

Election-Year Advocacy for Nonprofits: Getting Your Legal Playbook Ready

Association of Corporate Counsel's Nonprofit Organizations Committee
Webcast

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Topics for Today

- Part I: 501(c)(3) Activities
 - Basic Rules
 - Organization Activities
 - Debates
 - Forums
 - Questionnaires
 - Scorecards
 - Communications
 - Executive Activities
 - Being involved in a campaign
 - Fundraising
 - Official Events
- Part II: 501(c)(4) Activities
 - Basic Rules
 - Campaign Intervention
 - Primary Purpose
 - Tax Issues
 - Federal Independent Expenditures
 - State Political Activity
 - Contributions
 - Independent Expenditures
 - Disclosure
 - PACs
 - Super PACs

PART I: 501(c)(3) Organizations

Lots of Opportunity

Basic 501(c)(3) Rule

- No Campaign Intervention
 -  No contributions to candidates
 -  No use of corporate resources to support candidates
 -  No events/activities designed to benefit a candidate
 -  No endorsements

Lots That Can Be Done

- Interact with office-holders who are candidates
- Host debates and forums
- Communicate on issues
- Send scorecards and questionnaires

Hosting Debates

- Invite all candidates
 - Or use objective criteria (polling)
- Primary
 - May be just one party
- Equal time
- Neutral audience
- Neutral moderator
- Wide range of topics

Forums

- Invite all candidates
 - Equal time
 - Equally good time
 - Neutral questions
 - Variety of questions
-
- **NOTE:** Federal campaign finance law limits events with one candidate; debate format generally required for events open to the public (member-only events okay)

Other Issues for Forums and Debates

- Provide equal opportunity to respond/present views
- Don't use agree/disagree questions
- Don't comment on questions
- Don't imply approval or disapproval
- No fundraising
- Maintain neutral atmosphere

Candidate Questionnaires

Approach

- All Candidates for office sent questionnaire
- Unbiased structure
- No endorsement
- No pledge of support
- No grading responses (+/-)

Questions

- Clear and unbiased
- Subjects cover major areas of interest
- Clear issue descriptions
- Don't ask to accept a pledge

Answers

- Reasonable time to respond
- If limited answers allowed (support/oppose), opportunity to explain position

Format

- Questions the same in the guide as provided to candidates
- Answers the same as provided or edited for space only
- Answers presented close to the question

