

LAW MEMO

Nonprofit Lobbying Regulations

When can a nonprofit legitimately participate in political activities? This is one of the questions being asked now that budget shortfalls are seriously threatening state arts council funding in Missouri and Illinois.

The new administration in Illinois is facing a \$5 billion deficit. In Missouri, Gov. Bob Holden wants to fund the arts council by dipping into the corpus of its trust fund. Both states have many new legislators who may not be familiar with the important work of the arts in their districts.

Can your organization speak up without threatening its tax-exempt status? For IRS

Contrary to what some believe, 501(c)(3) organizations can become involved in legislative efforts without risking their tax-exempt status.

purposes, legislative activities and political activities are completely different and are subject to two distinct sets of rules. This issue of *Arts Law Memo* explains the restrictions. It also summarizes a recent report on the unprecedented budget gaps being faced by nearly every state and shows how the fiscal problems have impacted state arts councils.

POLITICAL CAMPAIGNS

To secure and maintain its tax-exempt status, your organization is absolutely forbidden from participating in a political campaign, endorsing or opposing candidates for public office, collecting or distributing money on behalf of a political candidate, or giving or selling their mailing lists to political candidates.

Some election-related activities are permitted, as long as they are even-handed. Permitted activities include educating voters by distributing candidates' voting

records or responses to questionnaires and sponsoring debates between candidates.

Individuals, including officers and directors, have the right to engage in political activities, but only as private citizens.

LOBBYING

While the rules prohibiting participation in elections are straightforward, those governing lobbying and advocacy are complex and subject to interpretation.

As defined by the IRS, lobbying is communication that is intended to influence legislation — national, state or local.

Judicial and administrative or executive agencies are not considered legislative bodies, so it is permissible to urge your local school board to adopt arts education curricula or to file an amicus brief with the Supreme Court.

Efforts to influence legislation include communications with members of legislative bodies ("direct" lobbying) and indirect communications through the electorate, known as "grass roots" lobbying.

Tax-exempt organizations are not allowed to engage in direct or grass roots lobbying to any "substantial" extent, unless they have made what is known as the 501(h) "safe harbor" election. In addition, recipients of some federal grants may be prohibited from using those funds for lobbying purposes.

SUBSTANTIALITY TEST

So, when are attempts to influence legislation considered "substantial"? Unfortunately, the IRS has never defined "insubstantial" in this context or identified a percentage safe harbor.

In one frequently cited case, *Seasongood v. Commissioner* (1955), the court ruled that less than 5 percent of time and effort is not substantial; in *Haswell v. U.S.* (1974), the court ruled that 16 to 17 percent of a budget was substantial.

But in other cases, the courts have rejected tests based solely on a percentage of the organization's budget. For example,

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
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- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
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- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national volunteer lawyers for the arts network.

This issue was written by Sue Greenberg, VLAA's executive director. Special thanks to volunteer attorney Lisa D. McLaughlin.

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in *Donald T. Regan v. Taxation With Representation of Washington* (1983), the court held that the prohibition against lobbying by charities does not violate the First Amendment or the Fifth Amendment due process clause.

The inability to predict with confidence what is permissible has caused many nonprofits to avoid lobbying activities. This approach seems overly cautious.

For most arts organizations, lobbying is rarely expensive or time consuming. It involves minimal printing and mailing costs and some staff time devoted to making phone calls, writing letters and visiting legislators — small investments that are not likely to approach a level of spending that would raise a red flag at the IRS.

Finally, certain activities are not considered lobbying at all, so they are not subject to the “substantial” test. Permitted activities include:

- Communicating with audiences or the public to educate them about pending legislation (as long as it does not include a specific call for action).
- Organizing or attending workshops on how to lobby (if they do not focus on specific legislation).
- Providing technical advice or expert testimony to a governmental body (in response to a request).
- Inviting legislators or their staff members to attend your organization’s programs or visit your facility.
- Making the results of nonpartisan research available to legislators.
- Advocating for broad issues without mentioning specific legislation.

