

FACE TO FACE: A GUIDE TO CANDIDATE DEBATES

Chapter 2: Legal Considerations

A. The Regulatory Framework

Candidate debates, as an important part of the American political process, are regulated by federal and state election laws and regulations; broadcast debates are subject to Federal Communications Commission (FCC) rules. Although challenges to debate sponsors under these rules are infrequent, sponsors should understand the relevant regulations and take them into consideration when planning and staging a debate. Debates are high-stakes campaign activities for candidates, and candidates who have been hurt politically by a debate or have not been invited to participate may challenge sponsors under these laws.

In addition, organizations designated as 501(c)(3) by the Internal Revenue Service (IRS) must be especially careful to protect their status by making sure that their debates do not, in any way, promote or advance one candidate over others.

Sponsors who plan debates in accord with the applicable laws and regulations will be secure in the knowledge that they are meeting their legal responsibilities and will have a far better chance of prevailing if they face a legal challenge.

Federal Election Commission (FEC) Regulations. The Federal Election Commission was established to enforce limits on contributions to the expenditures made on behalf of candidates for federal office by individuals or groups. The FEC rules apply only to candidates for *federal office*.

Under most circumstances, providing a platform for a federal candidate to address the public or providing information about a candidate is considered to be a contribution of "something of value," and thus subject to the contributions or expenditures limitations and prohibitions of the federal election laws. However, non-profit 501(c)(3) and 501(c)(4) type organizations, as well as broadcasters, bona fide newspapers, magazines and other periodicals may stage debates *without* triggering campaign finance limitations *provided* that:

1. the debates include at least two candidates;
2. the sponsoring organization does not structure the debate to "promote or advance" one candidate over another; and
3. the sponsoring organization uses "pre-established criteria" to determine which candidates to include in the debate. For general election candidates this criteria may *not* use "nomination by a particular political party as the sole objective criteria to determine whether to include a candidate in a debate."

Organizations may use their own funds or accept donations from corporations or labor organizations for such debates. Federal candidate events that do *not* meet the FEC definition of "debate," such as single candidate appearances ("empty chair debates") or consecutive candidate interviews ("forums"), *may* be

considered as contributions subject to campaign finance limitations, or as illegal corporate contributions to a federal candidate.

Federal Communications Commission (FCC) Regulations. The Federal Communications Commission regulates radio and television broadcasters and cablecasters. Under its regulations, any broadcaster or cablecaster that permits a candidate for any public office C federal, state, or local C to use its facilities must provide *all* other legally qualified candidates for the same office with equal opportunities for use. (Appearance by candidates on regularly scheduled, bona fide newscasts, news interviews and news documentaries are exempt from this requirement, as are appearances during broadcast coverage of news events such as debates.)

The FCC regulations apply to the debate broadcaster, not the sponsoring organization. However, debate sponsors should be aware of the restraints placed on the broadcasters. In order to qualify as exempt news events, debates must meet the following requirements:

- a broadcaster's decision to cover a debate should be based on a good faith, reasonable judgment of its news worthiness (and not on a desire to promote or disadvantage a particular candidate);
- debates must not be edited and must be broadcast in their entirety;
- debates should be broadcast live or reasonably soon after they take place;
- at least two candidates must appear in any debate.

Internal Revenue Service Rules. Federal tax law provides that organizations which are exempt from federal income tax under section 501(c)(3) "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 equally to campaigns for federal, state, and local office.

The IRS, however, considers forums and debates on political and social issues as educational activities that may be appropriately conducted by section 501(c)(3) organizations provided certain guidelines are followed. The general standards are that the procedures for the debates must not show a bias or preference for or against any particular candidate and that the overall effect must be fair and impartial treatment of all candidates, with nothing that promotes or advances one candidate over another.

More specific rules are these:

1. The sponsoring organization must have a record of concern with public and legislative issues.
2. All viable candidates must be invited to the debate, and "reasonable, objective" criteria must be used to determine which candidates are "viable."
3. The choice of location for the debate must be dictated by non-political considerations.
4. Each debate must address a broad range of issues, including (but not limited to) issues considered to be of important educational interest to the organization's members. The debate can, however, be limited to the range of issues with which the sponsoring organization is chiefly concerned, provided the range is reasonably broad.

5. Questions must be prepared and presented to candidates by a nonpartisan panel composed of knowledgeable persons who are independent of the sponsoring organization. The format need not be limited to questions, but can include a general discussion among the candidates.
6. Each candidate must have an equal opportunity to present his or her views, and questioning procedures must not be biased to favor or hinder any candidate.
7. The debate must be run by a moderator, who does not act as a spokesman for the organization's views on the subjects discussed, but has the sole function of ensuring that the ground rules are observed.
8. At the beginning and end of each debate, the moderator must state that the views expressed are those of the candidates, not of the sponsoring organization, and that the sponsorship of the debate is not an endorsement by the sponsor of any candidate.
9. The moderator must also state that all viable candidates have been invited. IRS staff members have informally advised that, if one or more of the invitees declines, the debate can go forward, but, in that event, the sponsor should exercise special care to avoid favoritism to those candidates who do participate.
10. The organization may report what happens at the debate, but must do so without editorial comment or endorsement and must circulate the report only through its normal channels of communication.