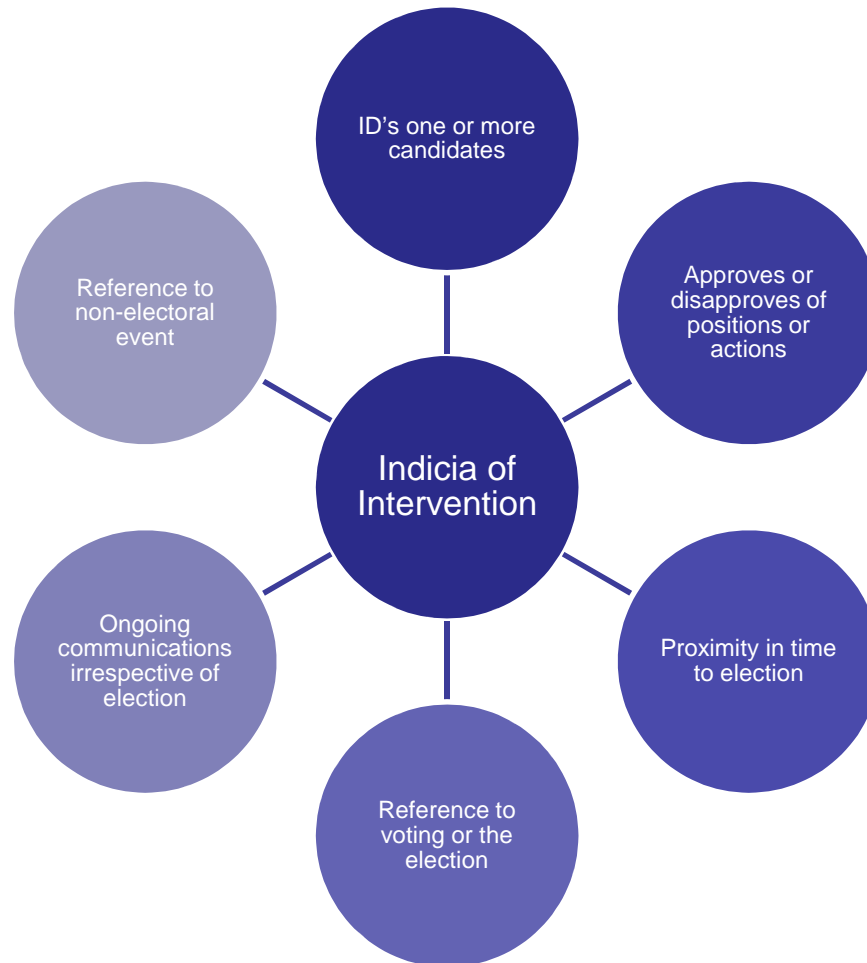
Legislative Scorecards

- Regular activity
 - Not timed with election
 - End of each legislative session
- Track a variety of issues
- Include all legislators
 - Don't include candidates who are not incumbents
 - Don't mention which incumbents are candidates
- Don't editorialize

Public Communications

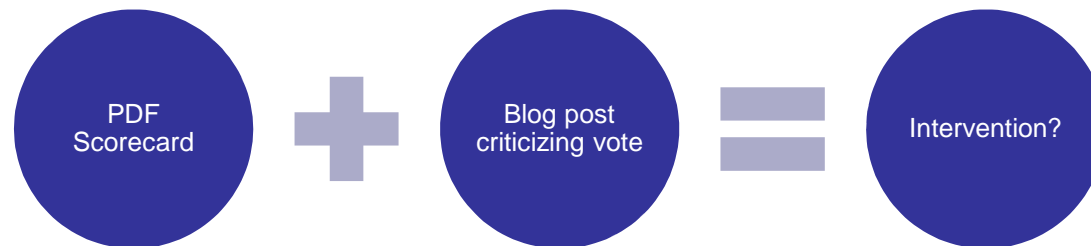
- Issue ads
- Facts and circumstances
 - Timing
 - Reference to candidate
 - Reference to party
 - Reference to election

IRS Test



Websites

- Treated as any other communication
- Risk of taking information from one section and linking it to a candidate on another



Blogs/Third-Party Postings

- Not clear what IRS thinks
- Include disclaimer
- Comments may be okay

Links

- Links to candidate sites
 - Context and purpose important
 - Voter education/all candidates v. advocacy
- Links to other sites
 - Purpose
 - Relation to advocacy
 - Number of clicks
- Links to related 501(c)(4) site okay
 - But, do not merge the two sites

Executive Activities

- Do not lose First Amendment rights
- Must act in personal capacity
- Must not use 501(c)(3) resources
- Position okay for identification purposes
- Include disclaimers

Examples

DAILY NEWS
OPINIONS & OP-EDS

...And so, that is why you should vote for Joe Blow for Mayor on Tuesday.

Sally Smith is the executive director of Neighborhood 501(c)(3). The views presented here are hers and not those of the organization.

CITIZENS FOR JOE BLOW

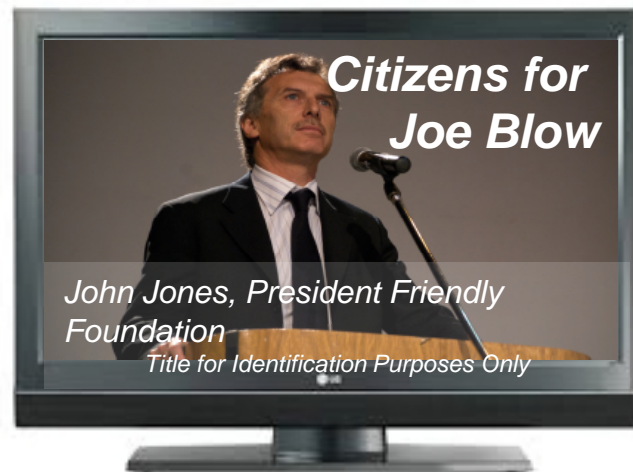
Dear Bob:
* * *

Join us on Tuesday to support Joe Blow.

