amount spent, PLUS those individuals who approved such expenditures will be subject to a 2.5% personal tax
3. More likely than an IRS audit is negative publicity, harming the nonprofit's image among its supporters, who expect legal compliance & nonpartisanship



Don'ts

Some of the legal technicalities:

- "All charities ... are absolutely prohibited from intervening in a political campaign for or against any candidate for an elective public office. If a charity does intervene in a political campaign, it will lose its tax-exempt status and its eligibility to receive tax-deductible charitable contributions." Form 990 Instructions.
- "All 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating or intervening in any political campaign on behalf of (or in opposition to) any candidate for elective public office. Non-partisan voter education activities (including public forums and voter education guides) are permitted. Similarly, non-partisan activities to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives, are not prohibited political campaign activity. However, voter education or registration activities that (a) favor one candidate over another, (b) oppose a candidate in some manner, or (c) favor a group of candidates, are prohibited." Instructions to Form 1023 – Application for Tax-Exempt Status.
- "Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the *publication or distribution of written or printed statements* or the *making of oral statements* on behalf of or in opposition to such a candidate." Federal Income Tax Regulation Section 1.501(c)(3)-1(c)(3)(iii).
- "The term *candidate for public office* means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local." *Id.*
- Don't get scared by this "prohibition," because Section 501(c)(3) actually contains several prohibitions that nonprofits easily comply with every day without worry, including:
 - must be "organized and operated *exclusively* for religious, charitable, ... or educational purposes"
 - "no part of the net earnings [may] inure to the benefit of any ... individual"
 - must not spend a "substantial part of [its] activities" attempting to influence legislation

Nonprofits & Elections: Where the Legal Lines Are Drawn

Translation of Federal Tax Law into English

| Do's | Don'ts |
|--|---|
| <ul style="list-style-type: none"> • Do → Voter Registration ... if nonpartisan <ul style="list-style-type: none"> ✓ Cannot be biased for or against any candidate (<i>e.g.</i>, can't target likely Democrats or Republicans, conservatives or liberals) ✓ But can target in nonpartisan ways: <ul style="list-style-type: none"> ✓ areas or people the nonprofit serves ✓ low-turnout areas (including low-income populations, minority populations, students) • Do → Voter Education ... if nonpartisan <ul style="list-style-type: none"> ✓ Can educate the public about issues, and even the issues of importance to the nonprofit ✓ Can educate candidates, too ✓ Can conduct <i>nonpartisan</i> candidate debates ✓ Can publish results of <i>nonpartisan</i> candidate questionnaires • Do → Voter Participation ... if nonpartisan <ul style="list-style-type: none"> ✓ Get-out-the-vote drives, information about polling locations, importance of voting, etc. – same as with voter registration • Do → normal activities <ul style="list-style-type: none"> ✓ Nonprofit may continue to lobby and engage in its other regular advocacy activities ✓ Nonprofit may continue to rent its space or sell its mailing lists to all who ask (including candidates – but only at full market value and if made available to all candidates) • Do → seek legal advice if you have questions <ul style="list-style-type: none"> ✓ Consult a <i>nonprofit law attorney</i> | <ul style="list-style-type: none"> • Don't → endorse (or favor) a candidate or political party <ul style="list-style-type: none"> ✗ Endorse, publish written or make oral statements supporting, or distribute materials (proactively or passively) supporting a candidate ✗ Rate candidates in any way ✗ Publicize which candidates share the nonprofit's views ✗ Target voters who would support a candidate for registration or turn out the vote • Don't → oppose (or slight) a candidate or political party <ul style="list-style-type: none"> ✗ Oppose, publish written or make oral statements against, or distribute materials (proactively or passively) against a candidate ✗ Rate candidates in any way ✗ Publicize which candidates don't share the nonprofit's views ✗ Target voters who would support a candidate for registration or turn out the vote • Don't → use nonprofit resources (money, time, facilities, contact lists, coordination of activities, etc.) for/against any candidates <ul style="list-style-type: none"> ✗ Fundraise for a candidate ✗ Let a campaign use phones for phone banks ✗ Give employees paid time off to campaign |
| <p>Do Be Neutral & Objective</p>  | <p>Don't Favor or Slight</p>  |

The “do’s and don’ts” listed above apply to the organization; individual staff members, board members, and other members of the nonprofit still enjoy their full First Amendment rights to engage in electioneering activities in their capacities as individual citizens when not on the job or representing the nonprofit.

