

THE ART OF ADVOCACY

CAPLAW 2009 National Training Conference

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Seattle, WA

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Handouts:

1. Anita Lichtblau's PowerPoint Presentation
2. Ellen Teller's PowerPoint Presentation
3. OMB Circular A-87 Excerpts on Advertising and PR, Fundraising and Marketing
4. OMB Circular A-122 Excerpts on Advertising and PR, Fundraising and Marketing

■ The Art of Advocacy

2009 CAPLAW Annual Training Conference

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■ What is “Education”?

- Providing information about:
 - CAA and other anti-poverty programs
 - Client demographics
 - Client needs
 - Poverty issues
- To members of the public
- To legislators
- When does education cross the line into advocacy?

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■ What is “Advocacy”? Education plus

- Persuading others, including general public and legislators, of your position on wide variety of issues
- Influencing a decision
- Encouraging action to be taken
- Commenting on proposed regulations
- When does advocacy cross line into lobbying?

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What is Lobbying? Advocacy plus ...

- Attempt to influence introduction, enactment, or modification of legislation, referenda and ballot initiatives
- Some lobbying rules also apply in much broader context, such as all contacts with government officials to influence any government action or policy, including grants and contracts

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Can CAAs, Other Federal Grantees, and other 501(c)3s Lobby?

- Yes!
- Yes!
- Yes!
- Yes!



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Which Lobbying Rules Apply to 501(c)(3) Federal Grantees?

- Internal Revenue Code
- OMB Circular A-122
- Federal Appropriations Act restrictions
- Federal Anti-Lobbying Act
- Byrd Anti-Lobbying Amendment
- Some individual federal program laws
- Individual grant or contract terms
- Federal and state lobbying registration rules

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Rules for Public Grantees

- Same as previous, except:
 - IRS 501(c)(3) rules don't apply
 - OMB Circular A-87 (2 CFR Part 215), not A-122 (2 CFR Part 230)
- Government entity may have additional rules

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Lobbying with unrestricted non-federal funds

- No restrictions on type of lobbying
- Non-federal funds do not include required matching funds or program income
- Amount subject to IRS limitation:
 - Must not be a substantial part of organization's activities; or
 - 501(h) election dollar limits

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Non-Lobbying Advocacy with Federal Funds

- Education re issues and programs, not specific legislation
- Advocacy re administrative regulations
- Advocacy re other non-legislative issues, such as accessible transportation or opening grocery stores in neighborhood

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2009 Appropriations Act: Government-Wide

- Federal agencies may not use appropriated funds, other than for normal and recognized executive-legislative relationships, for:
 - Publicity or propaganda purposes
 - Preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before Congress
 - Except in presentation to Congress itself

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2009 Labor, HHS, Education Appropriations Language

- Additional restrictions:
 - Ban on use of funds for propaganda or publicity purposes applies to state legislatures too
 - May not use funds to pay salary or expenses of any grant or contract recipient, or agent acting for such recipient
 - Related to any activity designed to influence **legislation or appropriations** pending before the Congress **or any State legislature**.

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2009 Appropriations Act: Dept. Of Energy

- DOE funds:
 - No lobbying on pending federal legislation or appropriations
 - No limits on state legislation or proposed, but not pending, federal legislation

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Federal Anti-Lobbying Act

- 18 U.S.C. 1913; expanded in 2002
- Unless authorized by federal statute, appropriated funds may not be used for activities intended to influence any government official on:
 - legislation, law, ratification, policy, or appropriation
 - now applies to local, state, and federal legislation, etc.
- Civil Penalty: \$10,000 - \$100,000
- Scope of current law unclear
 - But DOJ takes position that it applies to federal grantees, not just federal employees
 - May override OMB Circular exceptions

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OMB Circular A-122 Legislative Lobbying Restrictions

- Cannot use federal funds to influence introduction, enactment, or modification of **federal or state** legislation through:
 - communications with federal or state legislators or their staff
 - influencing state or local officials to lobby
 - communications with government officials or employees re signing or vetoing bill
 - grassroots lobbying
 - legislative liaison activities