Sincerely,

Ben Baloney Kent Conrad
President Chairman
Save the Shrews Slay the Shrews

Titles provided for identification purposes only.



Fundraising by Executives

- No use of 501(c)(3) resources
 - No facilities/space
 - No mailing lists/email lists
 - May use personal contacts
- Home fundraisers
 - FEC: \$1,000 per person per candidate for food and beverage/above that in-kind contribution
 - States: varies
 - Candidate may pay

Visits by Candidates in Official/Other Capacity

Reason

Other than candidacy

- Sitting official
- Expert
- Community leader

Organization

No mention of candidacy

- Communications refer to official position
- Invitations/introductions do not refer to candidacy

Guest/Speaker

No mention of candidacy

- Speaks in other official role
- Does not talk about campaign

Event

No campaign activity

- Non-partisan atmosphere
- No fundraising

PART II: 501(c)(4) Organizations

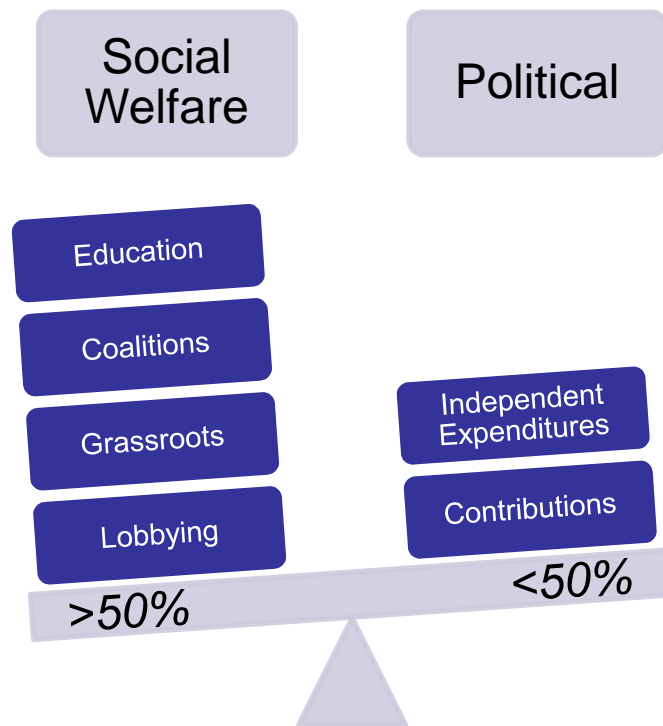
Actual Campaign Intervention

501(c)(4) Organizations

- Primary purpose must be promoting social welfare
- Campaign intervention is not promoting social welfare

NOTE: Remember other laws may restrict corporate activity (e.g., federal campaign finance law prohibits direct contributions to candidates)

Primary Purpose



Safe Harbor: 60%/40%

What Gets Counted?

- Expenditures
- Staff time
- Volunteer time

What Is Campaign Intervention?

- Facts and circumstances
 - Timing, content, background
- IRS tried to define it in rulemaking
- Intervention includes:
 - Express advocacy/independent expenditures
 - Campaign contributions
 - Endorsements
 - Supporting a connected PAC

Facts and Circumstances

Timing

- Proximity to election
- History of communications

Content

- Candidate name
- Candidate picture
- Party

Background

- Issues of importance to election
- Legislative votes

Tax on Political Activity

- 527(f) Tax
- Lessor of net investment income or political expenditures
- 35% tax
- Unless paid for from segregated fund
 - Fund must be registered with state, FEC, or IRS
 - Donors must be disclosed

Tax on Transfers from 501(c)(4)s

- Reasonable control on transfers
- Restrictions on use for political activity
- Cannot donate to another (c)(4) for purposes of making political expenditures or subject to tax
- Cannot transfer (c)(4) funds to 527 political committee without tax

