

LWVUS: Guidelines for State and Local Leagues including “empty chair” Debates

February 15, 2012 | by LWV

Candidate debates are regulated by federal and state election laws and regulations. In addition, important Internal Revenue Service (IRS) rules apply to debates sponsored by organizations designated as 501(c)(3) by the IRS. League-sponsored debates are governed still further by the League’s own nonpartisan policy. Although legal challenges are infrequent, debates are high-stakes campaign activities, and candidates who believe they have been hurt politically by a debate may challenge debate sponsors under these laws.[1]

NOTE: The following overview should not be construed as legal advice. State and local Leagues should consult their own tax and election law counsel to ensure that their debate plans are in accord with all applicable laws and regulations. Suggested resources for additional information include: Federal Elections Commission (www.fec.gov); Internal Revenue Service (www.irs.gov); Federal Communications Commission (www.fcc.gov); and your state’s chief elections official (e.g. Secretary of State, State Board of Elections or Attorney General).

The League Framework

The League of Women Voters shall not support or oppose any political party or any candidate.

All Leagues bear the responsibility of safeguarding this nonpartisan policy and the organization’s nonpartisan reputation.

League membership organizations are designated 501(c)(4) by the IRS, and League education fund corporations or trusts are designated 501(c)(3). League membership organizations that use funds in their education fund accounts must abide by education fund rules. Whether acting as a 501(c)(3) education fund or as a 501(c)(4) membership organization, each League will want to sponsor and conduct debates in such a way as to avoid creating the impression that it favors one candidate over another.

It is recommended that Leagues utilize a traceable form of mail delivery (e.g. USPS delivered, signed mail receipt or email returned mail receipt) to correspondence with the candidates regarding the “ground rules” for participating in the debate and the actual invitation to participate in the debate.

The Regulatory Framework

Key elements of the regulatory framework include the following:

The **Federal Election Commission** (FEC) regulates the conduct of corporate, labor and nonprofit organizations — including both 501(c)(3) and 501(c)(4) organizations — in **federal** elections. FEC regulations define a debate as an event that

- includes at least two candidates;
- is staged in a way that does not promote or advance one candidate over another; and
- allows the candidates to appear concurrently, in face-to-face confrontations, with opportunities to respond to each other.

The **Federal Communications Commission** (FCC) regulates radio and television broadcasters and cablecasters. Under its regulations, a broadcaster that permits a candidate for any public office — **federal, state or local** — to use its facilities must provide all other legally qualified candidates for the same office with equal opportunities for use.

A broadcast debate must comply with the following FCC requirements.

- The decision to cover the debate must be based on a good faith judgment of its newsworthiness (and not on a desire to promote or disadvantage a particular candidate).
- The debate must not be edited and must be broadcast in its entirety, either live or reasonably soon after it takes place.
- The debate must include at least two candidates.

Internal Revenue Service (IRS) rules provide that 501(c)(3) organizations "may not participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." This prohibition applies to campaigns for public office at all levels — **federal, state and local**. A violation of IRS rules could jeopardize the tax-exempt status of the 501(c)(3) organization responsible.

A 501(c)(3) organization may sponsor nonpartisan voter education projects, such as debates, provided certain rules are followed. The guiding principal for such debates is that there be fair and impartial treatment of all candidates, with nothing that promotes or advances one candidate over another.

"Empty Chair" Debates

It sometimes happens that only one candidate in a contested election accepts a debate invitation or that a candidate cancels a debate appearance after agreeing to participate, leaving the debate with only one participant — often called an "empty chair" debate. If only one candidate accepts the invitation, the debate should be canceled. While cancellation is also the most prudent course of action when a candidate fails to appear at the event or backs out shortly before the debate, Leagues may need to consider whether and how to proceed should they find themselves in an empty chair debate situation.

