



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 29, 1996

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-1

Roger S. Ballentine  
Patton Boggs, L.L.P.  
2550 M Street, N.W.  
Washington, D.C. 20037

Dear Mr. Ballentine:

This refers to your letters dated February 21 and January 16, 1996, which request advice concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposal by the Association of Trial Lawyers of America ("ATLA") to send "partisan communications" to its members that would solicit contributions for the campaigns of ATLA-endorsed Federal candidates.

You state that ATLA is an incorporated membership organization composed of individual trial attorneys, law professors, judges, military attorneys, government attorneys, and law students<sup>1</sup>. The Commission has concluded previously that ATLA is a federation of trade associations. See Advisory Opinion 1977- 44.

#### ATLA'S PROPOSED COMMUNICATIONS

You state that ATLA wishes to exercise its right to send "partisan communications" to its members. It plans to establish a program whereby its members are encouraged to contribute money to the campaigns of Federal candidates endorsed by ATLA. You affirm that members would have complete discretion whether to participate and how much to contribute.<sup>2</sup> You further explain that, in order to encourage ATLA members to contribute, ATLA proposes to establish honorific designations for members who contribute certain amounts to candidates chosen by the member from lists of ATLA-endorsed candidates and party committees.

After informing members of the program, ATLA would send lists of endorsed candidates to members. The numbers of such communications, you state, might vary between one or two in a

non- election year to monthly during an election year. Such communications would also vary as to the number of endorsed candidates or committees included. If a member asks to be removed from the program, that member would no longer receive communications.

You also state that ATLA might wish to seek advance commitments from members to attain a specific honorific designation in a given year. You explain that, while ATLA would expect members to fulfill such pledges, there would be no penalty or retribution for members who choose not to fulfill those commitments. ATLA would not ask for specific commitments from members to give a specific amount to any specific candidate. Members would be asked to reach a certain dollar amount of contributions for an entire group of candidates. The pledging ATLA members would reach a certain honorific designation by making the necessary amounts of contributions. Subsequent communications might remind members of their particular commitments, as well as provide the names of endorsed candidates.

You indicate that the communications would remind members of the contribution limits established under Federal election law. ATLA would not provide envelopes or stamps or in any way "facilitate the transmittal of contributions." The communications would disclose the names and addresses of the endorsed candidates, party committees, or the candidate's designated representatives, and state clearly that contributions must be sent directly to these recipients and not to ATLA headquarters. If the member wishes to receive an honorific designation on the basis of his or her contributions, it would be the member's responsibility to inform ATLA that he or she made the contributions. The members would inform ATLA either in writing or by telephone.

Regarding this proposal your request asks ten specific questions set out below:

1. May ATLA send communications to its members inviting them to attain certain honorific designations by contributing certain amounts of money to candidates endorsed by ATLA, as described above?
2. May ATLA follow up the initial partisan communications requesting a general commitment to contribute to Federal elections with subsequent communications informing the members of candidates endorsed by ATLA, as described above?
3. May ATLA obtain advance commitments from its members to contribute a specified amount to the campaigns of candidates endorsed by ATLA, as described above?
4. May the communications recommend the size of contributions that members should send to particular candidates?
5. May ATLA suggest when members should mail their contributions, such as urging contributions "by the end of the month"?
6. May ATLA request that its members who contribute to candidates endorsed by the organization notify ATLA by sending a card or by calling ATLA headquarters?
7. May ATLA request that the campaigns, or authorized representatives of the campaigns receiving contributions, notify ATLA of any such contributions by ATLA members to help ATLA confirm which members reach certain honorific designations?
8. May ATLA communicate with candidates or their campaigns for the purpose of determining the correct or preferred address to include in the communications with members as to where their contributions should be sent?
9. In some cases, a candidate's designated campaign representative, such as a state or regional finance chairman, might also be a member of ATLA. If that person is so

expressly authorized by the candidate, and holds such a significant position in the candidate's campaign, and if the campaign so requests, is there any reason why the candidate may not designate that person's personal address as the appropriate address to which members would be advised to send their campaign contributions? This inquiry assumes that the authorized representative volunteers or works in a compensated role for the campaign and is not acting on behalf of ATLA.

