



NONPROFITS AND LOBBYING

Yes, They Can!

By Nayantara Mehta

When many people think about nonprofits and lobbying, they might think of a relationship like oil and water: they don't mix. There is a widespread perception that nonprofits cannot lobby, or if they do lobby, they are exploiting some kind of legal loophole. The fact is that nonprofits, even 501(c)(3) organizations, which are the most restricted type of nonprofits, may legally lobby. Getting involved in the legislative process and having a say in policy discussions is not just an appropriate role for nonprofits; it is vital. If nonprofits are not speaking on behalf of their often-vulnerable communities, chances are nobody else is either.

Organizations with a focus on the environment may be the most visible nonprofits engaging in the policy process, but lobbying is no less important for nonprofits working on every issue area, from the arts to wildlife preservation. In a 2007 *Stanford Social Innovation Review* article, "Creating High-Impact Nonprofits," the authors identified a best practice that all successful high-impact nonprofits share: the combination of providing services in their communities and engaging in policy advocacy, including lobbying, at the local, state, or federal level. Who, after all, knows the problems of their communities more intimately and is in the best position to suggest practical solutions than the nonprofit organizations that work in those communities every day? Nonprofits that

do not take advantage of their ability to lobby miss an opportunity to advance policies that will improve the lives of their constituents.

The Legal Issues

Lawyers tend to be cautious, which, given the technical nature of much of their work, is usually a good thing. However, when it comes to advising nonprofits on lobbying, lawyers can be downright restrictive. Some of these groups have resources to hire lawyers for specific tasks, or they may have a lawyer or two on staff who specialize in the organization's issue area. Although a lawyer may be an expert at writing or reviewing contracts or dealing with employment law disputes, that does not necessarily mean he or she will understand the laws and regulations that govern nonprofit advocacy. Groups like Alliance for Justice (AFJ) work with organizations that are uncertain about what political activities they may safely engage in without jeopardizing their 501(c)(3) status. AFJ works primarily with nonprofits and foundations directly, but also specifically reaches out to lawyers who represent nonprofits. These lawyers should understand that 501(c)(3) organizations may have some restrictions on their activities, but there are a number of ways that nonprofits can and should be involved in the policy and electoral process.

To understand the lobbying rules that affect nonprofits, a short tour of federal tax law is required. The Internal Revenue Code governs tax-exempt organizations, the most common of which are 501(c)(3) public

charity organizations. Section 501(c) of the federal tax code and the relevant IRS regulations lay out the permissible activities of the various 501(c) organizations. 501(c)(3) organizations are described in the Internal Revenue Code as having charitable, religious, educational, scientific, or literary purposes. 501(c)(3) organizations include both public charities and private foundations. They have the best tax treatment under federal tax law: they are tax exempt and contributions to them are tax deductible. The trade-off for having these benefits, however, is a limitation on certain activities. No 501(c)(3) organization may support or oppose a candidate for public office. 501(c)(3) private foundations, such as the Ford Foundation and the Bill and Melinda Gates Foundation, are heavily taxed on any lobbying expenditures, which effectively acts as a prohibition on lobbying. 501(c)(3) public charities, on the other hand, are clearly permitted to lobby up to a certain dollar limit each year.

501(c)(4) social welfare organizations, such as the League of Conservation Voters and AARP, are also tax exempt, but contributions to them are not tax deductible. The trade-off for this less beneficial tax treatment is that they may engage in unlimited lobbying and also may engage in some partisan political activities (subject to state or federal election law rules). Similarly, labor unions (501(c)(5) organizations) and trade associations (501(c)(6) organizations) also may lobby without limits and engage in some partisan political activities. Since most of the concerns about tax-exempt

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organizations and lobbying center around 501(c)(3) public charity organizations, they will be the focus of the rest of this article.

Many people, including those who work for 501(c)(3) public charity organizations, believe that 501(c)(3)s may not lobby. Others may understand that 501(c)(3)s are legally permitted to lobby but think that lobbying is an inappropriate activity for public charities, for a variety of reasons. Some organizations may determine that their limited resources should be spent on providing meals or tangible services, rather than focusing on long-term policy goals that may never come to pass. Others may simply believe that there is something unseemly about lobbying, a notion that the U.S. presidential candidates suggested throughout the campaign season in 2008 by their attempts to outdo each other in distancing themselves from registered lobbyists.