Tax Disclosures

- 990 Schedule C
 - Total amount of political activity expenditures
 - Volunteer hours on political activity
 - Amount of direct and indirect expenditures
 - Payments to candidates, committees, and other political organizations itemized
- 1120-POL
 - Must be filed if political expenditures
 - Pay tax on lesser of net investment income or political expenditures

Contributions & Expenditures

Contribution

- Payment to candidate
- In-kind contribution
- Coordinated expenditure

Expenditure

- Independent of candidate
- No coordination
- Unlimited

Federal Corporate Contributions

- Federal law prohibits corporate contributions to:
 - Federal Candidates
 - Federal PACs
 - Federal Political Parties
 - Federal Accounts of State Parties

Keeping IEs Independent

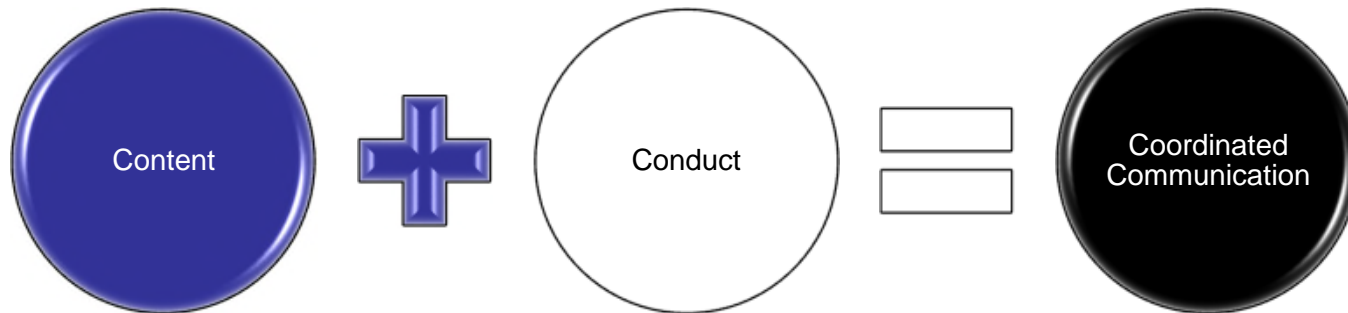
- May not coordinate with candidates supported



Types of Coordination

- Providing something of value to a candidate (e.g., voter file developed through IEs)
- Making a coordinated communication

Coordinated Communications



Content

Electioneering Communications

- Broadcast/radio/cable
- Targeted to relevant electorate
- Contains reference to candidate
- 30 days before primary
- 60 days before general

Express Advocacy in Public Communication

- Broadcast/cable/satellite
- Newspaper
- Magazine
- Outdoor advertising
- Mass mailing (500 pieces)
- Telephone bank (500 calls)
- Other form of general public political advertising

References to Candidates in Public Communications

- References a House or Senate candidate in the relevant jurisdiction 90 days or less before primary or general
- References a presidential candidate from 120 days before the primary up through the election

Republication in a Public Communication

- Disseminates
- Republishes
- Distributes

What's Not a "Public Communication"?

- Anything on the Internet that is not paid for on a third-party site
 - Email
 - Blogs
 - Social media
- What is included:
 - Banner ads
 - Targeted advertising
 - Paid social media

NOTE: Any expenditure for republication of candidate materials is an in-kind contribution

Conduct

Request/Suggestion	Material Involvement	Substantial Discussion	Common Vendor	Former Employee	Republication
<ul style="list-style-type: none"> • Candidate asks • Candidate assents to suggestion 	<ul style="list-style-type: none"> • Non-public information shared • Content • Audience • Means or mode • Outlets • Timing/frequency • Size, prominence, duration 	<ul style="list-style-type: none"> • Non-public material information • Plans • Projects • Activities • Needs 	<ul style="list-style-type: none"> • Same vendor within 120 days uses material nonpublic information • Media strategy • Audience selection • Polling • Fundraising • Content development • Production • Voter list development • Consulting or media advice • May establish a firewall 	<ul style="list-style-type: none"> • Employee or vendor worked for both entities within 120 days • Uses material, non-public information 	<ul style="list-style-type: none"> • Republish or broadcast candidate's materials • May use small sections to create ads