10. As discussed above, may ATLA follow up the initial partisan communication urging members to commit to contributions to Federal elections with communications encouraging unpledged members to participate and reminding pledged members of their commitment to contribute to ATLA-endorsed candidates of their choice? Must these subsequent communications be in writing or may ATLA communicate with its members by telephone?

Regarding question nine, in your February 20 letter you provide three examples, based on the last campaign cycle, of the types of ATLA members that might serve as the campaign representative. These include an ATLA member who served as the "campaign finance chairman" for a Republican Congressman, and an ATLA member who served as the "general campaign chairman" of a Democratic Senatorial campaign. You state that in these two instances neither of the ATLA members were part of the active leadership of ATLA. In the third example, you explain that the ATLA member, a member of the active leadership, was asked by a Republican Senator to be a finance vice-chairman of the campaign.

#### THE ACT AND COMMISSION REGULATIONS

The Act prohibits corporations from making any contribution or expenditure in connection with Federal elections. 2 U.S.C. 441b. Contributions include direct or indirect payments or gifts of money or any services, or anything of value, to any candidate for Federal office. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).<sup>3</sup> This general prohibition also has an exception that allows a corporation, including an incorporated membership organization such as an incorporated trade association, to communicate with its "restricted class," its stockholders, executive, and administrative personnel and their families on "any subject" including messages containing express advocacy. 2 U.S.C. 441b(b)(2)(A) and 11 CFR 114.1(j). For purposes of these communications, the restricted class of an incorporated membership organization and incorporated trade association also includes its membership. *Id.*

Corporations, including incorporated membership organizations and incorporated trade associations, may not facilitate the making of contributions to Federal candidates or political committees. 11 CFR 114.2(f). Corporate communications under section 114.3 may solicit or suggest that the individual member make a contribution to a particular candidate so long as the corporation limits its activity to communication only and does not actually facilitate the making of the member's contribution to the candidate or acts as a conduit. Examples of prohibited facilitation include providing materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes addressed to a candidate or political committee (other than the corporation's own separate segregated fund), or other similar items which would assist in transmitting or delivering contributions. 11 CFR 114.2(f)(2)(ii). Facilitation does not include providing the address of the candidate or political committee. *Id.* It also does not include

soliciting contributions to be sent directly to candidates, if the solicitation is directed only to the restricted class. 11 CFR 114.2(f)(4)(ii). See Advisory Opinion 1987-29.

All contributions by a person that are made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient. 2 U.S.C. 441a(a)(8) and 11 CFR 110.6. A person who is prohibited from making contributions or expenditures in connection with an election for Federal office shall be prohibited from acting as a conduit for contributions earmarked to candidates or their authorized committees. 11 CFR 110.6(b)(2)(ii).

An individual who is expressly authorized by the candidate or the candidate's authorized committee to engage in fundraising, and who occupies a significant position within the candidate's campaign organization shall not be considered to be a conduit or intermediary, provided that the individual is not acting as a representative of an entity which is prohibited from making contributions. 11 CFR 110.6(b)(2)(i)(E).

## APPLICATION TO ATLA'S PROPOSAL

### Election Communication Issues

The Commission notes that your proposal tracks closely the language of sections 114.2 and 114.3. The new regulations on corporate communications to the restricted class and corporate facilitation are consistent with Advisory Opinion 1987-29, which is relevant to ATLA's request and cited in the regulations' Explanation and Justification. See 60 Fed. Reg. 64260, 64265 (December 14, 1995). In that opinion, the Commission considered a proposal similar in many respects to ATLA's proposal. In Advisory Opinion 1987-29, a federated trade association wished to send campaign communications to its members. The communications offered members honorific designations for pledges of contributions made either to the organization's endorsed list of Federal candidates or to its separate segregated fund. The program included sending five or more letters, or making phone calls encouraging participation. The organization also stated that no penalty would accrue to members who declined participation. It also would not provide any envelopes or stamps or facilitate the transmittal of any contribution to an endorsed candidate. The Commission found that this proposal fell within the parameters of a permissible partisan communication. See Advisory Opinion 1987-29.

