



# Effectively Communicating about Public Health in the Context of Policy

*Kathleen Hoke*

Professor

*Mellissa Sager*

Senior Staff Attorney

University of Maryland Carey School of Law

December 13, 2017



## How Laws are Made

1<sup>st</sup> – There is an Idea, a Problem, an Opportunity for Improvement

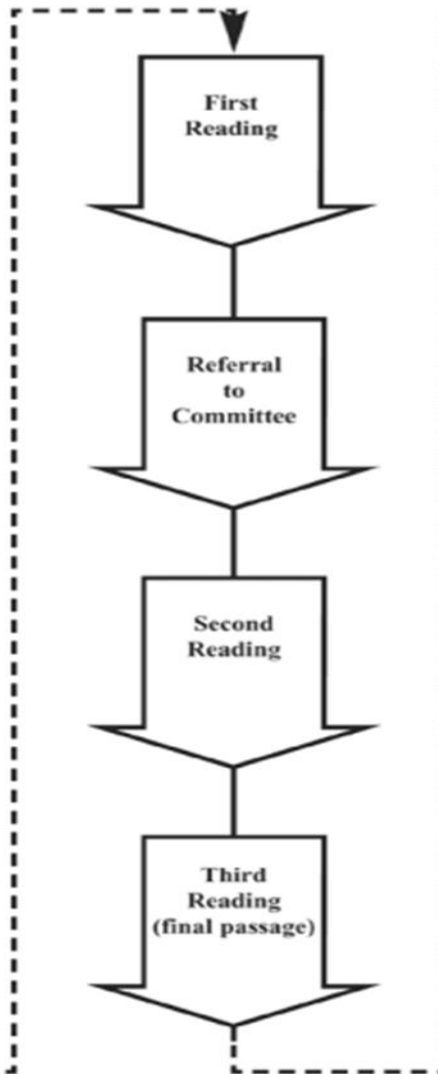
2<sup>nd</sup> – A Bill is Created

3<sup>rd</sup> – The Bill Must Move Through the Legislative Process

**FIRST CHAMBER**



**SECOND CHAMBER**



# First Steps

- First Reading – “Read” by Clerk of House/Secretary of Senate and assigned to Committee
- In Committee – A Fiscal and Policy Note is prepared by DLS and details the impact of state and local government and business. It is good to get information to the bill drafter in advance of this to avoid having to make corrections in the future. Point out errors in testimony

# The Role You Can Play Once a Bill is Filed

- Start Talking with Committee Members
  - In person visits; provide one-pager with your contact information
  - Bring constituents with you
- Start Educating the Public
  - Letters to the Editor/Secure OpEd.
  - Press releases/conferences
- Hearings
  - Little notice
  - Prepare to Testify
  - Testify

# After the Hearing

- May be assigned to a sub-committee to make recommendation to committee; focus on those members
- Follow-up in person and post-hearing one-pager and other written testimony to committee (if necessary—i.e. correct something said in hearing—deliver personally to any member whose question you answered incorrectly or less than adequately or to whom you promised further response)
- Committee Voting Sessions—little notice
- May make amendments; vote on them first—majority rule
- Majority vote (tie does NOT pass): Favorable (with amendments); Unfavorable; No Position (rare); Refer to Interim Study (technically dead)
- *Only favorable (with amendment) passed on to full body*
- *Floor Report Prepared*
  - ***Now you have to visit all members . . .***

# After the Hearing

- Second Reading
- Third Reading
- Amendments (*What if second house amends on cross over or cross filed bills get amended differently?*)
- Presentment to the Governor
- Effective Dates
- Chapter Law

# Request a Copy of Our General Assembly Toolkit

- Available January 2018
- Email Mellissa Sager at [msager@law.umaryland.edu](mailto:msager@law.umaryland.edu)



# Advocacy vs. Lobbying

- How are your activities with the state legislature limited? With Congress? With a local legislative body?
- What is lobbying?
- How is lobbying restricted?
- What is allowed?

## Competing Realities

- Need to promote and protect the public's health
  - Stagnant or shrinking budgets
  - Greater demand than ever for evidence-based solutions
  - Population level change often requires policy change

# Definitions

## Lobbying

“To conduct activities aimed at influencing public officials and especially members of a legislative body *on legislation.*”

## Advocacy

“The act or process of supporting a particular cause or proposal.”

...So what's the difference?

# **While all lobbying is advocacy, not all advocacy is lobbying.**

- Advocacy and lobbying are similar, and the distinction is not always clear.
- There are no formal restrictions on advocacy.
- There are restrictions/rules on lobbying.

