Advising Nonprofits on Lobbying Laws

Don't Be a Reason 501(c)(3)s Sit Silent on the Sidelines

By Morgen Cheshire

The passage of Act 127 in 2022 was a prudent legislative response to a perplexing (some may even say absurd) situation. Although the enactment of Act 127 was not driven exclusively by nonprofits and did not exclusively impact nonprofit service providers, it was a big-win reminder that nonprofits do have lobbying leverage, even when their budgets are lean — and that nonprofits can lose out when they sit silent on the sidelines and don't self-advocate. When they don't engage in lobbying, nonprofits not only miss out on opportunities for more impactful collaboration, additional funding and legislative reform in support of their missions, but, as the origin story of Act 127 tells, their silence could also be causing them harm.

As fiduciaries and service providers of nonprofits, lawyers are uniquely positioned to help identify and understand the detrimental impact of these threats and missed opportunities.

Lawyers also have the skills to empower nonprofits so that they may fully exercise their lobbying rights and leverage their resources to advance their charitable purposes without running afoul of lobbying laws.

And yet, attorneys tend to be overly cautious when advising charities, warning them to tread lightly when engaging in lobbying rather than showing them how far they can go.

By understanding lobbying laws and how much latitude they afford, and by connecting nonprofits with the right resources, lawyers can change outcomes for the nonprofits they advise — and can make a profound difference in the health and impact of Pennsylvania's nonprofit sector and the communities they serve.

Act 127's origin story was that certain government agencies (namely, county agencies and municipal government entities), which tend to have Goliath-like negotiating power because they are a significant revenue source for social service providing organizations (many of which are nonprofits), were able to contractually shift their liability for their own negligent acts to the service providers they rely on to provide services for children, youth and families.

For the social service providing organizations affected by these liability-shifting contractual provisions, this situation presented an untenable risk, as these organizations faced higher insurance premiums, the fear of losing coverage and liability risk for acts and omissions of government employees outside their control.

In response, the Pennsylvania Council of Children, Youth & Family Services (PCCYFS), which works on behalf of social service providing organizations, engaged in an advocacy effort to prevent the harm these unfair contractual provisions could cause its members.

Now, thanks to Act 127's borrowed provisions from laws governing construction contracts, any indemnification provisions in certain service contracts that force service providing entities (many of which are nonprofits) to indemnify a county agency or municipal government entity for the county agency's or municipal government entity's own negligence are no longer legal. Under the new

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67 Pa C.S. § 8102, these liability-shifting provisions are now void and unenforceable. To be clear, although this amendment only addresses certain types of county agency or municipal government entity service contracts, it is a meaningful change.

It's concerning that this situation arose in the first place and that social service providing nonprofit organizations, which help fill gaps where government agencies fall short, had to expend their scarce publicly sourced dollars to undertake efforts to hold government agencies accountable for their own acts of negligence. It's also concerning that an alliance for social service providing organizations carrying out government-contracted services had to make a legislative push for something so common and courteous as a contractual mutual indemnification clause and that legislative intervention was ultimately required.

But this is not an uncommon situation, as nonprofits in other states, which have yet to pass laws like these, are encountering similar troubles.

Such as it is, this situation and the subsequent push for and passage of Act 127 is a reminder of how essential it is for nonprofits to self-advocate and to have a voice in shaping legislation — and that part of a nonprofit's purpose is to identify issues and address them to better respond to community needs.

And yet, too few nonprofits engage in advocacy and lobbying efforts.

While the sector celebrates PCCYFS's success as a national leader in this effort, as lawyers in the service of the nonprofits, we need to be asking: Are the organizations we advise investing enough in long-term systemic change? And how can we use our skills as lawyers to better support — and at the very least, not impede — this often-avoided, critical work of nonprofits?

Most Nonprofits Don't Lobby — Are Lawyers Part of the Problem?

Although they have a constitutional right to lobby, according to the National Council on Nonprofits, less than 3% of nonprofits lobby to advance their missions, compared to 100% that have the legal right to do so. Presumably, this is because nonprofits are spread thin and are preoccupied with their day-to-day needs and may not feel that they have financial reserves and staff capacity for lobbying. Some nonprofit leaders could also be daunted, as the thought of changing laws can be overwhelming. Despite knowing that such efforts could significantly impact how an organization is able to carry out its mission, it may seem too remote and too long term an investment with too uncertain an outcome to invest in systemic legislative change.