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Exceptions to A-122 Ban on Legislative Lobbying Rule

- Influencing state legislation to reduce cost, or to avoid impairment of agency's authority to perform, grant
- Any activity specifically authorized by statute to be undertaken with grant funds

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Another Exception to OMB A-122 Lobbying Rule

- Technical and factual presentation of information to legislators
 - Topic must directly relate to grant performance
 - Through hearing testimony, statements or letters to Congress or state legislature, committee, member, or staff member
 - In response to documented request
 - Readily obtainable information
 - Travel, lodging, and meals are unallowable except for regularly scheduled Congressional hearing per written request of Chair or Ranking Minority Member

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OMB A-122 Executive Lobbying Restriction

- No federal funds for “improperly influencing” federal executive branch employee on sponsored agreement or regulatory matter
- “Improperly influence” means attempting to influence on basis other than merits of matter
- “Sponsored agreement” includes all federally funded grants and contracts

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OMB A-122: General Requirements

- Even if a cost falls within exception to OMB A-122’s lobbying rule, it may not be charged to a federal grant unless it is also:
 - Within grant purposes, not prohibited by grant terms
 - Reasonable
 - Allocable
 - Treated consistently with costs for other programs
 - Documented
 - In accordance with generally accepted accounting principles

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■ OMB A-87 Lobbying Rule

- Costs of membership in organizations substantially engaged in lobbying are unallowable
- Same prohibition on grant-related lobbying and executive lobbying restriction as in A-122
- No other provisions re lobbying

■ Corporation for National and Community Service Programs

- Foster Grandparents, RSVP
- No program funds may be used to influence passage or defeat of legislation or initiative petitions, except:
 - When legislative body, committee of that body, or member of that body asks program volunteer or employee to draft, review, or testify re bill; or
 - Re authorization or appropriations bill directly affecting operation of program

■ Does the Older Americans Act Authorize Legislative Lobbying?

- No!
 - Though the OAA gives area and state agencies a very active advocacy role, restrictions on lobbying with federal funds still apply.

■ Other Related Cost Restrictions

- Advertising and public relations
- Fundraising
- Selling and marketing
- See excerpt of these provisions from 2 CFR Parts 215 (State and local govt) and 230 (nonprofits)

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■ So how do we lobby?

- Set aside unrestricted non-federal funds to pay or reimburse lobbying costs, including appropriate share of both direct and indirect salary and expenses
- Use board members and volunteers
- Employees conduct lobbying on own time without use of CAA resources
- Keep records of lobbying activities, costs, and either source of funding or fact that no funding was used

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■ Lobbying by Employees

- Employees may engage in any type of lobbying on their own time without use of federally-funded facilities
 - But can't ask non-exempt employees to volunteer or even accept volunteer time of such employees if similar to paid duties
 - If employee engages in a lobbying activity during work time that is not permissible with federal funds, agency should reimburse federal funds for time, expenses out of non-federal funds

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■ Lobbying by Board Members

- Non-employee board members may conduct any type of lobbying, so long as federal funds are not used to support effort
- If board member lobbies on behalf of CAA, it is counted toward IRS lobbying limitation, unless CAA elects under 26 USC 501(h)

■ Recordkeeping

- Keep records of lobbying expenditures to show non-federal funding source
- If no costs incurred, be able to back that up (e.g. records reflect activity by volunteer or time card shows done on lunch hour)
- Keep records (letters, etc.) to establish that activity falls within one of lobbying exceptions

■ Recordkeeping, continued

- Records need to be kept of expenses as well as employee time (logs, time cards or activity reports)
- May not include unallowable lobbying costs in indirect costs, but must disclose separately as direct charges in indirect cost rate proposal and allocate indirect costs to those direct charges
- Keep records to answer question on IRS Form 990

Tax Code Lobbying Limitations on 501(c)(3)s

- 501(c)(3) may lobby, but no substantial part of its activities may involve attempting to influence legislation
 - “Substantial” may mean as little as 5% of budget
 - Determination based on the “facts and circumstances”
 - Volunteer lobbying activities are included
- Violations of this rule may result in loss of tax exemption and tax on organization and managers

