

# LAW CLINICS AND LOBBYING RESTRICTIONS

KEVIN BARRY & MARCY KARIN\*

*“Can law school clinics lobby?” This question has plagued professors for decades but has gone unanswered, until now. This Article situates law school clinics within the labyrinthine law of lobbying restrictions and concludes that clinics may indeed lobby. For ethical, pedagogical, and, ultimately, practical reasons, it is critical that professors who teach in clinics understand these restrictions. This Article offers advice to professors and students on safely navigating this complicated terrain.*

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\* Kevin Barry is an Associate Professor of Law at Quinnipiac University School of Law. Marcy Karin is an Associate Clinical Professor of Law and Director of the Work-Life Policy Unit and Civil Justice Clinic at the Arizona State University Sandra Day O’Connor College of Law. The authors thank Jane Aiken, Emily Benfer, Adam Chodorow, Chai Feldblum, Mary Ferrari, David Gartner, Phyllis Goldfarb, Mary Jo Hunter, Lily Kang, Melissa Mikesell, Rebecca Rosenfeld, Robin Runge, Sarah Russell, Brad Saxton, Anita Weinberg, and the Lobbying Working Group of the 2010 and 2011 AALS Clinical Conferences for their feedback. Special thanks to Rachael Cassella, Laura Clymer, Andrea Dupre, Michael Malin, Christine Porzio, Laura Van Buren, and Elizabeth Vargas for invaluable research assistance.

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INTRODUCTION

Policy advocacy work has expanded in law school clinics over the past decade, and for good reason. Policy advocacy expands students’ toolkit of transferable legal skills and exposes them to the range of ways in which the law may offer solutions to a particular client or client base. It also enables students to aspire to the highest ethical standards as set forth in the preamble to the ABA Model Rules of Professional Conduct, which states that all lawyers “should cultivate knowledge of the law beyond its use for clients [and] employ that knowledge *in reform of the law*.”<sup>1</sup>

Policy advocacy also is good for law schools. At a time when legal education is under fire for churning out too many lawyers into a saturated marketplace,<sup>2</sup> this work improves law

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1. MODEL RULES OF PROF'L CONDUCT, pmb. ¶ 6 (2012) (emphasis added).  
 2. See, e.g., Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, [http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?\\_r=0](http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=0); Joe Palazzolo, *Law Grads Face Brutal*

school graduates' chances of securing employment after law school by exposing students to both legal and quasi-legal jobs.<sup>3</sup> It also provides law schools with new (and attractive) ways of showcasing student opportunities.<sup>4</sup>

Furthermore, policy work is good for the communities that clinics serve. By working to remove systemic barriers facing many individuals, policy advocacy can accomplish what individual representation cannot.<sup>5</sup> As Professors Robert Kuehn and Peter Joy point out, “[i]n some circumstances, lobbying a legislature or an executive branch agency for a change in the law or regulations may be the lawyer’s most effective, or only, way to address the client’s need.”<sup>6</sup> Policy work also responds to

*Job Market*, WALL ST. J., June 25, 2012, <http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html?KEYWORDS=law+grads+face+brutal+job+market>; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, [http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?\\_r=1&ref=business](http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=1&ref=business).

3. Approximately 15,000 people registered as lobbyists in 2008. Thomas M. Susman, *Where to Look, What to Ask? Frames of Reference for Ethical Lobbyists*, 41 MCGEORGE L. REV. 161, 163 (2009). This figure represents more than a 25 percent increase in the number of federal “lobbyists” since 1998. *See id.* Moreover, despite “facing a slowing economy, interest groups spent a record \$17.4 million in lobbying expenses each day Congress was in session in 2008, a record 13.7 percent increase over 2007.” *Id.* (citations omitted). Quasi-legal jobs include those in which a law degree is not a prerequisite but may be an advantage, such as those involving work with federal, state, and local legislative bodies, or with lobbying firms.

4. *See, e.g.*, Marci Seville, *Coalitions, Collaboration, and Client Skills: Kelly Densmore (JD 2013)*, GOLDEN GATE LAW., Fall/Winter 2012–2013, at 16, available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1012&context=ggulawyer> (highlighting the experience of a law student in the Women’s Employment Rights Clinic who worked as part of the team advising the California Domestic Workers Coalition on AB 889); *Testimonials*, U. N.D. SCH. OF L., <http://law.und.edu/clinics/testimonials.cfm> (last visited Feb. 1, 2013) (featuring a quote from a law clinic student about her experience researching legislative testimony); *Projects and Cases*, BERKELEY L., <http://www.law.berkeley.edu/4443.htm> (last visited Feb. 1, 2013) (noting the range of policy projects the students enrolled in the Samuelson Law, Technology, & Public Policy Clinic experience).

5. An example might include advocating for a law that expands the issuance of pardons, thereby helping individual clients whose criminal convictions prevent them from getting public housing or jobs. *See, e.g.*, *An Act Concerning Certificates from Relief of Barriers Resulting from Convictions of a Crime: Hearing on S.B. No. 453*, 2012 Leg., Reg. Sess. (Conn. 2012) (testimony of Civil Justice Clinic, Quinnipiac University School of Law), <http://www.cga.ct.gov/2012/JUDdata/Tmy/2012SB-00453-R000323-Quinnipiac%20University,%20School%20of%20Law%20-TMY.PDF>.

6. Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 2037 (2003). In some cases, law clinics may be the only charitable legal organization in town that is not precluded from lobbying. *See* Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics*

a critical need for legislative advocacy services for people in poverty in light of a 1996 prohibition that prevents organizations funded by the Legal Services Corporation from doing this type of legal work.<sup>7</sup> For these reasons, many law school clinics have supplemented more traditional litigation-centered, direct-services work with policy advocacy, and still more law schools have expressed an interest in doing so.<sup>8</sup>

While interest in policy advocacy has surged, so have questions about the meaning of “lobbying,”<sup>9</sup> which generally

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*That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 586–87 (2011) (describing experiences of the Housing and Employment Law Clinic at University of North Dakota School of Law).

Recently, a collaboration of advocates, law professors (clinical and non-clinical), and others have joined together to support the American Legislative and Issue Campaign Exchange (“ALICE”). *About Alice*, ALICE, <http://www.alicelaw.org/about-alice> (last visited Feb. 4, 2013). ALICE hopes to help respond to the need for policy advocacy as well. It “is a one-stop, web-based, public library of progressive law on a wide range of issues in state and local policy.” *Id.* Faculty and students that are interested in helping draft model laws for ALICE should visit ALICE’s website at <http://www.alicelaw.org/get-involved>.

7. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 53. Although some privately funded legal aid organizations provide legislative advocacy services, *see, e.g.*, LEGAL ASSISTANCE RESOURCE CENTER OF CONN., <http://www.larcc.org/> (last visited Feb. 4, 2013), it is not enough to meet the needs of people in poverty, especially given the dramatic decrease in private funding to these organizations in recent years.

8. Karin & Runge, *supra* note 6, at 563–65; Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451, 451–52 (2010); *see also* Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 334 MCGEORGE L. REV. 785, 817–19 (2003) (listing law school clinics structured to include policy work exclusively or in conjunction with other work).

9. Clinical conferences and list serves have been abuzz with questions regarding lobbying restrictions. *See, e.g.*, 2013 Northern California Clinical Conference, “Integrating Policy into Clinical Work” (Feb. 23, 2013); E-mail from 2013 Clinical Conference Planning Committee to AALS Clinical Section Members (Dec. 11, 2012, 10:51 AM) (on file with authors) (describing a concentration “on the diversification of clinical legal education, both in the practice models of clinics (e.g., non-litigation clinics such as those focusing on . . . legislative advocacy . . . )”); E-mail from Anita Weinberg & Jay Pottenger to Members of the Legislative/Policy Working Group, 2012 AALS Clinical Conference (June 20, 2012, 2:24 PM) (on file with authors) (capturing the group’s questions and discussion about lobbying restrictions); JEFF SELBIN, IRS POLITICAL AND LOBBYING ACTIVITIES (2012) (on file with authors); Virgil Wiebe, Professor of Law, Remarks at the Advocacy Panel at Immigration Law Teachers Workshop 2012 (May 31–June 2, 2012) (applying concepts from an earlier version of this paper to immigration advocacy); Elizabeth B. Cooper, Suzanne Goldberg & Anita Weinberg, Remarks at Outcomes Assessment in Challenging Contexts: Applying Clinical Theory to the Design and Implementation of Legislative Advocacy Clinics at the 2010 Association of American Law Schools Conference on Clinical Legal Education (May 5, 2010).

refers to attempts to influence an act of the government.<sup>10</sup> Because lobbying is restricted by a complex web of laws, professors are right to be asking about the fine line between policy advocacy and lobbying and about what happens if one crosses it. Although professors' concerns are well placed, this Article concludes that there is little to fear about engaging in policy advocacy—including lobbying—once professors understand the various restrictions in place. Indeed, there are ways for almost any law school clinic to engage in policy advocacy generally, and lobbying in particular, without violating lobbying restrictions. Lobbying's place in the firmament of clinical legal education is increasingly bright, as it should be.

This Article, the first of its kind, situates law school clinics within the labyrinthine law of lobbying. While scholarly commentary and practitioners' guides have discussed various aspects of the laws applicable to lobbying,<sup>11</sup> none have analyzed the legal, theoretical, and practical dimensions of applying these laws to law school clinics. This Article fills that void. Its goal is to inform professors who teach in law clinics how to navigate the complex maze of lobbying restrictions (e.g., tax restrictions, government funding restrictions, and lobbying disclosure requirements) and to explain why doing so is important for ethical, pedagogical, and, ultimately, practical reasons.

Law school clinics are a unique blend of public and private; they are tax-exempt entities *and* law firms or think tanks representing private clients or causes. Clinics are also a blend of professional service and educational experience; they offer valuable legal services while simultaneously teaching legal skills to law students. This “unique hybrid nature”<sup>12</sup> places the application of laws purporting to govern law school clinics in a debatable space. This Article prompts that debate in the lobbying context by discussing why law clinics are—and are

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10. ROBERT D. HERMAN, *THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT* 232–33 (2005) (“People sometimes confuse the words ‘lobbying’ and ‘advocacy.’ . . . Advocacy covers a much broader range of activities that might, or might not, include lobbying. . . . [A]dvocacy does not necessarily involve lobbying.”).

11. See, e.g., Trevor D. Dryer, *Gaining Access: A State Lobbying Case Study*, 23 *J.L. & POL.* 283, 290–92 (2007) (cataloguing these resources as well as noting their potential value); Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 *YALE L. & POL’Y REV.* 485, 488–89 (2008).

12. See *Sussex Commons Assoc. v. Rutgers*, 46 A.3d 536, 541 (N.J. 2012).

not, as the case may be—subject to lobbying restrictions.

Part I identifies three critical questions that professors who teach policy in clinics should be asking. Each of these questions bears on a different area of lobbying law: federal income tax law, federal and state laws governing recipients of government funds, and federal and state lobbyist disclosure laws. Parts II through IV explore the answers to the questions identified in Part I. Part II covers congressional restrictions on the lobbying activities of charitable organizations. Specifically, it focuses on the two tests used by the Internal Revenue Service to determine whether lobbying by an organization exempt under § 501(c)(3) of the Internal Revenue Code (“Code”) is “substantial”: (1) the default substantial part test or (2) the (relatively) newer expenditure test.<sup>13</sup> Part III examines laws that preclude entities that receive government funding from using such money to lobby. Finally, Part IV analyzes federal and state laws that require lobbyists to register with the government and disclose information about their lobbying activities. All four parts explore when and how these laws apply to law school clinics and offer guidance to professors in making these fact-sensitive determinations.

## I. THREE QUESTIONS PROFESSORS SHOULD ASK ABOUT LOBBYING

As explained below, most lobbying is protected speech under the First Amendment and similar provisions of many state constitutions.<sup>14</sup> Nonetheless, Congress has imposed several restrictions on lobbying over the years, and states have followed suit. These lobbying restrictions impact nonprofit institutions such as universities and, by extension, law school clinics engaged in policy advocacy.<sup>15</sup>

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13. I.R.C. § 501(c)(3) (2010); *see infra* Part II.

14. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of people peaceably to assemble, and to petition the Government for a redress of grievances.”); *see also* OR. CONST., art. I, § 8 (“No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject . . . .”); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (holding that denial of tax exemption under I.R.C. § 501(c)(3) to organizations engaging in substantial lobbying does not violate free speech under the First Amendment because it does not prevent an organization from lobbying, it “merely refuse[s] to pay for the lobbying out of public moneys”); *accord* KAN. CONST. BILL OF RIGHTS, § 11.

15. These restrictions also impact law school clinics that are separately incorporated nonprofit organizations. Examples of law school clinics that are

Understanding these restrictions is important for both ethical and pedagogical reasons. The ABA Model Rules of Professional Conduct demand ethical lawyers, and a central focus of clinical legal education is the teaching of model ethical representation.<sup>16</sup> As model ethical law offices, it is important for law clinics to analyze the ethical dimensions of the work they do, including the applicability of federal and state lobbying restrictions.<sup>17</sup> Just as law school clinics teach students to perform conflict checks before accepting new cases,<sup>18</sup> law school clinics engaged in policy advocacy should teach students to comply with lobbying restrictions before accepting a new policy project or client. Of course, it also serves as an important learning experience for students who may need to navigate these restrictions later in their careers.<sup>19</sup>

Additionally, an understanding of lobbying restrictions is important for practical reasons. The recent debacle surrounding the American Legislative Exchange Council

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incorporated separately from the law schools to which they are affiliated include Main Street Legal Services, Inc. (the umbrella organization of clinics at CUNY School of Law) and Pace Environmental Litigation Clinic, Inc. (taxpayer identification numbers and registration forms on file with authors). Differences in the application of these restrictions to separately incorporated law clinics are addressed in footnotes.

16. Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 19–20, 45–47 (2004); Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 35 (2003) (“Every clinical teacher is a legal ethics and professional responsibility teacher, though few think of themselves as such.”); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1935–37 (2002).

17. See generally Peter A. Joy & Robert Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493 (2002); David F. Chavkin, *Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1501 (1998); Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97 (1995).

18. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.8, 1.9 (2004) (outlining the rules lawyers must follow to prevent the representation of a party with whom the lawyer has a conflict of interest).

19. Alan N. Fernandes, *Ethical Considerations of the Public Sector Lobbyist*, 41 MCGEORGE L. REV. 183, 194 (2009); see Deanna R. Gelak, *Executive Branch Advocacy*, in THE LOBBYING MANUAL 652–55 (4th ed. 2009) (outlining the various ethical rules applicable to lobbying members of the executive branch); Thomas Ross, *Ethics Law and the Lawyer/Lobbyist*, in THE LOBBYING MANUAL 689–715 (4th ed. 2009) (describes ethical obligations on the “lawyer/lobbyist” and analyzes them pursuant to the ABA Model Rules of Professional Conduct); see also Deborah J. Jeffrey, *A Practical Guide to Conflicts of Interest for Lawyer-Lobbyists*, in THE LOBBYING MANUAL 717–50 (4th ed. 2009).



(“ALEC”), a 501(c)(3) conservative think-tank and clearinghouse for model state legislation, is a case-in-point.<sup>20</sup> In April 2012, Common Cause, a liberal watchdog group, launched a national campaign against ALEC, which included the filing of a complaint with the IRS alleging that ALEC’s “taxpayer-subsidized lobbying” violates the Code.<sup>21</sup> According to Common Cause, ALEC has “flout[ed] federal tax laws by posing as a tax-exempt charity while spending millions of dollars to lobby for . . . bills each year in state legislatures.”<sup>22</sup> In addition to the IRS complaint, Common Cause alleged that ALEC personnel violated state ethics laws by failing to register as lobbyists with the appropriate agencies.<sup>23</sup>

As the ALEC debacle demonstrates, law school clinics could, like ALEC, become the target of groups that do not approve of the substance of clinics’ policy work.<sup>24</sup> While opposition toward law school clinics has primarily focused on litigation,<sup>25</sup> clinics’ policy advocacy work could be next. The

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20. *Frequently Asked Questions*, ALEC, <http://www.alec.org/about-alec/frequently-asked-questions/> (last visited July 30, 2012) (“ALEC is a [501(c)(3) nonprofit organization and] think-tank for state-based public policy issues and potential solutions. It . . . develops model bills and resolutions on economic issues[, which] . . . can be helpful resources for state legislators who have an interest in free markets, limited government and constitutional division of powers between the federal and state governments.”).

21. Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES, Apr. 21, 2012, at A1; Emily Osborne, “ALEC Accountability Act” Introduced in Wisconsin, PRWATCH (Feb. 10, 2012), <http://www.prwatch.org/news/2012/02/11269/alec-accountability-act-introduced-wisconsin>; see also Press Release, Common Cause, Common Cause Files IRS Whistleblower Complaint Against ALEC (Apr. 23, 2012), available at <http://www.commoncause.org/site/app/s/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773613&ct=11720653> (“[ALEC] exists to pass legislation that serves the economic and partisan interests of its corporate members in states all over the country. [It] is not entitled to abuse its charitable tax status to lobby for private corporate interests, and stick taxpayers with the bill.”).

22. McIntire, *supra* note 21.

23. *Id.*

24. See, e.g., Heather MacDonald, *This Is the Legal Mainstream?*, CITY JOURNAL, [http://www.city-journal.org/html/16\\_1\\_law\\_schools.html](http://www.city-journal.org/html/16_1_law_schools.html) (last visited Feb. 17, 2013) (“If lawyering were merely a synonym for left-wing lobbying, many clinics could claim strong pedagogical justification.”).

25. See generally Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 60–74 (2011) (providing a helpful overview of political interference matters from 1968 onward with respect to restrictions on case or project selection, funding, and practice of law school clinics); Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087 (2011) (detailing recent incidents of government interference in law clinic operations); ROBERT R. KUEHN & PETER A. JOY, AM. ASS’N OF UNIV. PROFESSORS, “KNEECAPPING” ACADEMIC FREEDOM 10–14 (2010), <http://www.bmar>

headline—“Business Group Files IRS Whistleblower Complaint Against Law School Clinic”<sup>26</sup>—may not be the stuff of fiction for long. In this climate, it is important that law school clinics are equipped to defend their work against dissent.

To facilitate compliance with lobbying restrictions, professors teaching (or considering teaching) policy advocacy in clinics should ask three questions before accepting a new project, each of which bears on a different area of lobbying law: federal income tax law, federal and state laws governing recipients of government funds, and federal and state lobbyist disclosure laws. These questions are: (1) Does the advocacy work trigger charitable lobbying reporting requirements for the law school’s university under the Code?<sup>27</sup> (2) Does the advocacy work violate lobbying prohibitions on recipients of government funds? And (3) Does the advocacy work require registration under federal or state lobbying disclosure laws?<sup>28</sup> Parts II, III, and IV of this Article address each question and its relevant area of lobbying law, in turn. While there is no single answer to these three questions that applies to every law school clinic and every policy project that a clinic may undertake, these Parts explain how almost any law school clinic can “lobby” without violating lobbying restrictions.

## II. THE CODE’S RESTRICTIONS ON CHARITABLE LOBBYING

Section 501(c)(3) of the Code exempts charitable institutions—that is, organizations that are “organized and operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes”—from federal taxation.<sup>29</sup> A separate section of the Code makes contributions to those institutions tax deductible.<sup>30</sup> In exchange for this favorable tax

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tin.cc/dissent/documents/Kuehn-Joy10.pdf (providing useful timeline chart of clinic inference cases and how they were resolved).

26. Press Release, Common Cause, *supra* note 21.

27. Or for itself if it is a separately incorporated charitable organization.

28. Faculty also should familiarize themselves with federal and state gift rules. *See, e.g.*, ARIZ. REV. STAT. § 41-1232.02 (2012) (requiring the reporting of certain gifts and expenditures to government actors, even if not made during the course of lobbying); *see also* Robert F. Bauer & Rebecca H. Gordon, *Congressional Ethics: Gifts, Travel, Income, and Post-Employment Restrictions*, in THE LOBBYING MANUAL 477–512 (4th ed. 2009). While further discussion of these rules is warranted, it is beyond the scope of this Article. Similarly, the impact of lobbying restrictions on for-profit law schools is not discussed in this Article.

29. I.R.C. § 501(c)(3) (2010).

30. *See id.* § 170 (2010).

treatment, Congress limits the amount of lobbying charitable institutions may do. Section 501(c)(3) states that “no substantial part” of a charitable organization’s activities may consist of “carrying on propaganda, or otherwise attempting, to influence legislation.”<sup>31</sup> So charitable organizations, such as universities, *can* lobby, they just cannot lobby *too* much. Too much lobbying renders the organization something other than charitable.<sup>32</sup>

As explained below, the Code’s lobbying restrictions permit every law school clinic in the country to lobby, so long as that lobbying is not a substantial part of the universities’ activities. Given the sheer size of universities, of course, there is little chance that the IRS would ever consider a law clinic’s lobbying activities substantial. But this does not mean that law school clinics are off the hook in terms of their obligations to the IRS. Although law clinics almost certainly *can* lobby under the Code, the university must report those lobbying activities to the IRS in the university’s annual tax filings. Clinics engaged in policy advocacy must therefore determine whether such advocacy constitutes lobbying under the Code and, if so, report those activities to the university for disclosure to the IRS.<sup>33</sup>

This Part begins with a brief history of the Code’s restriction on charitable lobbying, followed by a discussion of the applicability of this restriction to law school clinics. It next discusses how to determine whether an individual law clinic’s activities constitute lobbying under the Code and, if so, how to determine whether such lobbying is “substantial” in violation of the Code. This Part concludes with a discussion of the Code’s reporting requirement and recommendations for complying with the Code’s restriction on charitable lobbying.

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31. *Id.* § 501(c)(3). In addition to prohibiting charitable organizations from devoting a substantial part of their activities to influencing legislation, IRS regulations prohibit them from: (1) “participat[ing] or interven[ing], directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office,” Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2008); (2) having a “main or primary objective . . . (as distinguished from its incidental or secondary objectives) [that] may be attained only by legislation or defeat of proposed legislation[, and] advocat[ing] or campaign[ing] for the attainment of such main or primary objective,” *id.* § 1.501(c)(3)-1(c)(3)(iv); and (3) not being “organized exclusively for one or more exempt purposes,” *id.* § 1.501(c)(3)-1(b)(1).