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Another reason for abstention is that "folks don't have a clue how to do it," says Pat

Libby, one of the nation's leading lobbying experts and the author of *The Empowered Citizens Guide: 10 Steps to Passing a Law that Matters to You* (March 2022, Oxford University Press).

But, as some in the sector are alluding to — and others are saying outright — lawyers could also be a key reason nonprofits are holding back and are underinvesting and under-engaging in advocacy.

Libby calls out two other common barriers: "nonprofit leaders don't know that it's 100% legal … and they aren't familiar with the easy-to-understand legal rules that govern nonprofit lobbying activity." These are obstacles lawyers could help organizations overcome.

Others in the sector are more pointed with their criticism and warn that lawyers are part of the problem. While most lawyers (prudently) take a preventative approach when asked for advice about how to comply with laws, especially when laws are unclear, advocacy leaders in the nonprofit sector are critical of this approach because they believe it has a chilling effect on the work of nonprofits and can ultimately cause organizations harm and undermine the efficacy of their work.

Bob Smucker, the former vice president for government relations at the Independent Sector and author of the second edition of *The Nonprofit Lobbying Guide* (published in 1999 by the Independent Sector), warns that "attorneys almost always err on the side of extreme caution in counseling nonprofits about lobbying." His authoritative and helpful lobbying guide underscores his oft-repeated message: Nonprofits need not fear the limitations, as they have "plenty of legal latitude for lobbying without jeopardizing their tax-exempt status."

Similarly, an impact report published in 2019 by the National Council of Nonprofits warns charities of overly cautious legal advice and encourages organizations that are met with resistance from their attorneys to educate their lawyers about lobbying laws "if they're trying to … hold you back on the passive sideline."

The National Council of Nonprofits also separately sends a clear directive to lawyers: "be informed: don't trample on your clients' constitutional rights."

Given that a lot of lawyers serve on nonprofit boards and tend to have a significant voice, this is worthy criticism, and a shift in approach could make an impactful difference.

An underlying issue may be that few lawyers are well acquainted with the lobbying laws that apply to 501(c)(3) public charities, and aspects of these laws truly are somewhat dense, murky and complex — and they involve math, which makes many lawyers uneasy. But these are not legitimate reasons to advise nonprofits to tread lightly, especially when nonprofits are not coming anywhere statistically close to the line of what constitutes an impermissible amount of lobbying under these rules.

If the role of lawyer is to advocate and empower, we're clearly not doing our part when it comes to advising nonprofits about lobbying if national leaders are vocally proclaiming that lawyers are part of the problem and if advocacy consultants are taking it upon themselves to develop materials that help organizations decode and follow the rules.

Are we so daunted ourselves? Instead of approaching these laws with timidity, we ought to be lifting up this work and encouraging the organizations we serve to engage in advocacy and lobbying if they so desire, and we can do our part by easing their fears, connecting them with the right resources, simplifying the complexity, reminding them of the basic rules and advising them to check back in when questions arise and when they want to do more than the limitations allow.

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Knowing the Right Resources (many of which are referenced here) is a Helpful Start

Having awareness and some basic knowledge of the law can also help quell fears.

The National Council of Nonprofits reminds us that the highest performing nonprofits engage in direct service, but also engage in advocacy and lobbying initiatives. BoardSource, a preeminent leader in nonprofit board leadership development, echoes this message and is collaborating with other leaders in the sector to drive an industry-standard expectation that board members engage in some form of advocacy in support of the organizations they serve: "To be passionate, articulate and effective champions for their missions, board members need to be well informed of public policy issues that affect their organizations. They also need to be educated about the board's role in advocacy and provided appropriate support and resources to become ambassadors for their organizations."

For lawyers serving as board members on nonprofit boards, it's time to brush up.

Understand Just a Few Basic Lobbying Rules (Psst … 501(c)(3)s are generally nowhere near exceeding the limits)

Under the U.S. Internal Revenue Code, Section 501(c)(3), public charities are not prohibited from lobbying and, in fact, it's their constitutional right to engage in activities to influence legislation, but one condition of receiving 501(c)(3) status is that no substantial part of an exempt charitable organization's activities can be that of carrying on propaganda or otherwise attempting to influence legislation.

Since the 1934 enactment of the federal lobbying limitation, organizations (and the legal sector) struggled to understand the limits — mostly because no one knew the meaning of "no substantial part." Congress responded in 1976, and updated regulations followed in 1990, to offer a bright-line test for determining if a Section 501(c)(3) public charity is engaging in a permissible amount of lobbying. Organizations are now either subject to the old default rule, the Substantial Part Test (which is a murky one) or they can choose (by making an "election") to be measured by the Expenditure Test (which evaluates whether the dollar amount of an organization's lobbying expenditures exceeds certain spending limits). This election — called the "h" election because it is codified in Section 501(h) of the code — is only available to qualifying public charities and is not available to private foundations and churches.

