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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 3-21-96

March 14, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *JCS*
Staff Director

FROM: Lawrence M. Noble *L.M.N.*
General Counsel

N. Bradley Litchfield *NBL/SLP*
Associate General Counsel

Michael G. Marinelli *M.G.M.*
Staff Attorney

SUBJECT: Draft AO 1996-1

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 21, 1996.

Attachment

1
2 **ADVISORY OPINION 1996-1**

3
4 **Roger S. Ballentine**
5 **Patton Boggs, L.L.P.**
6 **2550 M Street, N.W.**
7 **Washington, D.C. 20037**

DRAFT

8
9 **Dear Mr. Ballentine:**

10
11 **This refers to your letters dated February 21 and January 16, 1996, which request advice**
12 **concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"),**
13 **and Commission regulations to a proposal by the Association of Trial Lawyers of America**
14 **("ATLA") to send "partisan communications" to its members that would solicit contributions for**
15 **the campaigns of ATLA-endorsed Federal candidates.**

16 **You state that ATLA is an incorporated membership organization composed of individual**
17 **trial attorneys, law professors, judges, military attorneys, government attorneys, and law**
18 **students¹. The Commission has concluded previously that ATLA is a federation of trade**
19 **associations. See Advisory Opinion 1977-44.**

20 **ATLA'S PROPOSED COMMUNICATIONS**

¹ 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.

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

8 After informing members of the program, ATLA would send lists of endorsed candidates
9 to members. The numbers of such communications, you state, might vary between one or two in
10 a non-election year to monthly during an election year. Such communications would also vary as
11 to the number of endorsed candidates or committees included. If a member asks to be removed
12 from the program, that member would no longer receive communications.

13 You also state that ATLA might wish to seek advance commitments from members to
14 attain a specific honorific designation in a given year. You explain that, while ATLA would
15 expect members to fulfill such pledges, there would be no penalty or retribution for members
16 who choose not to fulfill those commitments. ATLA would not ask for specific commitments
17 from members to give a specific amount to any specific candidate. Members would be asked to

²You 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 108(b)(4)(iv) and 11 CFR 114.1(e).

1 reach a certain dollar amount of contributions for an entire group of candidates. The pledging
2 ATLA members would reach a certain honorific designation by making the necessary amounts of
3 contributions. Subsequent communications might remind members of their particular
4 commitments, as well as provide the names of endorsed candidates.

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

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

- 15 1. May ATLA send communications to its members
16 inviting them to attain certain honorific designations by
17 contributing certain amounts of money to candidates endorsed by
18 ATLA, as described above?
19 2. May ATLA follow up the initial partisan
20 communications requesting a general commitment to contribute to
21 Federal elections with subsequent communications informing the
22 members of candidates endorsed by ATLA, as described above?
23 3. May ATLA obtain advance commitments from its
24 members to contribute a specified amount to the campaigns of
25 candidates endorsed by ATLA, as described above?
26 4. May the communications recommend the size of
27 contributions that members should send to particular candidates?

1 5. May ATLA suggest when members should mail their
2 contributions, such as urging contributions "by the end of the
3 month"?

4 6. May ATLA request that its members who contribute to
5 candidates endorsed by the organization notify ATLA by sending a
6 card or by calling ATLA headquarters?

7 7. May ATLA request that the campaigns, or authorized
8 representatives of the campaigns receiving contributions, notify
9 ATLA of any such contributions by ATLA members to help
10 ATLA confirm which members reach certain honorific
11 designations?

12 8. May ATLA communicate with candidates or their
13 campaigns for the purpose of determining the correct or preferred
14 address to include in the communications with members as to
15 where their contributions should be sent.

16 9. In some cases, a candidate's designated campaign
17 representative, such as a state or regional finance chairman, might
18 also be a member of ATLA. If that person is so expressly
19 authorized by the candidate, and holds such a significant position
20 in the candidate's campaign, and if the campaign so requests, is
21 there any reason why the candidate may not designate that person's
22 personal address as the appropriate address to which members
23 would be advised to send their campaign contributions? This
24 inquiry assumes that the authorized representative volunteers or
25 works in a compensated role for the campaign and is not acting on
26 behalf of ATLA.

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

35
36 Regarding question nine, in your February 20 letter you provide three examples, based on
37 the last campaign cycle, of the types of ATLA members that might serve as the campaign
38 representative. These include an ATLA member who served as the "campaign finance
39 chairman" for a Republican Congressman, and an ATLA member who served as the "general

1 campaign chairman” of a Democratic Senatorial campaign. You state that in these two instances
2 neither of the ATLA members were part of the active leadership of ATLA. In the third example,
3 you explain that the ATLA member, a member of the active leadership, was asked by a
4 Republican Senator to be a finance vice-chairman of the campaign.