32. Organizations whose attempts to influence legislation constitute a *substantial part* of their activities are known as “action organizations” and are explicitly excluded from the definition of “charitable.” Treas. Reg. § 1.501(c)-1(c)(3) (“Operational Test”); *id.* § 1.501(c)-1(d)(2) (“Charitable Defined”).

33. Separately incorporated clinics would report those activities directly to the IRS.

A. *Brief History of the Federal Lobbying Restriction on Charities and the Substantial Part and Expenditure Tests*

Some history is instructive in understanding the lobbying restriction on charitable organizations generally and law clinics more particularly, including the IRS's "substantial part" and "expenditure" tests.

1. Section 501(c)(3)'s Charitable Lobbying Restriction

In 1919, Treasury regulations completely prohibited charitable organizations from "disseminat[ing] controversial or partisan propaganda" on grounds that such activities were "not educational."<sup>34</sup> Under this interpretation, any attempts to influence legislation "were considered inherently controversial" and therefore prohibited.<sup>35</sup>

In 1929, in *Slee v. Commissioner of Internal Revenue*, the Second Circuit Court of Appeals considered whether contributions to the American Birth Control League were charitable donations and therefore tax deductible.<sup>36</sup> Writing for the court, Judge Learned Hand dismissed as irrelevant the controversial character of the League's legislative activity, which promoted "the repeal of laws preventing birth control."<sup>37</sup> Instead, he focused on whether such activity was in furtherance of the organization's charitable purpose.<sup>38</sup> "[T]here are many charitable, literary and scientific ventures that as an incident to their success require changes in the law."<sup>39</sup> So long as such "[political] agitation is ancillary to . . . the exclusive purpose of the organization," the organization does not "lose its [charitable] character."<sup>40</sup> Because the League's legislative

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34. See Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEXAS L. REV. 1269, 1282 n.32 (1993) (citing Treas. Reg. § 45, art. 517 (1919); T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919)).

35. Galston, *supra* note 34, at 1282.

36. *Slee v. Comm'r of Internal Revenue*, 42 F.2d 184, 184 (2d Cir. 1930).

37. *Id.* at 185.

38. *Id.*

39. *Id.*

40. *Id.* ("A charity may need a special charter allowing it to receive larger gifts than the general laws allow. It would be strained to say that for this reason it became less exclusively charitable, though much might have to be done to convince legislators. A society to prevent cruelty to children, or animals, needs the

activities “were general” and “not confined solely to relieving its hospital work from legal obstacles,” the court held that donations to the League were not deductible.<sup>41</sup> According to *Slee*, not all legislative activity was prohibited—just those activities that were not “mediate to the [organization’s] primary purpose.”<sup>42</sup>

In 1934, Congress passed the Revenue Act, which largely codified the *Slee* position.<sup>43</sup> But rather than require that lobbying activities further the organization’s charitable purpose, as stated in *Slee* (a purpose test), section 501(c)(3) of the statute requires that lobbying activities not be a “substantial part” of the organization’s activities (an activities test).<sup>44</sup> Under this formulation, substantial lobbying activity is not permitted no matter how much it furthers the charity’s purpose.<sup>45</sup>

Section 501(c)(3)’s lobbying restriction was added as an amendment to the Revenue Act of 1934. Its goal was to prohibit deductions for “selfish” contributions “made to advance the personal interests of the giver of the money.”<sup>46</sup> While the legislative history behind this restriction is sparse,<sup>47</sup> the

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positive support of law to accomplish its ends. It must have power to coerce parents and owners, and it does not lose its character when it seeks to strengthen its arm. A state university is constantly trying to get appropriations from the Legislature; for all that, it seems to us still an exclusively educational institution. No less so if, for instance, in Tennessee it tries to get leave to teach evolutionary biology. We should not think that a society of booklovers or scientists was less ‘literary’ or ‘scientific,’ if it took part in agitation to relax the taboos upon works of dubious propriety, or to put scientific instruments upon the free lists. All such activities are mediate to the primary purpose, and would not, we should think, unclass the promoters.”).

41. *Id.*

42. *Id.*

43. Judith E. Kindell & John Francis Reilly, “Lobbying Issues,” in INTERNAL REVENUE SERV., CONTINUING PROFESSIONAL EDUCATION MANUAL 266 (1997), <http://www.irs.gov/pub/irs-tege/eotopicp97.pdf>.

44. I.R.C. § 501(c)(3) (2010).

45. Outside of the lobbying context, the purpose test still resonates. *See Rev. Rul. 80-278*, 1980-2 C.B. 175 (“The organization’s activities will be considered permissible under section 501(c)(3) if: (1) The purpose of the organization is charitable; (2) the activities are not illegal, contrary to a clearly defined and established public policy, or in conflict with express statutory restrictions; and (3) the activities are in furtherance of the organization’s exempt purpose and are reasonably related to the accomplishment of that purpose.”).

46. Kindell & Reilly, *supra* note 43, at 264 (quoting 78 CONG. REC. 5,861 (1934)).

47. *See Galston, supra* note 34, at 1285 (stating that “the legislative history of the substantial part rule was ‘inconclusive as to the purpose and scope of the provision’ and that the rationale for the existing restrictions on lobbying activities by charities ‘has never been clearly articulated’” (quoting J. Roger Mentz,

provision originally was intended to be narrow.<sup>48</sup> However, by the time the restriction was added, it was much broader. Rather than tailoring the lobbying restriction to prohibit tax deductions for “selfish” contributions to charities, § 501(c)(3) forbade *any* charitable institution from engaging in substantial lobbying for *any* reason.<sup>49</sup> According to Senator David Reed, the ranking minority member of the Senate Finance Committee and the provision’s “moving force,”<sup>50</sup> the Committee “found great difficulty in phrasing the amendment,” which went “much further than the committee intended to go.”<sup>51</sup>

Notwithstanding the dearth of legislative history, the broad lobbying restriction on charities has “generally been understood as implementing a policy of government neutrality in legislative controversies.”<sup>52</sup> As Judge Hand noted in *Slee*, “[p]olitical agitation as such is outside the statute, however innocent the aim . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.”<sup>53</sup> Subsequent judicial decisions and congressional pronouncements have endorsed this reasoning, explicitly “link[ing] the limitation on lobbying by charities without reservation to ‘the Congressional policy that the United States Treasury should be neutral in political affairs.’”<sup>54</sup> “Substantial activities directed to attempts to influence legislation or affect a political campaign,” the reasoning goes, “should not be subsidized through the tax benefits accorded to charitable corporations and their contributors.”<sup>55</sup>

This history matters for law school clinics. Had Congress

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Assistant Secretary of Tax Policy, Dep’t of the Treasury)).

48. Kindell & Reilly, *supra* note 43, at 264 (quoting 78 CONG. REC. 5,861 (1934)).

49. *Id.* at 266.

50. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 21 n.117 (2003).

51. Kindell & Reilly, *supra* note 43, at 264.

52. Galston, *supra* note 34, at 1285.

53. *Slee v. Comm’r of Internal Revenue*, 42 F.2d 184, 185 (2d Cir. 1930).

54. Galston, *supra* note 34, at 1285 (quoting Christian Echoes Nat’l Ministry v. United States, 470 F.2d 849, 854 (10th Cir. 1972) (internal quotation marks omitted), *cert. denied*, 414 U.S. 864 (1973)); *see* Galston, *supra* note 34, at 1285 (“[T]he Supreme Court announced in 1959 that government neutrality vis-à-vis lobbying was a ‘sharply defined public policy’ and that the substantial part rule had merely ‘made explicit’ the *Slee* court’s observation about the importance of government neutrality in political controversies.” (quoting *Cammarano v. United States*, 358 U.S. 498, 512 (1959))).

55. Galston, *supra* note 34, at 1285 (citations omitted).

deemed permissible all lobbying in furtherance of a charitable organization's educational purpose, law clinics could have lobbied without so much as a second thought. Lobbying, like all other work undertaken in a clinic, is consistent with a university's educational purpose of teaching students. But this was not the tack that Congress took. Section 501(c)(3) prohibits a charitable organization from engaging in a "substantial" amount of lobbying.<sup>56</sup> To ensure that a charitable organization's "attempt[s] to influence legislation" do not constitute a "substantial part" of the organization's activities, the IRS requires charitable organizations to report lobbying activities—no matter how de minimis—in their annual tax filings.<sup>57</sup>

## 2. The IRS's "Substantial Part" and "Expenditure" Tests

The IRS employs one of two tests to determine whether a tax-exempt organization's lobbying is "substantial": (1) the substantial part test or (2) the expenditure test.<sup>58</sup> The default substantial part test applies "facts and circumstances" criteria to determine substantiality.<sup>59</sup> This test, enacted in 1934, is vague: "substantial" is not defined, and there is no authoritative guidance from the IRS on what constitutes an attempt to influence legislation.<sup>60</sup> The stakes are also high: Organizations that exceed the vague "insubstantial" standard risk losing their tax-exempt status.<sup>61</sup> This test governs tax-exempt organizations unless they elect the expenditure test.<sup>62</sup>

Given the vagaries of the substantial part test, many organizations elect the expenditure test.<sup>63</sup> The expenditure test

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56. I.R.C. § 501(c)(3) (2010).

57. See I.R.S. Schedule C: Political Campaign and Lobbying Activities (Form 990 or 990-EZ) (2012), <http://www.irs.gov/pub/irs-pdf/f990sc.pdf> (requiring tax exempt organizations that lobby to complete either Part II-A (expenditure test) or Part II-B (substantial part test)) [hereinafter Form 990].

58. See I.R.C. § 501(c)(3) (substantial part test); *id.* § 501(h) (expenditure test).

59. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (2008).

60. *Id.* § 1.501(c)(3)-1(c)(3)(ii) (failing to define "substantial" or provide guidance on prohibition against "adoption or rejection of legislation").

61. *Id.* § 1.501(c)(3)-1(a). An excise tax is also imposed on the organization and its members. I.R.C. § 4912.

62. As a practical matter, organizations governed by the substantial part test must answer a short set of questions on their annual Form 990, Schedule C, Part II-B. See Form 990, *supra* note 57.

63. I.R.C. § 501(h).

was enacted in 1976 in response to criticism that “the standards as to the permissible level of activities under [the substantial part test] were too vague and thereby tended to encourage subjective and selective enforcement.”<sup>64</sup> The expenditure test was intended to improve on prior law by “set[ting] relatively specific expenditure limits to replace the uncertain standards of prior law, . . . provid[ing] a more rational relationship between the sanctions and the violation of standards, and . . . mak[ing] it more practical to properly enforce the law.”<sup>65</sup>

Specifically, rather than having to parse what is substantial and what is not, tax exempt organizations that elect the expenditure test may spend up to the lesser of \$1 million or a sliding percentage of their overall exempt purpose budget<sup>66</sup> on lobbying.<sup>67</sup> In addition, the expenditure test clearly defines what is and is not an attempt to influence legislation, and the penalty for violating the expenditure test is less severe than the penalty for violating the substantial part test.<sup>68</sup> If the expenditure limits are exceeded, a tax (under a separate section of the Code, § 4911) is imposed on the organization.<sup>69</sup>

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64. Kindell & Reilly, *supra* note 43, at 281 (quoting Joint Committee on Taxation). Not all tax-exempt organizations, including churches and church-related organizations, are permitted to elect the expenditure test. See I.R.C. § 501(h)(5).

65. Kindell & Reilly, *supra* note 43, at 281–82.

66. Generally, “exempt purpose budget” refers to the budget minus fundraising costs. See 26 U.S.C. § 4911(e)(1) (defining “exempt purpose expenditures”).

67. See *id.* § 4911(c)(2) (providing formula for calculating percentage of permissible lobbying expenditures); see also *infra* note 172 and accompanying text; Timothy W. Jenkins & A.L. (Lorry) Spitzer, *Internal Revenue Code Limitations on Lobbying by Tax-Exempt Organizations*, in THE LOBBYING MANUAL 393, 395, 399 nn.28–30 (William A. Luneberg et al. eds., 4th ed. 2009) (explaining how to calculate percentage of permissible lobbying expenses). Grassroots lobbying expenditures are limited to 25 percent of permissible lobbying expenditures. I.R.C. § 4911(c)(4).

68. See ALLIANCE FOR JUSTICE, WORRY-FREE LOBBYING FOR NONPROFITS: HOW TO USE THE 501(H) ELECTION TO MAXIMIZE EFFECTIVENESS 7, 13 (2003), <http://www.afj.org/assets/resources/resources2/Worry-Free-Lobbying-for-Nonprofits.pdf> [hereinafter WORRY-FREE LOBBYING].

69. Under the expenditure test, a nonprofit organization will lose its exempt status only if the expenditure limits are exceeded by 150 percent over a defined period. 26 U.S.C. § 501(h). As a practical matter, an organization elects to be governed by the expenditure test by filing Form 5768 (“Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation”). See I.R.S. Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation (Form 5768) (2009), <http://www.irs.gov/pub/irs-pdf/f5768.pdf>; Form 990, *supra* note 57 (answering a set of corresponding questions on Form 990, Schedule C, Part II-A).



*B. The Charitable Lobbying Restriction's Applicability to Law Clinics*

As discussed above, the Code restricts lobbying by charitable organizations.<sup>70</sup> Because universities are charitable organizations “organized and operated exclusively for . . . educational purposes,”<sup>71</sup> the Code’s charitable lobbying restriction applies to them. But does the Code’s charitable lobbying restriction apply to law school clinics (whether at a public or private university) and separately incorporated law clinics? As a general matter, the answer is yes. The considerations detailed in the rest of this subsection are relevant to that determination. These considerations include whether any clinic lobbying is attributable to the university under principles of agency law and whether law clinics are otherwise exempt from the Code’s restriction because of academic freedom, because of their resemblance to private law firms, and because they often lobby on behalf of a client.

1. Clinic Lobbying is Attributable to the University and Therefore Subject to the Charitable Lobbying Restriction

Under principles of agency law, a professor’s personal lobbying activities (those not associated with his or her official duties) are not attributable to the university, and therefore are not subject to IRS restrictions on university lobbying.<sup>72</sup> Students’ personal lobbying activities, including the activities of student groups whose governance is not determined by the university and whose views do not represent those of the

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70. I.R.C. § 501(c)(3).

71. *Id.*

72. Kindell & Reilly, *supra* note 43, at 277–78 (“Only official acts can be attributed to the organization. Provision is made in the articles of organization by which a school is created, by its bylaws, and by other valid and proper means, for delegating authority and responsibility for operating the school to various people; trustees, administrators, faculty members, student leaders, etc. Each are assigned various tasks. The school is responsible for their acts in discharging these assigned duties. Their personal activities (those not associated with official duties) are not attributable to the school, and are, therefore, not relevant to an investigation of the school’s qualification for 501(c)(3) status.” (quoting I.R.S. Gen. Couns. Mem. 34,523 (June 11, 1971))); *see also* I.R.S. Priv. Ltr. Rul. 200151060 (Sept. 27, 2001) (“General agency law governs whether the personal activities of [taxpayer’s] employees would be attributed to [taxpayer]. Only acts undertaken by [taxpayer’s] employees within the scope of their employment or acts ratified by [taxpayer] would be considered activities of [taxpayer].”).

university, are also not subject to IRS restrictions on university lobbying.<sup>73</sup>

Conversely, when professors engage in lobbying as part of their official duties (such as law professors that lobby as part of their clinical work), their lobbying activities are most likely attributable to the university, and thus subject to Code restrictions.<sup>74</sup> Indeed, in a ruling regarding the reporting of fees received for representing indigent criminal defendants, the IRS recognized that “attorney-faculty members” in a law school clinic “are working solely *as agents of the law school*, while supervising the law students within the scope of the clinical programs.”<sup>75</sup> Similarly, when students perform lobbying activities under the supervision of professors who are acting in their official capacities (such as students engaging in lobbying in a clinic), the students’ lobbying activities are likely attributable to the university and thus subject to IRS restrictions.<sup>76</sup>

Consider the case of a university that provided office space, financial support, faculty advisors, and training in “coverage of political news and the preparation of editorial comments” for a campus newspaper that published students’ editorial opinions on pending or proposed legislation and candidates for political office.<sup>77</sup> Notwithstanding the Code’s prohibition on political campaigning and “substantial” lobbying by charitable organizations, the IRS ruled that the university did not violate § 501(c)(3).<sup>78</sup> Critical to the IRS’ determination was the lack of control asserted by the university.<sup>79</sup> For example, the editors and all other newspaper staff were students of the university. Neither the university administration nor the advisors exercised “any control or direction over the newspaper’s editorial policy,” which was determined by a majority vote of

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73. See Rev. Rul. 72-512, 1972-2 C.B. 246; Rev. Rul. 72-513, 1972-2 C.B. 246. For example, a professor or student in a clinic may testify before the state legislature in his or her personal capacity and not in his or her role as a clinic professor or a clinic student under the supervision of a professor. These lobbying activities would most likely not be attributable to the university. See, e.g., *Hearing on Protecting Religious Liberty Before the S. Jud. Comm.*, 106th Cong. (Sept. 9, 1999) (testimony of Chai R. Feldblum).

74. See Kindell & Reilly, *supra* note 43, at 277–78.

75. Rev. Rul. 74-581, 1974-2 C.B. 25 (emphasis added).

76. See Rev. Rul. 72-512, 1972-2 C.B. 246; Rev. Rul. 72-513, 1972-2 C.B. 246.

77. Rev. Rul. 72-513, 1972-2 C.B. 246.

78. *Id.*

79. *Id.*

the student editors.<sup>80</sup> And a statement on the newspaper's editorial pages made clear that "the views expressed are those of the student editors and not of the university."<sup>81</sup>

Given the university's lack of control, the IRS concluded:

The publication and dissemination of the editorial statements in question are acts and expressions of opinion by students occurring in the course of bona fide participation in academic programs and academic-related functions of the educational institution. In such circumstances, the fact that the university furnishes physical facilities and faculty advisors in connection with the operation of the student newspaper does not make the expression of political views *by the students* in the publishing of the newspaper *the acts of the university* within the intendment of section 501(c)(3) of the Code.<sup>82</sup>

Analogy can also be made to cases involving solely political activity on the part of universities. One such case involved a university's offering a political science course "to acquaint students with the basic techniques of effective participation in the electoral system."<sup>83</sup> Students enrolled in the course spent several weeks in the classroom learning about political campaign methods, spent two more weeks (between 60 and 80 hours) outside of the classroom participating in the political campaign of the student's chosen candidate, and wrote a paper evaluating the experience.<sup>84</sup>

Noting that "the university d[id] not influence the student in his choice of a candidate or control his campaign work" and was "reimbursed or paid for any services or facilities provided to the students for use in connection with the campaigns," the IRS concluded that the university did not violate § 501(c)(3).<sup>85</sup> "[T]he fact that such course is a part of the university's curriculum and that university personnel and facilities are employed in its conduct," the IRS reasoned, "does not make the university a party to the expression or dissemination of political views of the individual students in the course of their

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80. *Id.*

81. *Id.*

82. *Id.* (emphasis added).

83. Rev. Rul. 72-512, 1972-2 C.B. 246.

84. *Id.*

85. *Id.*

actual campaign activities.”<sup>86</sup>

Both of these cases are distinguishable from the law clinic context. Because legal ethics and state student practice rules require close supervision of non-lawyers, professors must exert a high level of control over clinic students’ activities.<sup>87</sup> Professors simply cannot disclaim responsibility for students’ conduct; ethical rules make them responsible for such conduct.<sup>88</sup> As a result, the IRS would most likely attribute clinic students’ lobbying activities to clinic professors and, by extension, to the university.

## 2. Academic Freedom Does Not Exempt Clinics from Lobbying Restrictions

One might argue that IRS lobbying restrictions do not apply to law school clinics because clinics engage in lobbying solely for *educational* reasons. By engaging students in policy advocacy, clinics “teach law students how to practice law and represent clients.”<sup>89</sup> Academic freedom, the argument goes, exempts law clinics from lobbying restrictions.

While this argument is attractive in its simplicity, it ignores § 501(c)(3)’s rejection of a purpose test for lobbying.<sup>90</sup> Section 501(c)(3) applies to all lobbying, regardless of its purpose.<sup>91</sup> Therefore, the fact that clinics lobby for educational reasons does not mean that § 501(c)(3) does not apply to them. If clinics lobby, then § 501(c)(3) applies and requires that such lobbying constitute an insubstantial part of the university’s activities.<sup>92</sup>

Although § 501(c)(3)’s lobbying restrictions undoubtedly

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86. *Id.*

87. MODEL RULES OF PROF’L CONDUCT R. 5.3 (2011) (“Responsibilities Regarding Nonlawyer Assistants”); *see, e.g.*, Conn. R. Sup. Ct. § 3-15 (“Supervision of Legal Interns”); Ariz. R. Sup. Ct. 38(d).

88. MODEL RULES OF PROF’L CONDUCT R. 5.3 (“A lawyer shall be responsible for conduct . . .”). Insufficient supervision that results in injury to the client is grounds not only for attorney discipline by the state bar licensing authority but also for a malpractice action by the client. *See* MODEL RULES OF PROF’L CONDUCT scope (2011) (“[S]ince the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”); *see, e.g.*, Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 717 A.2d 724 (Conn. 1998) (holding that supervisory attorneys committed malpractice by failing to properly supervise junior associate).

89. *Sussex Commons Assocs., LLC v. Rutgers*, 46 A.3d 536, 546 (N.J. 2012).

90. *See supra* notes 43–45 and accompanying text.