In the face of shrinking government budgets and foundation endowments and growing need for services, some nonprofits are concluding that they need to adopt more strategic and long-term approaches to meet the needs of their constituents. There is a growing awareness and recognition among public charities that policy work—including lobbying—is entirely consistent

with their charitable and educational missions. Without the input of the charities that work on behalf of vulnerable or underserved populations, legislators and regulators will craft policies and budgets that do not reflect the concerns of the people or communities they are supposed to serve.

Lobbying Versus Advocacy

Something that is often lost in the discussion about whether public charities can lobby or want to lobby is the fact that lobbying, under federal tax law, is a specifically defined activity. Just having a conversation with a legislator is not automatically lobbying. Lobbying is just one form of advocacy that an organization may engage in to achieve its particular goals and serve its constituencies. Other forms of advocacy include educating policymakers and the public about broad social issues, encouraging people to register to vote, organizing communities, educating voters about candidate positions, litigating, and many other activities. With the exception of lobbying and partisan political activities, all of the forms of advocacy listed above are unrestricted and unlimited for 501(c)(3) public charities.

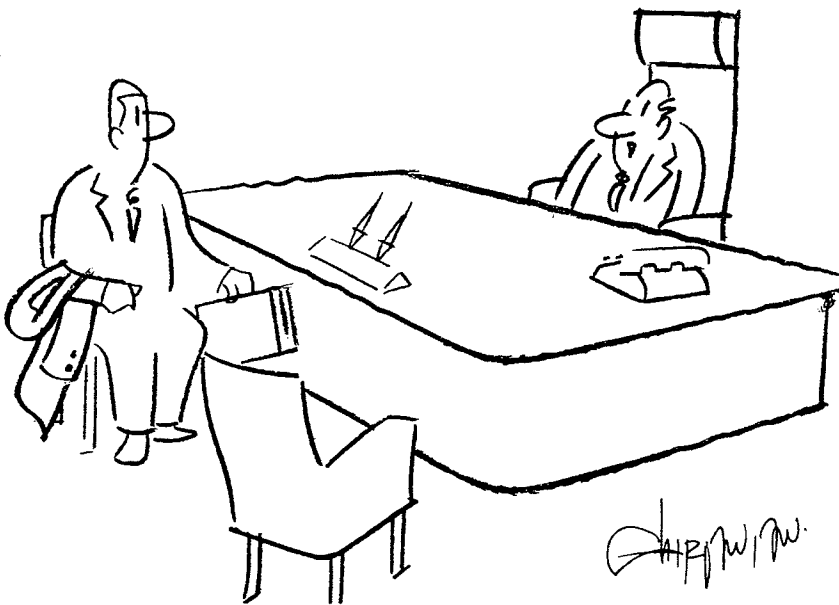
To determine how much they can lobby, 501(c)(3) public charities first

must choose how they will measure their lobbying limits. There are two ways for public charities to measure their lobbying: the insubstantial part test and the 501(h) expenditure test.

The insubstantial part test is the default test under which 501(c)(3) public charities measure their lobbying. Under this test, lobbying may not be a substantial part of an organization's overall activity. Unfortunately, the IRS has not provided guidance on what is an appropriate "insubstantial" amount of lobbying, and has not defined what exactly it considers to be lobbying under this test. Most tax practitioners believe that if a public charity's lobbying activity is less than 5 percent of its overall activities, it would be an insubstantial amount of lobbying.

In response to the vagueness of the insubstantial part test, Congress introduced the 501(h) expenditure test in 1976 to provide charities with guidance on how much lobbying they can conduct. Under the 501(h) expenditure test, there are clear dollar-based limits on how much money a public charity can spend on lobbying. Depending on the amount of an organization's exempt purpose expenditures, a charity can generally spend up to 20 percent of its annual expenditures on lobbying. There are also clear definitions of what constitutes lobbying. In order for a public charity to measure its lobbying under the 501(h) expenditure test, it must affirmatively elect to have its lobbying measured under this test, called making the 501(h) election. This is a very simple process, requiring what may possibly be the shortest and simplest IRS form in history, Form 5768.

Under the 501(h) expenditure test, there are two different types of lobbying: direct lobbying and grassroots lobbying. An organization that has made the 501(h) election may not spend more than one-quarter of its overall lobbying limit on grassroots lobbying. Direct lobbying is defined as any communication, with a legislator, that expresses a view about specific legislation. Grassroots lobbying is defined as any communication, with the general public, that expresses a view about



"Coffee? Tea? Flu Shot?"

specific legislation, and includes a call to action. A call to action refers to four very specific ways the organization can ask the public to respond to its message. Those calls to action must be either (1) asking the public to contact their legislators or their staff; (2) providing the address, phone number, Web site, or other contact information for the legislators; (3) providing a mechanism to contact legislators such as a tear-off postcard, petition, letter, or e-mail link to send a message directly to the legislators; or (4) listing the recipient's legislator, the names of legislators voting on a bill, or those undecided or opposed to an organization's view on the legislation.

