

Nonprofit organizations play an important role in advocating for the public's well being in the United States. They strengthen democracy by allowing citizens to participate and give citizens a variety of opportunities to meet and talk, build civic skills and assemble their resources for joint action. They also help represent the norms and values of society in public decision-making. When necessary, nonprofits ask government to address their concerns or initiate action. Through advocacy, nonprofits may instill their group's perception of the common good into wider notions of the private good or public interest (Boris, 1999). The two most common kinds of nonprofits working to improve the public's well being are "public charities" and "social welfare organizations." Although social welfare organizations may engage in relatively unlimited lobbying, public charities may not engage in "substantial" lobbying. Lobbying is divided into two main categories; direct lobbying refers to communications with lawmakers that take a position on specific legislation, and grassroots lobbying includes attempts to persuade members of the general public to take action regarding legislation (Herman, 1994).

Why Advocate?

Sometimes when people hear the word lobbying they think it's illegal for charities to do or that it's only for charities with money. Lobbying by charities is a powerful strategy for making people's lives better and for building stronger communities, it is something we should all do if we believe in a good cause because it is at the very heart of our democratic system. It only takes one person to initiate change; therefore people working together can make the difference and change laws. These efforts help find real solutions to help people because few institutions are closer to the real problems of people than nonprofits and community groups. Advocacy is easy, some people

become concerned that lobbying detracts from their mission, but quite the opposite is true, advocacy advances your cause and builds public trust and the view of local nonprofits are important, especially for policymakers who need your expertise.

What is Advocacy?

There are two main types of advocacy. First issue advocacy seeks to identify, analyze and develop solutions to social problems through public education and building relationships with influential people (Herman, 1994). Secondly, lobbying is an attempt to influence specific legislation and regulation. Federal law and IRS regulations divide lobbying into two main categories: direct lobbying and grassroots lobbying. (Activities that do not meet the definition of either direct or grassroots lobbying are not considered lobbying under the IRS rules.) The IRS defines "direct lobbying" as any attempt to influence legislation through communication with legislators, staff persons, or any other government official who participates in the formulation of legislation, where the communication refers to specific legislation and reflects a view on the legislation (Herman 1994). Rather than an attempt to influence legislators directly, "grassroots lobbying" is "any attempt to influence any legislation by affecting the opinions of the general public (Herman 1994). Grassroots lobbying must refer to specific legislation, reflect a view on the legislation, and include a "call to action"(Vernick, 1999). According to the regulations, "specific legislation" includes not only bills already introduced in a legislature but also specific legislative proposals that have not been formally introduced. It does not include broad discussions of possible solutions to problems. Unlike direct lobbying, grassroots lobbying communications must also include a "call to action" encouraging members of the public to contact a legislator or any other government

official who participates in the formulation of legislation. Indirect ways of issuing a call to action include providing the name, address, or telephone number of a legislator; providing a copy of a petition or some other way for the recipient to communicate with a legislator; or even simply identifying a particular legislator as having a position on the specific legislation or as the recipient's representative.

Types of 501(c)'s

The law exempts from federal taxation the income of about 25 different kinds of organizations, which are described in title 26 of the US Code under section 501(c). Of these organizations, those qualifying as tax-exempt under sections 501(c)(3) and 501(c)(4) are the most common. Organizations covered by section 501(c)(3) include primarily educational, religious, and charitable institutions. There are 2 kinds of 501(c) organizations: public charities and private foundations. Typically, universities, other educational organizations, hospitals, and churches are 501(c)(3) public charities. Private foundations include philanthropic organizations and other groups that do not derive a significant share of their revenues from public sources. Organizations under section 501(c)(4) are designed for the promotion of social welfare.

In many ways, 501(c)(3) public charities and 501(c)(4) social welfare organizations are quite similar. An organization that promotes public well being goals may choose to be either kind of nonprofit, and once approved by the IRS its income is tax-exempt.

There are also important differences between 501(c)(3) and 501(c)(4) organizations. Contributions to public charities are generally tax-deductible for the contributor, while those to social welfare organizations are not. This may make

contributions to public charities much more attractive for some donors. In exchange for this benefit, however, the law strictly limits the lobbying activities of public charities, while social welfare organizations, depending on the source of their funding, can engage in relatively unlimited lobbying.

How Much Lobbying is Permitted?

Under federal law, "no substantial part" of the activities of a 501(c)(3) public charity may consist of lobbying. No more than 20% of nonprofits or up to a limit of one million (for larger agencies) may be spent on lobbying. If a public charity engages in too much lobbying, it will be assessed an extra tax, it will lose its tax-exempt status, or both. (Vernick, 1999).

Instead of submitting to the "no substantial part" test, a public charity may choose to be governed by the lobbying limits contained in section 501(h) of the tax code. 501(h) electing charities must fill out a form notifying the IRS that they wish to be governed under this section, and then a sliding scale applies to the amount of permissible lobbying.

Obviously, it can be a real advantage for a public charity to make the 501(h) election. With the election, there is more certainty about what amount of lobbying is permitted, and generally a higher ceiling applies. In addition, certain nonmonetary expenditures, such as the time spent by organizational volunteers, are generally not included in the lobbying limits under the 501(h) election.