The Expenditure Test is helpful for the clarity it provides and is good enough for most public charities; organizations that have a lot of grassroots lobbying and expenses related to that type of lobbying tend to stick with the Substantial Part Test because the Expenditure Test caps the amount that can be spent on grassroots lobbying.

Quick Overview of the Expenditure Test

The Expenditure Test provides a bright-line numbers test, which involves recordkeeping and doing some basic math. Succinctly put, this test allows eligible 501(c)(3) public charities to annually spend on lobbying a certain percentage of the amounts they are spending to carry out their exempt purposes (i.e., program expenses but not investment management and certain fundraising costs).

There are two ceilings as part of the Expenditure Test: one on total lobbying (i.e., direct and grassroots lobbying), and another specifically limiting how much of the total lobbying can be comprised of grassroots lobbying expenditures. See the chart on the right, illustrating these two ceilings and how they relate.

Grassroots lobbying refers to broad public outreach (i.e., not just to members) and an attempt to affect the opinions of the general public or any segment thereof regarding legislation. By contrast, direct lobbying includes communications by the organization directly to legislators and their staff and to executive branch employees who participate in the making of legislation (or by the organization to its members urging them to contact these public officials).

Organizations making the "h" election are permitted to do more direct lobbying than grassroots lobbying, so if an organization does mostly grassroots lobbying — and incurs considerable expenses to do so — it will likely not want to make the "h" election.

Even with these limitations, that's a healthy annual lobbying allowance, considering most qualifying Pennsylvania public charity nonprofits have annual income that does not exceed $500,000. Being able to spend on lobbying 20% (or somewhere close to 20%) of the amount that the organization spends on its exempt-purpose activities isn't a meager allowance, especially when considering that — at least for the federal limitation — most of what we might think of as "lobbying" is not really lobbying and is

Exempt-purpose expenditures	Total Allowable/Nontaxable Lobbying Expenditures (including any grassroots lobbying)	Amount of Allowable/ Nontaxable Grassroots Lobbying (within the Total Lobbying Expenditures Limit)
≤ $500,000	20% of the exempt purpose expenditures	One-quarter
> $500,00 but ≤ $1 million	$100,000 + 15% of the excess of exempt purpose expenditures over $500,000	One-quarter or, in other words, $25,000 + 3.75% of excess over $500,000
> $1 million but ≤ $1.5 million	$175,000 + 10% of the excess of exempt purpose expenditures over $1 million	One-quarter or, in other words, $43,750 + 2.5% of excess over $1 million
> 1.5 million but ≤ $17 million	$225,000 + 5% of the exempt purpose expenditures over $1.5 million	One-quarter or, in other words, $56,250 + 1.25% of excess over $1.5 million
> $17 million	$1 million	One-quarter, up to $250,000

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instead considered advocacy, which is not captured by the Expenditure Test.

Organizations can make an "h" election to have their lobbying activities measured by the Expenditure Test by filing the super simple one-page IRS Form 5768. It's a lifelong election, so there's no need to renew it. The election can be filed at any time, but it does not take effect until it is filed; and when filed, it applies to the tax year in which it is filed and to all subsequent tax years until it is revoked. The election can be revoked using this same form, though the filing deadline for revocation is before the first day of the tax year to which the revocation applies. Organizations that revoke the election can make it again if they choose to do so.

Regardless of whether they make the "h" election, public charities that lobby must report both the actual and permitted amounts of lobbying expenditures (for direct and grassroots lobbying) on Schedule C of their IRS Forms 990 (or IRS Forms 990-EZ). Schedule C has a section for filers that have made the "h" election and another for those that have not. If an organization does not elect to have its lobbying activities measured by the Expenditure Test, expenditures still likely inform the IRS's determination of whether the organization's lobbying activities are substantial. Organizations must use IRS Form 4720 to report any excise taxes on excess lobbying.

