NEW YORK
TEMPORARY STATE COMMISSION
ON REGULATION OF LOBBYING

OPINION NO. 21 (79-1)

FACTS

The Committee on Public Utility Law of the New York State Bar Association posed the following as the first of three questions:

"May contacts other than direct contacts with legislators, the Governor, or regulatory agency decision makers be deemed 'lobbying' or 'lobbying activities' under Section 3(b) of the Act?"

The Committee believes such contacts are not lobbying, citing as the prime support for its opinion U.S. vs. Harriss, 347 U.S. 612 (1953), and later cases substantially relying on Harriss. The Committee therefore claims only certain direct contact activities come under the State's Regulation of Lobbying Act. These would include "buttonholing," or an equivalent, of a governmental decision maker. The Committee's brief relies heavily on the First Amendment guarantees of "unrestricted competition of ideas in the intellectual marketplace," and claims that the phrase "attempts to influence," under Section 3(b) of the Act, is "vague and unqualified."

ISSUE

The issues appear to narrow themselves to what constitutes "direct contact," and who may be included in the class of "decision makers."

DISCUSSION

Federal case law is clear when it speaks of a requirement that, to constitute lobbying, the action "must have been through direct communication with members of Congress." (U.S. vs. Harriss, 347 U.S. 612 and several later cases.) Relative to what constitutes direct communications, the question arises as to whether physical presence is necessary. In the Harriss case, Justice Douglas, in dissent, sees the majority as "construing the law narrowly to 'buttonhole' Congressmen...". However, the majority is nowhere that specific in suggesting the necessity of a physical presence. In fact, the majority (at p. 620) acknowledges the intent of Congress in passing the Federal Lobbying Act to cover disclosure of "direct pressures exerted by lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign." (Emphasis added.) Thus, direct physical presence or "buttonholing" would not appear to be necessary to constitute lobbying.

Further, it is a well-accepted practice, due to the complexities of modern government and the business world, for decision makers to delegate decision-making power to specified subordinates and to rely heavily on the informed recommendations of subordinates in the making of decisions. Today's busy legislator or executive cannot begin to become intimately familiar with all the information necessary for decision making in every instance, such that reliable staff are essential to the process. Lobbyists have long recognized this in focusing much of their effort to influence decision- making on key staff. Clearly, then, this type of lobbying must be considered "direct contact" under the Harriss and later cases.

On the question of First Amendment freedoms discussed by the Committee in their brief, the Supreme Court is quite clear in the Harriss opinion (p. 625):

"Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent."

"Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much..."

OPINION

To conform with Federal case law, to constitute "lobbying activity" under the New York State Regulation of Lobbying Act, Section 3(b), contacts with legislators, the Governor or regulatory agency decision makers must be direct. However, the term "direct" must be interpreted to include written or printed communications directed to the decision maker. Further, "direct contact" would include contacts with those staff members of the decision maker to whom authority to decide had been delegated and to those staff members upon whom the decision maker relies for informed recommendations on matters under consideration. To conclude otherwise would afford lobbyists, who might wish to use same, a major loophole through which they could accomplish their goal of attempting to influence legislation (through key staff) without having to register or report.

APPROVED BY COMMISSION: FEBRUARY 8, 1979

CONCURRING: CHAIRMAN S. STANLEY KREUTZER, VICE CHAIRMAN OWEN McGIVERN, MARGARET C. ANDRONACO, and D. CLINTON DOMINICK.

/S/

S. STANLEY KREUTZER
Chairman