Lastly activities in support of individual candidates cannot happen in 501(c)(3)'s, nor may organizations take a stance on them. In general, to be permissible such activities must be nonpartisan. This is a risky area of the law, however, and public charities are advised to proceed with caution.

By comparison, a 501(c)(4) social welfare organization may engage in relatively unlimited lobbying in areas related to its mission. Social welfare organizations may even intervene in political campaigns as long as this is not their primary purpose. For this reason, some public charities also have associated ("sister") social welfare organizations. This allows the public charity to shift some or all of its lobbying activities to its sister organization.

For many nonprofits, however, understanding which activities are permissible advocacy for the public's well being and which are the more restricted lobbying may be a matter of great confusion. As a result, these organizations may simply ignore the law, placing their tax-exempt status in jeopardy. Or conversely, they may be reluctant to engage in perfectly legitimate activities rather than risk breaking legal rules that they understand imperfectly at best. This may make them less effective in accomplishing their public well being goals.

What Activities Are Not Considered Lobbying?

But some activities that do seem to meet the definition of lobbying nevertheless do not count against the permissible lobbying limits for public charities, because they fit within one of the recognized exceptions established by the tax code. One important exception, particularly for academic or research-oriented organizations, is "nonpartisan analysis, study, or research" defined as "an independent and objective exposition of a particular subject matter." Nonpartisan analysis, study, or research may support or oppose specific legislation "so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion." (n18) A biased or unsupported presentation of information would therefore

not fit within this exception.

Another important exception covers discussions of "broad social, economic, and similar problems." Because the definition of lobbying refers to "specific legislation," it is not lobbying to communicate with a law maker about matters of general concern, even if they are the sort of issues that might later become the subject of legislation. For example, it is not lobbying to communicate with a lawmaker about the importance of motor vehicle injuries as a public health problem. It would, however, be direct lobbying to express support to a lawmaker for mandatory seat belt use laws, even if such a bill were not currently pending before the relevant legislative body. (n20)

More permissive rules also apply to a public charity's communications with its own members and to so-called self-defense lobbying on matters related to the organization's existence or tax-exempt status. When a public charity communicates solely or even primarily with its own members, it may take a position on specific legislation so long as it does not directly encourage its members to lobby. For example, in its member newsletter a public charity could state its support for pending legislation and even provide the names of legislators who support or oppose the bill. This communication would not be lobbying unless the newsletter also encouraged members to contact one or more of those legislators. (n22) Under the exception for self-defense lobbying, a public charity may communicate with legislators, but not the general public, about matters that might "affect the existence of the electing public charity, its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization" without those communications counting toward the lobbying limits.(n23)

Where Does the Money Come From?

The above rules apply generally to lobbying conducted by public charities and social welfare organizations with private funds, such as donations from individual citizens. Many nonprofit organizations that advocate for the public's well being, however, derive an important share of their operating funds from grants and contracts provided by the federal government or private foundations. And the lobbying rules can change depending on where the money comes from.

Unlike 501(c)(3) public charities, private foundations may generally not engage in lobbying without incurring substantial penalties. This does not mean, however, that private foundations are unable to provide grants to organizations that lobby. In fact, foundations regularly fund such organizations.(n24) Private foundations may provide general support grants to organizations that lobby as long as none of the foundation's funds are earmarked for lobbying, and they may even fund the nonlobbying portion of a specific project that includes both a lobbying component and other activities.(n25) For the purposes of these rules, the definition of lobbying for public charities and private foundations is virtually the same.

There are also a variety of rules that restrict lobbying with federal funds.(n26, n27) For nonprofit organizations; the most relevant of these are embodied in "circulars" issued by the Office of Management and Budget (OMB). These circulars, though not precisely the same thing as a law or regulation, provide instructions about what kinds of costs can and cannot be charged to the federal government by a grantee. OMB circular A-21 applies to educational institutions and A-122 applies to all other nonprofit organizations. Both have the same roles regarding lobbying. In general, costs associated

with attempting to influence the introduction, enactment, modification, or signing of federal or state legislation, whether through contact with legislators or members of the general public, are "unallowable." As with the IRS lobbying rules more generally applicable to public charities, certain exceptions apply, such as responding to a request for technical or factual presentations by Congress or a state legislature.(n28)

In 1995, a new restriction was added to federal law regarding lobbying by nonprofit organizations. The so-called Simpson Amendment forbids 501(c)(4) social welfare organizations that choose to lobby from receiving federal funds of any kind. That means that if a social welfare organization lobbies, even with private funds, it becomes ineligible to receive any federal funds.(n1) Because the primary advantage of 501(c)(4) status is the ability to engage in relatively unlimited lobbying with private funds, the Simpson Amendment may be a real obstacle to social welfare organizations that rely on federal funds for other activities. However, to minimize the effects of the new law, social welfare organizations can still organize affiliated nonprofits to either engage in lobbying or receive the desired federal funds.

Are Lobbying Restrictions Constitutional?

