What To Expect When You're Expecting . . . *Litigation!*

A Brief Guide for Leagues Considering Federal Litigation

LWVUS Advocacy & Litigation Department

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This guide is meant to provide Leagues who are considering federal litigation an overview of:

1) what to expect before and during litigation;
2) the role and responsibilities of the League in legal advocacy/litigation; and
3) how LWVUS will support the League taking legal action.[1]

The information contained herein is not legal advice; please consult your legal counsel for any specific legal questions.

Please read in conjunction with LWVUS Guidance for Leagues Considering Litigation.

Fill out the Federal Action Request Form for approval to engage in federal legal action.

State vs. Federal Litigation – what's the difference?

Federal Litigation

Federal litigation is any litigation filed in a court with U.S. in the title (e.g., U.S. District Court for the Southern District of New York, U.S. Court of Appeals for the Eleventh Circuit, or Supreme Court of the U.S.). Federal litigation can include claims under federal law *and* state law. Federal litigation often challenges state and local laws or policies. State and local Leagues considering joining federal litigation as a plaintiff, intervenor, or amicus must complete the Federal Action Request Form on the LWVUS League Management Site. LWVUS will respond to your request within 48 hours.

State Litigation

State litigation is filed in state courts (local or county trial courts and state courts of appeal) and includes at least one claim under state law. The LWVUS litigation and communications teams can provide support and guidance as capacity allows. At a minimum, please let the LWVUS litigation team know when a case is filed in state court, provide updates, and send filings once they are filed. This helps LWVUS keep accurate records of the state court litigation Leagues are engaged in around the country and keep the LWVUS Legal Center updated. The LWVUS Legal Center is a resource for Leagues to promote their work.

[1] This guide is meant to cover federal litigation, but much of the information will be useful for state court cases. As always, LWVUS is here to support Leagues in their litigation, including state cases where possible. Please let the LWVUS Litigation team know about any state cases your League is filing so we can track those cases and promote them on the LWVUS Legal Center.

Who Does What in Federal Litigation?

It is critical to understand the distinct roles played in federal litigation by the League's legal counsel, the League bringing the litigation, and the LWVUS Litigation team.

Client. League that seeks to challenge a law, policy, or practice with federal litigation or legal action.

The individual state or local League is the client and will become a party in the litigation,[2] usually the plaintiff, intervenor, or amicus. More than one League can be a client in a litigation, but most often is one state or local League. When making client-based decisions in the case, the Attorney/Counsel must seek approval from the Client. The League may not be the only client the attorneys represent in the case. The attorneys will discuss with the client how the representation will work for a multi-client case, and it will be explained in writing in the retainer. See also **Retainer, p.5**.

Attorney/Counsel. Law firm or legal organization retained to represent client League in legal action.

May be multiple firms/organizations. Scope of the representation will be explicitly spelled out in the retainer. Others who may be covered under the retainer agreement and considered part of the attorney/counsel team include paralegals, experts, law firm staff, co-counsel, and others who have an agreement with the law firm to work on the case. If there is another lawyer or law firm joining the case, they will sometimes require the League to sign a separate retainer. This is a common practice. It is important to carefully consider your legal counsel for any case. See LWVUS Guidance for Leagues Considering Litigation for details on identifying partners that comply with our nonpartisan policy.

LWVUS Counsel. LWVUS attorneys who work closely with client League and the League's counsel.

LWVUS attorney(s) will act on the Federal Action Request Form and, if legal action is approved, work with Attorney/Counsel and Client League. LWVUS attorney(s) will serve as support and resource for the client League as well as a legal advisor to the client League and legal team litigating the case.

What is the Federal Action Request Form?

The Federal Action Request Form must be completed if any state or local League seeks to bring litigation in federal court or take legal action involving federal law. The form provides an avenue for the state or local League to share pertinent details with LWVUS. Once submitted, LWVUS will respond within 48 hours (or sooner if needed). Please aim to complete the form with as much advanced notice as possible. The state or local League may also contact the LWVUS litigation team prior to filling out the Federal Action Request Form.