501(h) ELECTION

The 501(h) “safe harbor” election, which was instituted in 1976, allows organizations to replace the vague substantiality test with a concrete standard based on actual lobbying-related expenditures.

But very few organizations have made the safe harbor election, primarily because it is rumored to trigger IRS audits. As of 1998, only 1,510 out of a total 734,000 501(c)(3) charitable organizations had made the 501(h) election.

What kind of lobbying is permitted?

Lobbying is an any attempt to influence local, state or federal legislation. A public charity may engage in lobbying, but only if those activities do not constitute a “substantial” portion of its activities. Within reason, permissible lobbying activities would include:

- Writing to your legislators on organization letterhead.
- Calling long distance at your organization’s expense.
- Taking a carload of people to your state capitol or Washington, D.C. and getting reimbursed for mileage.
- Organizing a letter-writing or phone campaign.
- Attending meetings to plan a legislative strategy or develop the substance of legislation.
- Doing research or other analysis that you will use for lobbying purposes.
- Attending legislative sessions or giving advice on the legislation being discussed.
- Responding to phone call regarding specific legislation, explaining whether your organization is for or against it or outlining a strategy for action.

What limits are placed on lobbying activities?

- You must be able to show that all lobbying activities fall within your organization’s general charitable purposes and that lobbying is not your organization’s primary function.
- You cannot coerce employees or anyone else to lobby.
- Courts have generally interpreted “not substantial” to mean spending less than 5 percent of your organization’s annual expenditures on lobbying. Periodic letters and telephone calls to legislators or a few members of the public asking for action on a bill will certainly fit within this requirement, even for small organizations.

Source: Children’s Defense Fund, Lobbying and Political Activity for Nonprofits

State Budgets Under Siege

The numbers are grim and getting grimmer. State budget gaps have grown by 50 percent in the last two months, and state policy makers are facing unprecedented budget shortfalls for the next 15 months, according to a report released last month by the National Conference of State Legislators.

The survey reports that two-thirds of the states must reduce their budgets by nearly \$26 billion between now and June 30. The news gets worse for FY04 because state legislatures will face even wider gaps.

Only Arkansas, New Mexico and Wyoming are predicting no shortfalls for 2004. California and New York have the bleakest outlooks, followed by New Jersey, Texas and Illinois.

“State budgets are under siege,” the report says. “The faltering national economy, declines in the stock market, contractions in the manufacturing and high-tech sectors and soaring health costs have combined to undermine the stability of state budgets.”

The shortfalls are at the highest levels since World War II.

Medicaid spending has been cut in 13 states, higher education in 12, and nine states have cut elementary and secondary education and corrections spending. Twenty-nine states have adopted cuts in every program.

Across the country, state arts councils are taking major hits. New Jersey's governor has completely defunded the \$38 million arts council in his budget. Arizona is proposing zeroing out funding for its state arts agency as is Oregon.

A 62 percent cut in Massachusetts is already impacting organizations there. California state budget cuts will mean a 50 percent drop in grants to arts groups statewide, from \$16.4 million to about \$8 million. Virginia's arts council is bracing for a 45 percent cut and, in Washington state, the governor is recommending a 39 percent reduction. New York and Minnesota also are proposing substantial cuts.

State Arts Agency Appropriations, Fiscal Years 2002 & 2003 and Per Capita Spending Rank Fiscal Year 2003