Disclosure of Independent Expenditures

Periodic Reports **End of next reporting period**

- Required of all entities that make more than \$250 in IEs for any election in a calendar year
- Disclose all payments for the IEs (name and mailing address, amount, date, purpose, whether supporting or opposing a candidate)
- Disclose contributions >\$200 received for the “purpose of furthering the reported independent expenditure”

48-Hour Reports **20 days or more before election**

- Required if spend more than \$10,000 for a given election
- Additional reports required for each additional \$10,00 spent
- Same information as periodic reports

24-Hour Reports **Between 24 hours and 19 days before election**

- Required if spend more than \$1,000 between 19 days and 24 hours before election
- Additional reports required for each additional \$1,000 spent
- Same information as periodic reports

State Political Activity

- Independent expenditures
 - Coordination rules vary widely
 - Disclosure rules vary widely
- Direct contributions
 - State law varies
- Supporting a PAC

State Disclosure: California

- Multipurpose Committees:
 - Entity that receives donations or payments for purposes other than making political expenditures
 - One of the following:
 - Raise funds of \$1,000 or more for political activity
 - Solicited for purposes of making IEs or contributions
 - Accepted based on agreement or understanding \$ used for IEs or contributions
 - Reach subsequent agreement or understanding \$ will be used for IEs or contributions
 - Make IEs or contributions of \$50,000 in 12-month period or \$100,000 in four consecutive years
 - Are a federal or out-of-state political committee
- Must register as a “recipient committee”



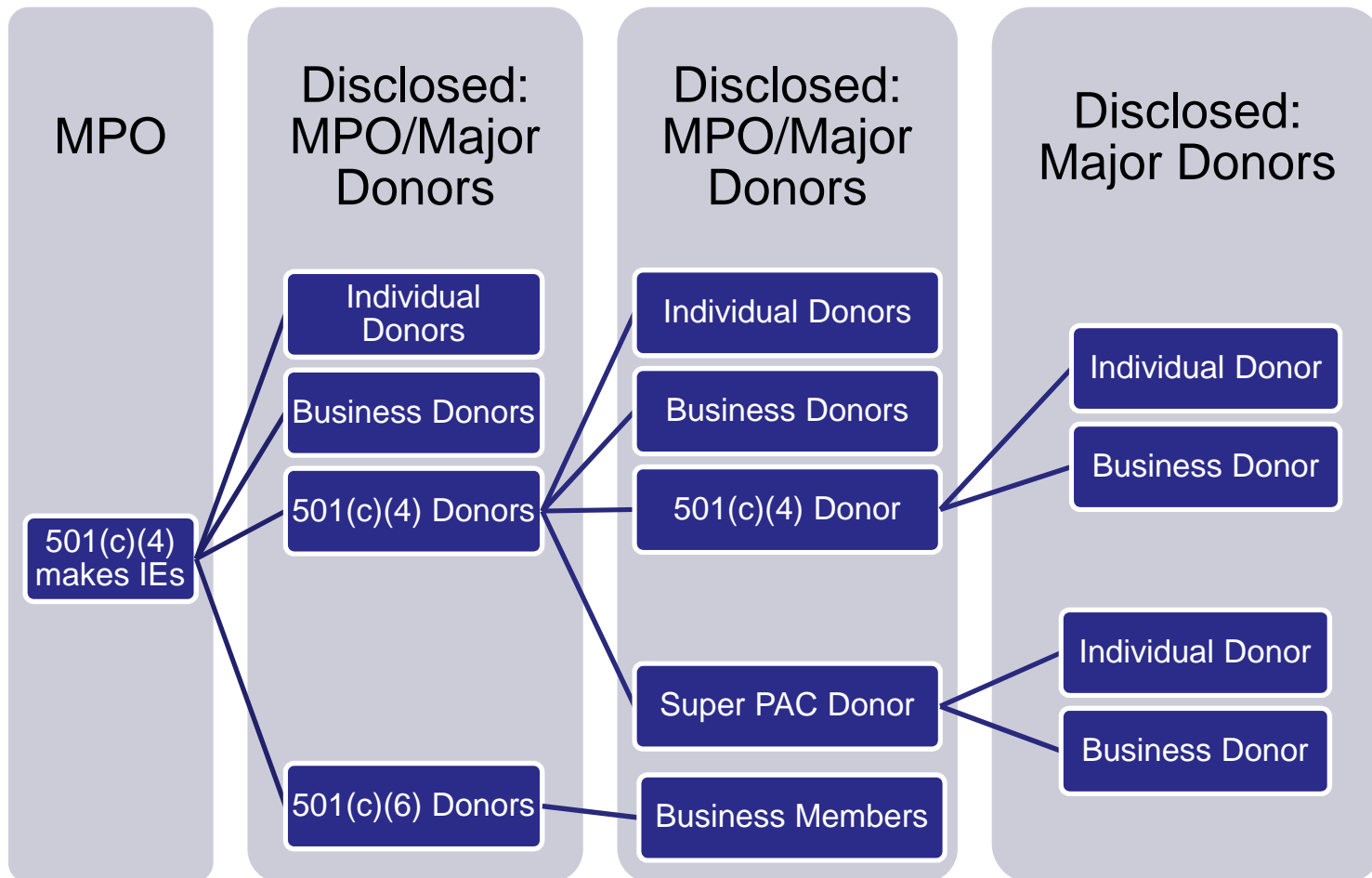
State Disclosure: California (Part 2)

