

NONPROFIT MATTERS

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The Public Law Center's Community Organizations Legal Assistance Project (COLAP), through staff and pro bono volunteer attorneys, provides *pro bono* legal counsel to local non-profit organizations and individuals wishing to form new charitable organizations that will benefit low-income residents of Orange County.

COLAP is sponsored by the law firm of Buchalter Nemer and is a part of the Equal Justice Works/ AmeriCorps Pro Bono Legal Corps.

For more information on COLAP services, please visit our [website](#).

Nothing in this newsletter should be construed as legal advice. For more information about complying with the various laws mentioned in this newsletter, please consult a legal or tax professional.

Election Year Activities: Dos & Don'ts

As nonprofits are active in the community and may come into contact with candidates and campaigns this election season, it is important that organizations fully understand the restrictions that apply to them.

Organizations that are exempt under Section 501(c)(3) of the Internal Revenue Code are strictly prohibited from intervening or participating in campaigns of individuals seeking public office at any level of government. The IRS defines political campaign intervention as "any and all activities that favor or oppose one or more candidates for

public office." Intervention includes both direct intervention and indirect intervention. We hope the following Dos & Don'ts will help you better understand these restrictions. If you have any questions, please contact [Shannon Anderson](#) at PLC.

Things You Cannot Do

First and foremost, organizational funds should not be used for political purposes. Although this is a pretty obvious don't, nonprofits can run in to trouble by giving other kinds of consideration, such as awards or benefits to candidates. Additionally, some staff members or

board members may be candidates. In both of these cases, the organization needs to be careful to avoid even the appearance of donating to that individual's campaign.

Second, similar to organizational funds, organizational resources should not be used to benefit or oppose a candidate. This includes the use of computers, fax machines, printers, e-mail accounts, and other supplies and equipment of the organization. It is very important for charities to inform staff members of this prohibition.

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IRS Political Activity Compliance Initiative Results Released

The IRS is serious about these restrictions! In response to an increasing number of complaints about illegal activity during the 2004 election, the IRS carried out a Political Activity Compliance Initiative and the agency says that they plan to do the same after the 2006 election year.

The results of the compliance initiative were released at the end of February and are available on the IRS's [website](#). According to the results, the IRS found



violations in nearly three-quarters of the cases they investigated. As a result of the investigation, the agency revoked the tax-exempt status of three organizations. However, the focus was on bringing organizations into compliance and in most cases, the organizations just needed to modify their activities and programs.

Restrictions on Lobbying Activities

In contrast to the complete prohibition on political campaign activity, 501(c)(3) organizations can engage in limited lobbying activities. However, if lobbying activities become “substantial,” the organization risks losing its tax-exempt status.

What is lobbying?

According to [the IRS](#), lobbying is attempting to influence legislation. This includes (1) contacting members or employees of a legislative body (or the public in the case of a ballot measure) “for the purpose of proposing, supporting, or opposing legislation” or (2) urging members of the public to contact members or employees of a legislative body for that purpose. Lobbying also includes holding rallies, demonstrations, or other public events designed to influence the outcome of legislation.



What legislation is included?

Legislation includes acts, bills, or resolutions of legislative bodies at any level, including Congress down to a city council. It also includes referendums, ballot initiatives, constitutional amendments, or similar measures voted on by the public because in essence the public is the legislature for these measures. Thus, a 501(c)(3) organization can get involved in ballot measure campaigns—at least to an insubstantial degree.

When do activities become substantial?

In determining whether an organization engages in “substantial” lobbying, the IRS considers all the relevant facts and circumstances of each case, including the resources expended for lobbying activities, including money and the time of staff and volunteers. The IRS does not use a magic formula – instead it looks to all the factors that are relevant for that case.