Some organizations that wish to enjoy the benefits of nonprofit status have been troubled by the lobbying restrictions imposed by Congress on 501(c)(3) public charities. One such organization, Taxation With Representation of Washington (TWR), wished to engage in substantial lobbying but nevertheless applied for 501(c)(3) status so that private contributions to the organization would be tax-deductible. When the IRS denied its application for public charity status, TWR brought a lawsuit in federal court arguing that the lobbying restrictions were unconstitutional. Specifically, TWR argued that the

restrictions violated its free speech rights under the First Amendment and its equal protection rights under the Fifth Amendment (Vernick, 1999).

In 1983, the United States Supreme Court upheld the constitutionality of the lobbying restrictions in the case *Regan [Secretary of the Treasury] v Taxation with Representation of Washington*.⁽ⁿ²⁹⁾ Writing for a unanimous court, Justice Rehnquist first recognized that granting TWR public charity status despite its substantial lobbying activities would amount to a public subsidy of those activities. He then framed the issue in the case as "not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby." He determined that the law "does not deny TWR the right to receive deductible contributions to support its nonlobbying activity.... Congress has merely refused to pay for the lobbying out of public money;" and he concluded that "this Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right."⁽ⁿ³⁰⁾ TWR's ability to form a sister 501(c)(4) organization that could lobby (albeit without tax-deductible contributions) was also important to the Court's conclusion that the lobbying restrictions were not unduly burdensome.

The Public Interest Conception

The public interest conception has been challenged on several grounds, the most important, being the question of objectivity. Who gets to say what the general or public interests are? One person's public good may be another public bad. The rationale that several nonprofits use is that advocacy is providing representation to groups that have been unable to effectively organize, therefore guaranteeing that all interested parties have a voice (Powell, 1987). Although nonprofit advocates may be giving underrepresented

groups a voice, may argue that they add to the overall problem by increasing the number and intensity of contending voices (Powell, 1987). Contenders also argue that nonprofit advocates are biased to the interests of those living on the margins of society, because they meet the needs of only those that are “underrepresented.” Therefore nonprofit advocates must be very cautious in defining the public interest.

Salisbury (1971) argues that the maintenance and survival of advocacy organizations is highly problematic because it requires entrepreneurs who perceive opportunities to advance their own careers and perhaps support and encouragement of similarly privileged individuals. Although this may be true initially, this is not the only incentive for individuals. Many supports seem to be more receptive to the advocates’ moral claim to public service. Moral and solidarity incentives are central to organizational maintenance. Solidarity incentives many include a special honors or the self-respect of the group as a whole, which a characteristic that many people may benefit from.

Nonprofit representation opens the political system to new voices, whereas many times income and education inequalities affect representation and hinder participation of low-income people in politics (Boris, 1999). Yet nonprofit representation has been criticized for many reasons. The degenerating “special interest” label is sometimes attached to groups that exert a powerful influence on political decisions through large expenditures of organizational funds for advocacy. Many of these groups, however have broad public involvement in their organizations and wide public support for their objectives (Hrebenar, 1997).

American electoral politics discourages participation by many citizens because they feel that they cannot compete with the “big bucks,” therefore these nonprofits encourage political action among their members and other citizens, and they offer opportunities for individuals to use their skills for civic and political purposes. Nonprofits also organize group action, such as group lobby days, letter writing campaigns, boycotts, public meetings, demonstrations, candidate forums, and voter registration. The personal networks that people develop in nonprofits often motivate them to action. People are also more likely to participate in activities when they are asked by someone they know. Organizations that mobilize voters and organize regular communication with government officials on policy issues offer an influential alternative to money in politics (Boris, 1999).

Groups with constituencies that engage in political action affect what public officials hear, and what public officials hear contribute to what political business gets accomplished. One study found that politicians hear messages differently when they are delivered face to face, a fact that makes low income grassroots advocacy organizations important to decision making (Verba, Scholzman & Brady, 1997, 79). Direct voice and votes are often poor people’s only political resource.

Conclusion

Nonprofit organizations, even public charities, may lobby, though the amount of lobbying permitted may be limited. Further restrictions apply to lobbying with federal or foundation funds. Nevertheless, much public advocacy is not considered lobbying under the IRS rules, either because it does not fit the definition of lobbying or because it meets a recognized exception. By better understanding the rules applicable to lobbying,

nonprofit organizations working to improve the public's health can maximize their effectiveness while minimizing the possibility of endangering their nonprofit status. In addition, nonprofits can be in a better position to appreciate the impact of any proposed new restrictions on their lobbying.

According to Walker (1983) nonprofit advocacy has grown at about double the rate of private advocacy over the past two decades. Nonprofit advocacy has been strengthened by the decline in public confidence. Yet it is also true that the adversarial attacks of some of the nonprofits may have helped sustain the confidence gap in the late 1970's by hastening the decline of political parties, identifying more political scandals, and heightening political awareness of gaps between promise and performance (Powell, 1987). In spite of the rapid growth of nonprofit advocacy, private for profit advocates continue to dominate the national pressure system. Yet nonprofit advocacy is still healthy and prosperous and does not appear to be endangered. If there was an overload, it would seem to be rooted in the dominance of the special interests rather than in the excess of nonprofit advocacy.