More liberal IRS rules apply to organizations that are exempt from federal income tax under section 501(c)(4). These organizations may intervene in political campaigns on behalf of candidates, subject only to the restriction that such intervention not be their primary purpose.

State Laws. Although the FEC regulations apply only to candidates for federal office, many states have campaign finance laws and laws that limit the activities of tax exempt organizations. Sponsors of debates for candidates for state and local office should be aware of any relevant state laws.

B. Applying Regulations

Primary Elections. Primary election debate sponsors can treat each party's primary as a separate election, according to decisions by the FEC and the IRS and supported by the courts. That means that organizations can limit participation in a primary election to those candidates seeking the nomination of one party. Also, an organization may hold a debate for the candidates in one party's primary election without any obligation to hold debates for other parties' primaries.

Candidate Selection. It is especially important to consider the regulatory constraints on candidate debates when deciding which candidates should be invited to participate. The most prudent route is to invite *all* the candidates running for a particular office (or, in the case of a primary election debate, all candidates for a particular party's nomination). There are many situations, however, when this is not wise or feasible. For example, one or more marginal candidates may be part of a large field of candidates running for the same office. The debate sponsor may decide that the public interest would be served best by limiting participation to "significant" candidates. A debate among a large number of

candidates, especially if there are time constraints, might be unmanageable and not provide voters with useful information.

Sponsor must make candidate selection decisions in a clear, fair and reasonable way, using "pre-existing criteria." To accomplish this, they should establish official selection criteria well in advance of selecting the candidates for a particular debate, and then use those criteria to determine which candidates are eligible to participate. Sponsors must realize that, even if they use objectively applied selection criteria, they may be challenged by uninvited candidates and may face objections ranging from protest rallies to lawsuits or complaints to federal or state agencies. But if the sponsor has established official debate goals and selection criteria in advance of any decisions on which candidates to include, it will be possible to demonstrate that the sponsor's decisions were reasonable, not arbitrary, and not made to promote or disadvantage any candidate. Even if a debate sponsor intends to invite all candidate running for an office, or if only two candidates are running, it is helpful to have criteria in place to deal with unexpected circumstances such as last-minute write-in candidates.

Ideally, selection criteria should be developed for each debate sponsored, based on the nature of the election C primary, general, special, partisan or nonpartisan, the likelihood of minor party, independent or write-in candidates and whether the debates will be broadcast. Criteria used for one debate should not be automatically applied to another, but may serve as a guide. Criteria should be reviewed and readapted for each debate an organization sponsors.

Note: For debates involving general election candidates, "nomination by a particular political party" may not be used as the sole criteria for determining which candidates will be invited to appear, according to FEC regulations. Thus, it would not be permissible to establish advance criteria which stated that the Republican and Democratic general election nominees would be invited to participate in a debate.

How to Set Criteria for Candidate Selection. Use the following checklist to set and apply criteria for determining candidates' eligibility to participate in a debate:

1. Define the organization's goal for sponsoring the debate C i.e.: educating voters about candidates' views on issues and stimulating voter interest and participation in the election.
2. Develop criteria that:
 - implement the debate goal
 - are nonpartisan, fair, impartial and clear
 - can be applied objectively
3. Adopt the criteria before any candidates have been invited. For organizations with a board and/or officers, the criteria should be adopted as an official action.
4. State clearly that the candidates must meet all the criteria to be eligible.
5. Send written invitations to all candidates that are clearly eligible. Include copies of the debate goals and selection criteria.
6. If other candidates seek an invitation, the burden of proof is on them to establish eligibility. The sponsor may request information to support a candidate's claim to eligibility.

7. Information about the debate goals and selection criteria should be included with publicity announcing the debate to the public and the news media. Send copies to the invited candidates and to others on request.
8. Once criteria have been adopted, stick to them and apply them consistently. The criteria are not negotiable; do not yield to pressure to change or waive them to accommodate particular candidates.
9. Develop and retain contemporaneous written documentation of the basis for determining not to invite a particular candidate, or for denying a candidate's request to participate. Be sure that the rationale explicitly references the previously-adopted selection criteria.

**EXAMPLES OF CRITERIA THAT HAVE BEEN USED TO SELECT CANDIDATES
TO PARTICIPATE IN A DEBATE**

Constitutional Eligibility: The candidate, if elected, must be legally qualified to hold the office under federal and state law.

Eligibility to be on the Ballot.

Evidence of a Campaign: (especially applicable in federal or statewide elections or in states where ballot access is unduly difficult or jurisdictions with a tradition of write-in candidates). The candidate has made a public announcement of an intention to run; the candidate has a campaign headquarters and staff, has issued position papers and has made campaign appearances.

"Significant" Candidacy: (used to limit debate participation to candidates who have a reasonable chance of being elected).