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Tax Code: Substantial Part Test Lobbying Definition

- Attempt to influence legislation by:
 - Contacting, or urging the public to contact, members of a legislative body for purpose of proposing, supporting, or opposing legislation
 - Advocating adoption or rejection of legislation
- “Legislation” means:
 - Action by Congress, state legislature, or local governing body
 - Action by general public in referendum, initiative, constitutional amendment, or similar procedure

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Substantial Part Test: Nonpartisan Analysis Exception

- Nonpartisan analysis, study, and research, and publication of such study is not considered lobbying
- Analysis may include objective discussion of legislation, full and fair exposition
- Analysis may conclude that legislation is good or bad
- May not contain call to action

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Internal Revenue Code: Expenditure Test

- 501(c)(3)s may elect to be subject to an expenditure test, rather than vague “substantial part” test
 - Sliding scale of permissible expenditures, up to 5% to 20% of total budget, up to \$1 million
 - Regulations define lobbying subject to test

The Choice: Substantial Part vs. Expenditure Test

Substantial Part Test

- No certain and definitely allowable amounts of lobbying expenditures
- One year violation may result in the loss of tax-exempt status
- Additional reporting burden on tax form 990

Expenditure Test

- Clear lobbying definitions
- Definitely allowable amount of lobbying expenditures
- Exceptions to what activities constitute lobbying
- No jeopardy to tax-exempt status for one year violation
- Less reporting burden than substantial part test

Lobby Ceilings Under 1976 Lobby Law

<u>Exempt Purpose Expenditures</u>	<u>Allowable Lobbying Expenditures</u>	<u>Allowable Grassroots Lobbying</u>
Up to \$500,000	20%	25% of Direct
\$500,000 - \$1 million	\$100,000 + 15% of excess over \$500,000	\$25,000 + 3.75% of excess over \$500,000
\$1 mil - \$1.5 mil	\$175,000 + 10% of excess over \$1 million	\$43,750 + 2.5% of excess over \$1 million
\$1.5 mil - \$17 mil	\$225,000 + 5% of excess over \$1.5 mil	\$56,250 + 1.25% of excess over \$1.5 mil
Over \$17 mil	\$1 million	\$250,000

■ 501(h) Election

- If election is made, these are excluded from limitation, even if view on specific legislation is expressed:
 - Nonpartisan analysis, study, or research
 - Communications with members, no call to action
 - Responses to written requests by governmental body for technical advice
 - Self-defense communications

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■ Making the 501(h) Election

- IRS Form 5768, available at www.irs.gov
- Decision as to whether to elect can be made on a year-to-year basis

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■ Grant-Related Lobbying: Byrd Amendment, 31 USC 1352

- Federal funds may not be used in attempt to influence federal employee in connection with awarding of federal grant
- But, federal funds may be used to:
 - Prepare, submit or negotiate bids or proposals
 - Provide specifically requested info
 - Discuss services not related to specific solicitation for federal grant or contract

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Grant-Related Lobbying, Continued

- Provide info prior to formal solicitation
- Engage in technical discussions concerning preparation of unsolicited proposal prior to official submission
- Agencies must report use of nonfederal funds for grant-related lobbying on certification form

NEW Resource: Seen But Not Heard: Strengthening Nonprofit Advocacy



Additional Resources

- www.capl原因.org: Articles , model policies, on political activity and lobbying
- www.npaction.org: an online resource hosted by [OMB Watch](http://www.omb.gov) to support capacity building for nonprofit advocacy
- www.afj.org: Alliance for Justice Non- Profit Advocacy Project: online resources and very user-friendly print publications
- www.irs.gov: read these publications online: *Political and Lobbying Activities* and *Tax Guide for Churches and Religious Organizations*

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Save the dates for

CAPLAW's 2010 National Training Conference

June 16-18, 2010
Savannah, Georgia

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From Community Action to Social Action

Painless Advocacy: How to Incorporate Public Policy Advocacy into Your Day Job

A Case Study for Opportunities in the Upcoming Child Nutrition Reauthorization

Not now – money is tight

- When isn't money tight?
- Where there is a political will - - there is a political way.
- Most program expansions occur during times of economic crisis and a scarcity of resources.