Two Common Intersection Points:

- Staff or board members, wearing their hats as individuals, are asked to endorse a candidate. When doing so, they should put next to their organization’s name, “Name listed for identification purposes only.”
- Board and staff members need to be reminded about the restrictions. For instance, board members cannot urge other board members at a board meeting to “vote for Joe because he’s been our good friend,” and staff members should not wear candidate campaign buttons when performing their jobs for the nonprofit.

Nonprofits & Elections: Where the Legal Lines Are Drawn

More Do's That You Get to Do!

Voter Registration

- Register your board, staff, volunteers, and members
- Pass out registration forms at your meetings and events
- Set up a table at a busy neighborhood location – it gets you visibility & members, and helps democracy

Note #1 = Feel free to contact your local election officials about voter registration forms, training, and other information about registration deadlines and laws governing voter registration in your community.

Note #2 = Make sure that the funds you use for voter registration activities do not come from restricted grants from the federal government or private foundations

Voter Education → Process

- Announce dates of registration deadlines and elections
- Display sample ballots
- Encourage your board, staff, and other members to sign up to work at the polls on Election Day

Voter Education → Candidates

- Host candidate debates or forums (see page 7)
- Send a questionnaire to the candidates and publish results in a voters guide (see page 7)
- Collaborate with other nonprofits to do debates and questionnaires (“there is power in numbers”)

Candidate Education

- Educate the candidates on your issues
- Send candidates a policy paper
- Let candidates know about your program initiatives

To be nonpartisan, you *must* make the same level of support and information to all candidates in a particular race. For instance, if you developed a policy report and gave it to just one candidate, then your action could appear to be a partisan effort to help get that candidate elected.

Voter Participation → Get-Out-The-Vote (“GOTV”)

- Encourage people to vote
 - Remind people to vote
 - “Sell democracy” – highlight the reasons people need to vote so they see the personal value
 - Post announcements at meetings or events/pass out information/mail postcard regarding:
 - Registration deadlines & election dates
 - 1-800 phone numbers or web sites about where to vote/ when polls open & close
 - Advertise rides to the polls offered by community organizations
 - Don't forget that due to early voting in many states, people can vote before Election Day, so help them learn how to request early ballots
- Facilitate getting people to the polls
 - Call members and others on or before Election Day
 - Provide rides to people who need help getting to the polls

Again, be nonpartisan: you *must* provide the same level of support and information to everyone and not just to GOTV to help those candidates who nonprofit leaders privately favor.

Voter Participation → Helping on Election Day

- Allow staff time off to vote
- Encourage your board, staff, and volunteers to sign up as poll workers or translators → America faces a severe shortage of poll workers, and with record turnout predicted for November 2008, we need to make sure that people's right to vote is not denied because lines were too long at polling sites

SOURCE: Condensed from the Nonprofit Voter Engagement Network's *Nonprofits, Voting & Elections*, available for free at <http://www.nonprofitvote.org/images/publications/nonprofits-voting-elections-eng-1-31-08.pdf>

Nonprofits & Elections: Where the Legal Lines Are Drawn

~ A Fashion Guide on What to Wear During Election Season ~

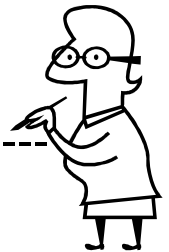
✓ **Do wear** ... your referee jersey, because you must be neutral & objective at all times



✓ **Do wear** ... your party hat, because you can celebrate democracy by getting others involved



----- 501(c)(3) -----



✗ **Don't wear** ... a team's uniform, because you can't score points for either side



✗ **Don't wear** ... your cheerleader's uniform, because you can't root for a team or candidate



What Questions to Ask (and which ones to avoid)

Answer: It all depends on the “facts and circumstances”

Neither Congress through statutes nor the IRS through regulations can address the millions of facts situations that might develop. Therefore, to determine whether a particular action crossed the legal lines, the IRS reviews the “facts and circumstances” of each situation. When considering whether a particular question constituted prohibited political campaigning, the IRS will consider “facts and circumstances” such as the following:

Questions ... by the nonprofit on a “candidates questionnaire” for a voters guide

“The questions must cover a broad range of subjects, be framed without bias, and be given to all candidates for an office. If a nonprofit has a very narrow focus, questionnaires may pose a problem. The IRS takes the position that a nonprofit’s narrowness of focus implies endorsement of a candidate whose replies are favorable to the nonprofit’s position on the topic covered in the questionnaire.” *Nonprofits and Election-Related Activities*, Center for Lobbying in the Public Interest.