Questions one through eight and question ten either follow the proposal approved in the earlier advisory opinion or add additional details. These additions, such as increasing the frequency of the communications, or including suggested levels of contributions, are not a material difference from Advisory Opinion 1987-29. The Commission concludes they do not place ATLA's proposal outside the corporate communications permitted by 2 U.S.C. 441b(b)(2)(A) and 11 CFR 114.3. ATLA's proposed communications also do not represent corporate facilitation of contributions that is prohibited by 2 U.S.C. 441b(b) and 11 CFR 114.2(f). The Commission notes, however, the importance of your statement that any contributions solicited for ATLA's endorsed candidates would be voluntary and no penalty would attach to any member who decides not to

participate, or who does not contribute at a previously agreed to level. See 2 U.S.C. 441b(b)(3)(A). See also 11 CFR 114.5(a) and 114.8(e)(4).

### Earmarking Issues

In question nine, contributions raised through the solicitations would be sent by ATLA members to other ATLA members, possibly members of its leadership acting as representatives of the ATLA-endorsed candidates. This element of ATLA's proposal requires additional analysis since it does depart significantly from the circumstances of Advisory Opinion 1987-29. The Commission considered this element of the ATLA proposal, but could not approve an opinion by the required four affirmative votes. 2 U.S.C. 437c(c), 11 CFR 112.4(a). Specifically, the Commission could not decide whether the activity proposed in question nine (the receipt and delivery of contribution checks made payable to candidates by ATLA members) would be prohibited or permitted under its regulations at 11 CFR 110.6(b)(2) and 114.2(f)(2).<sup>4</sup>

### Coordination Issues

While not specifically asked in ATLA's request, the endorsements and election advocacy communications in the proposal may have an impact on the independence of other expenditures made by ATLA or ATLA-PAC. You state in ATLA's request: While there may be some coordination with candidates prior to the point they are endorsed, such as to determine their position on certain issues, this endorsement process will be an internal ATLA undertaking. Further, the placing of a candidate on the endorsement list will not be part of any "coordinated" effort in support of a candidate undertaken with any other group, association, party committee or otherwise. Certainly such candidates may also be recipients of ATLAPAC contributions, and ATLA or ATLAPAC may at times and within legal limits undertake other political activity, such as supporting coordinated campaigns. Such activities, however, have been and will be undertaken without regard to and separate from any candidate endorsement operation.

The Commission regulations acknowledge that corporate communications permitted by section 114.3 to the restricted class may involve contact and coordination with a candidate and the candidate's campaign committees. See 11 CFR 114.3(a)(1). However, coordination beyond that described in section 114.3, while not causing subsequent activities directed at the restricted class to be considered prohibited contributions or expenditures, may be considered evidence that could negate the independence of subsequent election advocacy communications to those outside the restricted class by the corporation, labor organization or its separate segregated fund. This could result in a conclusion that future communications or expenditures on behalf of the candidate, directed outside the restricted class, were in-kind contributions, rather than permissible corporate activity by the corporation or independent expenditures by the separate segregated fund. See 11 CFR 114.2(c) and 109.1(b)(4).<sup>5</sup> The request does not expressly state whether (or not) ATLAPAC proposes to make any independent expenditures in connection with the election campaigns of any candidate who is endorsed by ATLA to its membership. The Commission emphasizes that, with respect to any purported independent expenditure by ATLAPAC, ATLA's contacts with candidates and their campaigns would result in coordination (and go beyond what is described in section 114.3) if these contacts became the means by which information is passed regarding the candidate's plans, projects or needs with a view toward having an expenditure made. 11 CFR