91. *Id.*

92. I.R.C. § 501(c)(3) (2010).

cabin law clinics' academic freedom, this does not meaningfully distinguish law clinics from other charitable institutions. Churches, for example, could make the same argument about their religious freedom, and all charitable institutions could claim infringement of their right to free speech and to petition the government.<sup>93</sup> According to the Supreme Court, § 501(c)(3)'s lobbying restrictions pass muster because Congress "is not required by the First Amendment to subsidize lobbying."<sup>94</sup>

### 3. Law Clinics' Resemblance to Private Law Firms Does Not Exempt Clinics from Lobbying Restrictions

As discussed above, IRS revenue rulings support the conclusion that law clinics, as educational programs within universities, are most likely subject to lobbying restrictions on universities.<sup>95</sup> But law clinics are different than other academic programs. The Supreme Court of New Jersey's recent decision in *Sussex Commons Associates, LLC v. Rutgers* is instructive.<sup>96</sup>

On July 5, 2012, the Supreme Court of New Jersey held that the Rutgers Environmental Legal Clinic ("RELC"), although state-funded, was categorically exempt from the state's Open Public Records Act.<sup>97</sup> Significantly, the court rejected the argument that law clinics are "indistinguishable from any other academic program offered by the Law School."<sup>98</sup> Acknowledging what the trial court termed the clinic's "unique hybrid nature," the Supreme Court observed that the RELC and other legal clinics at Rutgers "function like private law firms as they serve individual clients" and "also serve an important educational function by preparing law students for the actual practice of law."<sup>99</sup> Because law clinics "function like private law firms," the court reasoned, they are therefore

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93. U.S. CONST. amend. I.

94. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983). Although academic freedom does not support the inapplicability of IRS restrictions to law clinics, it may justify *exempting* law clinics from IRS lobbying restrictions that are otherwise applicable.

95. *See supra* II.B.1 and accompanying text.

96. *Sussex Commons Assocs., LLC v. Rutgers*, 46 A.3d 536 (N.J. 2012).

97. *Id.* at 538.

98. *Id.* at 541.

99. *Id.* at 538, 541, 544, 548 (Albin, J., concurring) (discussing RELC's "special mission to its law students and clients").

entitled to be treated like private law firms—even if that means being treated differently from other academic programs in certain circumstances.<sup>100</sup> “[N]ot even the University, let alone any government agency,” the court stated, “controls the manner in which clinical professors and their students practice law.”<sup>101</sup> The court held that because private law firms are not subject to New Jersey’s open records law, neither are law clinics.<sup>102</sup>

One might argue that *Rutgers’* reasoning should be extended beyond open records requests to the lobbying sphere. Given their similarities to private law firms, the argument goes, law clinics should not be subject to lobbying restrictions. After all, “[h]arm may . . . result to the client by prohibiting a lawyer from lobbying.”<sup>103</sup> But an argument in favor of exempting law clinics from lobbying restrictions on these grounds faces two significant hurdles. First, law clinics are not like private law firms for purposes of the Code because clinics receive two tax benefits that private law firms do not: tax exemption and tax deductible contributions. Thus, one might say, law clinics cannot have their cake (favorable tax treatment) and eat it too (unrestricted lobbying). Second, for purposes of the Code, law clinics closely resemble legal aid organizations, public interest law firms, and legal organizations dedicated to defending human and civil rights—all of which are tax exempt and subject to lobbying restrictions.<sup>104</sup> If the IRS can restrict lobbying by charitable law firms, why should law clinics be treated any differently? Although the IRS does not “control[] the manner in which clinical professors and their students practice *law*,”<sup>105</sup> the IRS *does* control how they, and any other charitable institution,

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100. *Id.* at 544.

101. *Id.* at 546.

102. *Id.*

103. Kuehn & Joy, *supra* note 6, at 2037. (“[L]obbying . . . for a change in the law or regulations may be the lawyer’s most effective, or only, way to address the client’s need.”).

104. *See, e.g.*, Rev. Proc. 92-59, 1992-2 C.B. 411 (stating, in relevant part, that public interest law firms providing legal representation on issues of significant public interest “must otherwise comply with” § 501(c)(3)’s provisions, “that is . . . no substantial part of its activities may consist of carrying on propaganda or otherwise attempting to influence legislation . . . .”); *accord* Rev. Rul. 69-161, 1969-1 C.B. 149 (discussing § 501(c)(3) legal aid societies that provide legal assistance to indigents); Rev. Rul. 73-285, 1973-2 C.B. 174 (discussing § 501(c)(3) organizations operated to defend human and civil rights secured by law).

105. *Sussex*, 46 A.3d at 546 (emphasis added).

lobby. Therefore, restricting lobbying by law school clinics is not at odds with the IRS's treatment of similarly situated legal organizations; instead, it is, arguably, wholly consistent with it.

#### 4. Lobbying on Behalf of a Client Does not Exempt Clinics from Lobbying Restrictions

A law school clinic lobbying on behalf of *a university* (as opposed to a cause or a client) would definitely trigger the Code's charitable lobbying restriction.<sup>106</sup> Most universities, for example, have lobbyists who track legislation, approach legislators, testify at hearings in support of or in objection to bills, and so on. Universities are required to report these activities to the IRS.<sup>107</sup>

But law school clinics rarely, if ever, lobby on behalf of universities. Instead, they often lobby on behalf of a *cause* (e.g., as a member of a coalition advocating repeal of a state death penalty<sup>108</sup>) or on behalf of a *particular client* (e.g., a nonprofit women's health organization seeking passage of a transgender nondiscrimination bill or a formerly incarcerated individual seeking passage of a bill that would change criminal sentences).

Whether a law school clinic lobbies on behalf of a cause or a particular client does not appear to matter under the Code. What matters to the IRS is the government action one seeks to influence—not the entity on whose behalf that influence is sought.<sup>109</sup> Therefore, the fact that a law school clinic lobbies on behalf of someone other than the university (such as a coalition or client) appears to be irrelevant for purposes of the Code. Although IRS regulations restricting lobbying by charitable

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106. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (2008).

107. See *supra* note 57 and accompanying text.

108. See, e.g., *An Act Revising the Penalty for Capital Felonies: Hearing on S. 280*, 2012 Leg., Reg. Sess. (Conn. 2012) (testimony of Quinnipiac University School of Law Civil Justice Clinic), available at <http://www.cga.ct.gov/2012/JUDdata/chr/2012JUD00314-R001100-CHR.htm>.

109. See Mayer, *supra* note 11, at 509 (stating that the Code's restrictions on lobbying "focus[] entirely on what government action an individual or entity seeks to influence"); cf. Rev. Rul. 67-293, 1967-2 C.B. 185 (holding that an "organization substantially engaged in promoting legislation to protect or otherwise benefit animals" was not exempt under § 501(c)(3), even though "[i]t rarely contact[ed] legislators in its own name, but merely encourage[d] others to do so.") (emphasis added); see *id.* ("The statute is quite specific in proscribing, *without qualification*, substantial legislative activities by organizations desirous of qualifying under section 501(c)(3) of the Code.") (emphasis added).

organizations shed little light on this issue, experts commonly advise charitable law firms to consider lobbying work on behalf of a client to be lobbying for purposes of the law firm's (and the client's) lobbying limit.<sup>110</sup> Consequently, lobbying does not appear to turn on the entity for whom the lobbying is performed.

Furthermore, lobbying does not turn on the entity that actually makes the lobbying communication. IRS regulations disallowing a business expense deduction for taxpayers who assist others with lobbying provide some useful insights.<sup>111</sup> According to the IRS:

If a taxpayer engages in activities for a purpose of supporting a lobbying communication to be made by another person (or by a group of persons), the taxpayer's activities are treated . . . as influencing legislation. For example, if a taxpayer . . . engages in an activity to assist a trade association in preparing its lobbying communication, *the taxpayer's activities are influencing legislation even if the lobbying communication is made by the trade association and not the taxpayer.*<sup>112</sup>

Relatedly, IRS regulations and judicial decisions interpreting the definition of lobbying to apply to supporting activities (such as research and similar activities that occur prior to "the moment that the organization first addresses itself to the public or legislature") bolster the conclusion that what

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110. Telephone Interviews with Melissa Mikesell & Nancy Chen, Attorneys, Alliance for Justice (July 18, 2012, Dec. 19, 2008). Alliance for Justice is a national organization dedicated to, among other things, strengthening the capacity of the public interest community to influence public policy. *About AFJ*, ALLIANCE FOR JUSTICE, <http://www.afj.org/about-afj/> (last visited Feb. 17, 2013). According to these attorneys, Alliance for Justice regularly takes the position that a nonprofit law firm's legislative advocacy work on behalf of another nonprofit organization is considered lobbying subject to IRS reporting for *both* organizations: the law firm *and* the client organization. In a conversation on April 22, 2009, an attorney at the Center for Lobbying in the Public Interest agreed with this analysis; the attorney also took the position that such work is lobbying for both the law firm and client. Telephone Interview, Attorney, Center for Lobbying in the Public Interest (Apr. 22, 2009) (name unavailable).

111. Unlike tax exempt organizations, "[b]usinesses are permitted to deduct the costs of direct lobbying of legislators as ordinary and necessary business expenses under section 162 of the Code if there is a close connection between the legislation involved and the welfare of the business and if all the other requirements of section 162 are met." See Galston, *supra* note 34, at 1280 n.27.

112. Treas. Reg. § 1.162-29(d) (2013) (emphasis added).



matters to the IRS is the character of the activity, not the entity who actually makes the communication.<sup>113</sup>

In sum, IRS regulations, case law, and expert guidance suggest that when a law school clinic either lobbies on behalf of another entity, such as an institutional or individual client, or supports a lobbying communication made by another entity, the clinic's activities are treated as lobbying. Given that the IRS considers activities in support of *another's* cause to be lobbying,<sup>114</sup> lobbying on behalf of one's *own* cause (i.e., lobbying without a client) would seem to be an even clearer example of lobbying.

As this section shows, law clinics are not exempt from lobbying restrictions. Universities must comply with lobbying restrictions, and clinics are part of universities. Arguments about clinics' academic freedom, their similarities to private law firms, and their representation of clients (or causes) do not change this analysis. Because clinic lobbying must be reported to the IRS, the crucial question for law clinics is whether their policy advocacy constitutes lobbying.

### *C. Determining Whether a Law Clinic's Activities Constitute "Lobbying" under the Code*

Even though charitable lobbying restrictions generally apply to law school clinics, this does not mean that an individual clinic's policy work necessarily constitutes lobbying. This determination is a fact-specific one. In determining whether an individual clinic's activities constitute lobbying under the Code, professors should consider whether the activity is an attempt to influence legislation and, if so, whether it falls within one of the Code's four exceptions.

#### 1. The Code's Restriction Only Applies to Legislation

Only attempts to influence *legislation* (whether federal, state, or local) constitute lobbying under the Code; attempts to

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113. Kindell & Reilly, *supra* note 43, at 280 (citing *League of Women Voters of United States v. United States*, 180 F. Supp. 379, 383 (Cl. Ct. 1960) and *Kuper v. Comm'r*, 332 F.2d 562, 562–63 (3d Cir. 1964), both of which held that lobbying is substantial part of League of Women Voters' activities because members spend significant time preparing for lobbying by discussing position on legislative issues).

114. *See supra* note 109–13.

influence actions by administrative bodies do not.<sup>115</sup> For example, a clinic that drafts comments in response to a Notice of Proposed Rulemaking on Implementing the Family and Medical Leave Act or meets with a Commissioner of the EEOC to discuss issues relating to disability discrimination against veterans with traumatic brain injury is not lobbying for purposes of the Code.<sup>116</sup>

## 2. Defining Attempts to Influence Legislation

Under the default substantial part test, an attempt to influence legislation means: “(i) contact[ing], or urg[ing] the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (ii) advocat[ing] the adoption or rejection of legislation (even if no legislation is pending).”<sup>117</sup>

The law governing the expenditure test is considerably more detailed.<sup>118</sup> Under this test, an attempt to influence

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115. Treas. Reg. §§ 1.501(c)(3)-1(c)(3)(ii), 56.4911-2(d)(1). The Code’s exclusion of administrative advocacy from the definition of lobbying is implicit in the regulations governing the substantial part test and explicit in the regulations governing the “expenditure test.” See *id.* §§ 56.4911-2(d)(3)–(4) (stating that “[l]egislative body’ does not include executive, judicial, or administrative bodies” and providing examples of administrative advocacy that do not constitute lobbying). Importantly, if the organization requests that the administrative body support or oppose legislation, this may constitute lobbying. See Kindell & Reilly, *supra* note 43, at 277. But see David C. Vladeck, *Special Considerations for Lobbying by Nonprofit Corporations*, in THE LOBBYING MANUAL 401, 406 (William A. Luneberg et al. eds., 4th ed. 2009) (stating that urging administrative official to support or oppose specific legislation would not constitute lobbying).

116. Letter from Patricia Kempthorne, Founder, President, & CEO, Twiga Found., to Mary Zeigler, U.S. Dep’t of Labor (Apr. 30, 2012) (commenting in response to the Notice of Proposed Rulemaking to Implement Statutory Amendments to the Family and Medical Leave Act); Vivian Corral-Nava, SANDRA DAY O’CONNOR C. OF L. <http://www.law.asu.edu/justiceclinic/CivilJusticeClinic/StudentTestimonials/VivianCorralNava.aspx> (last visited Feb. 18, 2013) (describing Vivian Corral-Nava’s impressions of a meeting with EEOC Chair Jacqueline Berrien). Importantly, administrative advocacy work may constitute lobbying for purposes of disclosure under the federal Lobbying Disclosure Act and corollary state laws. See *infra* Part IV.

117. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (2008); see, e.g., *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855–56 (10th Cir. 1972) (holding that ministry’s publication of articles and production of radio and television broadcasts urging recipients to write their representatives in support of prayer in public schools and opposing foreign aid constituted an attempt to influence legislation even though no legislation was pending); Kindell & Reilly, *supra* note 43, at 273.

118. See I.R.C. § 4911 (1978) (expenditure test); I.R.C. § 501(h)(2)(A) (2010) (cross-referencing definition of “influencing legislation” under expenditure test,

legislation means engaging in either so-called “direct” or “grassroots” lobbying.<sup>119</sup> Direct lobbying refers to any attempt to influence any legislation by communicating with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation.<sup>120</sup> A communication is deemed direct lobbying when it “[r]efers to specific legislation”<sup>121</sup> and “[r]eflects a view on such legislation.”<sup>122</sup> By contrast, grassroots lobbying refers to any attempt to influence any legislation by attempting to “affect the opinions of the general public or any segment thereof.”<sup>123</sup> A communication is deemed grassroots lobbying if it “[r]efers to specific legislation,” “[r]eflects a view on such legislation,” and “[e]ncourages the recipient of the communication to take action with respect to such legislation.”<sup>124</sup>

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§ 4911(d). “Although they are similar, none of the tests or definitions used [for the expenditure test] in Section 501(h) and Section 4911 expressly applies to the ‘substantial part’ test of Section 501(c)(3).” Jenkins & Spitzer, *supra* note 67, at 397; *see also* Kindell & Reilly, *supra* note 43, at 282 (noting that regulations defining attempt to influence legislation under substantial part test “should not be used to determine whether an organization that [has made the] 501(h) election has engaged in substantial lobbying”).

119. I.R.C. § 4911(d).

120. *Id.* § 4911(d)(1)(B).

121. Treas. Reg. § 56.4911-2(d)(1)(ii) (1990) (“‘[S]pecific legislation’ includes both legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes.”).

122. *Id.*; *see, e.g., Support ADA Restoration (H.R. 3195/S. 1881)*, CONSORTIUM FOR CITIZENS WITH DISABILITIES (n.d.), [http://www.c-c-d.org/task\\_forces/rights/TPs\\_FINAL\\_bill.pdf](http://www.c-c-d.org/task_forces/rights/TPs_FINAL_bill.pdf) (prepared in part by Georgetown Law’s Federal Legislation and Administrative Law Clinic).

123. I.R.C. § 4911(d)(1)(A).

124. Treas. Reg. §§ 56.4911-2(b)(2)(ii)-(iii), -2(d)(1)(ii) (1990) (defining terms). A communication that encourages a recipient to take action is one that: urges a recipient to contact a legislator or other relevant official or staff member; “[s]tates the address, telephone number, or similar information of a legislator” or staff member; “[p]rovides a petition, tear-off postcard or similar material for the recipient to communicate with a legislator” or other relevant official or staff member; or “[s]pecifically identifies one or more legislators who will vote on the legislation.” *Id.*; *see, e.g., California Domestic Workers Bill of Rights*, CAL. DOMESTIC WORKERS COALITION, <http://cadwbor.live2.radicaldesigns.org/> (last visited Feb. 17, 2013) (includes examples of grassroots lobbying that ask the public to take action). *Cf.* I.R.C. § 162(e) (2011); Treas. Reg. § 1.162-29(b) (1995) (defining, *inter alia*, “influencing legislation” and “lobbying communication” for purpose of disallowing business expense deduction for lobbying expenditures); *see also* Jenkins & Spitzer, *supra* note 67, at 396 (noting inconsistency between regulations governing lobbying restrictions and those governing nondeductible lobbying expenses); Kindell & Reilly, *supra* note 43, at 348 (same).

### 3. Categories of Lobbying that are Exempt Under the Code

Certain activities undertaken to influence the legislative process do not constitute lobbying. The law governing the expenditure test sets forth four major exceptions to the definition of lobbying.<sup>125</sup> The law governing the substantial part test recognizes some (but not all) of those exceptions and provides far less detail than does the expenditure test.<sup>126</sup> The following subsections each discuss one of the Code's four major lobbying exceptions.

#### *a. Nonpartisan Research and Analysis*

For organizations electing the expenditure test, “the most important exception is . . . nonpartisan analysis, study, or research.”<sup>127</sup> Under this exception, certain “communications that refer to and reflect a view of specific legislation” are not considered lobbying.<sup>128</sup> To qualify for this exception, the organization's communication must satisfy three requirements: content, distribution, and no direct call for action.<sup>129</sup>

First, the communication must provide “an independent and objective exposition of a particular subject matter.”<sup>130</sup> “The mere presentation of unsupported opinion” will not do.<sup>131</sup> Educational activities—that is, “instruction or training of the individual for the purpose of improving or developing his capabilities” or “instruction of the public on subjects useful to the individual and beneficial to the community”<sup>132</sup>—necessarily

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125. I.R.C. § 4911(d)(2); Treas. Reg. §§ 56.4911-2(c)(1)–(4); *see also* I.R.C. § 4911(d)(2).

126. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (2008); *see also* WORRY-FREE LOBBYING, *supra* note 68, at 7, 13; *see also* Joint Comm. on Taxation, Description of Present-Law Rules Relating to Political and Other Activities of Orgs. Described in Section 501(c)(3) and Proposals Regarding Churches Scheduled for a Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 2002 WL 34255197 (I.R.S. May 14, 2002) [hereinafter Joint Comm. on Taxation] (stating that “the private foundation rules under [Treas. Reg. § 53.4945-2] describe four exceptions . . . that generally are considered applicable to public charities as well.”).

127. Vladeck, *supra* note 115, at 409 (emphasis omitted).

128. *Id.*

129. *Id.* at 410; *see also* Treas. Reg. § 56.4911(c)(1)(ii).

130. Treas. Reg. § 56.4911-2(c)(1)(ii).

131. *Id.*

132. *Id.* §§ 56.4911-2(b)(iv), -2(c)(ii) (“[N]onpartisan analysis, study, or research . . . include[es] any activity that is ‘educational’ within the meaning of §

fall within this exception “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.”<sup>133</sup>

One might argue that law clinic policy work—regardless of its objectivity vis-à-vis the public—is always educational and, therefore, always within the nonpartisan research and analysis exception because it trains individual students for the purpose of developing their legal skills. This argument has merit, but it is probably not a winning one.

Recall the case of the university that provided, among other things, facilities and faculty advisors to a campus newspaper that published students’ editorial opinions on political and legislative matters.<sup>134</sup> There, the IRS recognized that the students’ activities were educational.<sup>135</sup> “The processes of gathering news, doing research, analyzing data, writing, and editing material for the newspaper on any subject (including political and legislative matters),” the IRS stated, “further the education of the students on the newspaper staff by improving and developing their knowledge and skills.”<sup>136</sup> But the IRS’ determination that the university had not violated § 501(c)(3) was not based on the educational character of the students’ political and legislative activities. Rather, the determination was based on the fact that those activities were the students’—not the university’s.<sup>137</sup> While educational activities *may* be an exception to lobbying, they are not necessarily so; they must meet the criteria for a lobbying exception.<sup>138</sup>

Because clinic policy work sits at an uneasy crossroad between educating students and persuading legislators, law school clinics relying on this exception should, in an abundance of caution, ensure that the content of their policy work is “sufficiently full and fair.”<sup>139</sup> Professor David Vladeck offers useful shorthand for satisfying the content test:

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1.501(c)(3)-1(d)(3) [the regulations governing the substantial part test.]”; *id.* § 1.501(c)(3)-1(d)(3) (defining “educational”).

133. *Id.* § 56.4911-2(c)(1)(ii).

134. *See supra* notes 77–82 and accompanying text (citing Rev. Rul. 72-513, 1972-2 C.B. 246).

135. *See* Rev. Rul. 72-513, 1972-2 C.B. 246.

136. *Id.*

137. *Id.*; *see also* I.R.S. Priv. Ltr. Rul. 01-51-060 (Dec. 21, 2001).

138. *See* Rev. Rul. 72-513, 1972-2 C.B. 246.

139. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (2008); *see* Kindell & Reilly, *supra* note 43, at 274.