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[2] There will often be legal action that comes before litigation, like a demand letter. In fact, some federal laws (like the NVRA) require a notice letter before a plaintiff can sue. Please let the LWVUS litigation team know if your League is planning to take such action as it indicates an intent to file legal action in federal court. You may complete a Federal Action Request Form, but it is not required at the notice/demand letter stage.

What Happens Before Filing Federal Litigation?

There's no guidebook that can fully prepare you to be a plaintiff in federal litigation, but here is some of what you can expect.

Investigation/Pre-Litigation

The work of voting rights litigation often begins well before the case is filed! This is known as the pre-litigation or investigation stage. This could take place during a legislative session or as part of coalition work. Even if you are not sure that litigation may result, it is important to prepare for it. Always consider the possibility that your documents and communications about a bill, law, or policy could be seen by a court or opposing counsel in the future, even if they are just exchanged internally or with coalition partners. It is also important to retain (don't delete) any documents and communications relating to a bill, law, or policy in case it is challenged in court later. See also **Litigation Hold Letter, p. 8**.

BEST PRACTICE ALERT!

In your electronic files (email, documents, etc.), take care not to delete anything that relates to advocacy work. Instead, create folders to keep it organized. These can be very general and broad. When in doubt, don't delete.

In the investigation stage, legal partners—typically civil rights or voting rights non-profit organizations—may contact your League to find out more about your work that relates to the issue at hand and any harm to League members, voters, or community members. The legal partner may ask your League to sign an "investigative retainer" for this purpose. A retainer will ensure that any communication between your League and the legal partner is protected from later disclosure. It will not bind your League to filing litigation. If federal litigation is possible, signing an investigative retainer is also legal action that should be run past the LWVUS team. LWVUS can ensure that your League is supported, and League positions are protected. Even if an investigative retainer is not signed, it is a best practice to let the LWVUS Litigation team know that a legal organization has reached out to talk to your League about the impact of a law or policy.

Questions to Answer as a Board when Considering Litigation

Retainer

A retainer is a legal agreement between a client and their attorney setting forth the scope and terms of the representation. The proposed retainer often comes from the legal partner seeking to represent the League and is not just for litigation. After your League has been approved to take federal action, the client League, the legal partner, and LWVUS attorneys will review the proposed retainer. LWVUS Counsel will ensure that the interests of the client League and LWV generally are protected in the retainer. Once the retainer is signed by all parties, or executed, the legal partner now represents the client League in the action as its attorney!

Attorney-Client Privilege & Confidentiality

As will be spelled out in the retainer, a key component of the attorney-client relationship is the duty of confidentiality and the protection of attorney-client privilege.

Attorney-client privilege is a legal right belonging to the *client* that protects the ability of a client to be honest with their attorney. In general, it prevents the attorney from disclosing confidential communications between the attorney and the client to the opposing party. It is a narrow privilege, and it can be unintentionally broken *by the client* in certain circumstances, explored below. It is important that client Leagues take care not to break attorney-client privilege.

Attorney-client privilege protects communications between the ***attorney*** and the ***client*** because those communications are intended to remain private and secret. The privilege is broken anytime a ***third-party*** is included in or becomes privy to those communications because it is assumed that the client no longer desires that communication to remain private or secret. Thus, it is imperative to 1) recognize when a communication (email, text, chat, letter, attachment, etc.) is between the client League and your attorneys and 2) protect it from any sharing, forwarding, etc. with anyone who isn't also a fellow client or your attorney on the same case.

Important notes:

The "client" may include more than just the client League. It could also include co-plaintiffs. It's important to understand who at your League is included in the definition of "client." Does it include the President? The Board? All your members? This should be spelled out clearly in your retainer or clarified by your attorney. Privileged communications should *only* be shared with those individuals who are the client.

Similarly, the "attorney" may include more than just the attorney you speak to most of the time. It will necessarily include any of the attorneys working on your case, their paralegals, assistants, colleagues in the same firm, communications team, and many others. It may also include those they consult with to assist with the case. This should be spelled out clearly in your retainer agreement.

BEST PRACTICE ALERT!