Richard Russell National School Lunch Act, Declaration of Policy

"It is hereby declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs."

42 U.S.C. Sec. 1751 (1946)

Big Picture - The Vision Thing

- Your advocacy efforts and priorities are part of a larger vision for the nation. Find ways to tack-on to priorities that are currently in the national debate.
 - Health Care Reform/Childhood Obesity
 - Out-of-School-time programs
 - Pre-school child care
 - Getting children ready to learn

Eliminate Child Hunger by 2015

1. Feeding and Nourishing America's Children
2. Providing all Poor Children with a Free School Meal
3. Providing Nutrition Assistance throughout the Year
4. Supporting Community-Based Providers

Obama and Biden: Tackling Domestic Hunger, 2008

Totally Painless Advocacy

1. Are your elected officials (Federal, state and local) on your agency's mailing list?
 - Newsletters
 - Reports/Studies
 - Media Clips
 - Outreach/Educational Efforts

"Toe in the Water" Advocacy Options

1. Link up with a organization that is organizing the nationwide effort. FRAC's Child Nutrition Reauthorization Center, www.frac.org.
2. Sign onto the Child Nutrition Forum Statement of Principles for CN Reauth, http://frac.org/Legislative/action_center/statement_principles.htm

3. Organize a Site Visit with Your Elected Officials



Getting your Message Heard From Back Home

4. Staying connected to Washington, DC or your state capital from the comfort of your office –
 - Organize conference calls with your elected officials
 - Make sure you include community partners that will support and reinforce your message and demonstrate broad support for your policy priority

Re-explore your creative self

5. The Visual

- Every picture does indeed tell a story!
Postcard campaigns with digital pictures from agencies and programs back home (with messages from constituents written on the back) are a powerful way to get across a message.
- Scrapbooks/Photo Albums work, too!

Get Real

- Real stories capturing the need for program improvements and expansions
 - Members of Congress want to hear from “real people” or people on the front line delivering services. Hearings in DC and Field Hearings or Town Hall Forums can be organized by Members or coordinated by advocates. If you build it - - they will come!

Reminding You of What you Already Know

- Don't be partisan
- Work collaboratively with others in your community/state in your dealings with elected officials –
 - Don't give your Member an excuse to “sit this one out” (a thing at rest tends to stay at rest)
- Expand your tent – find creative collaborations and unusual partners

“Collaborate and Cut and Paste”

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Excerpts from 2 CFR Part 225, App. B (OMB Circular A-87) on Advertising and Public Relations, Fundraising and Investment Management Costs, and Selling and Marketing

1. Advertising and public relations costs.

- a. The term advertising costs means the costs of advertising media and corollary administrative costs.

Advertising media include magazines, newspapers, radio and television, direct mail, exhibits, electronic or computer transmittals, and the like.
- b. The term public relations includes community relations and means those activities dedicated to maintaining the image of the governmental unit or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.
- c. The only allowable advertising costs are those which are solely for:
 - (1) The recruitment of personnel required for the performance by the governmental unit of obligations arising under a Federal award ;
 - (2) The procurement of goods and services for the performance of a Federal award;
 - (3) The disposal of scrap or surplus materials acquired in the performance of a Federal award except when governmental units are reimbursed for disposal costs at a predetermined amount; or
 - (4) Other specific purposes necessary to meet the requirements of the Federal award.
- d. The only allowable public relations costs are:
 - (1) Costs specifically required by the Federal award;
 - (2) Costs of communicating with the public and press pertaining to specific activities or accomplishments which result from performance of Federal awards (these costs are considered necessary as part of the outreach effort for the Federal award); or
 - (3) Costs of conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary keep the public informed on matters of public concern, such as notices of Federal contract/grant awards, financial matters, etc.
- e. Costs identified in subsections c and d if incurred for more than one Federal award or for both sponsored work and other work of the governmental unit, are allowable to the extent that the principles in Appendix A, sections E. ("Direct Costs") and F. ("Indirect Costs") are observed.
- f. Unallowable advertising and public relations costs include the following:
 - (1) All advertising and public relations costs other than as specified in subsections c, d, and e of this appendix;
 - (2) Costs of meetings, conventions, convocations, or other events related to other activities of the governmental unit, including:
 - (a) Costs of displays, demonstrations, and exhibits;
 - (b) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and
 - (c) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;
 - (3) Costs of promotional items and memorabilia, including models, gifts, and souvenirs;