The greater the informational and factual content of the report, the more likely it will pass muster under this test. Generally books, white papers, substantial reports, and other serious treatments of an issue qualify under this test. Conversely, a report that is more rhetoric than substance will probably not survive this test. Certainly the short, one- or two-page ‘fact sheets’ of handouts that organizations pass out to legislative staff that simply summarize an issue and the organization’s position would not qualify. The point here is that reports that generally contribute to the public debate—even if they clearly take a point of view—do not constitute lobbying, whereas documents that simply announce a political position, without an exposition of the underlying facts, do not add to the public debate and are considered to be lobbying activity.<sup>140</sup>

Second, in order to qualify for this exception, the communication must be “ma[de] available to the general public or a segment or members thereof or to governmental bodies, officials, or employees.”<sup>141</sup> The communication “may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue.”<sup>142</sup> “An organization may choose any suitable means, including oral or written presentations, to distribute the results of its [nonpartisan research and analysis], with or without charge.”<sup>143</sup> This includes the circulation of “reprints of speeches, articles and reports; presentation of information through conferences, meetings and discussions; and dissemination to the news media, including radio, television and newspapers, and to other public forums.”<sup>144</sup>

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140. Vladeck, *supra* note 115, at 410. Professor Vladeck, the co-director of the Institute for Public Representation and Georgetown University Law Center professor, has written extensively on access to justice issues, including lobbying by nonprofit corporations. See *Profile David Vladeck*, GEORGETOWN L., <http://www.law.georgetown.edu/faculty/vladeck-david-c.cfm> (last visited Feb. 18, 2013). For examples of reports that meet this content test, see *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, INT’L HUM. RTS. & CONFLICT RESOL. CLINIC OF STAN. L. SCH. & GLOBAL JUST. CLINIC AT N.Y.U. SCH. OF L. (2012), <http://livingunderdrones.org/report/>, and *Access Denied: The Unfulfilled Promise of the D.C. Language Access Act*, AM. U. WASH. C. OF L. IMMIGRANT JUST. CLINIC (2012), <http://www.wcl.american.edu/news/documents/AccessDenied.pdf>.

141. Treas. Reg. § 54.4911-2(c)(1)(i) (2006).

142. Treas. Reg. § 56.4911-2(c)(1)(iv) (1990).

143. *Id.*

144. *Id.*

Third, the communication cannot “directly encourage[] the recipient to take action with respect to such legislation.”<sup>145</sup> For example, the communication cannot urge the recipient to contact a legislator or give the recipient legislator’s telephone number. The communication can, however, list the names of the legislators who are undecided on the legislation or who are sitting on the committee or subcommittee that will be voting on the legislation.<sup>146</sup>

Although the definition of lobbying under the substantial part test contains an exception for nonpartisan analysis, study, or research,<sup>147</sup> the exception appears to be narrower. Under the substantial part test, the lobbying exception for nonpartisan analysis, study, or research does not appear to apply to communications that advocate the adoption or rejection of legislation.<sup>148</sup> By contrast, under the expenditure test, an organization can advocate the adoption or rejection of legislation and still fall within the exception, so long as it meets the content and distribution tests and does not directly call for action by recipients.<sup>149</sup>

*b. Examinations and Discussions of Broad Social Problems*

Under the expenditure test, public discussion or communication with members of legislative bodies or governmental employees regarding broad social and economic issues that are also the subject of legislation before a legislative

145. *Id.* § 56.4911-2(c)(1)(vi).

146. *Id.* For examples of communications that satisfy the nonpartisan research and analysis exception, see *id.* § 56.4911-2(c)(1)(vii).

147. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (2008).

148. *See id.*; *see also* Kindell & Reilly, *supra* note 43, at 274 (citing Revenue Rulings); *cf.* Rev. Rul. 64-195, 1964-2 C.B. 138 (holding that nonprofit educational organization dedicated to promoting, among other things, the study of law and suitable standards of legal education, which engaged in nonpartisan study, research, and assembly of materials in connection with legislature’s proposed reform of court system, was exempt under section 501(c)(3) because it “d[id] not expend any of its funds or participate in any way in the presentation of suggested bills to the State legislature” nor did it “expend its funds in any campaign necessary to persuade the people to vote for the constitutional amendment”). *But see supra* note 126 (stating that private foundation rules under Treas. Reg. § 53.4945-2, which include broad nonpartisan research and analysis exception, “generally are considered applicable to public charities as well”).

149. *See supra* note 129 and accompanying text; Treas. Reg. § 56.4911-2(b)(2)(iii)-(iv), -2(c)(1)(vi) (discussing distinction between encouraging and directly encouraging recipient to take action).

body is not lobbying—“even if the problems are of the type with which government would be expected to deal ultimately.”<sup>150</sup> “So long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take action with respect to legislation,” it is not considered lobbying.<sup>151</sup> Although explicitly listed as an exception in the regulations governing the expenditure test, the exception for “broad social problems” is also implicit in the definition of lobbying under the expenditure test, which requires that a lobbying communication, at a minimum, refer to and reflect a view on specific legislation.<sup>152</sup> Because the definition of lobbying under the substantial part test likewise requires “proposing, supporting, or opposing legislation” or “advocating the adoption or rejection of legislation,” examinations and discussions of broad social problems presumably would not be lobbying under the substantial part test.<sup>153</sup>

*c. Requests for Technical Advice or Assistance*

Under the expenditure test, technical advice or assistance (including oral or written testimony) to a legislative body, committee, or subcommittee in response to a *written request* by such body does not constitute lobbying, even if it advocates the passage or defeat of legislation.<sup>154</sup> The request for assistance or advice “must be made in the name of the requesting governmental body, committee, or subdivision rather than an individual member thereof,” and “the response to such request

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150. Treas. Reg. § 56.4911-2(c)(2) (1990).

151. *Id.*

152. *See id.* § 56.4911-2(b) (defining lobbying); *see also* Kindell & Reilly, *supra* note 43, at 306.

153. *See* I.R.C. §§ 1.501(c)(3)-1(c)(3)(ii)(a)–(b) (2008); *see, e.g.*, MELISSA ADER ET AL., VETERANS LEGAL SERVS. CLINIC, JEROME N. FRANK LEGAL SERVS. ORG. AT YALE L. SCH., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM (2012), [http://www.law.yale.edu/documents/pdf/Clinics/VLSC\\_CastingTroopsAside.pdf](http://www.law.yale.edu/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf); GREGORY FETTERMAN ET AL., WORK-LIFE POL’Y UNIT, CIV. JUST. CLINIC AT A.S.U. SANDRA DAY O’CONNOR C. OF L., THE LEGAL FRAMEWORK FOR STATES AS EMPLOYERS-OF-CHOICE IN WORKPLACE FLEXIBILITY: A CASE STUDY OF ARIZONA AND MICHIGAN (2009), <http://www.twigaoundation.org/documents/TwigaWhitePaper.AZ.MI.Final.3.pdf>.

154. Treas. Reg. §§ 53.4945-2(d)(2), 53.4911-2(c)(3) (2012) (emphasis added); *see, e.g.*, *Hearing on Leading by Example: Making Government a Model for Hiring and Retaining Older Workers Before the S. Spec. Comm. on Aging*, 110th Cong. (Apr. 28, 2008) (testimony of Chai R. Feldblum, Co-Dir., Workplace Flexibility 2010, Professor of Law, Dir., Fed. Legislation Clinic, Georgetown Univ. L. Ctr.).



must be available to every member of the requesting body, committee or subdivision.”<sup>155</sup>

The IRS has likewise ruled that appearances before legislative committees in response to official requests for testimony do not constitute lobbying for purposes of the substantial part test.<sup>156</sup>

#### *d. Self-Defense Communications*

Under the expenditure test, communication with a legislative body or person involved in the legislative process does not constitute lobbying if it is limited to possible action “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.”<sup>157</sup> While permitting an organization to communicate with legislators to protect the organizations’ self-interest, the exception for “self-defense” communications “is a limited one . . . and does not apply to grassroots lobbying communications even if undertaken for self-defense.”<sup>158</sup> The substantial part test, by contrast, does not explicitly recognize the self-defense exception.<sup>159</sup>

### 4. Supporting Activities May Be Considered Lobbying

Assuming that the clinic is attempting to influence legislation and none of the four exceptions described in the previous section apply, professors should determine whether any supporting activities are also considered lobbying. Under the substantial part test, research, discussion, and similar preparatory activities that take place prior to the moment that

155. Treas. Reg. § 53.4945-2(d)(2)(i).

156. Kindell & Reilly, *supra* note 43, at 276–77; see Rev. Rul. 70-449, 1970-2 C.B. 112 (holding that university whose representative testified as expert witness on pending legislation at request of congressional committee was exempt under § 501(c)(3)); Kindell & Reilly, *supra* note 43, at 276 (“[A]ttempts to influence legislation as described in the regulations imply an affirmative act and require something more than a mere passive response to a Committee invitation.”).

157. Treas. Reg. §§ 56.4911-2(c)(4)(i), (v).

158. Vladeck, *supra* note 115, at 411.

159. See Kindell & Reilly, *supra* note 43, at 277 n.20. *But see supra* note 126 (stating that private foundation rules under Treas. Reg. § 53.4945-2, which include self-defense exception, “generally are considered applicable to public charities as well”).

an organization first addresses itself to the public or the legislature may be considered attempts to influence legislation.<sup>160</sup> Similarly, under the expenditure test, expenses related to preparing and distributing lobbying communications count as lobbying expenditures.<sup>161</sup>

Under the expenditure test, even those activities originally exempt from lobbying may be considered lobbying down the road. In certain narrowly defined circumstances, non-lobbying materials (such as nonpartisan analysis, study, or research) may be deemed to be lobbying communications if they are *later* used in grassroots lobbying campaigns.<sup>162</sup> In these circumstances, all expenses of preparing and distributing the materials are treated as grass roots expenditures.<sup>163</sup> For example, if a law school clinic were to draft and distribute to members of the public a nonpartisan report referring to specific legislation and expressing a view on it (which is not lobbying) and then, one month later, were to redistribute to a much larger group of people a copy of that report, together with a one-page document directly encouraging members of the public to call their legislators, the nonpartisan report would likely be considered a grassroots lobbying communication (as would the one-page document).<sup>164</sup> Thus, work that falls under a lobbying exemption when originally conducted may be considered lobbying based on subsequent activities.

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160. *See id.* at 280; *see, e.g.*, *League of Women Voters of the U.S. v. United States*, 180 F. Supp. 379, 381, 383 (Ct. Cl. 1960) (holding that time spent studying, discussing and recommending policy positions in advance of adopting a national policy agenda should be considered in determining substantiality of attempts to influence legislation); *id.* (“It seems to us that the hours spent by some 128,000 women in more than 700 local Leagues, deliberating and discussing what position, if any, should be taken on questions of public interest, are spent in preparation for the influencing of legislation[, mainly] for the purpose of presenting a united front to legislative bodies in order to induce action or inaction.”).

161. *See, e.g.*, Treas. Reg. 54.4911-2(c)(1)(vii)(3) (stating that expenses relating to preparation and distribution of lobbying communication constitute lobbying expenditures).

162. *See id.* §§ 54.4911-2(b)(2)(v)(C), -2(c)(1)(v).

163. *Id.*

164. *See id.* § 54.4911-2(b)(2)(v)(H). For a helpful discussion of the complicated rules governing the subsequent use of a non-lobbying communication, *see* Vladeck, *supra* note 115, at 413–15 and Kindell & Reilly, *supra* note 43, at 304–06.

*D. Determining Whether a Law Clinic's Lobbying is  
"Substantial" in Violation of the Code*

Assuming that the clinic is attempting to influence legislation and that no exceptions apply, the clinic may be engaged in lobbying. Importantly, this does not mean that the clinic has violated the Code. The Code does not prohibit *all* lobbying by charitable organizations—only lobbying that constitutes a substantial part of the organizations' activities.<sup>165</sup> The critical question, then, is whether the clinic's lobbying is a substantial part of the university's activities.

Unfortunately, under the default substantial part test, "there is no simple rule as to what amount of activities is substantial."<sup>166</sup> According to the IRS, "the percentage of the budget dedicated to a given activity is only one type of evidence of substantiality."<sup>167</sup> Others are the amount of volunteer time devoted to the activity" (which would include law student hours), "the amount of publicity the organization assigns to the activity, and the continuous or intermittent nature of the organization's attention to it."<sup>168</sup> Although "neither the [IRS] nor the courts have adopted a percentage test for determining whether a substantial part of an organization's activities consist of lobbying . . . a 5 percent safe harbor has been frequently applied as a general rule of thumb regarding what is substantial."<sup>169</sup> Further, lobbying expenditures that exceed the

165. I.R.C. § 501(c)(3) (2006).

166. Kindell & Reilly, *supra* note 43, at 279.

167. *Id.* (quoting I.R.S. G.C.M. 36,148 (Jan. 28, 1975)).

168. Kindell & Reilly, *supra* note 43, at 279; *see also* Galston, *supra* note 34, at 1280 (stating that substantial part's "facts and circumstances standard . . . looks at expenditures as well as other factors such as time and effort expended, including the time and effort of unpaid volunteers, and the relative place of the organization's lobbying activities in its larger agenda"). Under the expenditure test, the IRS considers *only* expenditures; other facts and circumstances, including unpaid volunteer time, are irrelevant. *See* Treas. Reg. § 1.501(h)-3(e) (2012); *see also* WORRY-FREE LOBBYING, *supra* note 68, at 13.

169. Kindell & Reilly, *supra* note 43, at 280; *see also* I.R.S. G.C.M. 36,148 (stating that IRS "should not adopt a percentage of total expenditures test for the substantiality of nonexempt activities conducted by exempt organizations. We also think that ten percent would be unjustifiably high, even if a percentage test were merely adopted for use as a threshold for more intensive auditing in which the Service can give due consideration to the relative importance of volunteer services and the like. In our judgment, a five per cent test would be a much better rule of thumb for use as such a threshold.") (emphasis added); *compare* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir 1955) (holding that attempts to influence legislation that constituted 5 percent of organization's total activities were not substantial), *with* Christian Echoes Nat'l Ministry, Inc. v. United States,

roughly 16 to 20 percent range of total expenditures generally are considered substantial.<sup>170</sup> Therefore, even if a law school clinic's activities constitute lobbying, it is highly unlikely that those activities would ever be considered a substantial part of the university's total activities and thereby jeopardize a university's tax-exempt status.<sup>171</sup>

Under the expenditure test, of course, substantiality is straightforward: lobbying expenditures that do not exceed the lesser of \$1 million or a specified percentage of the organization's (in this case, the university's) total budget are not substantial.<sup>172</sup>

### *E. Reporting Lobbying Activities*

Although it is very unlikely that a clinic's lobbying activities would ever be considered substantial and therefore in violation of the Code, law clinics engaged in lobbying still have reporting obligations. In order to ensure that a charitable organization's lobbying activities do not rise to the level of "substantial," the IRS requires charitable organizations to disclose *all* lobbying activities—no matter how de minimus—in their annual tax filings. Simply put, if a clinic lobbies, it must report its lobbying activities to the IRS.<sup>173</sup> Consequently, what is ultimately at stake for the majority of law clinics is *not* the potential for universities to lose their tax-exempt status because of substantial clinic lobbying. Given the size of clinics compared with their universities, it is unlikely that any clinic

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470 F.2d 849, 855 (10th Cir. 1972) (rejecting the use of percentage test for determining substantiality).

170. Kindell & Reilly, *supra* note 43, at 280; *see, e.g.*, Haswell v. United States, 500 F.2d 1133, 1146–47 (Cl. Ct. 1974) (holding that attempts to influence legislation that constituted between 16 and 20 percent of an organization's total expenditures were substantial).

171. *Cf.* Rev. Rul. 60-143, 1960-1 C.B. 192 (holding that university alumni association was exempt under § 501(c)(3) because "substantially all of its activities are devoted to charitable purposes in that they are in aid of education," notwithstanding association's engagement in *incidental* social and recreational activities that were "not educational or charitable"). The result may be different for separately incorporated clinics whose expenses and time spent on lobbying are a sizeable portion of their total activities.

172. *See* I.R.C. § 4911(c)(2) (2006) (stating that charitable organization may spend on lobbying "the lesser of (A) \$1,000,000 or (B) the amount determined under the following table," and providing sliding scale percentage of permissible lobbying amounts based on size of organization's budget); *see also supra* note 67 and accompanying text.

173. *See infra* notes 194–202 and accompanying text (discussing reporting under substantial part and expenditure tests).

will ever tip the scales. Instead, the real issue for law clinics is not *reporting* lobbying activities as the Code requires.

*F. Recommendations for Complying with the Code's Charitable Lobbying Restriction*

Professors whose clinics are engaged in policy advocacy should ask the following three questions to ensure compliance with the Code's lobbying restrictions. These questions, along with recommendations for identifying policy work that may trigger reporting requirements under the Code, are further summarized in Appendix A.<sup>174</sup>

1. What is the Tax Reporting Test Used by My University?

Clinic professors should be aware of the tax reporting test utilized by the university to which their clinic is affiliated: the default substantial part test or the expenditure test.<sup>175</sup>

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174. For concise recommendations on how public charities can lobby, see *Public Charities Can Lobby: Guidelines for 501(c)(3) Public Charities*, ALLIANCE FOR JUST., <http://familiesusa2.org/conference/health-action-2011/tool-kit/pdfs/Public-Charities-Can-Lobby.pdf> (last visited Feb. 18, 2013); *When Does Your Activity Become Lobbying?*, ALLIANCE FOR JUST., <http://www.afj.org/assets/resources/nap/prepworkcounts.pdf> (last visited Feb. 18, 2013); and WORRY-FREE LOBBYING, *supra* note 68. For other helpful materials related to policy advocacy, see generally *Bolder Advocacy*, ALLIANCE FOR JUST., <http://bolderadvocacy.org/> (last visited Feb. 18, 2013).

175. A university's IRS Form 990 shows its filing status. Form 990 is an annual disclosure that certain federally tax-exempt organizations, including universities, must file with the IRS. See Form 990, *supra* note 57. Retrieving a university's Form 990 is easy thanks to GuideStar, a nonprofit organization that gathers and publicizes this information. GUIDESTAR, <http://www.guidestar.org/> (last visited Feb. 18, 2013). To obtain a university's Form 990, visit GuideStar's website at <http://www.guidestar.org/> (registration is free). Under "Search GuideStar," select "Nonprofit Search" in the pull-down menu, type the name of a university in the search box, and click on "Start Your Search." Find the university among the list of results, select it, then select "Form 990 & Docs" on the screen that follows. The university's Forms 990 for the past three years will appear beneath the words "Forms 990 Received by the IRS." Select one, then review Part IV of the form ("Checklist of Required Schedules") to determine how the university answered the question, "Did the organization engage in lobbying activities?" Assuming the university answered "yes" (most do), scroll down to Schedule C. If the university completed Part II-A, it elects the expenditure test. See, for example, the Form 990 filed by Georgetown University, at <http://www.guidestar.org/FinDocuments/2010/530/196/2010-530196603-073c6ec1-9.pdf>. If your university completed Part II-B, it is subject to the default substantial part test. See, for example, the Form 990 filed by New York University, <http://www.guidestar.org/FinDocuments/2010/135/562/201013556230>

Whether an activity is considered lobbying, and, if so, whether it is considered substantial, may depend on it.

Experts agree that, given the vagaries and potential perils of the substantial part test, the expenditure test is preferable for at least three reasons.<sup>176</sup> First, according to Professor Vladeck, “an electing organization may engage in substantially more lobbying than organizations that forgo election.”<sup>177</sup> Although the IRS has not defined “precisely what the ‘no substantial part’ test means,” it has indicated that it “implicates something far less in terms of lobbying activities than the limits permitted under [the expenditure test].”<sup>178</sup> For example, under the expenditure test, a tax-exempt organization with a total budget of \$1.2 million could spend up to \$195,000 on lobbying.<sup>179</sup> Under the substantial part test, it is unclear whether the organization’s expenditure of \$195,000 on lobbying (which is 16 percent of the organization’s total budget), together with any volunteer activity, publicity, and other facts and circumstances bearing on substantiality, would be considered substantial.

Second, according to Professor Vladeck, “election provides an organization with a high degree of certainty in an area otherwise fraught with uncertainty,” thereby “free[ing] the organization to engage in lobbying activities.”<sup>180</sup> For example, under the expenditure test, a law clinic can produce a report that advocates the adoption or rejection of legislation and *still* fall within the lobbying exception for nonpartisan research and analysis.<sup>181</sup> In fact, the clinic can even go so far as to “identif[y] one or more legislators who will vote on the legislation as: opposing the communication’s view with respect to the legislation; being undecided with respect to the legislation; being the recipient’s representative in the legislature; or being

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8-075acdd6-9.pdf.

176. Vladeck, *supra* note 115, at 404; *see also* WORRY-FREE LOBBYING, *supra* note 68, at 14 (“[W]e are convinced that making the election will serve the interests of the great majority of eligible 501(c)(3) organizations that engage even remotely in efforts to influence legislation or public opinion or in other activities touching on public policy. Public charities that do not elect remain subject to the archaic and dangerously subjective ‘substantial part’ test added to the code in 1934.”).

177. Vladeck, *supra* note 115, at 404.

178. *Id.*

179. *See* I.R.C. § 4911(c)(2) (2006)  $((.20 \times \$500,000) + (.15 \times \$500,000) + (.10 \times \$200,000) = \$195,000)$ ; *see also* Jenkins & Spitzer, *supra* note 67, at 395 & n.29.

180. Vladeck, *supra* note 115, at 404–05.

181. Treas. Reg. § 56.4911-2(b)(2)(iii)(D) (2012).

a member of the legislative committee or subcommittee that will consider the legislation.”<sup>182</sup> Under the substantial part test, such a report would arguably fall outside of the exception for nonpartisan research and analysis because it advocates the adoption or rejection of legislation.<sup>183</sup>

Finally, Professor Vladeck explains:

[E]lection [of the expenditure test] reduces possible friction with the IRS. . . . [T]o the extent that problems arise, they tend to arise with nonelecting 501(c)(3) organizations that do not have a 501(c)(4) affiliate. . . . [O]rganizations that have elected usually accept the fact that election carries with it significant record-keeping responsibility, and they are prepared to demonstrate what lobbying activities they undertook and what expenses were associated with the lobbying.<sup>184</sup>

Keeping track of time spent on lobbying (e.g., employee timesheets) and expenditures made in furtherance of lobbying (e.g., transportation and copy costs) are worth the effort; these types of records are the best insurance against challenges to lobbying activities. Given the small size of most law school clinics, this record-keeping requirement should not be too burdensome and is consistent with the time-keeping requirement that many clinics already impose on students in preparation for the practice of law.