Lots of Exclusions

Many expenditures that might intuitively seem like lobbying are, in fact, not considered lobbying activities — at least under the federal rules. For example, lobbying conducted by volunteers is only considered lobbying if expenditures are made (e.g., to reimburse for travel expenses or to pay for expenses related to conducting a rally). A nonprofit's communications with its members — if it does not urge them to take action to lobby — is not lobbying, even if the nonprofit voices its position to its members. Providing technical advice and taking a position on pending legislation in response to a written request from a legislative body is also not lobbying. A nonprofit organization making available the results of nonpartisan analysis, study or research on a legislative issue, is likewise not lobbying; the work product can even take a position on the merits of proposed legislation if it does not contain a call to action (e.g., encouraging readers to contact their legislators) and is a sufficiently full and fair exposition of the pertinent facts to enable the audience to form an independent opinion (and notably, the work product need not be neutral or objective to meet this test). These are just a few of the exclusions. For easy-to-read summaries on what does and does not constitute lobbying, see the sources mentioned in this article.

Federal Lobbying Disclosure Law

The federal Lobbying Disclosure Act requires organizations to register and report their federal level lobbying activities, but this law is not applicable to organizations that have only occasional federal lobbying activities. The act's thresholds require filings only from organizations with sustained federal lobbying activities and expenses.

Pennsylvania and Local Lobbying Laws

Pennsylvania has its own lobbying rules that apply to grassroots and direct lobbying, but these rules don't set limits as the federal tax rules do; instead, like the federal

Lobbying Disclosure Act, Pennsylvania law requires that organizations make public disclosures and that organizations (and individuals) register and report lobbying expenditures on a quarterly basis, generally if in any quarter such expenditures exceed $3,000. Pennsylvania's definition of lobbying activity is very broad and not completely aligned with federal laws, but compliance with both the federal and Pennsylvania laws requires a solid recordkeeping and expense tracking system. For guidance on keeping these records — "the least appreciated, most important thing" — see the Alliance for Justice publication "Keeping Track: A Guide to Recordkeeping for Advocacy Charities," by John Pomeranz, available on Bolder Advocacy's resource library. See also Bolder Advocacy's sample time sheets.

The Pennsylvania-specific practical guide to lobbying published by Bolder Advocacy in partnership with the Democracy Capacity Project is a great place to start, as it calls out key points in Pennsylvania's law and explains how Pennsylvania's law differs from the federal rules. This guide doesn't get into Philadelphia and Pittsburgh laws or the laws of other local jurisdictions, but it notes that these lobbying laws also require registration and reporting and that regulation in local jurisdictions is on the rise, as there is an ongoing movement to enact additional local county- and municipal-level lobbying regulations.

Bolder Advocacy also has a free Technical Assistance Hotline and additional resources available in the robust resource library on its website, www.bolderadvocacy.org.

A Call to Action

While many nonprofits choose to hire professional contract lobbyists, as they should, especially when a matter is of great concern, an organization doesn't have to spend money or hire a lobbyist to engage in advocacy and lobbying activities that can create systemic change. Here are some simple steps you can take to help the nonprofits you serve:

- Encourage nonprofits to become members of the Pennsylvania Association of Nonprofit Organizations (PANO) for updates and engagement opportunities and identify other mission- and value-aligned associations (such as PCCYFS) that advocate and lobby for the interests of their nonprofit members.

- Subscribe to the National Council of Nonprofit's free biweekly e-newsletter, *Nonprofit Champion* (formerly *Nonprofit Advocacy Matters*), for updates about federal, state and local policy matters of concern to most nonprofits.

- Engage in planned and coordinated advocacy opportunities on behalf of the nonprofits you advise: speak to journalists about a community problem, recruit volunteers, visit elected officials to share data about the nonprofit's successes and positive impact, attend an advocacy day at the state capitol to build relationships, share stories from the front lines with public officials, write an op-ed, etc.

- Check out how-to lobbying guides, like Pat Libby's *The Empowered Citizens Guide: 10 Steps to Passing a Law that Matters to You* (Oxford University Press, 2022) and Bob Smucker's *The Nonprofit Lobbying Guide, Second Edition* (Independent Sector, 1999), which provide roadmaps for effective lobbying campaigns and provide helpful legal summaries.

- Look up your state legislators at https://www.legis.state.pa.us and encourage them to join Pennsylvania's newly relaunched (in June 2023) bipartisan Nonprofit Caucus. The general goals of this caucus are to make it easier for nonprofits to operate in Pennsylvania, provide a venue for nonprofits to convey issues and address nonprofit legislative matters.

- Update nonprofit board service contracts to require board members to engage in advocacy.

- Check out what other organizations are doing and follow their lead. PCCYFS' written advocacy work was wonderfully done, and the beauty is that some (or possibly all) of its involvement in Act 127 may not have even constituted lobbying — at least under the federal law limitations.

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