5 **THE ACT AND COMMISSION REGULATIONS**

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

16 Corporations, including incorporated membership organizations and incorporated trade
17 associations, may not facilitate the making of contributions to Federal candidates or political
18 committees. 11 CFR 114.2(f). Corporate communications under section 114.3 may solicit or
19 suggest that the individual member make a contribution to a particular candidate so long as the

³ 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).

1 corporation limits its activity to communication only and does not actually facilitate the making
2 of the member's contribution to the candidate or acts as a conduit. Examples of prohibited
3 facilitation include providing materials for the purpose of transmitting or delivering
4 contributions, such as stamps, envelopes addressed to a candidate or political committee (other
5 than the corporation's own separate segregated fund), or other similar items which would assist
6 in transmitting or delivering contributions. 11 CFR 114.2(f)(2)(ii). Facilitation does not include
7 providing the address of the candidate or political committee. *Id.* It also does not include
8 soliciting contributions to be sent directly to candidates, if the solicitation is directed only to the
9 restricted class. 11 CFR 114.2(f)(4)(ii). See Advisory Opinion 1987-29.

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

18 An individual who is expressly authorized by the candidate or the candidate's authorized
19 committee to engage in fundraising, and who occupies a significant position within the
20 candidate's campaign organization shall not be considered to be a conduit or intermediary,

1 provided that the individual is not acting as a representative of an entity which is prohibited from
2 making contributions. 11 CFR 110.6(b)(2)(i)(E).

3 **APPLICATION TO ATLA'S PROPOSAL**

4 **Election Communication Issues**

5 The Commission notes that your proposal tracks closely the language of sections 114.2
6 and 114.3. The new regulations on corporate communications to the restricted class and
7 corporate facilitation are consistent with Advisory Opinion 1987-29, which is relevant to
8 ATLA's request and cited in the regulations' Explanation and Justification. See 60 Fed. Reg.
9 64260, 64265 (December 14, 1995). In that opinion, the Commission considered a proposal
10 similar in many respects to ATLA's proposal. In Advisory Opinion 1987-29, a federated trade
11 association wished to send campaign communications to its members. The communications
12 offered members honorific designations for pledges of contributions made either to the
13 organization's endorsed list of Federal candidates or to its separate segregated fund. The
14 program included sending five or more letters, or making phone calls encouraging participation.
15 The organization also stated that no penalty would accrue to members who declined
16 participation. It also would not provide any envelopes or stamps or facilitate the transmittal of
17 any contribution to an endorsed candidate. The Commission found that this proposal fell within
18 the parameters of a permissible partisan communication. See Advisory Opinion 1987-29.

19 Questions one through eight and question ten either follow the proposal approved in the
20 earlier advisory opinion or add additional details. These additions, such as increasing the
21 frequency of the communications, or including suggested levels of contributions, are not a

1 material difference from Advisory Opinion 1987-29. The Commission concludes they do not
2 place ATLA's proposal outside the corporate communications permitted by 2 U.S.C.
3 §441b(b)(2)(A) and 11 CFR 114.3. ATLA's proposed communications also do not represent
4 corporate facilitation of contributions that is prohibited by 2 U.S.C. §441b(b) and 11 CFR
5 114.2(f). The Commission notes, however, the importance of your statement that any
6 contributions solicited for ATLA's endorsed candidates would be voluntary and no penalty
7 would attach to any member who decides not to participate, or who does not contribute at a
8 previously agreed to level. See 2 U.S.C. §441b(b)(3)(A). See also 11 CFR 114.5(a) and
9 114.8(e)(4).

10 Earmarking Issues

11 In question nine, contributions raised through the solicitations would be sent by ATLA
12 members to other ATLA members, possibly members of its leadership acting as representatives
13 of the ATLA-endorsed candidates. This element of ATLA's proposal requires additional
14 analysis since it does depart significantly from the circumstances of Advisory Opinion 1987-29.
15 However, you have structured your proposal in a way that avoids creating a conduit situation
16 prohibited by 11 CFR 110.6(b)(2)(ii).⁴

17 The Commission notes your assertion that the individuals would be acting solely as
18 agents of a particular campaign and that "[i]n no circumstances would any [campaign
19 representative] be using ATLA resources or otherwise be acting on behalf of ATLA."⁵ As noted

⁴ Under the Act and Commission regulations, ATLA, as an incorporated trade association, is prohibited from serving as a conduit for contributions to candidates. *Id.*

⁵ In the Explanation and Justification for section 110.6(b)(2), the Commission especially noted the consideration whether the individual acting as an agent for a campaign incurred any solicitation expenses and if so whether those