Excerpts from 2 CFR Part 225, App. B (OMB Circular A-87) on Advertising and Public Relations, Fundraising and Investment Management Costs, and Selling and Marketing

(4) Costs of advertising and public relations designed solely to promote the governmental unit.

17. *Fund raising and investment management costs.*

- a. Costs of organized fund raising, including financial campaigns, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable, regardless of the purpose for which the funds will be used.
- b. Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable. However, such costs associated with investments covering pension, self insurance, or other funds which include Federal participation allowed by this Circular are allowable.
- c. Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subsection C.3.b. of Appendix A to this part.

39. *Selling and marketing.* Costs of selling and marketing any products or services of the governmental unit are unallowable (unless allowed under section 1 of this appendix as allowable public relations costs or under section 33 of this appendix as allowable proposal costs).

Excerpts from 2 CFR Part 230, App. B (OMB Circular A-122) on Advertising and Public Relations, Fundraising and Investment Management Costs, and Selling and Marketing

1. Advertising and public relations costs.

- a. The term advertising costs means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television, direct mail, exhibits, electronic or computer transmittals, and the like.
- b. The term public relations includes community relations and means those activities dedicated to maintaining the image of the non-profit organization or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.
- c. The only allowable advertising costs are those which are solely for:
 - (1) The recruitment of personnel required for the performance by the non-profit organization of obligations arising under a Federal award (See also paragraph 41, Recruiting costs, and paragraph 42, Relocation costs of this appendix);
 - (2) The procurement of goods and services for the performance of a Federal award;
 - (3) The disposal of scrap or surplus materials acquired in the performance of a Federal award except when non-profit organizations are reimbursed for disposal costs at a predetermined amount; or
 - (4) Other specific purposes necessary to meet the requirements of the Federal award.
- d. The only allowable public relations costs are:
 - (1) Costs specifically required by the Federal award;
 - (2) Costs of communicating with the public and press pertaining to specific activities or accomplishments which result from performance of Federal awards (these costs are considered necessary as part of the outreach effort for the Federal award); or
 - (3) Costs of conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary keep the public informed on matters of public concern, such as notices of Federal contract/grant awards, financial matters, etc.
- e. Costs identified in subparagraphs c and d if incurred for more than one Federal award or for both sponsored work and other work of the non-profit organization, are allowable to the extent that the principles in Appendix A, paragraphs B. ("Direct Costs") and C. ("Indirect Costs") are observed.
- f. Unallowable advertising and public relations costs include the following:
 - (1) All advertising and public relations costs other than as specified in subparagraphs c, d, and e; (2) Costs of meetings, conventions, convocations, or other events related to other activities of the non-profit organization, including:
 - (a) Costs of displays, demonstrations, and exhibits;
 - (b) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and
 - (c) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;
 - (3) Costs of promotional items and memorabilia, including models, gifts, and souvenirs;
 - (4) Costs of advertising and public relations designed solely to promote the non-profit organization.

Excerpts from 2 CFR Part 230, App. B (OMB Circular A-122) on Advertising and Public Relations, Fundraising and Investment Management Costs, and Selling and Marketing

17. *Fund raising and investment management costs.*

- a. Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions are unallowable.
- b. Costs of investment counsel and staff and similar expenses incurred solely to enhance income from investments are unallowable.
- c. Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subparagraph B.3 of Appendix A.

45. *Selling and marketing.* Costs of selling and marketing any products or services of the non-profit organization are unallowable (unless allowed under paragraph 1 of this appendix as allowable public relations cost. However, these costs are allowable as direct costs, with prior approval by awarding agencies, when they are necessary for the performance of Federal programs.