Notwithstanding the benefits of the expenditure test, it appears that most universities do not elect this test, and are therefore subject to the default substantial part test.<sup>185</sup> A random sampling of the public tax filings of fifty-four universities showed that eleven did not report lobbying at all and only eight of the forty-three reporting universities elected

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182. *Id.*

183. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (2008).

184. Vladeck, *supra* note 115, at 405. While many § 501(c)(3) organizations engage in (insubstantial) lobbying, others form affiliated tax-exempt § 501(c)(4) organizations to engage in lobbying on their behalf. Jenkins & Spitzer, *supra* note 67, at 397. Like § 501(c)(3) organizations, § 501(c)(4) organizations (such as civic leagues and other social welfare organizations) are tax-exempt. I.R.C. §§ 501(c)(3)–(4) (2008). But unlike § 501(c)(3) organizations, § 501(c)(4) organizations may lobby without limit and contributions to such organizations are *not* tax-deductible. See Jenkins & Spitzer, *supra* note 67, at 397; Vladeck, *supra* note 115, at 402.

185. See *infra* Appendix B (chart of electing and non-electing universities) (2012).

the expenditure test.<sup>186</sup> The remaining thirty-five reporting universities were subject to the substantial part test.<sup>187</sup> Appendix B contains the names of the universities reviewed and the tax-reporting test used by those universities.

An organization subject to the default substantial part test will have less certainty regarding whether its activities are lobbying, and, if so, whether those lobbying activities are substantial. Nevertheless, given the sheer size of most universities, it is highly unlikely that the small fraction of funds that a university devotes to a law school clinic in terms of professor staffing and other expenses, together with the relatively small amount of lobbying performed by clinic professors and students, would ever constitute a substantial part of university's activities and thereby jeopardize the university's tax-exempt status. As a result, any law school clinic can almost certainly lobby, given the small amount of lobbying it does in relation to the activities of the university. Professors whose clinics engage in lobbying at a school governed by the default substantial part test should be prepared to make this argument in response to challenges to the permissibility of their policy work.

## 2. Is It Lobbying, an Exception to Lobbying, or Something Else?

Once a professor determines which reporting test the university utilizes,<sup>188</sup> the professor should next consider whether the clinic's policy advocacy constitutes lobbying under the relevant statutes and regulations. If the clinic's policy

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186. See *infra* Appendix B.

187. See *infra* Appendix B. These results are consistent with those for charitable organizations as a whole. E-mail from Melissa Mikesell, Alliance for Just., to authors (Aug. 27, 2012, 5:51 AM) (on file with authors).

188. Based on public tax filings, several universities report no lobbying whatsoever. This may be because the university, in fact, conducts no lobbying or because it has created a separate § 501(c)(4) organization to conduct lobbying. Or it may be the result of an oversight by the university. Alternatively, if it is a state institution, it may not be required to file a Form 990 in the first place under an exemption for "income derived from . . . the exercise of any essential governmental function and accruing to a State or any political subdivision thereof . . ." I.R.C. § 115; I.R.S., Instructions for Form 990 Return of Organization Exempt From Income Tax, <http://www.irs.gov/pub/irs-pdf/i990.pdf>; see I.R.S. P.L.R. 200127033 (July 6, 2001) (stating that education is an essential government function); see generally AAU, Tax Exemption for Universities and Colleges (2012) (explaining the application of § 115 and § 501(c)(3) to exempt universities from filing Form 990).



advocacy is lobbying, the professor should determine whether one of the lobbying exceptions, especially the exception for nonpartisan research or analysis, applies.

If a clinic's lobbying falls within a lobbying exception, or is otherwise not lobbying, there is no need to do anything further. For example, a clinic's submission of comments in response to a federal agency's notice of proposed rulemaking would not constitute lobbying because it is an attempt to influence regulations, not legislation.<sup>189</sup> Likewise, a clinic's preparation and distribution of a report on homelessness, which analyzes various legislative proposals but does not advocate their adoption or rejection,<sup>190</sup> would fall within the exception for nonpartisan analysis, research, or study.<sup>191</sup>

If, however, a clinic's activities constitute lobbying—for example, a law clinic's testimony in support of repeal of a state's death penalty<sup>192</sup>—clinics should ask the third question.

### 3. Do Professors (and *What* Do Professors) Need to Report?

If a clinic determines that its legislative activities constitute lobbying under the Code, the time and money the clinic spends on those activities should be reported to the IRS in the university's annual tax filings.<sup>193</sup> To do so, professors will likely need to speak with the law school's administration, the university's general counsel, or the finance department to

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189. See, e.g., Workplace Flexibility 2010, Reasonable Break Time For Nursing Mothers (2011) (comment on WHD-2010-0003) (commenting on reasonable break time for nursing mothers); Georgetown Law Community Justice Project, Comment In Response to Proposed Rule: National Standards to Prevent, Detect, and Respond to Prison Rape (2011) (comment on DOJ-OAG-2011-0002); Harvard Law School's Emmett Environmental Law and Policy Clinic, Comment in Response to Proposed Changes to Nutrition Standards for the National School Lunch and School Breakfast Programs (2011) (comment on USDA-2007-0038).

190. Cf. Meribah Knight, *Homeless Families Walking a Hard Road*, N.Y. TIMES, Dec. 11, 2011, at A37A (discussing a study on homelessness prepared by the Health Law Project of the Loyola School of Law).

191. Under the "expenditure test," the report could advocate the adoption or rejection of legislation and still fall within the exception. See Treas Reg. § 56.4911-2(b)(2)(iii)-(iv), -2(c)(1)(vi); see also *supra* note 149 and accompanying text.

192. *An Act Revising the Penalties for Capital Felonies: Hearing on S.B. No. 280*, 2012 Leg., Reg. Sess. (Ct. 2012) (testimony of Quinnipiac University School of Law Civil Justice Clinic), <http://www.cga.ct.gov/2012/JUDdata/Tmy/2012SB-00280-R000314-Christine%20Gertsch-%20Quinnipiac%20University%20School%20of%20Law-TMY.PDF>.

193. This information should be reported in the clinic's own annual tax filings, in the case of separately incorporated clinics.

confirm that such reporting is necessary, and, if so, what information is required.<sup>194</sup>

The information a university must report to the IRS depends on which test the university utilizes.<sup>195</sup> The substantial part test requires universities to provide “a detailed description of any activities the organization engaged in (through its employees or volunteers) to influence legislation . . . *whether expenses were incurred or not.*”<sup>196</sup> The expenditure test requires considerably more detailed information regarding lobbying (e.g., total grassroots lobbying expenditures, total direct lobbying expenditures, and total exempt purpose expenditures) but, as its name suggests, requires only dollar amounts—not narrative.<sup>197</sup>

Generally, law clinics that engage in lobbying should keep track of the time that professors,<sup>198</sup> staff, and students<sup>199</sup> spend

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194. This article takes an admittedly conservative approach to IRS lobbying restrictions. This type of approach is also used by several national nonprofit organizations that specialize in advising other nonprofit organizations on the tax consequences of lobbying in the public interest. *See supra* note 110 (citing correspondence and communication with Alliance for Justice and Center for Lobbying in the Public Interest). Nevertheless, reasonable minds can—and likely will—differ on the need for law school clinics to report lobbying to their universities. A clinic’s decision to report lobbying to a university, and the myriad ways a university may respond to that decision (e.g., disagreeing with a law clinic that reporting is required; asking a law clinic to refrain from engaging in legislative advocacy or dictating the legislative activities in which a clinic can engage; asking a law clinic for potentially confidential information with respect to policy clients) raises a host of important questions implicating professional ethics and academic freedom. Those questions, while worthy of further review, are beyond the scope of this Article.

195. *See generally* Form 990, *supra* note 57 (requiring tax exempt organizations that lobby to complete either Part II-A (expenditure test) or Part II-B (substantial part test)).

196. I.R.S. Instructions for Schedule C: Political Campaign and Lobbying Activities (Form 990 or 990-EZ) (2012), <http://www.irs.gov/pub/irs-pdf/i990sc.pdf> at 5 (emphasis added).

197. *See* Form 990, Schedule C, Part II-A (expenditure test), *supra* note 57; *see generally* JOHN POMERANZ, ALLIANCE FOR JUST., KEEPING TRACK: A GUIDE TO RECORDKEEPING FOR ADVOCACY CHARITIES (n.d.), [http://www.afj.org/for-nonprofits-foundations/resources-and-publications/free-resources/keeping\\_track.pdf](http://www.afj.org/for-nonprofits-foundations/resources-and-publications/free-resources/keeping_track.pdf).

198. Under both the expenditure and substantial part tests, a university should report the hours of all professors—both full-time and adjunct—engaged in lobbying in a clinic. *See* Form 990, Schedule C, Parts II-A (expenditure test) and II-B (substantial part test), *supra* note 57.

199. Under both the expenditure and substantial part tests, a university should report the hours of students who engage in lobbying in the clinic and receive money from the university (irrespective of whether the student is also getting credit for his or her work). *See* Form 990, Schedule C, Parts II-A (expenditure test) and II-B (substantial part test), *supra* note 57. This would

on lobbying.<sup>200</sup> They should also keep track of lobbying expenditures—“from the cost of reproducing one-page fact sheets to be handed to [legislative] staffers to bagels and coffee for staff briefings, to the cab or subway fares back and forth to [the legislature],”<sup>201</sup> as well as “an allocable share of overhead expenses.”<sup>202</sup>

### III. LOBBYING RESTRICTIONS ON RECIPIENTS OF GOVERNMENT FUNDS

Lobbying restrictions on recipients of federal and state funds are among the most opaque of all the lobbying restrictions. Generally speaking, organizations such as universities that receive federal funds by way of grants, contracts, or cooperative agreements are absolutely prohibited from using that federal money for lobbying (defined in various ways) but retain the right to use their own non-federal resources for lobbying.<sup>203</sup> Similarly, most states prohibit lobbying with state funds,<sup>204</sup> and some states restrict (but do

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include, for example, research assistants who are paid out of clinic professors' research stipends or out of clinic budgets, as well as LL.M. or other fellows who are paid a stipend or salary by the university. This would also include students who receive money in the form of a grant to the university from private donors, such as a corporation or charitable organization. In each of these cases, the university spends money on lobbying by funding the student. So long as the charity in the latter example does not earmark the donated funds *for lobbying*, those funds would not be considered a lobbying expense to that organization. See, e.g., ALLIANCE FOR JUST., PRIVATE AND PUBLIC FOUNDATIONS MAY FUND CHARITIES THAT LOBBY 1 (n.d.), [http://bolderadvocacy.org/wp-content/uploads/2012/04/Private\\_and\\_Public\\_Foundations\\_May\\_Fund\\_Charities\\_that\\_Lobby.pdf](http://bolderadvocacy.org/wp-content/uploads/2012/04/Private_and_Public_Foundations_May_Fund_Charities_that_Lobby.pdf) (discussing special rules for foundations to follow when funding charities that lobby).

Only the substantial part test would require the reporting of hours of clinic students engaged in lobbying who are not paid (for example, your garden-variety clinic student), or not paid by the university (for example, a student fellow paid directly by a private donor). See Form 990, Schedule C, Part II-B (substantial part test), *supra* note 57. This is because the expenditure test requires reporting of *only* expenditures. See Form 990, Schedule C, Part II-A (expenditure test), *supra* note 57.

200. Vladeck, *supra* note 115, at 405. Although Professor Vladeck's comments relate to recordkeeping under the expenditure test, clinics would be wise to maintain similar records under the substantial part test.

201. *Id.*

202. Treas. Reg. § 56.4911-3(a)(1) (2012).

203. See JACK MASKELL, CONG. RESEARCH SERV., RL 34725, “POLITICAL” ACTIVITIES OF PRIVATE RECIPIENTS OF FEDERAL GRANTS OR CONTRACTS (2008), <http://www.fas.org/sgp/crs/misc/RL34725.pdf>.

204. E-mail from Melissa Mikesell, Alliance for Just., to Authors (Aug. 10, 2012, 1:03pm) (on file with authors); see also *Kansas Service Groups Balk at New Lobbying Restrictions*, CHRON. OF PHILANTHROPY (May 31, 2012),

not prohibit) lobbying by public employees, including professors at public universities.<sup>205</sup> This Part begins with discussion of lobbying restrictions on federal funding recipients, followed by discussion of lobbying restrictions on state funding recipients, and concludes with recommendations for complying with these restrictions.

### A. *Implications for Recipients of Federal Funding*

Lobbying restrictions on recipients of federal funds impact clinics in which professors' salaries and other lobbying costs are paid for in total or in part with federal grant money.<sup>206</sup> This section explores the relevant laws that prohibit lobbying by federal grantees, namely, Office of Management and Budget ("OMB") regulations, the so-called "Byrd Amendment,"<sup>207</sup> appropriations laws, and specific criminal laws.<sup>208</sup>

#### 1. Lobbying Restrictions in OMB Regulations

To "avoid the appearance that the government has

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<http://philanthropy.com/blogs/philanthropytoday/kansas-service-groups-balk-at-new-lobbying-restrictions/47904> (discussing recent Kansas policy prohibiting state human service contractors from using state money "to pay, directly or indirectly, any person for influencing or attempting to influence an officer or employee of any agency").

205. See, e.g., ARIZ. REV. STAT. § 15-1633(A) (2011).

206. See MASKELL, *supra* note 203, at 2 ("The restrictions on lobbying with federal funds generally follow only the funds themselves, . . . and do not require a private recipient to forgo the exercise of First Amendment advocacy activities with one's own, private resources in return for or as a condition to the receipt of federal grant or contract funds.").

207. 31 U.S.C. § 1352 (West 1996).

208. This Article does not discuss Federal Acquisition Regulations, which restrict lobbying by federal contractors. For more information on this topic, see Thomas M. Susman, *Federal Acquisition Regulation Governing Lobbying*, in THE LOBBYING MANUAL 365–70 (4th ed. 2009). Nor does it discuss the Foreign Agents Registration Act of 1938 (FARA) or executive restrictions on lobbying officials about Recovery Act funds. For more information about these lobbying restrictions, see ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–21 (2006)); William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 103–04 (2009) (describing how FARA and the LDA interact); THE LOBBYING MANUAL 16–18 (4th ed. Supp. 2011) (summarizing the new lobbying restrictions established via Executive Memoranda); JACOB R. STRAUS, CONG. RESEARCH SERV., R40947, LOBBYING THE EXECUTIVE BRANCH: CURRENT PRACTICES AND OPTIONS FOR CHANGE (2009), [http://www.americanbar.org/content/dam/aba/publications/administrative\\_regulatory\\_law\\_newsletters/crs\\_lobbying\\_and\\_the\\_executive\\_branch1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/administrative_regulatory_law_newsletters/crs_lobbying_and_the_executive_branch1.authcheckdam.pdf) (summarizing the ABA Task Force on Lobbying's position on these lobbying restrictions).

‘endorsed, fostered, or prescribed as orthodox’ any one political view,”<sup>209</sup> OMB regulations explicitly prohibit educational institutions and other nonprofit recipients of federal grant funds from seeking reimbursement for federal and state lobbying costs under federal grants.<sup>210</sup> The regulations also require recipients to make certifications to this effect.<sup>211</sup>

OMB defines lobbying broadly to include federal and state direct lobbying,<sup>212</sup> grassroots lobbying,<sup>213</sup> and “[l]egislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.”<sup>214</sup> Although OMB regulations provide no exception for nonpartisan research and analysis<sup>215</sup> or for examinations and

209. Thomas M. Susman, *Office of Management and Budget Regulations Governing Lobbying Costs Incurred by Nonprofit Organizations*, in THE LOBBYING MANUAL 372 (4th ed. 2009) (quoting Office of Mgmt. & Budget, Circular No. A-122 (2004), available at [http://www.whitehouse.gov/omb/circulars\\_a122\\_2004/](http://www.whitehouse.gov/omb/circulars_a122_2004/)).

210. 2 C.F.R. § 220.20 (2005) (“Cost Principles for Educational Institutions”) (“OMB Circular [A]-21”) (“All Federal agencies that sponsor research and development, training, and other work at educational institutions shall apply the provisions of Appendix A to this part in determining the costs incurred for such work.”). Although the lobbying restrictions discussed in this subsection specifically apply to educational institutions, *see id.*, virtually identical lobbying restrictions apply to nonprofit organizations more generally. *See* 2 C.F.R. § 230 (2005) (“OMB Circular A-122”).

211. 2 C.F.R. pt. 220 app. A at K.2.b (“This is to certify that to the best of my knowledge and belief: . . . (3) This proposal does not include any costs which are unallowable under applicable cost principles such as (without limitation): advertising and public relations costs, contributions and donations, entertainment costs, fines and penalties, *lobbying costs*, and defense of fraud proceedings . . . .”) (emphasis added).

212. *Id.* at J.28.a.(3) (prohibiting “[a]ny attempt to influence The introduction of Federal or State legislation; The enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature, including efforts to influence State or local officials to engage in similar lobbying activity; or any government official or employee in connection with a decision to sign or veto enrolled legislation”).

213. *Id.* at J.28.a.(4) (prohibiting “[a]ny attempt to influence The introduction of Federal or State legislation; or The enactment or modification of any pending Federal or State legislation by preparing, distributing, or using publicity or propaganda, or by urging members of the general public, or any segment thereof, to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign”).

214. *Id.* at J.28.a.(5).

215. Although OMB regulations do not explicitly provide an exception for nonpartisan research and analysis, at least one federal agency has found such an exception to be implied. *See* Letter from Reginald F. Wells, Ph.D., Deputy Comm’r, to Directors, Designated State Agencies (Sept. 20, 2001), available at

discussions of broad social problems, they do provide exceptions for, among other things, requests for “[t]echnical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement” in response to a request from Congress or a state legislature,<sup>216</sup> and for self-defense communications.<sup>217</sup>

## 2. Lobbying Restrictions in the “Byrd Amendment”

The “Byrd Amendment” also restricts lobbying, but it is narrower than the OMB regulations.<sup>218</sup> It prohibits universities, as federal grant recipients, from using federal funds “to pay a person to influence or attempt to influence” federal agency officials and Congressional employees (but not state officials) *in connection with the making of any federal grant, loan, contract, or agreement*.<sup>219</sup> It also requires universities to regularly certify to the agency issuing the grant that they have not made prohibited payments.<sup>220</sup> Further, if

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<http://archive.acf.hhs.gov/programs/add/instructions/PI011.html> (“Using a nonpartisan approach, grantees would be free to advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the policymaker to form an independent opinion or conclusion. In such an analysis, a grantee would refrain from presenting unsupported opinions, distorted facts, inflammatory and disparaging terms, or conclusions based more on strong emotional feelings than on objective factual conclusions.”).

216. 2 C.F.R. pt. 220 app. A at J.28.b.(1).

217. *Id.* at J.28.b.(2).

218. Compare 31 U.S.C.A. § 1352, with 2 C.F.R. pt. 220. For a helpful discussion of the Byrd Amendment’s “sparse” legislative history, see Thomas M. Susman, *The Byrd Amendment*, in *THE LOBBYING MANUAL* 350 (4th ed. 2009) (discussing “congressional belief that lobbying encouraged federal agencies to elevate political favoritism over objective evaluation of the merits of prospective awardees”).

219. 31 U.S.C.A. § 1352(a)(1)–(2) (West 1996) (“None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress *in connection with . . . [t]he awarding of any Federal contract . . . [t]he making of any Federal grant . . . [t]he making of any Federal loan . . . [t]he entering of any cooperative agreement . . . [t]he extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.*”) (emphasis added); see, e.g., 20 U.S.C.A. § 1011m (West 2012) (certification of institutions of higher education regarding use of federal funds under Higher Education Opportunity Act of 2008); 34 C.F.R. § 82.100 (1990) (Department of Education “Conditions on Use of Funds”).

220. See, e.g., 34 C.F.R. § 82.110 (“Certification and Disclosure”); 34 C.F.R. Pt. 82, App. A (Department of Education “Certification Regarding Lobbying”); see also 45 C.F.R. § 93.110 (Department of Health and Human Services “Certification and

funds *other than federal funds* have been or will be used to lobby federal officials in connection with the making of a federal grant, loan, contract, or agreement, universities must disclose that information.<sup>221</sup>

### 3. Lobbying Restrictions in Riders to Federal Appropriations

Federal appropriations laws usually contain general riders prohibiting federal agencies—and, arguably, recipients of funds from those agencies<sup>222</sup>—from using federal funds for “publicity or propaganda” purposes directed at “legislation pending before Congress.”<sup>223</sup> In addition to these general riders restricting federal agencies, federal appropriations laws may include more specific riders prohibiting private grantees and contractors from using federal funds for “publicity and propaganda.”<sup>224</sup> In either case, “publicity and propaganda” is generally interpreted to mean only “grassroots” lobbying—not “direct” lobbying—involving direct appeals to the public to contact their legislators to support or oppose specific legislation (as opposed to communications that express a view on legislation but are “essentially expository in nature”).<sup>225</sup>

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Disclosure”) (same); 7 C.F.R. § 3018.110 (Department of Agriculture “Certification and Disclosure”) (same); 29 C.F.R. § 93.110 (Department of Labor “Certification and Disclosure”) (same).

221. See 34 C.F.R. pt. 82, app. B (“Disclosure Form to Report Lobbying”); see also 54 FR 52306-01 § 100(c) (“[OMB] Government-wide Guidance for New Restrictions on Lobbying”). These disclosure requirements do not apply where the grant, loan, contract, or agreement sought is less than \$100,000. 31 U.S.C. § 1352(d)(2)(B)-(C).

222. See MASKELL, *supra* note 203, at 5 (“[T]he general appropriations law restrictions enacted yearly have been ‘imputed’ by the Comptroller General to apply to the *grantees* of federal agencies.”) (emphasis added).

223. *Id.* at 4–5 & n.12 (citing public laws).

224. See, e.g., 42 U.S.C.A. § 2996f(a)(5) (West 2010) (stating that the Legal Services Corporation shall “insure that no funds made available to recipients . . . shall be used . . . to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition . . .”).