# Restrictions on Lobbying

- State Law
- Lobbying Disclosure Act, 2 U.S.C. § 1605
- Anti-Lobbying Act, 18 U.S.C. § 1913
- Internal Revenue Code
- Federal Appropriations Act § 503

## Maryland Law on Lobbying: *Purpose of Regulating*

General Provisions Article §5-102

The General Assembly of Maryland, recognizing that our system of representative government is dependent upon the people maintaining the ***highest trust*** in their government officials and employees, finds and declares that the people have a right to be assured that the ***impartiality and independent judgment*** of those officials and employees will be maintained.

It is evident that this ***confidence and trust is eroded when the conduct of the State's business is subject to improper influence or even the appearance of improper influence.***

# Who is Regulated

General Provision Article Title 5 of the Maryland Code is the source but can be a bit confusing. State Ethics Commission has described those covered in three groups: Legislative Advocacy, Executive Advocacy; Grassroots Advocacy.

We will look at Legislative and Grassroots today.

# Who is Regulated Legislative Advocacy

An entity is required to register as a lobbyist if:

1. The person communicates **in the presence** of an official or employee in the legislative branch or executive branch for the purpose of influencing any legislative action during a lobbying reporting period and  
**incurs expenses of \$500** or more other than for personal travel or subsistence expenses;  
or  
**earns \$2,500 or more** as compensation, from all lobbying employers cumulatively, for all such communication and activities; or
2. The person is **not in-the-presence** of an official or employee but communicates with an official or employee for the purpose of influencing legislative action and **earns at least \$5,000 from all lobbying employers** cumulatively as compensation for all such communication and activities relating to the communication during a reporting period for activities aimed at influencing legislative action.



## Who is Regulated Grassroots Advocacy

The Ethics Law requires registration for any person, group, organization or business entity that **expends \$2,000**, including salaries, contractual employees, postage, telecommunication services, electronic services, advertising, printing and delivery services, in a reporting period for the express purpose of soliciting others to communicate with any official to influence any legislative or executive action.

# Exceptions

General Provisions Article §5-702 provides for five exceptions for:

1. **Appearances as part of the official duties** of a duly elected or appointed official or employee of the State or a political subdivision of the State, or of the United States, and not on behalf of any other entity.
2. Actions of a **member of the news media** to the extent the actions are in the ordinary course of gathering and disseminating news or making editorial comments to the general public.
3. The representation of a **bona fide religious organization** solely for the purpose of protecting the right of its own members to practice the doctrine of the organization.

## Exceptions Cont.

4. Appearances as part of the official duties of an officer, director, member, or employee of an **association engaged exclusively in lobbying for counties and municipalities** and not on behalf of any other entity.
  
5. Actions as part of the **official duties of a trustee, administrator, or a faculty member of a non-profit independent college or university in the State** provided the official duties of the individual do not consist primarily of attempting to influence legislative or executive action.

# Exemptions

The following eight activities are **exempt** from regulation **if the person engages in no other acts for an employer during the reporting period that require registration:**

1. **Appearances** before the **General Assembly** or any committee or subcommittee **at the specific request of the body involved.**
2. **Appearances** before an **executive unit** at the **specific request of the executive unit** involved provided the individual engages in no other acts during the reporting period requiring registration.
3. **An elementary, secondary, or postsecondary school student** or student organization that communicates as **part of a course or student activity** is not subject to the registration requirements based **solely on the \$500.00 expense threshold.**
4. **Appearances** before a legislative committee at the **specific invitation or request of regulated lobbyist** provided no other act is undertaken for which registration is required and provided the witness notifies the committee that the testimony is at the request of a regulated lobbyist.
5. **Professional services in drafting bills** or in advising and rendering opinions to clients as to the construction and effect of proposed or pending legislation where these services do not otherwise constitute activities as a regulated lobbyist.
6. **Appearances** before an executive unit **at the specific request of a regulated lobbyist** if the witness notifies the executive unit that the testimony is at the request of the regulated lobbyist, and the individual engages in no other acts during the reporting period requiring registration.

# Protections/Restrictions for State Employees

***Employment by the State does not affect any right or obligation of a citizen under the Constitution and laws of the United States or under the Constitution and laws of the State.***

Except as otherwise provided in this section or by federal law, a State employee:

- (i) may freely participate in any political activity and express any political opinion; and
- (ii) may not be required to provide any political service.

An employee may not:

- (i) engage in political activity while on the job during working hours; or
- (ii) advocate the overthrow of the government by unconstitutional or violent means.

A public official or an employee of the State may not require any State employee to make a political contribution.