When considering whether a nonprofit’s candidates’ questionnaire is partisan or nonpartisan, the IRS looks at:

- “Are the questions or any description of the issues clear and unbiased in both structure and content?”
- “Do the questions cover a broad range of issues related to the broad interests of the electorate?” If you focus just on one question (such as “Will you increase funding for this project that the PTA wants”), then the IRS might interpret this as so narrow that it favors a particular candidate that you know you want. Therefore, “if your organization, like many, is concerned with a single issue or a small number of issues, it may sometimes be easier to create these materials together with a group of organizations working on different issues.”
- “Are the questions posed to candidates identical to the questions as presented in the voter guide” that reports the answers to the questions?
- “Are the candidates given a reasonable amount of time to respond?”
- “If the questions ask the candidates to respond with ‘Yes’ or ‘No’ or ‘Undecided,’ are candidates given the opportunity to give short one or two sentence explanations to explain their positions in their own words and is that explanation printed in the guide?” *Nonprofits, Voting & Elections*, Nonprofit Voter Engagement Network.

Questions ... at a nonprofit-sponsored “candidates debate” or “candidates forum”

When considering whether a nonprofit’s candidates’ debate is partisan or nonpartisan, the IRS looks at whether:

- “The questions are fair: They should address a broad range of issues, they should not suggest the response the forum sponsor prefers, and they should not be selected to show particular candidates in a better or worse light. (This doesn’t mean they can’t be controversial!)”
- “All viable candidates for an office are invited. (Even if all are invited, there is a risk that the event could appear partisan if some candidates refuse to participate. If only one candidate agrees to attend, it is no longer a forum.)”
- “The rules of the forum don’t favor any candidate over another. (Consider using an independent moderator, setting time for replies, etc.)” *Nonprofits, Voting & Elections*, Nonprofit Voter Engagement Network.

“Even-handedness must be maintained in promoting and holding a public forum. ... The nonprofit should not state its views or comment on those of the candidates. ... [E]ach candidate must be given an equal opportunity to answer questions, and the moderator should strive to ensure balance.” *Nonprofits and Election-Related Activities*, Center for Lobbying in the Public Interest.

Questions ... by individuals who happen to be members of a nonprofit

Individuals enjoy their full First Amendment rights to ask whatever questions they want, whether they are with a nonprofit or not. However, individuals should not attempt to get cute by “taking their nonprofit hat off” at their nonprofit’s sponsored event. It is not worth the risk of bad publicity, alienating audience members or candidates, or having a complaint filed with the IRS for the board chair of a PTA, for example, to stand up at a PTA sponsored candidate’s debate, say “I’m the Board chair, but I’m taking my hat off to ask a personal question.” Instead, the Board chair can ask the same question privately, or go to another group’s debate and wear their individual’s hat there.

How to Support or Oppose Ballot Measures

The prohibition in Section 501(c)(3) against electioneering is directed at “any political campaign on behalf of (or in opposition to) any *candidate* for public office.” Therefore, the prohibition does not apply to political campaigns regarding ballot measures – such as public votes on bonds, initiatives and referenda, constitutional or charter amendments, or other “issue” rather than “candidate” elections.

Democracy in America

→ “*Representative Democracy*” = when citizens elect individuals to represent them; for example, on a public decision-making body, such as a school board, city council, state legislature, or Congress

Section 501(c)(3) treats activities trying to influence who will represent the people as prohibited political campaigning; to keep their tax-exempt status nonprofits must remain absolutely neutral in any activities involving elections relating to candidates.

→ “*Direct Democracy*” = when citizens make laws directly by voting on issues, such as whether to approve or reject proposed initiatives or referenda or amendments to a state constitution

Section 501(c)(3) treats “direct democracy” activities not as political campaigning but as lobbying, because the activities are a direct attempt to influence (“lobby”) the ultimate decision-maker: the voters. Therefore, when it comes to supporting or opposing ballot measures, nonprofits must recognize that a separate set of rules applies to their activities.

For Ballot Measures, Federal Tax Law on Nonprofit Lobbying Applies

For too long myths have circulated that nonprofits will lose their tax-exempt status if they lobby (“attempt to influence legislation”). Those harmful myths are absolutely wrong. According to both Congress and the IRS, nonprofits have legal rights to lobby. The question is not whether they can, but how much they can.

Since 1934, nonprofits have faced a limit on how much lobbying they can do. The 1934 law said nonprofits could not spend a “substantial” amount of their activities lobbying – meaning they can spend an “insubstantial” amount of their activities lobbying. But the federal government refused to define what “substantial” or “insubstantial” meant. Not knowing where the limitation lines would be drawn by the IRS after the fact scared many nonprofits away from any lobbying activities. In 1976 Congress gave nonprofits another option: instead of using the vague “substantial part” test, they could fill out a simple form to adopt the “expenditure test” that looks at dollars spent rather than ill-defined “activities.”