109.1(b)(4)(i)(A). Coordination is also presumed where an expenditure is made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent. See 11 CFR 109.1(b)(4)(i)(B). Furthermore, coordination would be presumed if an ATLA member, who occupies a significant position in a candidate's campaign (as you describe above), is also either a member of ATLA's executive committee, an officer of ATLAPAC, or a person otherwise involved in the planning and execution of ATLA's or ATLAPAC's political programs.<sup>6</sup> Again, this will implicate or even vitiate the independence of any expenditure made by ATLAPAC on behalf of a candidate endorsed by ATLA.

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott  
Chairman

Enclosures (AOs 1991-24, 1987-29, 1984-23 and 1977-44)

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<sup>1</sup> You state that the purpose of ATLA is to: Seek justice for all; preserve the constitutional right to trial by jury; prevent injury from occurring; champion the cause of those who deserve redress for injury to person or property; promote the public good through concerted efforts to secure safe products, a safe workplace, a clean environment, and quality health care; inspire excellence in advocacy through training and education; encourage cooperation among members; advance the common law and the finest traditions of jurisprudence; and uphold the honor and dignity of the legal profession and the highest standard of ethical conduct and integrity.

<sup>2</sup> You state that for purposes of your request, the proposed communications would be sent only to members of ATLA who meet all requirements for "membership" under the Act and Commission regulations, i.e., communications will be sent only to those members who pay regular dues or have other significant financial attachment to the organization and who have the right to vote for members of the highest governing body of the organization or for someone with the right to cast such votes. Because of this assertion, this opinion will not discuss issues of ATLA membership relative to the Act and Commission regulations. See 11 CFR 100.8(b)(4)(iv) and 11 CFR 114.1(e).

<sup>3</sup> The discussion that follows takes as its basis the newly revised Commission regulations found at 11 CFR 114.1, 114.2, 114.3 and 114.4. The regulations were published in the Federal Register on December 14, 1995 (60 Fed. Reg. 64260). They became effective March 13, 1996. See 61 Fed Reg. 10269 (March 13, 1996).

<sup>4</sup> Under the Act and Commission regulations, ATLA, as an incorporated trade association, is prohibited from serving as a conduit for contributions to candidates and is also prohibited from facilitating contributions to candidates by its membership. 11 CFR 110.6(b)(2)(ii), 114.2(f)(1), and 114.2(f)(2).

<sup>5</sup> The Explanation and Justification for section 114.2 illustrates this point by a discussion on the preparation of voter guides by the corporation: For example, a prohibited in-kind contribution would result if a voter guide is prepared and distributed after consulting with the candidate regarding his or her plans, projects or needs regarding the campaign. Please note that, in the case of a communication just to the restricted class, coordination will not cause that activity or future communication to the restricted class to be considered in-kind contributions. However, such coordination may compromise the ability of a corporation's or labor organization's separate segregated fund to make independent expenditures to those outside the restricted class in the future. See 60 Fed. Reg. 64263, (December 14,

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1995) Your request notes that ATLAPAC is governed by a separate board of trustees from the ATLA Executive Committee. In circumstances described above, the separate internal governance of an incorporated organization and its separate segregated fund would not foreclose application of the presumption that ATLAPAC's expenditures were not independent of the candidate. Commission regulations assume that a corporation has control of its separate segregated fund. 11 CFR 114.5(d). See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 426 (1972). (The Court concluded in the similar situation of a labor union "it is difficult to conceive how a valid political fund can be meaningfully `separate' from the sponsoring union in any way other than `segregated.' ")

<sup>6</sup> Your request defines ATLA's leadership as being two groups, its Executive Committee which you state numbers about a dozen members and its Board of Governors which contains over one hundred trial lawyers. ATLA has 55,000 members.