Organizations that want more clarity may elect to use the expenditure test provided in section 501(h) of the Internal Revenue Code. The expenditure test places a cap on the expenditure amount an organization can use for lobbying activities. The cap is a sliding scale, based on the size of the organization. To elect to use the 501(h) test, organizations must file [Form 5768](#) with the IRS. To learn more about whether the 501(h) election is right for your organization, read [Worry Free Lobbying for Nonprofits](#) by [Alliance for Justice](#).

What activities are ok?

Not all public policy activities rise to the level of lobbying. For instance, certain public education activities, such as informing the public about the impact of a piece of legislation without encouraging those individuals to contact members of a legislative body, do not rise to the level of lobbying.

Consequences of Engaging in Prohibited Activities

501(c)(3) organizations that engage in prohibited campaign activities face potentially drastic consequences.

The IRS can choose to impose an excise tax on the organization’s illegal expenditures or the agency can even revoke the organization’s tax-exempt status. If the organization loses its tax-exempt status, it will have to pay tax on all income received for the years in which violations occurred, which can be a hefty amount. Additionally, if the IRS finds that organization managers agreed to engage in these activities knowing that they violate the law, the agency can hold these managers responsible for an excise tax.

If you think you are violating the restrictions on prohibited electioneering activities, you should immediately consult with a legal or tax professional. As with any area of the law, there are a lot of gray areas and it is important to get professional advice tailored to your specific facts and circumstances.

One thing you should not do is ignore the violations. The IRS encourages compliance and is often willing to abate taxes if the illegal activity was inadvertent and you self-correct by creating new policies or procedures. It is best to notify the IRS and to seek advice on how to best correct the situation.

Protect Your Organization from These Consequences—Tell Your Staff & Directors about Prohibited Electioneering Activities

The activities of staff members, and of directors and other volunteers, can often be attributable to the organization itself. This is especially relevant for political activities.

The IRS encourages organizations to send a memorandum to its staff, directors, and volunteers explaining the prohibition on campaign-related activities. The memorandum should also establish guidelines designed to prevent illegal activity. To assist you in this effort, PLC has drafted a sample memorandum, which can be requested from [Shannon Anderson](#).

Election Year Dos and Don'ts, Cont.

Third, organizations are prohibited from endorsing or opposing a candidate. Clearly, this means that organizations should not issue a statement (either verbal or written) endorsing or opposing a candidate or be included in someone else's communication as endorsing or opposing a candidate. However, this also means that organizations should not distribute materials of other organizations, individuals, or businesses endorsing or opposing a candidate.

Additionally, organizations should monitor websites they link to on their website to make sure those websites do not include statements endorsing or opposing a candidate. Organizations should also make sure to remove all candidate signs that get placed on their property because these signs, even if the organization itself did not place them there, could be attributable to the organization.

Finally, organizations should not give a candidate preferential treatment in regards to an organization's assets (like a mailing list) or facilities. Organizations should maintain a fair, neutral, and inclusive policy towards candidates. For instance, if your organization regularly rents out its facilities for special events of other organizations and businesses, it can rent out its facilities to a candidate. However, the rental rate and access must be the same as the rate and access for other groups and the facilities must be available at that same rate to all other candidates seeking that same public office. If you do rent out your facilities or sell your mailing list, you might want to consider creating a written policy to document costs and availability to ensure fairness and equal access.

Things You Can Do

Organizations can engage in activities that encourage people to

participate in the electoral process, such as voter registration and get-out-the-vote drives. However, as mentioned in the last don't above, these activities must not have the effect of favoring one candidate or groups of candidates above other candidates. Also, voter registration drives must remain non-partisan by encouraging everyone to register, not just people wishing to register for a particular party. Similarly, if you drive people to the polls or otherwise engage in Get-Out-the-Vote activities, make sure you are not giving preferential treatment to individuals from one political party or group of parties.

Organizations can also engage in some voter education activities, such as creating a voter guide or holding a candidate debate. However, for these activities, organizations should also make sure to maintain a fair, neutral, and inclusive policy towards candidates.