For both direct and grassroots lobbying, if one part of the definition is missing in a particular activity, the activity will not count as lobbying. Let's say the policy director of a 501(c)(3) group that works with former inmates schedules a meeting with her member of Congress to discuss the challenges former inmates face in finding employment and housing. As long as there is no legislation pending on this issue and the policy director does not propose any legislation to address this issue, that meeting would likely not count as a lobbying communication. It is a communication with a legislator, but there is no discussion of specific legislation, so it is not direct lobbying. Or if a 501(c)(3) organization paid for a newspaper ad praising a proposed bill that would ban the sale of soft drinks in public schools but did not include one of the four calls to action listed above, that communication would not be lobbying. It is a communication to the general public that expresses a view about specific legislation, but it is missing a call to action, so it is not grassroots lobbying.

In addition to the benefits of clear lobbying limits and clear definitions of lobbying, there is another reason that making the 501(h) election makes sense for most 501(c)(3) organizations: less-burdensome reporting requirements. A public charity operating under the insubstantial part test, or a "nonelecting public charity," reports its

lobbying activities on its annual Form 990 information return to the IRS. The Form 990 requires a public charity to provide a detailed written description of the lobbying activities it has engaged in that tax year. The public charity must account for the time that any unpaid volunteers have spent on lobbying for the organization. On the other hand, a public charity operating under the 501(h) expenditure test, or an "electing public charity," only has to report on the Form 990 its expenditures on lobbying activities. There is no need to provide a written description of the organization's lobbying activities or count the time of volunteers lobbying on behalf of the organization; the IRS just wants to know how much the "electing" 501(c)(3) is spending per tax year.

Making the 501(h) election makes lobbying simpler all around for 501(c)(3)s: they know how much money they may allocate to lobbying each year, making planning for a lobbying campaign easier; they can use the clear definitions of lobbying to their advantage in determining whether they want a particular communication to contain a lobbying message; and they only have to report to the IRS on dollars spent on lobbying, rather than describing all their lobbying activities. The major drawback for some 501(c)(3)s in making the 501(h) election is that there is an overall \$1 million cap on lobbying expenditures, regardless of what the organization's annual expenditures are. This means that for some large organizations, with annual expenditures of well over \$17 million, they would hit the \$1 million cap and may be able to do more lobbying under the insubstantial part test. For many 501(c)(3)s, however, the idea of \$1 million being an insubstantial expenditure is a far-off fantasy.

No Partisan Political Activities

In addition to the limitations on the lobbying activities of 501(c)(3) public charities, there is an absolute prohibition on engaging in partisan political activities. No 501(c)(3) may support or oppose any candidate for

public office. This prohibits direct endorsements or contributions by the organization as well as even the use of 501(c)(3) resources to support or oppose a particular candidate or party. Some high-profile IRS investigations of 501(c)(3) charities and churches for alleged violations of this prohibition have put the issue in the spotlight, especially during last year's elections. An election year is a particularly good time for charities to promote their issues since they know that the public and the candidates are listening. Although all 501(c)(3) organizations need to be careful to avoid supporting or opposing candidates, or even looking like they're supporting or opposing candidates, they

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- any communication
- with a legislator
- that expresses a view about specific legislation.

Grassroots lobbying is defined as

- any communication
- with the general public
- that expresses a view about specific legislation
- and includes a call to action.

may engage in a range of nonpartisan election-related activities. It is important for 501(c)(3) organizations to understand that while they should not criticize a particular candidate's positions, they can, and should, continue to engage with sitting legislators and other policy makers.

Federal Rules, State Rules, Local Rules

Although 501(c)(3) public charities are clearly entitled to lobby under the federal tax law that governs their tax-exempt status, that is not the end of the story. State and municipal lobbying disclosure laws impose additional reporting requirements on all organizations—not just on 501(c)(3) organizations—that lobby a certain amount at the state or local level. Similarly, the federal Lobby Disclosure Act (LDA) requires disclosure of federal lobbying activities by any organization that spends a certain amount of

time and money lobbying the federal government. The rationale for the various state and local rules and the federal LDA is different than the purpose of the IRS restrictions on 501(c)(3)s.