225. MASKELL, *supra* note 203, at 7 (“The Comptroller General has thus interpreted this appropriations rider on grantees and contractors in a similar manner as the ‘publicity and propaganda’ riders on federal agencies, that is, to apply to ‘grassroots’ lobbying campaigns where the public is urged to contact their Members of Congress.”).

#### 4. Lobbying Restrictions in Criminal Law

Federal criminal law prohibits lobbying with federally appropriated money. Adopted in 1919, 18 U.S.C. § 1913 contains a prohibition against “directly or indirectly” using any money given by Congress “to pay for any [activity or communication] intended or designed to influence” the legislative process.<sup>226</sup> Historically, this law was interpreted only to prohibit officers and employees of the federal government from using federal funds to lobby Congress.<sup>227</sup> Although the law imposed a penalty of imprisonment of not more than one year or a fine,<sup>228</sup> it appears that no enforcement action was ever brought, nor any indictment returned based on this law.<sup>229</sup> In 2002, amendments to the law eliminated the criminal penalty and substituted the Byrd Amendment’s civil penalties.<sup>230</sup> The 2002 amendments also expanded the law’s prohibition to cover the use of federal funds to lobby *all* levels of governmental authority—not just Congress.<sup>231</sup> It is unclear whether the law, as amended in 2002, will be interpreted to prohibit lobbying by federal grant *recipients*—not just federal officers and employees.<sup>232</sup> Furthermore, supposing the law applies to grant recipients, it is unclear whether it prohibits only “grassroots” lobbying, or includes “direct” lobbying as well.<sup>233</sup>

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226. 18 U.S.C.A. § 1913 (West 2002) (“No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for [any activity or communication] intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation.”).

227. MASKELL, *supra* note 203, at 8.

228. 18 U.S.C.A. § 1913, *Historical and Statutory Notes* (quoting pre-2002 amendment statute); *see also* MASKELL, *supra* note 203, at 8.

229. MASKELL, *supra* note 203, at 8.

230. 18 U.S.C. § 1913 is now punishable by a civil penalty of between \$10,000 and \$100,000. 18 U.S.C.A. § 1913 (West 2002); 31 U.S.C.A. § 1352(c) (West 1996).

231. 18 U.S.C. § 1913.

232. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-225 n.145 (2004) (“While 18 U.S.C. § 1913 has been regarded as applicable only to officers and employees of the federal government and not to contractors or grant recipients, this interpretation has not been challenged since the statute was amended in 2002.”); *see also* MASKELL, *supra* note 203, at 8.

233. *See* MASKELL, *supra* note 203, at 9.



*B. Implications for Recipients of State Funding*

In addition to federal funding restrictions, state funding restrictions may limit law clinic lobbying in one of two primary ways. First, state grants to law clinics may prohibit lobbying with state funds in much the same way that federal grants prohibit federal grantees from lobbying with federal funds.<sup>234</sup> Second, state law may explicitly restrict lobbying by public employees, including professors at public universities.<sup>235</sup> For example, in Arizona, “[a] person acting on behalf of a university . . . shall not use university personnel, equipment, materials, buildings or other resources . . . to advocate support for or opposition to pending or proposed legislation.”<sup>236</sup> Notably, the law does not stop professors from “using personal time and resources [to show] support for or opposition to pending or proposed legislation,”<sup>237</sup> or “providing classroom instruction on matters relating to politics, elections, laws, ballot measures, candidates for public office and pending or proposed legislation.”<sup>238</sup>

The Arizona law also prohibits universities from providing “publicly funded programs, scholarships, or courses”—or allowing the operation of “publicly funded organizations, institutes or centers”—whose “purpose . . . is to advocate for a specified public policy.”<sup>239</sup> Here, too, there are some relevant exceptions including: “[t]he publication of reports or the hosting of seminars or guest speakers . . . that recommend public policy”; “[r]esearching, teaching and service activities” involving “the study, discussion, intellectual exercise, debate or presentation of information that recommends public policy”; and a broad catch-all for “[a]ny other type of advocacy that is

234. *Id.*; see also *supra* Section III.A.3.

235. See *supra* text accompanying note 205.

236. ARIZ. REV. STAT. ANN. § 15-1633(A) (2011). This lobbying restriction was passed in 2011. Whether it applies to law school clinics and, if so, whether it is permissible under state or federal law, are questions in need of further scrutiny.

237. *Id.* § 15-1633(A)(3). To the extent faculty members lobby as private citizens, university personnel policies may require that they “clearly indicate that the position they advocate is an individual position” by, for example, saying as much in oral or written testimony, and by refraining from using university letterhead. *Academic Affairs Manual ACD 205-01: Political Activity and Lobbying*, ARIZ. STATE UNIV., <http://www.asu.edu/aad/manuals/acd/acd205-01.html> (last updated July 1, 2011).

238. ARIZ. REV. STAT. ANN. § 15-1633(2)–(4). The law is silent on its specific application to law school clinics, but the last exception may offer support to public law school clinics engaged in policy advocacy.

239. *Id.* § 15-1633(E).

allowed by law.”<sup>240</sup>

*C. Recommendations for Complying with Lobbying Restrictions on Recipients of Government Funds*

Government-funded law clinics must exercise care when lobbying.<sup>241</sup> Unlike the Code’s charitable lobbying restriction that prohibits only “substantial” lobbying, lobbying restrictions on recipients of federal funds are absolute.<sup>242</sup> For this reason, professors in law clinics funded in any way through federal grants must take great care when lobbying, especially given the breadth of OMB’s prohibition, which applies to federal and state lobbying, and arguably provides no exception for nonpartisan research and analysis or examinations of broad social problems.<sup>243</sup> Professors should also review the terms of federal grants to ensure compliance with any prohibitions on the use of such funds for “publicity and propaganda” or other lobbying.<sup>244</sup> With respect to the Byrd Amendment, only professors involved in law clinics that lobby “in connection with . . . the making of any . . . Federal grant, loan, contract, or agreement” need be concerned with those restrictions.<sup>245</sup> And 18 U.S.C. § 1913 poses even less of a concern for most professors, especially because it is unclear whether it applies to grant recipients at all.<sup>246</sup>

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240. *Id.* § 15-1633(F)(6)–(8). The law does not define this phrase further. *See id.* § 15-1633(F)(8).

241. Professors should not simply rely on central university administration to monitor clinic lobbying and compliance with lobbying restrictions. Ethical standards require professors to maintain a degree of separation between clinic activities and non-clinical professors and administration, including the selection of lobbying projects. *See* Kuehn & Joy, *supra* note 6, at 2011 & n. 212 (“Efforts [of third parties] to influence law clinic case and client selection decisions . . . threaten the ethical duty of a clinic attorney to exercise independent professional judgment on behalf of the client.”). The involvement of non-clinic parties in individual project selection and management may also create academic freedom concerns. *Id.* at 1988, 2019–20; *see also* Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469, 487–89 (2011); ABA Informal Op. 1208 (1972).

242. *Compare* I.R.C. § 501(c)(3) (2008), *with e.g.*, 31 U.S.C.A. § 1352 (West 1996).

243. *See supra* notes 209–17 and accompanying text (discussing OMB regulations).

244. *See supra* notes 222–225 and accompanying text (discussing federal appropriations law riders).

245. 31 U.S.C. § 1352; *see also supra* notes 218–21 and accompanying text (discussing Byrd Amendment).

246. *See supra* notes 226–33 and accompanying text (discussing 18 U.S.C. §

Although federally funded law clinics must exercise care when lobbying, this does not mean that they are prohibited from lobbying. Importantly, lobbying restrictions on federal grant recipients apply only to *federal* funds. If a clinic is only partially funded by federal grants, and the university or some other entity underwrites the remainder, the clinic may use those funds for lobbying.

To illustrate how these restrictions apply in practice, take the example of a law clinic that receives funding from the IRS to represent low-income taxpayers.<sup>247</sup> A clinic could not use those funds to “send letters to members of Congress or state or local legislators, urging them to favor or oppose specific legislation pending under their jurisdiction.”<sup>248</sup> Nor could a clinic “[d]evelop materials designed to advocate for the enactment or repeal of any legislation or provide such materials to anyone,” “[d]raft or assist in the drafting of legislation or provide comments on draft legislation,” or otherwise engage in lobbying.<sup>249</sup> However, assuming the clinic receives 90 percent of its funding from federal grants and 10 percent from a foundation, the clinic could expend 10 percent of its funds on lobbying.<sup>250</sup>

Professors who engage in policy advocacy in state funded law clinics or who teach in law clinics at public universities should also familiarize themselves with any lobbying restrictions imposed by state law.<sup>251</sup> Professors can best do so by reviewing the terms of any state grants to their law clinics. Professors also should examine any other generally applicable state laws governing lobbying by recipients of state funds. Significantly, these grants and laws may be broadly construed to permit lobbying where the “purpose” is to educate law students on the role a lawyer may play in legislative advocacy, or to provide pro bono representation to clients or causes in

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1913).

247. See *Low Income Taxpayer Clinics*, I.R.S. (Aug. 29, 2012), <http://www.irs.gov/advocate/article/0,,id=106991,00.html>.

248. *Low Income Taxpayer Clinics*, TAXPAYER ADVOCATE SERV., 36–37 (2012), <http://www.irs.gov/pub/irs-pdf/p3319.pdf> (“Employees are prohibited from engaging in any lobbying activities during the portion of time that their salaries are paid from federal grant funds or matching funds.”).

249. *Id.*

250. See 34 C.F.R. pt. 82, app. B (“Disclosure Form to Report Lobbying”); see also OFFICE OF MGMT. & BUDGET, 54 FR 52306-01, GOVERNMENT-WIDE GUIDANCE FOR NEW RESTRICTIONS ON LOBBYING § 100(c) (1989).

251. See *supra* notes 234–40 and accompanying text (discussing implications of lobbying restrictions on recipients of state funding).

need of assistance.<sup>252</sup> In addition, professors should consult their university personnel policies. For example, Arizona State University's personnel policies state, among other things, that "[f]aculty and academic professionals responsible for disbursement or allocation of state funds shall determine prior to disbursement or allocation that such funds will not be used for purposes of influencing legislation."<sup>253</sup>

If lobbying prohibitions apply to the law clinic, professors should next determine whether any exceptions also apply, or, in the alternative, whether private funds might be used to fund any lobbying activities.

While this Part has focused on various lobbying restrictions affecting universities and law clinics, professors also should be aware of how lobbying restrictions impact another important recipient of government funds, namely, the law student. Law students typically receive federal funds in the form of work-study and loans. A student who receives federal work-study funds for part-time work in a law clinic is most likely not prohibited from engaging in lobbying. Although Department of Education regulations governing the federal work-study program explicitly prohibit a student employed by a "Federal, State, or local public agency, or a private nonprofit organization" from "lobbying on the Federal, State, or local level," a student employed by "the institution in which the student is enrolled" is not so limited.<sup>254</sup>

As for a student receiving education loans, such as Federal Stafford, Federal Perkins, or Federal PLUS loans, the law is even clearer: students receiving these types of loan assistance may lobby.<sup>255</sup> In fact, the law explicitly prevents schools from

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252. See *supra* notes 236–40 and accompanying text (discussing Arizona law restricting lobbying by public employees).

253. *Academic Affairs Manual*, *supra* note 237.

254. Compare 34 C.F.R. § 675.22(a)–(b) (2009) ("If a student is employed by a Federal, State, or local public agency, or a private nonprofit organization, the work that the student performs must be in the public interest . . . . Work is not in the public interest if . . . [i]t involves lobbying on the Federal, State, or local level."), with *id.* § 675.20 (distinguishing "[a] Federal, State, or local public agency" and "[a] private nonprofit organization" from "[t]he institution in which the student is enrolled") (emphasis added). Professors in separately incorporated law clinics that employ work-study students should consider whether their clinics are part of the "institution in which the student is enrolled" or are instead "private nonprofit organizations." In the latter case, professors should not allow work-study students to lobby.

255. Compare 34 C.F.R. § 675.22(a)–(b) (prohibiting certain recipients of federal work-study funds from lobbying), with 20 U.S.C.A. § 1091(a)(4)(a) (West 2012) (requiring, among other things, that recipients of loan assistance be

barring students receiving these loans from relevant educational opportunities. According to the Higher Education Act, which provides, among other things, federal funds to universities for distribution to students in the form of financial aid, no student should be “excluded from” or “denied the benefits of” any “educational program, activity, or division of the institution” (such as a law clinic) based on the student’s engagement in protected speech (such as lobbying).<sup>256</sup> “[T]he diversity of institutions and educational missions,” the Act states, “is one of the key strengths of American higher education.”<sup>257</sup> Every university “should design its academic program in accordance with its educational goals . . . [and] should facilitate the free and open exchange of ideas.”<sup>258</sup>

Taken together, the federal work-study and loan assistance programs acknowledge that students who receive federal funding may lobby, whether they work part time for a university or earn credit. As a result, professors in clinics staffed, in whole or in part, by students who receive federal work-study funds or loan assistance need not worry about permitting those students to engage in lobbying.

Appendix C summarizes these recommendations.

#### IV. FEDERAL AND STATE LOBBYING DISCLOSURE LAWS

In addition to lobbying restrictions imposed by the Code and various laws governing recipients of federal and state funds, professors should be aware of both federal and state lobbying disclosure laws, which may require registration as a lobbyist and public disclosure of any lobbying activities. This Part begins with a discussion of federal disclosure law, followed

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enrolled at institutions of higher education and that students certify that “money attributable to such grant, loan, or loan guarantee will be used solely for expenses related to attendance or continued attendance at such institution”); *see also* 34 C.F.R. § 668.32 (Department of Education regulations governing student loan eligibility).

256. 20 U.S.C. § 1011a(1) (“It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this chapter, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution.”).

257. *Id.* § 1011a(2).

258. *Id.*

by a discussion of state disclosure laws, and concludes with recommendations for complying with these laws.

### A. *The Federal Lobbying Disclosure Act*

Unlike charitable lobbying restrictions under the Code and federal laws prohibiting lobbying by grant recipients, the Lobbying Disclosure Act (“LDA”) neither prohibits nor restricts lobbying.<sup>259</sup> It is solely a disclosure law, which requires the registration and disclosure of information related to lobbying activities as described below.

#### 1. A Brief History of the LDA

As Professor William Eskridge writes, “[l]obbying Members of Congress and the executive, by fair means or foul, has been an important and accepted part of national politics since the foundation of the Republic.”<sup>260</sup> Not surprisingly, concern over the excessive influence of lobbyists—those so-called “influence peddlers” and “procurer[s] of ‘wine, women, and favors’”—have persisted for nearly as long.<sup>261</sup>

While congressional efforts to regulate lobbyists date back to 1852, these efforts expanded during the last third of the nineteenth century, as federal government spending increased and, with it, “ferocious competition for government largesse.”<sup>262</sup> The beginning of the twentieth century saw numerous congressional investigations into lobbying abuses and the introduction of numerous bills to curb such abuses—none of which passed.<sup>263</sup> A 1936 bill did make it through to conference, but its broad coverage “doomed it in the House, where opponents argued that the bill reached far beyond the utility [industry] lobbyists whose activity had triggered congressional concern about the issue,” to “all farm organizations, all

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259. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995).

260. William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in THE LOBBYING MANUAL 6 (4th ed. 2009).

261. JOHN L. ZORACK, THE LOBBYING HANDBOOK 24 (1990); see also Brian W. Schoeneman, *The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?*, 60 CATH. U. L. REV. 505, 505 (2011) (“[P]eople are tired of a . . . political process where the vote you cast isn’t as important as the favors you can do. And they’re tired of trusting us with their tax dollars when they see them spent on frivolous pet projects and corporate giveaways.” (quoting then-Senator Barack Obama)).

262. Eskridge, *supra* note 260, at 6.

263. *Id.* at 7–8.

patriotic organizations, all women's clubs, [and] all peace societies . . . .”<sup>264</sup>

In 1946, Congress succeeded in passing the Federal Regulation of Lobbying Act (“FRLA”), the first disclosure law for federal lobbyists. Adopting, with some minor modifications, the language of the 1936 conference bill, the FRLA’s underlying premise was to inform Congress and the public about “who is lobbying, how much they are spending, and where the money is coming from.”<sup>265</sup> Such information, Congress believed, “would prove helpful in evaluating [lobbyists’] representations and weighing their worth. Publicity is a mild step in protecting government under pressure and in promoting the democratization of pressure groups.”<sup>266</sup> In 1954, in *United States v. Harriss*, the Supreme Court upheld the constitutionality of the FRLA under the First Amendment, finding the law limited in scope as to who must register (only paid lobbyists) and what must be disclosed (information about “who is being hired, who is putting up the money, and how much [is being spent]”).<sup>267</sup>

264. *Id.* at 9.

265. Jerald A. Jacobs & David A. Handzo, *Lobbying Registration*, in FEDERAL LOBBYING LAW HANDBOOK 1 (Jerald A. Jacobs ed., 2d ed. 1993); *see also* Eskridge, *supra* note 259, at 9 (“This committee believes that every American citizen and interest that may be affected by proposed legislation has the highest right and privilege to be heard, a right that should be neither denied nor abridged. But, on the other hand, the membership of Congress, to whom appeal is made, and upon whom it is sought to exert pressure, and public likewise to whom it is appealed to, and who is asked to exert that pressure, have a right to know by whom and in whose interests such appeals are made, and by whom these movements are financed, and the manner in which the money is expended.” (quoting SUBCOMM. ON RULES OF THE HOUSE JUDICIARY COMM., 74TH CONG., REPORT ON H.R. 11,663, *reprinted in* 80 CONG. REC. 4541 (1936))).

266. Angela Lynne Davis, *Genuine Reform or Just Another Meager Attempt to Regulate Lobbyists: A Critique of the Honest Leadership and Open Government Act of 2007*, 18 KAN. J.L. & PUB. POL’Y 340, 345 (2009) (citing S. REP. NO. 79-1400, at 4–5 (1946)).

267. *United States v. Harriss*, 347 U.S. 612, 625 (1954). Indeed, “courts have generally upheld lobbying laws against challenges that they violate First Amendment-protected freedom of speech and freedom to petition the government, but only after subjecting such enactments to guarded interpretations . . . .” PETER C. CHRISTIANSON ET AL., LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK 2 (2007); *see Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009) (holding that lobbying disclosure law (HLOGA) did not violate First Amendment because “Congress’ interest in increasing public awareness of the efforts of paid lobbyists to influence the public decisionmaking process is sufficiently compelling to withstand strict scrutiny”) (internal quotation marks and citation omitted); *id.* at 14 (“Transparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy.”).

Importantly, the FRLA's disclosure requirement did not apply to all lobbyists—only those whose “principal purpose” was to lobby and who were paid to do so.<sup>268</sup> Nor did the FRLA apply to all lobbying efforts—only those directed at Members of Congress (not members of the executive branch or, arguably, congressional staff).<sup>269</sup>

Plagued by ambiguities and a lack of compliance and enforcement,<sup>270</sup> the FRLA was the source of much congressional consternation—and many proposed changes—for the next half century.<sup>271</sup> In 1995, Congress finally succumbed to the momentum for reform and replaced the FRLA with the LDA, which remains in force today.<sup>272</sup>

## 2. Application of the LDA to Law Clinics

The LDA requires only that “lobbyists”—as defined in the LDA and subject to certain monetary thresholds—publicly register and disclose details about their lobbying activities.<sup>273</sup> The two crucial questions for law clinics are: whether professors or students working in clinics are considered “lobbyists” for purposes of the LDA; and, if so, whether expenses related to lobbying activities exceed the required monetary thresholds.<sup>274</sup>

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268. See generally Federal Regulation of Lobbying Act, 2 U.S.C.A. §§ 261–270, repealed by Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995); S. REP. NO. 103-37 (1992) (explaining these limitations).

269. William V. Luneburg & A.L. (Lorry) Spitzer, *The Lobbying Disclosure Act of 1955: Scope of Coverage*, in THE LOBBYING MANUAL 43 (4th ed. 2009).

270. See, e.g., S. REP. NO. 105-147, at 1–2 (1997) (noting “serious loopholes” with respect to FRLA’s coverage, in particular, and stating that test used by FRLA to determine what constituted “primary purpose” was “much-abused”); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 33 (2006) (noting that compliance with FRLA was “rare”); Eskridge, *supra* note 259, at 11 (discussing Department of Justice’s failure to prosecute violations).

271. For a helpful discussion of FRLA reform attempts before the LDA, see Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL 23–42 (4th ed. 2009); CRAIG HOLMAN, PUBLIC CITIZEN, ORIGINS, EVOLUTION, AND STRUCTURE OF THE LOBBYING DISCLOSURE ACT 8 (2006), <http://www.citizen.org/documents/LDAorigins.pdf>.

272. 2 U.S.C.A. §§ 1601–1614 (West 1995).

273. *Id.* § 1603(a).

274. *Id.* §§ 1602(10) (defining “lobbyist”), 1603(3)(A) (listing monetary thresholds).



*a. Are Clinic Professors or Students “Lobbyists” under the LDA?*

Under the LDA, a lobbyist is a person (1) “who is employed or retained . . . for financial or other compensation,” (2) “by a client,” (3) for services that include more than one “lobbying contact,” (4) provided that the person spends at least twenty percent of his or her time over a three-month period on lobbying activities for that client.<sup>275</sup>

With respect to the first part of this definition, and of particular importance to law clinics, the LDA makes clear that “volunteers who receive no financial or other compensation” are not lobbyists (or employees).<sup>276</sup> As for the second part of the definition, the LDA defines a “client” as “any person or entity”—including a “coalition or association”—“that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity.”<sup>277</sup>

The third part of the definition represents a significant departure from both the FRLA and the Code. It defines “lobbying contacts” as “any oral or written communication” to federal legislative and executive officials and their respective employees with regard to, among other things, the formulation, modification, or adoption of federal legislation or regulations.<sup>278</sup> So, unlike the other lobbying restrictions described above, the LDA applies to *administrative* advocacy as well as legislative advocacy. The LDA also explicitly exempts a host of activities from the definition of lobbying contacts. These exemptions include: indirect (grassroots) lobbying, congressional testimony,<sup>279</sup> communications broadly disseminated to the

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275. *Id.* § 1602(10); see CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, LOBBYING DISCLOSURE ACT GUIDANCE 4 (revised Dec. 15, 2011) [hereinafter LDA GUIDANCE].