You as the client are the keeper of your attorney-client privilege! Take great care to protect any communications between you—meaning those in your League considered the client—and your attorneys. This is especially important for written communications (emails, texts, chats, letters, etc.) Do not forward, share, or include third parties on replies unless you have explicit approval from your attorneys.

In contrast to attorney-client privilege, the responsibility of confidentiality applies to both the attorney and the client. Confidentiality is a broader concept. It applies to *all* information the attorney may obtain about the client or their case (not limited to communications) and applies in all situations (not just during

litigation). It is important that confidential information remain confidential. For the client, this means that you be careful not to share information that is meant to remain secret with anyone outside of the attorney-client relationship.

There are many reasons to protect confidentiality, including 1) protecting our internal strategy and planning; 2) maintaining good and trusting relationships with partners and counsel by demonstrating that we are trustworthy; 3) protecting our internal documents.

BEST PRACTICE ALERT!

Do not use your personal email for official League business, especially if others have access to it (like family members). Set up a League-specific email account just for League business. You can create free email accounts with Gmail. Gmail and Google also have a lot of other products that can be useful for League business. Be careful who you share your account information with to avoid breaking attorney-client privilege.

Legal Standing Requirement

The requirement of "standing" is critical to establish before filing litigation. Standing is a legal requirement in litigation that ensures that the plaintiff bringing the case is in the right position to challenge the law or policy at issue. The League typically can establish standing without much difficulty, but defendants and courts in voting rights lawsuits continue to try to make standing more difficult to prove, so it is crucial that we shore up our standing before filing.

In federal court, a plaintiff must demonstrate all of the following to establish standing:

1. An injury in fact to the plaintiff, meaning the injury is of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent.
2. A causal connection between the injury and the conduct brought before the court.
3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

How does the League establish standing?

The League's standing will turn on factor 1 above—does the League have an actual injury? The League can establish standing in two ways – direct standing or representational standing.

Direct Organizational Standing

A League can establish standing by demonstrating harm to the League itself caused by the challenged law or policy. One way to establish direct harm to LWV is to show that the League has **diverted resources** to address the harm of the law or policy—resources it would have used elsewhere if the law/policy didn't exist. Resources diverted do not need to be financial and can include volunteer hours, staff time, etc.

An organization can also argue that the law or policy harms the organization because it **frustrates its mission**.

Representational Standing

The League can also establish standing by alleging **injury to its members** through representational standing—also called membership or associational standing. As a membership organization, the League is well-positioned to establish this type of standing. The League can sue on behalf of individual members who are specifically harmed by the law or policy. Individual League members can still serve as individual plaintiffs as well. To establish membership standing, it is useful to have specific members identified who are willing to submit a declaration explaining how they are harmed.

Timing of Litigation

When a case is filed matters a great deal. In voting rights litigation, time is often of the essence because of upcoming elections. Your legal counsel should explain 1) when they hope to file the case, and 2) what relief they are seeking and when. A legal principle known as *Purcell* often prevents courts from making changes to election rules too close to an election, so the timing of the filing and the request for relief are critical.

What Happens During Federal Litigation?

Once you've decided to engage in federal litigation and received approval from LWVUS, the case can be filed! Below are common steps during federal litigation that your League can expect.

Complaint

To initiate a case, plaintiffs must file a complaint. The complaint will explain the challenged law or policy, the claims asserted, and the interest/harm of the plaintiffs. It is important for the client League to review the complaint to ensure that statements about the League are accurate and to understand the claims being brought.

Motion for Preliminary Injunction/Temporary Restraining Order

In some cases, plaintiffs may file a motion for emergency relief to ask the court to stop the challenged law or policy right away. This is often filed in the form of a motion for a preliminary injunction or temporary restraining order. To succeed on this type of emergency motion, the plaintiffs must demonstrate that they are likely to succeed on the claim when it goes to trial, so these motions are not filed lightly. There may be a hearing where League members are asked to testify. It's important to ask your legal counsel if an emergency motion is contemplated in your case and when they expect to get relief.