The state lobbying laws and the federal LDA do not place any restrictions on the amount of lobbying that an organization may do. Rather, these laws serve a public disclosure role to allow the public to know who is lobbying and how much money they are spending on their lobbying activities. The IRS lobbying restrictions, on the other hand, arose out of Congress' concern that since 501(c)(3) public charities are in effect receiving a public subsidy through their tax exemption and their ability to offer tax-deductible contributions, they should have limits on their political activities, including lobbying. The existence of these overlapping laws that serve different purposes may act as yet another obstacle for 501(c)(3)s considering lobbying.

Alliance for Justice has resources available to public charities and their lawyers to help them understand these sometimes confusing rules. These resources are designed to demystify the legal rules that may prevent nonprofits from getting involved in the policy process in the first place, and help to chip away at the resistance to being strong and vocal advocates and lobbyists for the public interest.

Additionally, Alliance for Justice has a short, free publication available on its Web site, www.afj.org, called *Worry Free Lobbying*, that describes why AFJ thinks most 501(c)(3) public charities should make the 501(h) election and also explains how to do so.

Lobbying in Action

Public Advocates Inc. is a San Francisco-based nonprofit legal organization that promotes civil rights through a number of issue areas, including education, transportation, and housing. While engaging in litigation and providing legal counsel are often a given for a legal organization, Public Advocates also has incorporated policy, coalition, and

communication work into their arsenal of tactics to challenge systemic causes of poverty and discrimination. President Jamiene Studley acknowledges the very real concerns of those in the nonprofit sector that they lack the time or resources to devote to developing an effective policy strategy and learning the relevant legal rules. Despite that, Public Advocates feels strongly enough about the need to be involved at the state legislative level that they have a Sacramento office that works on education policy issues. Advocating before the state legislature and state agencies is one of their basic legal strategies, alongside the more traditional lawyers' approach of representing clients through litigation.

Studley noted that the state legislature makes many critical choices about budgets and setting legislative priorities that directly affect her organization's clients. If Public Advocates did not engage at the state legislative level, Studley does not think that they would be able to fully advance the interests of their clients. A legislative focus is a natural component of their education practice. In their other issue areas where they do not have staff and resources dedicated to a legislative agenda, they feel the lack of it, operating as if an important tool was missing from their tool kit, according to Studley.

Marj Plumb, founding director of the Women's Policy Institute (WPI), a program of the Women's Foundation of California, strongly believes that we need a participatory democracy. That means that we as a society should be engaged in the process of lawmaking ourselves, not just leaving the lobbying up to the professionals. The WPI was founded in 2003 on the idea that women's voices had not been present in the policy arena, and the program trains women who are community and nonprofit leaders from California in policy advocacy, including lobbying.

Plumb noted that what many nonprofits know about their ability to lobby is based on "folklore": they either think they cannot lobby, or if

they know they can lobby, they think they can do much less lobbying than they are actually legally permitted to do. Participants in the WPI learn the legal rules and get hands-on experience by working in some aspect of the policy making process on real legislation. They take that knowledge and those skills back to their own organizations, increasing the capacity of their organizations to be more effective advocates for systemic change. Equally important, WPI participants are communicating the needs of their communities to legislators who are otherwise not hearing about how their decisions affect these communities directly.

Plumb pointed out that the mission statements of many social service organizations is to improve lives and strengthen neighborhoods, perhaps working to end homelessness, helping people find jobs, or feeding the hungry. Ultimately, the goal of many nonprofits is to put themselves out of business, that is, to eradicate the need for the services they provide. According to Plumb, engaging in the policy process is the best way for a nonprofit to actually implement its vision and put itself out of business.

Conclusion

Anyone who works for and with nonprofits is familiar with the reasons that keep nonprofits from lobbying. But lobbying is not just for large nonprofits based in Washington, D.C. Lobbying is an effective form of advocacy that can help all nonprofits—whether focused on federal immigration reform or local land use issues—fulfill their missions. Working toward structural policy changes is more likely to reduce, or at least prevent from worsening, the need for the very services that many dedicated nonprofits provide. Most nonprofits exist to make the world better and fairer, for a particular constituency group or community, or for the planet as a whole. If nonprofits really want to achieve their goals—a cleaner environment, more affordable housing, health care for everyone, equal pay for equal work—then lobbying is an indispensable tool. **BT**