

ALA Legal Framework: Twenty Questions

Q1 When we talk about ALA's legal framework, what do we mean?

ALA is a non-profit association, incorporated under the laws of the commonwealth of Massachusetts. ALA is tax-exempt under section 501(c)(3) of the U.S. Internal Revenue Code. A broad range of federal, state and local laws affect ALA – as a non-profit corporation, as a tax-exempt organization, as an association, as an employer, as a publisher and conference sponsor.

Q2 Why is ALA incorporated – and what difference does that make to ALA members?

While it is possible to be an association without incorporating, most associations elect to become incorporated. By incorporating, an association becomes a legal entity composed of individual members but with a legal existence apart from its members. This has significant advantages for the members of an association. Most importantly, members are not held personally liable for obligations incurred by their association and are not personally liable if other officers, directors or staff of the association violate the law in the course of their work for the association.

Q3 What does “non-profit” mean in a legal context?

It does not mean that ALA is prohibited from having revenues greater than its expenses. There are many specific differences in law and regulation between non-profit and for-profit entities. The overriding difference is that while a for-profit corporation has equity shareholders – the legal “owners” of the corporation, a non-profit corporation does not have shareholders. Its profits are not distributed to owners, but remain in the corporation to be used to further its mission.

Q4 ALA is incorporated under the laws of the commonwealth of Massachusetts and ALA-APA under the laws of the state of Illinois? Does the state of incorporation make a difference?

Yes. Many aspects of association operation – such as laws governing Board meetings and voting – are governed by state laws.

Q5 What does it mean that an association is “tax-exempt”?

The determination that an organization may be “tax-exempt” primarily relates to the purpose for which it is organized and operated. A determination by the U.S. Internal Revenue Service that an association is tax-exempt generally permits that association to earn specific types of income without paying federal income tax. [see Q6] Most importantly for ALA, this means that ALA does not pay federal income tax on dues received from its members, on subscriptions to its journals, on

registration for its conferences and institutes, and on other mission-related income.

Q6 Does that mean that ALA pays no taxes at all?

No. First, ALA does pay some federal income tax. The Internal Revenue Code states that income which is not directly related to an association's tax-exempt purpose is subject to tax – called Unrelated Business Income Tax (UBIT). For instance, ALA pays federal income tax on revenue derived from advertising in its journals. The distinction between taxable and non-taxable revenue is the subject of voluminous IRS rulings and court decisions.

Q7 Is the particular type of tax-exemption – 501(c)(3) – significant?

The U.S. Internal Revenue Code grants tax-exempt status to non-profit organizations in more than 20 categories under Section 501(c). Depending on its category of tax-exemption, a non-profit organization may be permitted to, or prohibited from, engaging in various activities.

Section 501(c)(3) is reserved for organizations organized for public benefit. Permitted tax-exempt purposes include charitable, educational and literary. As a 501(c)(3) organization, ALA may use its funds for charity, education, the promotion of literature, and related administrative costs. Charitable activities include promoting literacy, giving scholarships, and improving libraries. Educational activities include publications, seminars, institutes and conferences. Literacy activities include promoting books and authors, and providing forums for discussion of literary topics.

There are limitations on 501(c)(3) organizations. Any activities which are not charitable, educational or literary must be “insubstantial” – i.e. short-term, limited in nature. There are limitations on the amount of lobbying done by 501(c)(3) organizations [see Q8-9]. All political activity is prohibited [see Q12]. Transfer of funds to organizations in different tax-exemption categories is prohibited, unless the transfer furthers a charitable, educational, or literary purpose – or unless it is a loan at market rates of interest, as is the ALA loan of funds to ALA-APA. Other 501(c)(3) organizations include the American College of Surgeons, American Psychological Association, the National PTA, the United Way, and the Arthritis Foundation.

Many association which might appear to be “like ALA,” are, in fact, exempt under section 501(c)(6), the section which deals with business leagues, chambers of commerce, real estate boards, and boards of trade. The IRS defines a “business league” as an association of persons having some common business interest, the purpose of which is to promote such common interests. ALA-APA is tax-exempt under section 501(c)(6). Associations in this category include the American Bar Association, American Medical Association, Independent Insurance Agents of

America, Spring Manufacturers Association, Northwest Association of Realtors. State library associations – ALA chapters – include both 501(c)(3) and 501(c)(6) organizations.