If a nonprofit does nothing, then the old 1934 “substantial part” test applies. But now, if a nonprofit fills out a simple quarter-page short form (Form 5768), then it gets clear bright lines on how much it can spend lobbying (using a sliding scale depending on its overall expenditures), generous limits (*e.g.*, 20% of the first half a million in expenditures), friendly definitions that declare many activities as not being lobbying (meaning the expenditures for the activities do not count towards the already-generous limits), and reduction of reporting requirements on Form 990. Because Congress added this option in Section 501(h) of the Tax Code, it often is referred to as the “501(h) election” – or simply the “expenditure test.” [FACT: If a 501(c)(3) nonprofit takes the 501(h) election, it still is a 501(c)(3) nonprofit – it just gains the benefit of getting to use the expenditure test.]

Example: If a PTA wants to support a ballot measure this fall, and in 2008 that PTA will have total expenditures of \$100,000, then if it has elected to use the “expenditure test” it can spend up to \$20,000 on all of its lobbying activities, including supporting the ballot measure. If that same PTA has not taken the 501(h) election to use the expenditure test, then the “substantial part” test is applied automatically as the default, and the IRS would determine after the fact if the PTA had spent too much of its activities in 2008 lobbying (including on the ballot measure).

CAUTION: Be Sure to Check Your State’s Laws Relating to Ballot Measures

In addition to knowing how federal tax laws treat election-related activities, make sure you know how your state’s laws treat activities relating to ballot measures. Although there likely will be no special restrictions on what “nonprofits” can do, there will be laws (such as reporting of expenditures) that everyone must follow, including nonprofits.

Resources for Future Reference

A. Nonprofits & Elections Relating to Candidates

Internal Revenue Service's web site: www.irs.gov , especially:

- IRS Revenue Ruling 2007-41, in which the Service identifies several fact scenarios and shows how it would apply the law <http://www.irs.gov/pub/irs-tege/rr2007-41.pdf>

Nonprofit Voter Education Network's web site:

- links to each state's election information <http://www.nonprofitvote.org/>
- several free (and good!) resources, including: *Nonprofits, Voting & Elections* <http://www.nonprofitvote.org/images/publications/nonprofits-voting-elections-eng-1-31-08.pdf>
- several "hands-on" tools at <http://www.nonprofitvote.org/index.php/Resources.html> including:
 - Nonprofit VOTE Toolkits (e.g., *A Nonprofit's Guide to Hosting a Candidate Forum*)
 - Training Resources
 - Civic Engagement Resources
 - Voter Turnout

B. Nonprofits & Ballot Measures

Ballot Questions: Education & Advocacy, by Nonprofit Voter Education Network, free at <http://www.nonprofitvote.org>

C. Nonprofits & Advocacy, including Lobbying

Center for Lobbying in the Public Interest: <http://www.clpi.org>

The Center for Lobbying in the Public Interest (CLPI) focuses on promoting, supporting, and protecting nonprofit advocacy and lobbying. To advance charitable missions and strengthen participation in our democratic society, CLPI travels to provide advocacy training where it is needed. CLPI also maintains a resource-rich web site that provides answers to frequently asked questions, free access to short explanations of federal laws and other items relating to nonprofit advocacy, information about how to start a public policy program, various "how to" guides, and stories about successful nonprofit advocacy campaigns containing helpful hints. Plus CLPI's web site contains a listing of links to dozens of other nonprofit advocacy web sites: <http://www.clpi.org/Links.aspx>

To advance its mission, CLPI provides on-site training for nonprofits regarding legislative lobbying and other forms of advocacy. If you want a Training Fellow to come visit your nonprofit – or nonprofits in your area – then contact CLPI.

National Council of Nonprofit Associations: <http://www.ncna.org>

NCNA's web site has a wealth of information for nonprofits, both of general interest and relating to public policy at both the federal and state levels. Three items in particular merit attention (and each is free at NCNA's web site):

1. *Nonprofit Agenda: A Blueprint for Action* – offers suggestions for a nonprofit public policy agenda
2. *Tool Kit: Building Capacity for Public Policy* – for nonprofits starting or re-energizing public policy programs, this helpful tool kit offers wonderful hints from others who share insights they learned/earned in the field
3. Nonprofit Congress – see the activities and projects being developed by nonprofits across America as they put muscle behind the action priority of "advocacy and grass roots community organizing" for the nonprofit sector