*State Personnel and Pensions Article, §2-304*

# Federal Laws: Two Main Factors

- Nature of Employer
  - Government
  - Nonprofit
- Source of Funds
  - Federal government
  - State or local government
  - Private

# Internal Revenue Code: Non-Profit Organizations

- Limits, but does not prohibit, nonprofits from lobbying
- “In general, no organization may qualify for section 501(c)(3) status if a *substantial* part of its activities is attempting to influence legislation (commonly known as lobbying). A 501(c)(3) may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status.” – IRS website
- What is *substantial*?
  - Case-by-case determination made by time and money spent by organization on lobbying
  - Devoting less than 5% of activities to lobbying is *not* substantial

# Direct Lobbying

## Three Elements:

1. Direct written or oral communication to a legislator, legislative staff, or other government official working on legislation
2. That reflects a view (for or against),
3. Specific legislation.
  - “Specific legislation” = introduced bills, legislative proposals not yet introduced, budget bills, ballot measures, U.S. Treaties and confirmation of appointees



# Grassroots Lobbying

## Four Elements:

1. A written or oral communication to the public (e.g., speeches, ads, op-eds, blog)
2. That reflects a view
3. On specific legislation, and
4. Includes a call to action.

# What constitutes a call to action?

- Asks audience to contact a legislator;
- Identifies a legislator as being the audience's representative;
- Provides legislator's contact information;
- Provides a vehicle for contacting the legislator (e.g., form email, petition);
- Identifies a legislator's position on the legislation as being undecided or opposing the communication's viewpoint;
- Identifies a legislator as sitting on the voting committee; OR
- A paid ad that expresses a view on prominent legislation within 2 weeks of a vote, even if it doesn't contain a CTA.

# Key Points

- Nonprofits are not prohibited from lobbying, but rather limited in the amount they can lobby
- IRS lobbying restrictions expressly limit
  1. Communications
  2. Expressing a view on specific legislation
- Restrictions apply to *legislation* only, meaning Congress, any state legislature, or local legislative body (e.g., board of selectmen)
  - **IMPORTANT:** Does not include executive, judicial or administrative bodies\*
- Nonprofits should consider the 501(h) election
  - Funds may be spent on lobbying within certain limits, up to \$1 million per year
  - Ex.: Up to 20% of the first \$500K in “exempt purpose expenditures” may be spent on lobbying

# **Lobbying Restrictions for Federal Grantees**

# Consolidated Appropriations Act, 2012

In 2011, Congress established clear restrictions on the use of HHS funds, including CDC grant funds, for lobbying and related activities.

Division F, Title V, Section 503

“No part of any appropriation...shall be used:

- (a) For publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, electronic communication, radio, television, or video presentation designed to support or defeat the enactment of legislation before the Congress or any State or local legislature or legislative body...or designed to support or defeat any proposed or pending regulation, administrative action, or order issued by the executive branch of any State or local government.
- (b) To pay the salary or expenses of any grant or contract recipient, related to an activity to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any State government...
- (c) To advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product, including its sale or marketing...”

# What is prohibited?

- All direct and grassroots legislative lobbying
  - Same rules as for nonprofits
  - Applies to legislation pending in federal, state and local legislative bodies
- Lobbying on federal, state or local level executive actions
  - Restrictions now extend to agency regulations, administrative actions and executive orders\*
- Advocacy related to any proposed, pending or future: (1) tax increase or (2) regulation of a consumer product

# What is allowed?

- Health departments may work directly on policy-related issues, and on policy implementation, with other executive agencies
  - **Ex.:** A city health department can lobby another city agency
- Nonpartisan policy research, study or analysis
- Examination of broad social, economic, or health problems that do not refer to specific legislation or contain a call to action

## What is allowed? (Cont.)

- Health departments may work with the state legislature, city council, board of selectmen, etc., if it is part of the normal scope of your work
  - **Important:** Non-government grantees, may upon formal, written request, provide technical assistance to public officials (e.g., testify before a committee)
- Educate the public on:
  - Personal health behavior and choices
  - Health issues and their public health consequences
  - Examples of best practices or success stories across states or localities



## Key Additional Points

- The lobbying restrictions only apply to the use of federal grant dollars. Employees on federal grants may lobby if using other, unrestricted funds.
- If an activity constitutes lobbying, it does not mean you cannot do it, but rather that the activity must be paid from a non-federal funding source.
- Seek guidance! The lobbying restrictions are legally complex, you should consult:
  - CDC guidance documents
  - Your CDC project officer
  - Legal counsel

# Sign up for Our Injury Prevention Updates!

- Bi-weekly conference calls beginning January 16<sup>th</sup> at 1 p.m. (Pre-call December 18<sup>th</sup>)
  - Review significant injury prevention bills and take questions on any of the bills.
- Tracking document updates
  - Detailed information on each injury prevention bill, including hearing dates and hearing summaries.
  - Updated on Google Docs for ready access at any time and current version in pdf form distributed weekly.
- Email Mellissa Sager at [msager@law.umaryland.edu](mailto:msager@law.umaryland.edu) to be added to the listserv.