276. 2 U.S.C.A. § 1602(5); see also Lunenburg & Spitzer, *supra* note 269, at 53.

277. 2 U.S.C.A. § 1602(2).

278. *Id.* § 1602(8)(A); see S. REP. NO. 105-147, at 1–2 (1997) (expressing intent to add non-legislative issues and congressional staff and executive officials to the LDA’s coverage). Unlike the Code, the LDA does not include contacts with state and local employees. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-38, FEDERAL LOBBYING: DIFFERENCES IN LOBBYING DEFINITIONS AND THEIR IMPACT 2 (1999) (confirming that “[t]he differences in the lobbying definitions can affect whether organizations [are required to] register under LDA.”).

279. This exemption is important for law clinics. *Cf. Legislative Advocacy Clinic*, U. OF WASH. SCH. OF L. (Nov. 2, 2011), <http://www.law.washington.edu/Clinics/LegAdv/Default.aspx> (describing recent law clinic policy advocacy projects and linking to video testimony of Jason Kovacs, student in Legislative

public,<sup>280</sup> comments in response to formal rulemaking,<sup>281</sup> responses to (oral or written) government inquiries,<sup>282</sup> and anything required by subpoena or otherwise compelled by law.<sup>283</sup> Lastly, even if a person otherwise meets the definition of “lobbyist,” the LDA explicitly exempts a person whose “lobbying activities” on behalf of a client are minimal, that is, lobbying activities that constitute less than 20 percent of the person’s time working for a client over a three-month period.<sup>284</sup>

Applying the four parts of this definition, professors who teach in clinics, and students enrolled in clinics, almost certainly are not “lobbyists” under the LDA and therefore are not required to publicly register with the federal government or disclose their lobbying activities.

Even assuming that professors and students working in a clinic spend more than 20 percent of their time over a three-month period on federal lobbying activities (part four of the definition), and that such activities include more than one

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Advocacy Clinic at University of Washington “in favor of bill to extend time for shelters to report runaways during the Senate Human Services and Corrections Committee”); *Neighborhood Law and Policy*, CLINICAL PERSPECTIVES (George Wash. Univ. Law Sch., D.C.), Summer 2012, at 16, available at [http://issuu.com/gwlawpubs/docs/clinic\\_newsletter\\_summer2012\\_finalweb?mode=window&viewMode=doublePage](http://issuu.com/gwlawpubs/docs/clinic_newsletter_summer2012_finalweb?mode=window&viewMode=doublePage) (describing testimony of student in GW Law’s Neighborhood Law and Policy Clinic on DC’s Inclusionary Zoning Program); *Hearing on Federal Acknowledgment Process Before the S. Comm. on Indian Affairs*, 110th Cong. (Apr. 24, 2009) (testimony of Patty Ferguson-Bohnee, Clin. Professor of Law, Dir., Indian Legal Clinic, ASU Sandra Day O’Connor College of Law).

280. This exemption tracks the Code’s nonpartisan research exception. Compare 2 U.S.C.A. § 1602(8)(B) (West 2007), with I.R.C. § 4911(d)(2) (1978), and Treas. Reg. § 56.4911-2(c) (1990).

281. 2 U.S.C.A. § 1602(8)(B)(x). This exemption includes an activity that many law clinics engage in: communications made in response to notice of proposed rulemaking, request for information, or other notice published in the *Federal Register*. *Id.*; see also *supra* note 189 (listing examples of such activity).

282. There may be times when it is prudent for professors or students to ask for an official request to allow clinic work to fall within this exception. Only written or electronic communications in response to a request are covered. 2 U.S.C.A. § 1602(8)(B)(viii); see also William V. Luneburg, *The Lobbying Disclosure Act of 1995 and Administrative Rulemaking*, in THE LOBBYING MANUAL 231 (4th ed. 2009) (providing additional guidance on using this exception).

283. 2 U.S.C.A. § 1602(8)(B).

284. *Id.* § 1602(10). The definition of “lobbying activities” includes both “lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.” *Id.* § 1602(7) (emphasis added). Therefore, in determining whether a person’s lobbying activities exceed 20 percent, the LDA requires that one look not only at lobbying contacts but also supporting activities. *Id.*

lobbying contact (part three of the definition),<sup>285</sup> they are most likely exempt under the LDA for one of two reasons. First, to the extent that professors and students conduct lobbying activities on behalf of another individual or entity, as in the case of a lobbying firm,<sup>286</sup> they almost certainly do so on a pro bono basis.<sup>287</sup> As a result, they are “volunteers” under the LDA—not lobbyists “employ[ed] or retain[ed] . . . for financial or other compensation” (part one of the definition).<sup>288</sup> And because the individual or entity for whom they lobby does not pay them, that individual or entity is not a “client” for purposes of the LDA (part two of the definition). Indeed, congressional guidance supports this position: “a registration would not be required for pro bono clients since the monetary thresholds . . . would not be met.”<sup>289</sup> If a client pays or reimburses the clinic for lobbying expenses, this analysis may change.

Second, to the extent that professors and students conduct lobbying activities on behalf of a *cause* rather than on behalf of an individual or entity, they, too, are exempt under the LDA. In this situation, the professors and students lobby on behalf of the clinic, which is, in effect, a self-lobbying organization.<sup>290</sup> Because students do not receive monetary compensation from the clinic for their services, they are not lobbyists for the reasons discussed above. The question of whether *professors*

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285. These assumptions will not be true in the lion’s share of cases. For starters, most professors that teach in clinics do not devote such a substantial amount of time to lobbying activities. Furthermore, in contrast to the Code’s charitable lobbying restriction, the LDA’s definition of “lobbying contacts” does not include grassroots lobbying or lobbying at the state and local levels, and explicitly exempts a host of other contacts. Mayer, *supra* note 11, at 511.

286. See 2 U.S.C.A. § 1602(9) (“The term ‘lobbying firm’ means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.”).

287. Indeed, state student practice rules often *require* that law students work on a pro bono basis. See, e.g., ARIZ. SUP. CT. R. 38(d)(5)(A)(ii) (requiring that law students “neither ask for nor receive any compensation or remuneration of any kind for services rendered by [them] from the person on whose behalf the services are rendered”); see also Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 539 (2012) (“State bar student practice rules are also value-laden. Most student practice rules restrict students in clinical programs to representing poor citizens and nonprofit organizations.”).

288. 2 U.S.C.A. § 1602(2); see *id.* § 1602(5)(B) (discussing “volunteer”).

289. LDA GUIDANCE, *supra* note 275, at 5.

290. Compare 2 U.S.C.A. § 1602(2) (discussing self-lobbying organization, which is “[a] person or entity [here, the clinic] whose employees act as lobbyists on its own behalf,” and which is, therefore, “both a client and an employer of such employees.”), with *supra* notes 286 (discussing lobbying firm).

are lobbyists is admittedly more nuanced. While the university provides financial compensation to professors, the university is not the clinic's "client" under the LDA (part two of the definition). The university does not employ professors "to conduct lobbying activities on [its] behalf;"<sup>291</sup> it employs professors to teach clinics, which here includes conducting lobbying activities on behalf of someone *other* than the university, namely, the clinic.<sup>292</sup>

*b. Do Lobbying Expenses Exceed the Monetary Threshold?*

Even in the unusual situation where professors or students are considered lobbyists under the LDA on account of reimbursement or other payment they receive from clients, they are still not required to disclose their lobbying activities under the LDA unless certain monetary thresholds are met. Here, disclosure is not required unless the client pays professors and students a total of more than \$3,000 over a three-month period.<sup>293</sup> In the unlikely event that professors or

291. 2 U.S.C. § 1609(2).

292. The analysis applicable to professors would also apply to students paid by the university (for example, research assistants and LL.M. fellows). In that case, neither the students nor the university (as employer) would be required to register because the university does not pay the students to lobby on its behalf. The same would be true of students funded directly by private sources, such as a foundation. If the funding source is also the client, however, the student (or possibly the funding source, as employer of the student) may be required to register and disclose.

The same analysis would also apply to an adjunct clinic professor who works for a lobbying firm by day and then engages in lobbying work in the clinic at night on behalf of a cause. Because she is not paid by the university to lobby on behalf of the university, the university (as part-time employer) does not need to register her as its lobbyist, and her full-time employer does not need to register her as a lobbyist for the university (as client).

293. 2 U.S.C.A. § 1603(a)(3)(A)(i) (listing original \$2,500 amount). Under 2 U.S.C.A. § 1603(a)(3)(B), these monetary thresholds are adjusted every four years pursuant to the Consumer Price Index, which is why the amounts have increased. "Good faith estimates" may be used to calculate these amounts. 2 U.S.C. § 1604(b)(4).

For an organization that lobbies *without* a client—that is, on its own behalf (a self-lobbying organization)—the LDA requires disclosure only if the organization's "total expenses in connection with lobbying activities . . . do not exceed or are not expected to exceed \$10,000." *Id.* § 1603(a)(3)(A)(ii); see also William V. Luneburg & A.L. (Lorry) Spitzer, *Registration, Quarterly Reporting and Related Requirements*, in THE LOBBYING MANUAL 105, 142–46 (4th ed. 2009) [hereinafter *Registration, Quarterly Reporting*]; Luneburg & Spitzer, *supra* note 268, at 83–89; Elizabeth J. Kingsley, *A Lobbyist By Any Other Name*, in 20 TAXATION OF EXEMPTS 39, 41 (2009). As discussed above, this Article takes the

students are considered lobbyists and the monetary threshold is met, the employer for which the lobbyists work—here, the university—must register with the Secretary of the U.S. Senate and the Clerk of the U.S. House of Representatives.<sup>294</sup> After registering, the university must file quarterly reports “disclos[ing] the identities of people attempting to influence the government, the subject matters of [any such] attempts, and the amounts of money [spent] to accomplish their goals.”<sup>295</sup> In this situation, a professor would need to provide the required information to the appropriate personnel to ensure it is

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position that a clinic that lobbies *without* a client (a self-lobbying organization) would not be required to register under the LDA because neither professors nor students are paid by the university to lobby on behalf of the university.

294. 2 U.S.C. § 1603(a)(1); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-487, 2008 LOBBYING DISCLOSURE: OBSERVATIONS ON LOBBYISTS' COMPLIANCE WITH DISCLOSURE REQUIREMENTS 4 (2009) [hereinafter GAO-09-487]. The rules differ slightly for lobbying firms and in-house lobbyists. See 2 U.S.C. § 1603(a)(3)(A)(i)–(ii); Form LD-1 (initial 2 U.S.C. § 1603 registration form) and Form LD-2 (quarterly 2 U.S.C. § 1604 disclosure report form). For more information on registration and reporting generally, see Luneburg, *supra* note 208. For up to date LDA guidance, see *Lobbying Disclosure*, OFFICE OF THE CLERK (Feb. 2013) <http://lobbyingdisclosure.house.gov>, and *Public Disclosure*, U.S. SENATE [http://www.senate.gov/pagelayout/legislative/g\\_three\\_sections\\_with\\_teasers/lobbyingdisc.htm#lobbyingdisc=fec](http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm#lobbyingdisc=fec) (last visited Feb. 18, 2013). Here, a separately incorporated law clinic may have to register as the employer.

295. GAO-09-487, *supra* note 294, at 4; see 2 U.S.C. § 1603(a)(1); see generally *Registration, Quarterly Reporting*, *supra* note 292 (providing detailed information about registration and reporting under the LDA). These disclosure requirements were added to the LDA by the Honest Leadership and Open Government Act of 2007 (HLOGA), Pub. L. No. 110-81, 121 Stat. 735 (2007). Experiencing broad bipartisan support after Jack Abramoff and other lobbying scandals, HLOGA was the first piece of legislation introduced in the 110th Congress. See Davis, *supra* note 265, at 349–64 (analyzing HLOGA's impact on disclosure requirements and enforcement penalties under the LDA); Schoeneman, *supra* note 260, at 521 (stating that “[g]iven the pressure on Congress to reign in perceived abuses, HLOGA was a high priority” and further noting that HLOGA passed by “83-14 in the Senate and a similarly lopsided 411-8 in the House”).

Historically, the LDA has notoriously poor enforcement. See, e.g., Luneburg, *supra* note 207, at 123–26 (highlighting the LDA's enforcement activity); see also William V. Luneburg, *Administration and Enforcement of the LDA and Miscellaneous Lobbying Restrictions*, in THE LOBBYING MANUAL 183, 185–89 (4th ed. 2009) (describing the limited enforcement authority granted to the Secretary of the Senate and Clerk of the House as well as the notification and correction processes if a lobbyist or organization is found in “noncompliance” with the law). For this reason, some have described the LDA as “a primarily symbolic law.” Anita S. Krishnakumar, *Towards A Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 521–22 (2007). Nonetheless, compliance with the LDA is particularly important for professors who teach students about the “model” law office. See Joy, *supra* note 16 and accompanying text; see also Geoffrey W. Rapoport, *Licensing And Self-Regulation Of Lobbyists*, 23 GEO. J. LEGAL ETHICS 749, 749–52 (2010) (calling for a lobbying bar to create structures to regulate activity to “promote the public good”).

included in the university's filings.

### B. State Disclosure Laws

In addition to the LDA, each state has its own lobbying disclosure law.<sup>296</sup> These laws vary considerably, both from each other and from the LDA. The main differences fall into three categories: (1) the definition of lobbying; (2) monetary thresholds that must be met to prompt disclosure; and (3) disclosure requirements.

#### 1. Definitions of Lobbying

Like the LDA, state disclosure laws are not triggered unless "lobbying" occurs.<sup>297</sup> With respect to the definition of lobbying, the overwhelming majority of states follow the LDA's definition and include contact with legislative and administrative bodies.<sup>298</sup> Indeed, only six states limit the definition of lobbying to legislative bodies only.<sup>299</sup> Some states go even further than the LDA by including efforts to influence *local* legislative and administrative bodies in their definitions of lobbying.<sup>300</sup>

In addition to differences based on the target of the lobbying contact, states' definitions of lobbying differ based on the activities in which the lobbyist engages. Fourteen states follow the LDA in excluding grassroots lobbying from coverage, while others require disclosure of grassroots lobbying only when the lobbyist also engages in direct lobbying.<sup>301</sup>

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296. See *States' Legislative Ethics and Lobbying Laws*, NAT'L. CONFERENCE OF STATE LEGISLATURES (Feb. 2012) <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-legislative-ethics-and-lobbying-laws.aspx>; CHRISTIANSON ET AL., *supra* note 267, at 1–7 (detailing each state's laws on the impact of money on lobbying and other efforts).

297. See, e.g., ARIZ. REV. STAT. ANN. §§ 41-1231, 1232 (2012); S.C. CODE ANN. § 2-17-20(A) (2012).

298. NIELSEN ET AL., STATE LOBBY AND GIFT LAWS, 1901 PLI/CORP 703, 710 (2011).

299. NIELSEN ET AL., *supra* note 298, at 710; see also FLA. STAT. § 11.045(e) (2012) (in addition to "influencing or attempting to influence legislative action or nonaction[, lobbying includes] an attempt to obtain the goodwill of a member or employee of the Legislature").

300. NIELSEN ET AL., *supra* note 298, at 711.

301. *Id.* at 710; see, e.g., ARIZ. REV. STAT. ANN. § 41-1231(11) ("Grassroots lobbying" need not be disclosed); WIS. STAT. § 13.68(1)(a)(5) (2013) (stating that if registration is otherwise triggered, expenditures related to grassroots lobbying must be included in calculating figures to disclose).

Finally, some states exempt certain lobbyists or impose different disclosure requirements based on the identity of the lobbyist or the client. For example, in Arizona, a lobbyist is not subject to certain disclosure requirements if he or she is lobbying on behalf of a public body.<sup>302</sup> In Maryland, helping a religious organization protect its members' right to practice that religion is not lobbying.<sup>303</sup> In Connecticut, media personnel are exempt if the activities involve editorializing or distributing news to the public.<sup>304</sup> Other states exempt personnel from specific organizations by name. For example, Indiana exempts the National Conference of State Legislators, the National Black Caucus of State Legislators, Women in Government, the National Conference of Insurance Legislators, and the Council of State Governments.<sup>305</sup>

In many states, much of the policy work that clinics undertake for a cause or client will fall into a lobbying exemption or, with professor foresight and client consent, could be structured in such a way. For example, it is not lobbying in Arizona to draft legislation or to offer advice to clients about "the construction and effect of proposed or pending legislation."<sup>306</sup> Nor is it lobbying to answer "technical" questions posed by legislators.<sup>307</sup>

## 2. Monetary Thresholds

If lobbying occurs, the next question is whether the amount of lobbying meets any applicable monetary thresholds such that registration and disclosure is required. Unlike the LDA, the majority of state disclosure laws do not have a monetary threshold that must be met to trigger disclosure requirements.<sup>308</sup> For example, in Arizona, "any person . . . who is employed by, retained by, or representing a person other

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302. ARIZ. REV. STAT. ANN. §§ 41-1231(2), (4), (11). Essentially, a "public body" is any state, county, city, town, district, or political subdivision in Arizona that uses a designated public lobbyist. *Id.* § 41-1231(17).

303. MD. CODE ANN., STATE GOV'T § 15-701(b)(1)(iii) (LexisNexis 2012).

304. CONN. GEN. STAT. § 1-91(1)(2) (2012).

305. IND. CODE § 2-7-1-10(b) (2012); *see also* Paul Abowd, *ALEC Gets a Break from State Lobbying Laws*, MOTHER JONES (May 8, 2012), <http://www.motherjones.com/politics/2012/05/alec-lobbyist-exemption>.

306. ARIZ. REV. STAT. ANN. § 41-1232.04(5).

307. *Id.* § 41-1232.04(4); *see also* CHRISTIANSON ET AL., *supra* note 267, at 78–79.

308. *See, e.g.*, N.Y. LEGIS. LAW §1-C (2012); N.C. GEN. STAT. § 120C-100 (2012); OR. REV. STAT. § 171.725 (2012); S.C. CODE ANN. § 2-17-10(13) (2012).

than himself *with or without* compensation for the purpose of lobbying” is a lobbyist.<sup>309</sup> In these states, “lobbyists” must comply with disclosure obligations regardless of how much money is spent or received on lobbying activities.

A minority of states, however, follow the LDA and do not require disclosure unless the lobbyist has spent or received a statutorily defined amount of money.<sup>310</sup> While the LDA sets this threshold at \$11,500 (expended) and \$3,000 (received),<sup>311</sup> state laws usually designate smaller amounts. For example, in Connecticut, a lobbyist is required to register with the Office of State Ethics if he or she spends at least \$2,000 in a calendar year on lobbying (a so-called “client lobbyist”).<sup>312</sup> A lobbyist is also required to disclose if he or she receives at least \$2,000 in a calendar year for lobbying on behalf of a client lobbyist, even if the lobbying “is incidental to that person’s regular employment” (a so-called “communicator lobbyist”).<sup>313</sup> Thus, for both client and communicator lobbyists, there is a threshold monetary amount that must be met to trigger disclosure requirements.

Clinic professors and students are unlikely to meet the monetary thresholds contained in state laws for the same reasons that they do not meet those thresholds under the LDA. For example, Connecticut’s Office of State Ethics takes the position that clinic students are not required to register because they receive no money (only academic credit) for their policy work.<sup>314</sup> Furthermore, because clinic professors are not paid by their clients to lobby, and because professors’ salaries are not dependent on, or influenced by, their engaging in legislative advocacy, they too are not required to register. According to the Office of State Ethics, however, if a client were

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309. ARIZ. REV. STAT. ANN. § 41-1231(12) (emphasis added).

310. See, e.g., ARK. CODE ANN. § 21-8-402 (2012); GA. CODE ANN. §§ 21-5-70, -71 (2012); HAW. REV. STAT. § 97-1 (2012); IND. CODE § 2-7-1-10 (2012); KAN. STAT. ANN. § 46-222 (2012); MD. CODE ANN., STATE GOV’T § 15-701 (2012); MICH. COMP. LAWS § 4.415 (2012); MINN. STAT. § 10A.01 (2012); 65 PA. CONS. STAT. §§ 13A03, 13A06 (2012); TEX. GOV’T CODE ANN. § 305.003 (2011); VT. STAT. ANN. 2 § 261 (2012).

311. 2 U.S.C.A. § 1603 (West 2007); see *supra* note 293 and accompanying text.

312. CONN. GEN. STAT. ANN. § 1-94 (West 2013); see also SANDRA NORMAN-EADY, OFFICE OF LEGISLATIVE RESEARCH, 2002-R-0714, OLR RESEARCH REPORT: LOBBYING (2002), available at <http://www.cga.ct.gov/2002/rpt/2002-R-0714.htm> (explaining the “two categories of lobbyists: client and communicator”).

313. CONN. GEN. STAT. ANN. § 1-94; see also NORMAN-EADY, *supra* note 312 (explaining the “two categories of lobbyists: client and communicator”).

314. Telephone Interview, Assistant General Counsel for Connecticut Office of State Ethics (Jan. 12, 2012) (name unavailable).



to reimburse the clinic for lobbying expenses, such as transportation or copying costs, or were to otherwise render payment to the clinic for lobbying, this would likely trigger registration for the clinic (and for the client), assuming the monetary thresholds were met.<sup>315</sup>

### 3. Registration and Disclosure Requirements

If state disclosure requirements are triggered, state laws vary considerably in the frequency and content of information that must be disclosed.<sup>316</sup> Generally speaking, lobbyists (and/or their employers and clients) must file regular reports with a designated executive agency.<sup>317</sup> Some states require an initial registration form to be filed before any lobbying may take place; others allow filing within a reasonable time after the initial lobbying contact or activity.<sup>318</sup> Most states require disclosures to be updated regularly (as defined by statute or regulation).<sup>319</sup>

With respect to the content of the disclosures, usually lobbyists (and/or their employers and clients) must disclose the amount of time they spent lobbying and the amount of money they spent or received with regard to a particular client or issue.<sup>320</sup> Some states require the name and number of a specific bill or administrative proposal to be disclosed; others allow for a general description of the issue.<sup>321</sup> Other states go further,

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315. *Id.*

316. See BUREAU OF NAT'L AFFAIRS, BNACPS No. 25-3 s VI, CORPORATE LOBBYING: FEDERAL AND STATE REGULATION (2010). See generally *States' Legislative Ethics and Lobbying Laws*, *supra* note 296.