This is the most difficult criterion to apply, and depends on information that is not always available, especially in local elections. Several factors can be used to measure significance, depending on the availability of information.

- Choose those factors that are relevant to the particular office or election.
 - Choose those factors for which there is sufficient information to apply them objectively.
 - Clearly state those factors that will be used to measure significance.
 - State that the organization will use its "good faith judgment" in considering factors to determine "significance."
1. Results of major, reliable, nonpartisan public opinion polls C use a reasonable percentage, i.e.: 10-15 percent C to show evidence of support, keeping in mind the probable number of candidates. Possible polling sources include professional pollsters, independent newspapers and broadcasters and universities. Set a cut-off date, so there will be sufficient time to make final debate plans.
 2. Eligibility for public matching funds (if available).

3. Coverage by the media as a recognized candidate.
4. Do not condition general election debate eligibility solely on status as nominee of a particular party.

C. Copyright Issues

Who "Owns" a Debate and Why Does it Matter? Once a debate has been recorded C whether by video or audio tape or as a written transcript C the question of who controls the use and distribution of the record or profits from its sale falls under the copyright laws. Unless there is a written agreement to the contrary, everyone who participated in creating a debate, including the sponsor, the broadcaster, candidates, moderator, panelists, even producers and camerapersons, has a potential claim to ownership of at least part of the final product.

An organization that wants to have control of the distribution and use of debate tapes and/or transcripts C for example, to prevent the use of debate excerpts in partisan political ads C should assert its claim of copyright ownership in written agreements with broadcasters and candidates.

A copyright notice should appear on all copies of tapes and transcripts (consisting of the word "copyright" or the letter "c" in a circle, the name of the copyright owner and the year of publication.) In order to challenge an infringement of a copyright, and organization should seek the assistance of a legal expert who specializes in this complex area of the law.

D. Legal Protection

Plans for any major debate should include provision for legal advice in case it is needed. Organizations should be prepared to secure free or reduced rate assistance, perhaps from attorneys who are members or relatives of members or from law school faculties or major law firms that provide pro bono help to nonprofit organizations. Most legal challenges are brought by candidates who are not asked to participate in the debate and are designed to stop the debate from happening. An organization that has easy access to legal assistance can cope with the disruption of an unexpected, last minute legal challenge.

Organizations may also need legal assistance to:

- keep current with federal, state and local requirements;
- review criteria for consistency with current applicable laws;
- draft or review agreements with candidates, broadcasters or cosponsors and, if necessary, advise on the enforcement of agreements;
- draft or review contracts with staff, consultants or managers of debate sites;

- protect the organization's copyright interests in the debate record.

A LEGAL GLOSSARY FOR DEBATES

Federal Election Commission (FEC). An agency established by the Federal Election Campaign Act of 1971 to administer the Act and enforce limits on contributions that can be made to, or expenditures that can be made on behalf of, candidates for federal office by individuals and groups.

Candidate for Federal Office (for purposes of FEC regulations). Persons running for President, Vice-President, senator, representative, delegate or resident commissioner to the U.S. Congress. A "candidate for federal office" has received contributions or made expenditures exceeding an aggregate of \$5,000; others have received or spent more than an aggregate of \$5,000 on her or his behalf; or, after written notification from the FEC, she or he has failed to disavow such contributions or spending by others.

Debate (as defined by the FEC). An event staged by a section 501(c)(3) or (c)(4) type organization or a broadcaster, cablecaster, or by bona fide newspaper or magazine that:

- includes two or more candidates;
- is staged in a way that it is fair to all participating candidates, i.e., the format does not promote or give an advantage to one candidate over the other(s); and
- the candidates appear concurrently, in face to face confrontations, with opportunities to respond to each other.

Federal Communications Commission (FCC). An agency established by the Communications Act of 1934 which regulates broadcasters and cablecasters. Section 315(a) of the Act provides that whenever a broadcaster or cablecaster permits any legally qualified candidate for any public office to "use" a broadcast station or cable facilities, it must also afford equal opportunities for uses to all other legally qualified candidates for that office.

Legally Qualified Candidate. (as defined by the FCC) An individual who:

- has publicly announced an intention to run for nomination or office;
- is eligible under the applicable laws to hold the office being sought; and
- either has qualified to be on the ballot, or has publicly committed to be a write-in candidate and can show that the candidacy is bona fide (for example, by making campaign speeches, distributing literature, issuing press releases maintaining a campaign committee, and/or establishing campaign headquarters.)

Use (for purposes of FCC regulations). Any broadcast or cablecast of a legally qualified candidate's voice or picture in such a way that he or she can be identified by listeners or viewers, even if the appearance is not for the purpose of discussing the candidacy.

Nonpartisan Organization (as defined by the Internal Revenue Service (IRS)). A nonprofit

organization that is recognized by the Internal Revenue Service as tax exempt under sections 501(c)(3) and 501(c)(4) and that does not endorse, support or oppose political candidates and parties.