Motion to Dismiss

A motion to dismiss—filed by the defendants—can be expected in most federal cases. The defendant(s) will typically argue that the client League lacks standing at this point in the case, among other arguments to get the case dismissed.

BEST PRACTICE ALERT!

In federal court, a person or organization can file a statement on the record in the form of a **declaration** in support of a filing like a motion for a preliminary injunction or an opposition to a motion to dismiss. The declaration comes from the person or organization itself and is signed under penalty of perjury. Thus, it is critical to review and correct anything in a declaration written on behalf of the League to ensure it is accurate.

Discovery

As the case moves forward—often after a motion to dismiss is resolved but sometimes before or during—the parties in the litigation will engage in discovery, which is the exchange of information that is relevant to the case and will help each side litigate the case effectively.

Types of discovery include:

- Initial disclosures – a mandatory filing by both sides in litigation disclosing witnesses, documents, experts, and other information the party intends to use to litigate the case.
- Interrogatories – questions posed by the other side seeking an answer from the opposing party.
- Requests for Production – requests to identify and produce documents and information held by the opposing party.
- Requests for Admission – requests for the opposing party to admit or deny specific statements.
- Depositions – legal proceeding where a party sits for a virtual or in-person questioning by the opposing party. The deponent is under oath during the deposition.
    - Fact Deposition – a deposition where the opposing party asks questions of another party or a fact witness.
    - Organizational Deposition – also known as a 30(b)(6) deposition, a party can depose an organization to ask specific questions. The opposing party is required to provide a list of topics for the deposition so the organization can determine the best organizational representative to sit for the deposition.

Discovery is typically conducted and managed between the parties. The court does not get involved unless there is a dispute the parties cannot resolve amongst themselves. If a party is withholding documents, the opposing party may file a motion to compel to force disclosure. If the opposing party is seeking documents that are not appropriate, the party may file a motion to quash or a protective order. A protective order is common in federal litigation to outline what information can be exchanged and how to protect certain information and individuals.

Depending on the type of case and how many facts are in dispute, discovery may be limited, or it may be extensive. Ask your legal counsel what they expect during discovery in your case and what type of documents and information your League can be expected to produce.

Litigation Hold Letter

At the beginning of litigation, your legal counsel may send you a "litigation hold" letter notifying the League of its duty to preserve any documents and information relating to the subject of the litigation. This is another reminder to not delete any documents, emails, files, etc. relating to the League's work on the challenged law or policy.

Motions for Summary Judgment

One or both parties in the litigation may file motions for summary judgment, which essentially argue that there are no factual disputes to be decided in the case and the court can resolve the issue on the legal issues alone. The client League may be asked to file a declaration in support of the motion for summary judgment (or an opposition). There may be a hearing on these motions, but they often only include oral argument by the attorneys, not testimony by witnesses.

Trial

If your case is not fully resolved on a motion to dismiss or motion for summary judgment, the case may proceed to trial. Most often, voting rights cases are tried before a judge, not a jury. This means the judge in the case will decide the facts and the law in and the outcome of the case. A trial can last a couple days or a few weeks, depending on the amount of evidence to present. As plaintiffs, Leagues and League members involved in litigation can expect to testify in support of their case at trial.

Media & Press During Litigation

A key part of many League cases is public awareness of and education on the issues raised in the case.

For federal litigation, this is where the LWVUS Communications team comes in. The LWVUS communications team can provide talking points, support for press releases, media contact lists, media training, and more.

For state court litigation, the LWVUS communications team can provide support based on capacity and the issues raised in the case. Please be sure to share any filings with the LWVUS team as soon as possible so they can keep the LWVUS Legal Center up to date.

You can reach the LWVUS communications team at communications@lwv.org with any questions.

Final Reminders

- For litigation in state court, LWVUS does not need to approve the case, but it is crucial to keep us informed of the filings and any developments in the case. LWVUS is happy to help whenever possible.
- Litigation in state and federal court can be a lengthy, time-consuming, intrusive process. It is also inherently adversarial. It is important to be aware of the expectations for the League, its leaders, and its members before joining any litigation.