317. Unlike the LDA, which places a legislative entity in charge of disclosures, 2 U.S.C. § 1605 (2012), all states have placed that responsibility in an administrative office. See Robert L. Theriot, *Lobbying Government Officials—Legal, Ethical, and Practical Considerations*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION SPECIAL INSTITUTE: FEDERAL AND INDIAN OIL AND GAS ROYALTY VALUATION AND MANAGEMENT BOOK 1, PAPER 12 (2007) (observing that the LDA is the only law that requires disclosure to a legislative office).

318. Compare ARIZ. REV. STAT. ANN. §§ 41-1232, 41-1232.01 (2012) (disclosure must take place before lobbying), with MINN. STAT. § 10A.03 (2012) (initial disclosure must take place within five days of executing a lobbying agreement with a new client).

319. See BUREAU OF NAT'L AFFAIRS, *supra* note 316, at 220 (noting that some states “require monthly, quarterly, semiannually, annually, or biennially” updated disclosures).

320. See, e.g., MICH. COMP. LAWS § 4.417(1) (2012); WASH. REV. CODE. § 42.17A.600(1) (2012); MD. CODE ANN., STATE GOV'T § 15-704(b) (2012).

321. Compare N.Y. LEGIS. LAW §§ 1-e(c)(5)(ii)–(iii) (2011) (requiring disclosure of “the legislative bill numbers[, and] the numbers or subject matter (if there are

requiring the names of the particular people lobbied or targeted.<sup>322</sup> Finally, unlike the LDA, many states require lobbyists to disclose their salaries as well as any association they may have with the people whom they are trying to influence.<sup>323</sup>

*C. Recommendations for Complying with Federal and State Lobbying Disclosure Laws*

To ensure compliance with the LDA and state disclosure laws, professors should carefully evaluate potential client retainer agreements and the structure of clinic projects to determine whether they trigger disclosure requirements.

In most cases, professors, universities (as the professors' employers), and students will not have to register as lobbyists under the LDA or in states like Connecticut that require compensation as a prerequisite to disclosure. Professors and students simply will not meet the requisite monetary thresholds. The answer might be different, however, for clinics that receive payment from a client, such as reimbursement for travel or copying expenses, assuming these payments exceed any relevant monetary thresholds. Professors that teach in clinics should keep this in mind as they undertake lobbying work for clients.

In the majority of states, like Arizona, that impose registration requirements on lobbyists without regard to compensation, professors should familiarize themselves with the scope of the definition of lobbying in their state—in particular, available exemptions. If desired, projects can often be structured in a way that avoids disclosure without sacrificing the goals of the advocacy or the training of students.<sup>324</sup> If disclosure is required, professors will need to

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no numbers) of gubernatorial executive orders . . . ”), with MINN. STAT. § 10A.03(5) (2010) (requiring disclosure of “a general description of the subject or subjects on which the lobbyist expects to lobby”).

322. See, e.g., ARIZ. REV. STAT. ANN. § 41-1232(A) (2010) (requiring disclosure of all government bodies (including commissions, councils, agencies, and others) targeted by any lobbyist); 65 PA. CONST. STAT. § 13A05(b)(3) (2012) (requiring disclosure of “name, position and each occurrence [of a] State official or employee who receives from a principal or lobbyist anything of value”).

323. See, e.g., ARIZ. REV. STAT. ANN. § 41-1232.05(A); FLA. STAT. § 11.045(2)(d) (2012) (requiring disclosure of any business relationships with existing legislators).

324. Professors might also consider contacting the offices of the U.S. Senate Secretary, U.S. House Clerk, or relevant state enforcement agency to confirm that

familiarize themselves with the frequency and content of the information required to be disclosed. These requirements will vary depending on the applicable state law.

Appendix D summarizes these recommendations.

## CONCLUSION

Over the past decade, policy advocacy has exploded onto the clinical legal education scene, bringing with it not only the promise of new teaching opportunities, but also the problems of the unknown. Professors that teach in clinics know that there is a fine line between policy advocacy and lobbying, but they do not necessarily know where that line is, or what happens if one crosses it; and so “lobbying” has been relegated to the shadows—a creature of tax, of government funding, of technical disclosure requirements. The *L* word of which we dare not speak.

At the same time, law clinics have been attacked for the work they undertake. While these attacks primarily have targeted the litigation that clinics bring,<sup>325</sup> clinic lobbying could be next, as demonstrated by the recent legal assault on ALEC for flouting various lobbying restrictions.<sup>326</sup> ALEC’s woes are a cautionary tale for those who would prefer not speak Lobbying’s name.

This Article thrusts clinic lobbying out of the darkness and into the light by explaining lobbying restrictions’ implications for law clinics and how professors might best comply with them. A subsequent article will explore whether these restrictions *should* apply to law clinics by examining the theoretical dimensions of applying lobbying restrictions to law clinics, and by offering legal and policy reasons for exempting law school clinics from such restrictions.

In the meantime, far from scaring professors away from lobbying, we seek to embolden professors (and, by association, their students) to lobby *more* by equipping them with (nearly) everything they need to traverse this rewarding terrain. In

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potential projects fall outside the definition of lobbying pursuant to that office’s interpretation of relevant laws. Of course, professors should be mindful of the ethical quandaries this may present. *See* Kuehn & McCormack, *supra* note 25, at 81–85 (describing survey results about the impact of external sources on clinic faculty in project/case selection).

325. *See supra* note 25.

326. *See* Abowd, *supra* note 305; *see also supra* notes 21–23 and accompanying text.

sum, "Can law school clinics lobby?" Yes, clinics almost certainly can. And they should.

## APPENDIX A

### *The Internal Revenue Code's Restrictions on Lobbying*

This appendix contains questions designed to help professors that teach in law school clinics identify policy work that may trigger reporting requirements under the Internal Revenue Code.

Part II of the Article covers this topic further.

#### I. Determine the Tax Reporting Test Utilized by Your University

Does your university use the *substantial part* test (see Appendix B)?

*If yes:* Proceed to Part II, Question A.

*If no:* Proceed to Part II, Question D.

#### II. Determine if Your Activity is Considered Lobbying by the IRS

**A. Is the clinic attempting to influence legislation?** Is the clinic contacting, or urging the public to contact, members of a legislative body for the purpose of:

1. Proposing, supporting, or opposing legislation, or
2. Advocating the adoption or rejection of legislation (even if no legislation is pending)?

*If yes to either:* You may be engaged in lobbying under the substantial part test. Proceed to Question C.

*If no to both:* Proceed to Question B.

**B. Is the clinic engaged in supporting activities?** Is the clinic engaged in research, discussion, and similar activities in support of lobbying by someone else (e.g., a client)?

*If yes:* Assuming that the ultimate activity is considered lobbying, these supporting activities are also probably considered lobbying. Proceed to Question C.

*If no:* Your supporting activities are probably not lobbying under the substantial part test, **and you do not need to**

**report your activity.**

**C. Do the clinic's activities fall within a lobbying exception?** Is the clinic engaging in:

1. Nonpartisan research and analysis?
  - a. Is the material made available to the public or to governmental bodies, officials, or employees?
  - b. Does the material avoid advocating the adoption or rejection of legislation?

*If yes to both:* Your activity likely falls within the lobbying exception for nonpartisan research and analysis. It is not considered lobbying, **and you do not need to report your activities.**

*If no to either:* This exception likely does not apply. Proceed to Question C2.

2. Examinations or discussions of broad social problems? This exception is unclear under the substantial part test. Nevertheless, the following questions are instructive:
  - a. Does the communication involve public discussion, or communications with members of legislative bodies or governmental employees, regarding issues that are also the subject of legislation before a legislative body?
  - b. Does the communication avoid advocating the adoption or rejection of legislation?

*If yes to both:* Your activity probably falls within the lobbying exception for examinations of broad social problems. It is probably not considered lobbying, **and your activities need not be reported to the IRS.**

*If no to either:* This exception probably does not apply. Proceed to Question C3.

3. Responses to official requests for technical advice or assistance? This exception is unclear under the substantial part test. Nevertheless, the following

questions are instructive:

- a. Is the clinic providing technical advice or assistance (including oral or written testimony) to a legislative body, committee, or subcommittee?
- b. Is the request in writing?
- c. Is the request from a governmental body, committee, or subcommittee, as opposed to an individual?
- d. Is the clinic's response made available to every member of the requesting body?

*If yes to all:* Your activity probably falls within the lobbying exception for a response to a request for technical advice or assistance. It is probably not considered lobbying, even if the clinic advocates the passage or defeat of legislation, **and you do not need to report your activity to the IRS.**

*If no to any:* Your activity probably does not fall within a lobbying exception. It *is* considered lobbying. Proceed to Part III.

**D. Does your university elect to use the *expenditure* test** (see Appendix B)?

*If yes:* Proceed to Question E.

*If no:* Return to Question A.

**E. Is your clinic engaged in direct lobbying?**

1. Is your clinic attempting to influence legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation?
2. Does the communication refer to specific legislation?
3. Does the communication reflect a view on such legislation?

*If yes to all:* You likely are engaged in direct lobbying. Proceed to Question G.

*If no to any:* You likely are not engaged in direct lobbying. Proceed to Question F.

**F. Is your clinic engaged in grassroots lobbying?**

1. Is your clinic attempting to influence the views of the general population or a specific segment of the public?
2. Does the clinic's communication refer to and reflect a view on such legislation?
3. Does the clinic's communication "encourage the recipient to take action" with respect to the legislation?

*If yes to all:* You likely are engaged in grassroots lobbying. Proceed to Question G.

*If no to any:* You likely are not engaged in grassroots lobbying, **and you do not need to report your activity to the IRS.**

**G. Do the clinic's activities fall within a lobbying exception?** Is the clinic engaging in:

1. Nonpartisan research and analysis?
  - a. Does the communication provide an independent and objective exposition of a particular subject matter?
  - b. Is the communication made available to the general public or a segment of members of the general public, or to governmental bodies, officials, or employees (and not those who are interested solely in one side of a particular issue)?
  - c. Does the communication avoid directly encouraging recipients to take action with respect to legislation?

*If yes to all:* Your communication likely falls within the lobbying exception for nonpartisan research and analysis. It is not considered lobbying, **and you do not have to report your activity to the IRS.** (Reminder: subsequent use of the materials for grassroots lobbying may cause them to be treated as grassroots lobbying.)

*If no to any:* This exception likely does not apply. Proceed to Question G2.



2. Examinations or discussions of broad social problems?  
Does the communication:

- a. Involve public discussion, or communications with members of legislative bodies or governmental employees, regarding issues that are also the subject of legislation before a legislative body?
- b. Avoid addressing the merits of specific legislation?
- c. Avoid directly encouraging action with respect to that legislation?

*If yes to all:* Your communication likely falls within the lobbying exception for examinations of broad social problems that are also the subject of legislation before a legislative body. It is not considered lobbying, **and you do not have to report your activity to the IRS.**

*If no to any:* This exception likely does not apply. Proceed to Question G3.

3. Requests for technical advice or assistance?

- a. Is the clinic providing technical advice or assistance (including oral or written testimony) to a legislative body, committee, or subcommittee?
- b. Is the request in writing?
- c. Is the request from a governmental body, committee, or subcommittee, as opposed to an individual?
- d. Is the clinic's response made available to every member of the requesting body?

*If yes to all:* Your communication likely falls within the lobbying exception for technical advice or assistance. It is not considered lobbying, even if the clinic advocates the passage or defeat of legislation, **and you do not have to report your activity to the IRS.**

*If no to any:* This exception likely does not apply. Proceed to Question G4.

4. Self-defense communications?

- a. Is the clinic's communication with a legislative body, committee, or subcommittee, or with individual legislators, staff members, or executive officials?
- b. Does the communication relate to possible legislative action that might affect the existence of the university (or, presumably, the clinic), its powers and duties, its tax-exempt status, or the deductibility of contributions to the university?

*If yes to both:* Your communication likely falls within the lobbying exception for self-defense communications. It is not considered lobbying, **and you do not have to report your activity to the IRS.**

*If no to either:* Your activity likely does not fall within a lobbying exception. It is considered lobbying. Proceed to Part III.

### III. Determine What Information to Report if the Clinic is Lobbying

If you are engaged in lobbying, **you should disclose the following information** for inclusion in the university's annual report to the IRS via Form 990.

- A. Determine who oversees the university's tax filings or the appropriate person(s) at your university to whom you should provide the relevant information about the clinic's lobbying activities (e.g., law school administration, university general counsel, finance department).
- B. If your university uses the substantial part test, you should provide the person(s) identified in III.A. with a narrative description of all lobbying activities; professor, student (paid or unpaid), and staff time devoted to lobbying (including time spent on research, discussion, and similar activities in preparation for lobbying); and all money spent on lobbying.
- C. If your university uses the expenditure test, you

should provide the person(s) identified in III.A. with a report of professor and staff time devoted to lobbying as well as money spent on lobbying (including expenses related to preparing and distributing lobbying communications). You also should report the hours of clinic students engaged in lobbying who receive money from the university.

**APPENDIX B***University Reporting and Elections Related to Lobbying Under the Internal Revenue Code*

This appendix captures information reported by various universities on IRS Form 990 as required by the Internal Revenue Code.<sup>327</sup>

UNIVERSITY	University Reported Lobbying Activities	University Elected Expenditure Text	University Subject to Substantial Part Test
American University	No		
Baylor University	Yes		X
Boston College	Yes		X
Boston University	Yes		X
Brooklyn Law School	No		
Case Western Reserve	Yes		X
Catholic University of America	No		
Chapman University	Yes		X
Columbia University	Yes		X
Cornell University	Yes		X
DePaul University	Yes		X
Duke University	Yes		X
Emory University	Yes		X
Fordham University	Yes		X
George Washington University	Yes	X	

[Table Continued on Next Page]

327. This list was last updated on December 3, 2012. This appendix does not include any separately incorporated law clinics at the listed universities or public universities utilizing the section 115 exemption without also being a 501(c)(3) organization.

UNIVERSITY	University Reported Lobbying Activities	University Elected Expenditure Text	University Subject to Substantial Part Test
Georgetown University	Yes	X	
Gonzaga University	Yes		X
Harvard University	No		
Hofstra University	Yes		X
IIT (Chicago-Kent)	Yes		X
Lewis and Clark College	No		
Loyola University	No		
Marquette University	Yes		X
New York University	Yes		X
Northwestern University	Yes	X	
Pepperdine University	Yes		X
Quinnipiac University	No		
Santa Clara University	Yes		X
Seattle University	Yes		X
Seton Hall University	Yes		X
Southern Methodist University	Yes	X	
St. John's University	Yes		X
St. Louis University	Yes		X
Stanford University	Yes		X
Temple University	Yes		X
Tulane University	Yes		X

[Table Continued on Next Page]

UNIVERSITY	University Reported Lobbying Activities	University Elected Expenditure Text	University Subject to Substantial Part Test
University of Chicago	Yes		X
University of Miami	Yes	X	
University of Notre Dame	Yes		X
University of Pennsylvania	Yes		X
University of Pittsburgh	Yes		X
University of Richmond	No		
University of San Diego	Yes		X
University of San Francisco	Yes		X
University of Southern California	Yes		X
University of the Pacific	Yes		X
Vanderbilt University	Yes	X	
Villanova University	No		
Wake Forest University	Yes		X
Washington & Lee University	No		
Washington University	Yes	X	
William Mitchell College of Law	No		
Yale University	Yes	X	
Yeshiva University	Yes		X

## APPENDIX C

### *Lobbying Restrictions on Recipients of Government Funds*

This appendix contains questions designed to help professors that teach in law school clinics identify policy work that may trigger lobbying restrictions on recipients of federal and state funds.

Part III of the Article covers this topic further.

#### I. Determine the Source of Government Funding

- A. Does the clinic receive money from a federal grant, contract, or cooperative agreement?

*If no:* Proceed to Question B of this Section.

*If yes:* Proceed to Section II, Question A.

- B. Does the clinic receive money from a state grant, contract, or cooperative agreement?

*If no:* Proceed to Question C of this Section.

*If yes:* Proceed to Section III, Question A.

- C. Is the professor a state employee?

*If no:* The professor is probably not subject to state lobbying restrictions on recipients of government funding.

*If yes:* State law and, in turn, state employee personnel policies, may restrict lobbying by state employees, such as public university employees. Professors should review relevant state laws and state employee personnel policies with respect to lobbying to confirm.

#### II. Determine if Federal Lobbying Restrictions Apply.

- A. **Does the clinic use federal money** (as opposed to money from non-federal sources):

1. to attempt to influence the introduction, enactment or modification of federal *or state* legislation by communicating with a member of a

- legislative body (except if the communication is a self-defense communication or a response to a request for technical assistance)?
2. to make direct appeals to the public to contact legislators to support or oppose federal *or state* legislation (including urging individuals to contribute to or participate in a demonstration, march, rally, fund raising drive, lobbying campaign, or letter writing or telephone campaign)?
  3. for “legislative liaison activities,” which include attending legislative sessions or hearings, gathering information regarding legislation, and analyzing the effect of legislation, but only in preparation to engage in unallowable lobbying?

*If yes to any:* The clinic may be in violation of OMB regulations restricting lobbying by recipients of federal funds. Proceed to Section II, Question B.

*If no to all:* The clinic is probably not in violation of OMB regulations. Proceed to Section II, Question B.

- B. **Does the clinic use federal money** (as opposed to money from non-federal sources) to “pay a person to influence or attempt to influence a federal agency official or Congressional employees in an attempt to obtain a federal grant, loan, contract, or agreement?”

*If yes:* The clinic may be in violation of the Byrd Amendment’s restrictions on certain lobbying by recipients of federal funds. Proceed to Section II, Question C.

*If no:* The clinic is probably not in violation of the Byrd Amendment. Proceed to Section II, Question C.

- C. **Does the Clinic use federal money** (as opposed to money from non-federal sources) for “publicity or propaganda,” that is, grassroots lobbying?

*If yes:* The clinic may be in violation of federal appropriations laws, which often prohibit such lobbying by recipients of federal funds. Professors should closely review the terms of their grants with respect to lobbying to confirm. Proceed to Section I, Question B.



*If no:* The clinic is probably in compliance with federal appropriations laws. Proceed to Section I, Question B.

III. Determine if State Lobbying Restrictions Apply.

Does the Clinic use money from a state grant, contract, or cooperative agreement for lobbying?

*If yes:* The clinic may be in violation of state appropriations laws, which often mirror federal appropriations laws in prohibiting such lobbying. Professors should closely review the terms of their state grants with respect to lobbying to confirm. Proceed to Section I, Question C.

*If no:* The clinic is probably not in violation of state appropriations laws. Proceed to Section I, Question C.

**APPENDIX D***Lobbying Disclosure Requirements*

This appendix contains questions designed to help professors that teach in law school clinics identify whether they need to register and report lobbying to the government pursuant to the Lobbying Disclosure Act (“LDA”) or state lobbying disclosure laws.

Part IV of the Article covers this topic further.

I. Determine if the Clinic’s Activities Trigger Disclosure Obligations under the LDA?

A. Are the professors or students in the clinic considered lobbyists?

1. Does a professor or student lobby either the U.S. Congress or a federal agency? (See *supra* Part IV.A.2 for the LDA’s definition of lobbying, including lobbying exceptions for: indirect (grassroots) lobbying, congressional testimony, communications broadly disseminated to the public, comments in response to formal rulemaking, responses to (oral or written) government inquiries, and anything required by subpoena.)
2. Does a client provide financial or other compensation to a professor or student to lobby on its behalf?
3. Does a professor or student make more than one lobbying contact on behalf of the client and spend more than 20 percent of his or her time over a three-month period on such lobbying?

*If yes to all of the above:* Proceed to Question B.

*If no to any one of the above:* The professors and students in the clinic are likely not “lobbyists” under the LDA; you are probably not required to disclose information.

B. Do clinic lobbying expenses exceed the required monetary threshold?

Does the client pay professors or students more than a total of \$3,000 over a three-month period to engage in lobbying activities?

*If yes:* The LDA probably requires the university to register with the Secretary of the U.S. Senate and Clerk of the U.S. House of Representatives and to include the clinic's lobbying activities and expenses in any quarterly disclosure reports.

*If no:* The LDA probably does not require the clinic or university to disclose any information.

II. Determine if the Clinic's Activities Trigger Disclosure Obligations under State Law.

A. Do your activities fall within the definition of "lobbying" under relevant state law?

1. Consider the target of lobbying activities. Most states, like the LDA, include contact with legislative *and* administrative staff within their definition of lobbying. Some states also include efforts to influence local legislative and administrative bodies.
2. Consider the type of lobbying activities. Disclosure may not be required for grassroots lobbying.
3. Consider the identity of the lobbyist or client. Disclosure may not be required for certain bodies.

*If your clinic's activities fall within the state's definition of lobbying:* proceed to Question B.

*If your clinic's activities do not fall within the state's definition of lobbying:* you are probably not required to disclose your activities to the applicable state body.

B. Do your activities exceed any defined monetary thresholds?

1. If state law includes a monetary threshold (the minority rule) and:
  - neither professors nor students receive payment from a client in excess of that threshold, state disclosure laws are most likely

not triggered and you are not required to disclose your activities.

- professors or students receive payment from a client in excess of that threshold, state disclosure laws are probably triggered. Review your state law closely to determine what you may be required to disclose.

2. If state law does not include a monetary threshold (the majority rule), state disclosure laws are probably triggered. Review your state law closely to determine what information you may be required to disclose.