For instance, if an organization chooses to hold a candidate debate or candidate forum, the organization needs to invite all the candidates seeking the same office, not just a select few. An organization should not invite a candidate to speak in a candidate capacity at an event without inviting the other candidates either at the same event or a future comparable event. For



instance, if your organization holds weekly community forums, it is ok to invite one candidate one week so long as you also invite the other candidates for other weeks. Additionally, candidates can attend charity events in a non-candidate



capacity. However, it is good policy to inform the candidate that no campaigning or political fundraising may take place at the event as candidates are focused on election law and often do not know the restrictions that apply to charities.

Similarly, if an organization publishes a voter guide, the guide should include the views or positions of all candidates. Additionally, the guide must include candidate stances on a wide range of issues that the candidate would be dealing with if elected, not just the issues that the organization is most concerned about.

For more guidance on how organizations can engage in these activities, read [Playing by the Rules](#): by [Independent Sector](#) and [The Real Rules](#) by the Unitarian Universalist Association of Congregations.

People involved in the organization, like staff members or board members, can participate in candidate campaigns in their individual capacity. However, it is important that these people avoid even the appearance that they are representing the organization.

Written and verbal disclaimers should be used to clearly indicate that an endorsement or statement is an endorsement or statement of only the individual and not one of the organization.

Need More Guidance?

In response to its 2004 political activity compliance initiative the IRS released Fact Sheet [FS-2006-17](#). It provides a great overview of the restrictions and provides helpful examples of permitted and prohibited activities.





PUBLIC LAW CENTER

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Want to continue receiving this newsletter? E-mail [Viki Morales](mailto:Viki.Morales) to get on our e-mail list.

Nonprofit Matters will be sent out twice a year with occasional special editions.

[The Public Law Center](#), Orange County's pro bono law firm, is committed to providing access to justice for low income residents. Through volunteers and staff, the Public Law Center provides free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. Now in its 25th year, PLC is sponsored by the Orange County Bar Association and is supported by lawyers throughout the county.

PLC may be able to assist your clients who are low-income Orange County residents and have certain types of immigration, family law and civil legal problems, including: landlord-tenant, homeownership, collection, bankruptcies, consumer, estate-planning, discrimination, employment, adoptions, guardianships, custody matters, divorces involving children or domestic violence, and immigration work that does not involve naturalization or work visas. To determine whether your clients are eligible for services, they may contact the [Legal Aid Society of Orange County](#), which regularly refers cases to PLC, or attend one of PLC's clinics at various [homeless shelters](#) and community organizations around Orange County.

New COLAP Services in 2006

COLAP now assists organizations through a legal checkup program. Through this program, teams of volunteer attorneys and law students conduct legal checkups on organizations to make sure they are complying with various state and federal laws. The service allows organizations to address legal issues before they become a problem. If nonprofits do not comply with legal requirements, they may be subject to administrative fines or they can even lose their tax-exempt status. This project helps organizations avoid these consequences.



nonprofit organizations. The clinic will be offered twice a year and will give nonprofit representatives a chance to ask questions of attorneys and law students. Attorneys will also be able to review documents and policies, such as bylaws and contracts. Additionally, the clinic will serve as a mechanism to conduct client intake for the COLAP program for organizations needing legal services. If you are starting a new fundraising program, hiring a new employee, signing a new office lease, or generally not sure what laws and regulations apply to your organization, this clinic is for you!

Another new service starting in the summer of 2006 is a legal clinic for

For more information, contact [Shannon Anderson](#).

Upcoming Workshops in Collaboration with the Volunteer Center of Orange County

To Be Or Not To Be A 501(c)(3),
May 12th, 10-11 a.m.

How to Start a Nonprofit Organization in California,
June 8th, 6-9 p.m.

Upcoming Legal Clinic for Nonprofit Organizations

Rancho Santiago Community College, Santa Ana
June 22, 2-4 p.m.

For more information about these events, or to register, contact [Shannon Anderson](#).