1 above, your request presents three examples which are illustrative of the possible types of
2 campaign representatives. The Commission observes that in these three examples, the individuals
3 would hold titles in a candidate's campaign organization such as "general campaign chairman,"
4 "finance vice-chairman," and "campaign finance chairman." Although you do not describe the
5 duties these individuals will perform for the campaign committees, these titles would appear to
6 indicate significant positions of authority in a campaign organization. Your request further
7 indicates that no contributions to candidates would pass through ATLA's accounts or that of its
8 separate segregated fund. The facts of your request also indicate that the association or its
9 separate segregated funds will not be collecting the solicited contributions and forwarding them
10 to various campaign committees. See 11 CFR 114.2(f)(2)(iii).⁶ Therefore, the Commission
11 concludes that these circumstances would meet the requirements of 11 CFR 110.6(b)(2)(i)(E)
12 and that individual ATLA members who forward their contributions to these ATLA members in
13 this manner would not cause ATLA to be considered a conduit or intermediary. These factors
14 support the Commission's conclusions that ATLA's proposed election advocacy
15 communications to its membership, as described in questions one through ten of your request,
16 are permissible under 11 CFR 114.3 and are not conduit activity by ATLA of the sort that would
17 constitute "contributions" or "expenditures" prohibited by 2 U.S.C. §441b.⁷

expenses were being reimbursed by the campaign or by another entity. See Explanation and Justification, 50 Fed. Reg. 34106 (August 17, 1989).

⁶ The Commission notes that ATLA could otherwise solicit contributions earmarked for a candidate that are to be collected and forwarded by ATLAPAC and avoid corporate facilitation issues only if it treated the earmarked contributions as also being contributions from ATLAPAC to the candidate. See 11 CFR 114.2(f)(2)(iii).

⁷ The regulations provide that reporting requirements attach to certain types of corporate communications. See 11 CFR 114.3 (b), 100.8(b)(4) and 104.6.

1 **Coordination Issues**

2 While not specifically asked in ATLA's request, the endorsements and election advocacy
3 communications in the proposal may have an impact on the independence of other expenditures
4 made by ATLA or ATLA-PAC. You state in ATLA's request:

5 While there may be some coordination with candidates prior to the
6 point they are endorsed, such as to determine their position on
7 certain issues, this endorsement process will be an internal ATLA
8 undertaking. Further, the placing of a candidate on the
9 endorsement list will not be part of any "coordinated" effort in
10 support of a candidate undertaken with any other group,
11 association, party committee or otherwise. Certainly such
12 candidates may also be recipients of ATLAPAC contributions, and
13 ATLA or ATLAPAC may at times and within legal limits
14 undertake other political activity, such as supporting coordinated
15 campaigns. Such activities, however, have been and will be
16 undertaken without regard to and separate from any candidate
17 endorsement operation.
18

19 The Commission regulations acknowledge that corporate communications permitted by
20 section 114.3 to the restricted class may involve contact and coordination with a candidate and
21 the candidate's campaign committees. See 11 CFR 114.3(a)(1). However, coordination beyond
22 that described in section 114.3, while not causing subsequent activities directed at the restricted
23 class to be considered prohibited contributions or expenditures, may be considered evidence that
24 could negate the independence of subsequent election advocacy communications to those outside
25 the restricted class by the corporation, labor organization or its separate segregated fund. This
26 could result in a conclusion that future communications or expenditures on behalf of the
27 candidate, directed outside the restricted class, were in-kind contributions, rather than

1 permissible corporate activity by the corporation, or independent expenditures by the separate
2 segregated fund. See 11 CFR 114.2(c) and 109.1(b)(4).⁸

3 Generally, any of ATLA's contacts with candidates and their campaigns would result in
4 coordination (and go beyond what is described in section 114.3) if these contacts became the
5 means by which information is passed regarding the candidate's plans, projects or needs. See 11
6 CFR 109.1(b)(4)(i)(B). Coordination is also presumed where an expenditure is made by or
7 through any person who is, or has been, authorized to raise or expend funds, who is, or has been,
8 an officer of an authorized committee, or who is, or has been, receiving any form of
9 compensation or reimbursement from the candidate, the candidate's committee or agent. See 11
10 CFR 109.1(b)(4)(i)(B). Your request, as noted in example 3 above, envisions that members of
11 the ATLA leadership may also serve as an "addressee" for contributions made as a result of

⁸The 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, 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. A corporation is conclusively presumed to have control of its separate segregated fund. 11 CFR 114.5(d).

1 ATLA's communication.⁹ Coordination would be presumed if an addressee, who occupies the
2 position in a campaign you describe above, is also either a member of ATLA's executive
3 committee, an officer of ATLAPAC, or a person otherwise involved in the planning and
4 execution of ATLA's or ATLAPAC's political programs.

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

8 Sincerely,

9
10
11 Lee Ann Elliott
12 Chairman

13
14 Enclosures (AOs 1991-24, 1987-29, 1984-23 and 1977-44)
15

⁹ 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.