There are no specific guidelines from the FEC or the IRS pertaining to the ability of nonprofit organizations to sponsor an empty chair debate. (FCC regulations would preclude any *broadcast coverage* of such an event.) Inasmuch as an empty chair debate, by giving one candidate a

forum to talk to voters all by him/herself, bestows a real benefit on that candidate, there is a risk to any League that hosting such a debate would run afoul of FEC and/or IRS rules as well as the League's nonpartisan policy.

The degree of risk and the options available to Leagues vary depending on the office being sought by the candidates and the IRS designation of the sponsoring organization:

- For debates involving candidates for **federal** office, FEC rules are particularly significant. To meet the FEC definition of a debate and thereby avoid being categorized as an illegal contribution to a federal candidate, the event must include at least two candidates. This rule applies to debates sponsored by both 501(c)(3) and 501(c)(4) organizations. **Any League that contemplates hosting an empty chair debate in connection with a federal election is strongly encouraged to seek formal guidance from the FEC.** FEC rules do allow educational institutions (e.g., a university) to sponsor "candidate appearances" that also involve members of the public. The rules are not clear as to whether cosponsorship with an educational institution would give the League more latitude in dealing with an empty chair situation.
- For debates sponsored by **501(c)(3) organizations** for candidates for **state or local** office, IRS rules are critical. (It is also critical to review any applicable state and local election laws.) Although empty chair debates are not expressly prohibited by the IRS, the agency might well consider such an event to be an improper electioneering activity. Leagues can reduce that risk by observing the following guidelines:
 - The League board's decision to sponsor a debate should include adoption of relevant policies and rules well in advance of the intended debate. See *Face to Face* for ideas. These should include provisions about empty chair debates.
 - League sponsorship of the debate, the issuance of invitations, and candidate responses should be announced via press releases.
 - An empty chair debate should not be conducted if all but one candidate decline the League's offer to participate in a debate. It would be very risky for the League to sponsor the debate, knowing from the start that there will be only one participant.
 - An empty chair debate could be conducted only if one or more candidates pull out of a scheduled debate after agreeing to participate, and rescheduling is not feasible. (A League could also choose to cancel the debate in this situation.)
 - The closer to the scheduled debate that the candidate cancels his/her appearance, the stronger the arguments that going forward with the debate is not a partisan political activity.
 - If the candidate cancels well enough in advance of the debate to allow the sponsoring League to make other arrangements without charge or penalty, the League should make some effort to see if the debate can be rescheduled.
 - In announcing that a candidate has canceled his/her participation in a debate, the League should present the factual reasons given by the candidate, if any, without any editorial comment. If no reason is given by the candidate, the League should simply state that it was contacted by the candidate or his/her campaign and told that the candidate would not be able to appear at the debate; the League can also state that the candidate provided no reason for canceling his/her participation.

- To maintain a clear record, the League should correspond **in writing** with candidates concerning invitations to appear at debates, attempts to accommodate each candidate's schedule, confirmation of scheduled debate appearances, confirmation of the cancellation of a debate appearance and attempts, if any, to reschedule a canceled appearance.
- In conducting any empty chair debate, the League should maintain, to the extent practicable, the debate format. The League must prevent the debate from turning into a candidate appearance that has the look, feel and content of a campaign rally for the only candidate attending the debate. The moderator and other panelists, therefore, should ask nonpartisan questions, the length of the candidate's response should be limited, and if possible, the moderator and other panelists should act as devil's advocate, asking probing questions and follow-up questions.
- IRS rules are more liberal for debates sponsored by **501(c)(4) organizations**, but the League nonpartisanship policy still applies. A League acting as a 501(c)(4) membership organization could sponsor a **state or local** candidate event involving only one candidate. In considering such an option, the League would want to ensure that
 - the event would not violate any state or local election laws;
 - no tax deductible funds would be used for the event; and
 - the event would not damage the League's nonpartisan reputation by creating the impression that the League favored one candidate over another.

[1] These guidelines amplify information provided in Chapter 2 of the LWVEF publication *Face to Face: A Guide to Candidate Debates* (pub #830).

LWVEF

Guidelines for State and Local Leagues including “empty chair” debates

EF 03-05

Reaffirmed October 2011