Q8 What limits does the U.S. Internal Revenue Code place on ALA's lobbying activity?

No “substantial” percentage of activities of a 501(c)(3) organization may be focused on “propaganda, or otherwise attempting to influence legislation...” – in other words, on lobbying. While the IRS initially provided only the vague standard of “no substantial lobbying...,” one federal case (*Seasongood v. Commissioner*) determined that spending up to 5% of the budget for lobbying might be within the “insubstantial” range.

In 1976, an elective alternative provision [501(h)] was added to the law to permit 501(c)(3) organizations to be guided by an absolute numerical percentage test; final rules were issued in 1990. This elective rule does not increase the amount of lobbying that an organization of ALA's size can do – but does provide an alternative guide to the vague “insubstantiality” test. The provision provides a mathematical formula – a sliding scale – for determining permissible lobbying expenditures as compared to (most) other association expenditures (excluding fund-raising expenditures). There is an absolute limit – regardless of the size of the budget – of \$1,000,000/year on lobbying expenditures.

An exempt organization is responsible for maintaining careful records of resources used for lobbying and must identify both direct and grassroots lobbying on its IRS information forms. A 25% excise tax is imposed on excess lobbying expenditures. If lobbying expenditures average more than 150% of the permissible limit over 4 years, 501(c)(3) tax exemption may be lost. ALA is well below its allowable limit.

Q9 What is lobbying?

Lobbying includes oral or written communication with members of a legislature, their staff, political appointees, senior executive office personnel for the purpose of influencing legislation or regulation. Preparation for lobbying, including research intended to be used for lobbying, is included in the definition of lobbying. Any communication which urges ALA members – explicitly or implicitly – to contact legislators regarding a specific piece of legislation is considered direct lobbying. Meetings may constitute a “lobbying communication” if the meeting is used to urge members to act for/against specific legislation. Grassroots lobbying is an attempt to influence legislation through a communication with the general public. Grassroots lobbying may not constitute more than 25% of the permitted expenditure for direct lobbying.

Q10 Does testimony before a Congressional committee or subcommittee constitute lobbying?

If the testimony is provided at the request of the Congressional committee or subcommittee, it is not lobbying. (If ALA requests an opportunity to provide testimony, it may be considered lobbying.) Similarly, providing comments in response to a proposed rulemaking is not lobbying, nor is responding to a request from an administrative agency for information. Filing an *amicus curiae* brief during the course of a judicial proceeding is not lobbying.

Q11 Are there other laws that affect ALA's lobbying activity?

ALA, like other associations, must comply with provisions of the Lobbying Disclosure Act of 1995. This requires registration by every lobbyist, defined as an individual "employed or retained by a client for financial or other compensation" to make one or more "lobbying contact." An association staff member meets that definition if he/she spends more than 20% of his/her time on lobbying activities. Registration also includes a statement outlining the general issue areas about which the registrant expects to lobby. ALA files a regular report with the Secretary of the Senate and Clerk of the House of Representatives.

Q12 What limits does the U.S. Internal Revenue Code place on ALA's political activity?

501(c)(3) organizations are completely prohibited from engaging, directly or indirectly, in any political campaign for or against a candidate for local, state or federal office. The penalty for violation of these prohibitions is revocation of tax-exempt status. A "candidate for public office" is defined as "an individual who offers himself, or is proposed by others, as a contestant for public office."

- The name of a 501(c)(3) organization may not be used to support or oppose a candidate for public office.
- Stationery of a (c)(3) organization or its organizational components – divisions, round tables, offices, committees – may not be used to make comments favorable – or in opposition to – a candidate for office.
- Staff or leadership titles in a 501(c)(3) organization may not be used by individuals in discussing their individual support or opposition for candidates, whether in writing or orally, in a public forum.
- Both campaign contributions and statements of support or opposition are prohibited.
- Providing a forum for a candidate to speak is viewed as supporting the candidate. Providing a forum for opposing candidates to speak will be viewed as supporting one candidate if the organization publicly supports that candidate's policies.
- The prohibition on organizational support or opposition for candidates does not in any way prohibit staff, officers or directors, or members from expressing their

- personal views, as long as organizational titles, stationery, publications, websites, forums (including discussion lists, blogs, wikis), staff time and other resources (including headquarters and conference meeting rooms) of the 501(c)(3) organization are not used.
- A 501(c)(3) organization may not participate in or sponsor a political action committee (PAC).