State	Legislative Appropriation including line items		Percent Change FY02 to FY03	Per Capita Rank
	FY02	FY03		
Alabama	5,704,653	5,346,596	-6.3%	24
Alaska	457,400	460,000	0.6%	16
Arizona	4,140,105	4,042,740	-2.4%	36
Arkansas	1,966,843	1,435,979	-27.0%	41
California	43,399,000	21,378,000	-50.7%	42
Colorado	1,860,417	1,141,947	-38.6%	49
Connecticut	12,301,847	10,189,242	-17.2%	1
Delaware	1,657,600	1,648,900	-0.5%	4
Florida	32,833,356	30,042,433	-8.5%	15
Georgia	5,176,841	4,679,973	-9.7%	44
Hawaii	6,370,207	6,297,396	-1.1%	2
Idaho	1,017,400	885,800	-12.9%	30
Illinois	19,568,900	18,957,300	-3.1%	19
Indiana	3,673,094	3,378,717	-8.0%	43
Iowa	1,597,824	1,259,329	-21.2%	45
Kansas	1,649,406	1,584,914	-3.9%	39
Kentucky	3,971,900	3,984,000	0.3%	29
Louisiana	5,196,440	4,913,513	-5.4%	27
Maine	822,200	707,396	-14.0%	33
Maryland	13,554,113	12,082,772	-10.9%	10
Mass.	19,144,688	7,294,921	-61.9%	22
Michigan	26,933,600	23,681,700	-12.1%	8
Minnesota	13,118,000	12,596,000	-4.0%	6
Mississippi	2,122,086	1,766,770	-16.7%	14
Missouri	6,180,244	3,911,281	-36.7%	40
Montana	331,928	334,095	0.7%	13
Nebraska	1,440,556	1,229,822	-14.6%	31
Nevada	1,426,559	1,439,917	0.9%	32
New Hamp.	651,417	646,840	-0.7%	34
New Jersey	22,740,000	18,613,000	-18.1%	11
New Mexico	1,968,500	1,882,010	-4.4%	23
New York	51,493,500	51,473,500	0.0%	7
N. Carolina	6,025,242	5,694,532	-5.5%	38
North Dakota	491,214	480,899	-2.1%	17
Ohio	14,668,902	13,321,228	-9.2%	25
Oklahoma	4,475,313	4,182,110	-6.6%	20
Oregon	1,121,797	1,121,797	0.0%	48
Pennsylvania	14,000,000	14,000,000	0.0%	28
Rhode Island	2,537,740	2,500,377	-1.5%	3
S. Carolina	4,493,485	4,172,706	-7.1%	26
South Dakota	519,517	526,650	1.4%	18
Tennessee	1,892,700	2,332,100	23.2%	35
Texas	5,743,976	5,624,829	-2.1%	50
Utah	3,015,000	2,590,900	-14.1%	21
Vermont	564,206	517,206	-8.3%	9
Virginia	4,880,239	3,869,054	-20.7%	46
Washington	2,844,821	2,855,356	0.4%	37
West Virginia	2,527,017	2,716,895	7.5%	5
Wisconsin	2,576,200	2,455,200	-4.7%	47
Wyoming	426,275	425,044	-0.3%	12

Source: National Assembly of State Arts Agencies, December 2002

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RESOURCES ON THE WEB

State Advocacy Organizations

Illinois Arts Alliance (www.artsalliance.org) advocates for greater support for the arts, increases public awareness that the arts are essential to society and fosters a climate in which the broadest spectrum of artistic expression can flourish freely.

Missouri Citizens for the Arts (www.missouricitizensforthearts.org) advocates on behalf of public funding for the Missouri arts industry. It organizes the state's arts advocacy network, coordinates Citizen Days at the Legislature, sponsors a biennial dinner for freshmen legislators and contracts with a lobbyist who provides year-round representation of the arts agenda in Jefferson City.

From the IRS

Extensive papers on election year and lobbying issues are posted on the Internal Revenue Service web site (www.irs.gov). Both are by Judith E. Kindell and John Francis Reilly.

Policy Report

"Policy Partners: Making the Case for State Investments in Culture," published by the Pew Charitable Trusts in July 2002, highlights policy victories in 10 states where line-item appropriations, taxes and other funding mechanisms have been used to support the arts, humanities, historic preservation and folklife. The report focuses on coalition building that brings together the interests of public and private, cultural and non-cultural groups and agencies. It can be downloaded from www.pewtrusts.com.