- Multipurpose Committee Disclosure
 - Disclose donors of \$100 or more in a calendar year if:
 - *Donor made payments for political purposes*
 - *Donor knew all or some would be used for political purposes*
 - *Donor reached subsequent understanding*
 - If expenditure not fully funded:
 - *Last-in-first-out disclosure of **any** donor of \$1,000 or more*
 - *Unless donor prohibits contribution from being used for political purposes*
 - Unless funded with non-dues revenue or interest income

State Disclosure: California (Part 3)

- Upstream Disclosure
 - Multipurpose Organizations must notify:
 - Nonprofit donors of \$50,000 or more that they may be multipurpose organizations subject to the rules
 - Donors of \$5,000 or more of potential Major Donor (\$10,000 or more) status and further disclosure
 - Donors to multipurpose organizations will be one of the following:
 - Major Donors (contribute \$10,000 or more statewide in calendar year; no further donor disclosure required; businesses and individuals)
 - Recipient Committees (raise more than \$1,000 for political purposes; must register and report donors)
 - Multipurpose Organizations (must register and report as described above)
 - Other/Nothing (businesses or individuals who contribute less than \$10,000; no disclosure)

What It Means



California Coordination Rules

Presumption of Coordination

Communication made based on information about needs/plans provided by campaign	Communication made by or through an agent of campaign	Person making communication retains services of someone providing services to campaign within 12 months	Communication reproduces campaign materials	Candidate participates in fundraising or appears as speaker at fundraiser	Entity making communication is established, run, or staffed in leadership role by person who worked for campaign within 12 months
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Political Action Committees

- Fund to hold individual contributions
- Used to make contributions directly to candidates
- Federal law:
 - \$5,000 per donor per year to PAC
 - \$5,000 per election per candidate
- Restricted Class
 - Members of 501(c)(4)
- Non-Connected PAC
 - May solicit general public
 - No corporate support

Super PACs

- Used to fund Independent Expenditures only
 - Unlimited contributions
 - Individual or corporate donation
- Fully disclosed to FEC (or states)
- 501(c)(4) may donate to Super PACs
- Useful way to engage in IE activity by 501(c)(4)

Related Organizations

- 501(c)(3) may have a related 501(c)(4)
- 501(c)(4) may have a connected PAC
- 501(c)(4) may fund a Super PAC and its operations



Considerations

- 501(c)(3) funds may not go to political activities of 501(c)(4)
- Allocate costs
- Maintain corporate formalities
- Maintain distinct branding
- Consider which organization will be primary public face
 - May be easier to have 501(c)(4) play this role
 - 501(c)(4) can support the 501(c)(3), but not vice versa

Questions?

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