



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

**CONCURRING OPINION OF  
COMMISSIONER LEE ANN ELLIOTT  
TO ADVISORY OPINION  
1994-30**

I concur with the result reached in today's Advisory Opinion, but I disagree with part of its analysis.

In deciding whether the requester would be engaging in commercial or political activity, Advisory Opinion 1994-30 makes repeated references to independent expenditures, and the amount of "contact or coordination" that can disqualify them. 11 C.F.R. § 109.1(b)(4).

In my opinion, it is incorrect for the Commission to equate the amount of contact that would defeat the independence of an expenditure with the amount of contact that will convert a commercial enterprise into a political one. First, none of the precedent today's Advisory Opinion cites for support contain any reference to independent expenditures, or use 109.1(b)(4) as the guide for evaluating commercial enterprises.

Second, by equating commercial speech with independent expenditures, the draft leaves the mistaken impression that a corporation can make an independent expenditure if it avoids too much contact. That can't be the case, however, since for-profit corporations may not make independent expenditures.

And last, the Commission has already recognized that a commercial entity can have a substantial amount of contact with a candidate committee and still be considered to be engaging in a lawful commercial enterprise. See, e.g., Advisory Opinion 1988-17. If a political committee, however, tried to undertake the activity in Advisory Opinion 1988-17, the Commission would undoubtedly not consider it an independent expenditure.

Instead of introducing this independent expenditure "contact" analysis, the draft should have analyzed this activity as the Commission has done in the past: is the commercial entity acting in its ordinary course of business by offering goods and services at its usual and

normal charge with the expectation of making a profit? See Advisory Opinions 1990-19, 1989-21, 1988-17, 1979-36. If so, the Commission will consider it to be a legitimate commercial enterprise. Advisory Opinions 1988-17, 1979-36. But if the corporation is acting as an agent of a political committee, or is advancing funds, involved in fundraising or soliciting political contributions, the Commission would find the activity prohibited or regulated under the Act. Advisory opinions 1989-21, 1976-50.

Using the above analysis, and relying on past Advisory Opinions, today's case is easily decided as being legitimate commercial activity. Particularly important are the facts that this entity is an established vendor of T-shirts and will not remit any proceeds to any political committee.

In my opinion, it is important for the Commission to remember that entrepreneurial activity involving candidate-related merchandise is commonplace, and often involves contact with campaigns. Such contact will not, in my opinion, convert otherwise commercial activity into political activity. Hopefully, today's analysis is just a one-time diversion from this agency's otherwise good precedent on this subject.

November 1, 1994

  
Lee Ann Elliott  
Commissioner