Q13 Do member (volunteer) leaders have any potential liability resulting from their service to the Association?

Associations take several steps to protect their boards of directors and other volunteer leaders.

- (1) They incorporate, creating a legal “shell” around their members.
- (2) They provide ongoing orientation so that members of the Board and other leaders understand legal limitations and responsibilities.
 - a. Both criminal and civil claims have been brought against associations.
 - b. Most claims are against the association itself, not against individual members of its board of directors or other volunteer leaders or staff.
 - c. There are three areas of possible personal liability: acts where the individual is clearly acting beyond the scope of his/her authority (*ultra vires*); intentional or negligent injury or damages to persons or property (*torts*), even if the activities were carried out on behalf of the association; participation in or conscious approval of activities constituting serious violations of state or federal law. The principal tests are ordinary care and diligence in the discharge of duties and acting in “good faith.”
- (3) They carry broad insurance coverage, including Association Professional Liability (sometimes called Directors and Officers) insurance, as well as comprehensive general liability insurance.

Q14 Some of the most damaging claims brought against associations have related to antitrust laws. Are antitrust laws relevant to ALA?

Yes. While ALA may be different from a trade association in the extent of its exposure, antitrust laws are relevant. This is a broad and complex area of the law and there are numerous ways in which associations are impacted.

- ALA cannot, for instance, encourage a boycott of a specific vendor, product or service. This does not mean that there cannot be discussion of a specific product, service or vendor at ALA meetings or in ALA publications. But, as relates to antitrust considerations, such discussion may not seek to fix prices, regulate the availability of services or products, encourage unfair practices, encourage non-competition, or encourage boycotts.

- To provide another example, under current legal interpretations, ALA-APA may not require ALA membership as a precondition for certification. It could (a) provide preferential pricing for ALA members and (b) require a statement of voluntary compliance with the ALA Code of Professional Ethics. The difference in fee may not be so significant as to, effectively, compel the applicant to be an ALA member.
- Corporate membership cannot be a requirement for renting booth space at ALA Annual Conference. Again, a differential rate may be applied.

Q15 Does the Association have to be “officially” involved for an antitrust violation to occur?

No. The 1982 case *American Society of Mechanical Engineers, Inc. v Hydrolevel Corporation* determined that the association’s volunteers and lower-level staff members caused competitive injury, although the association’s leadership was not aware of the activities and had not approved them. The Court ruled that the association was liable because it failed to prevent antitrust violations by its volunteers and staff, who had acted within their “apparent authority” in speaking for the Association. Treble damages were assessed the association under provisions of the Sherman Act.

Q16 Are there other legal considerations that may impact ALA meetings and publications?

Yes. Laws relating to defamation affect associations. Defamation encompasses both libel (generally written) and slander (generally oral). A defamatory communication is one which harms the reputation of someone through libel or slander. This is a complicated area of the law. Public figures are subject to a somewhat different set of standards from other individuals or corporations. Defamation laws are relevant to associations because (a) officers, directors and other members of an association may be personally liable for certain kinds of actions – including defamation, (b) publishers – including associations – are liable for defamatory statements in publications, including publications on the website. Truth is a defense to a defamation claim. Opinion is protected – thus book reviews, for instance, do not represent significant legal exposure. Again, this does not mean that programs or articles by members should not address specific products or services. Attention to the accuracy of facts is important. Any claim related to “incorrect” facts must be promptly addressed to help lessen the damages.

Q17 ALA, like other associations, gathers and makes available statistical data. Are there laws that affect that service?

Yes, especially statistics relating to salaries or the price of products or services or components of price (such as cost information). Participation in any program to gather statistics must be voluntary. The confidentiality of information supplied by each participant must be maintained; only composite or average figures should be used in statistical reports. Nonmembers must have access to the results of association statistical programs, assuming a legitimate need to receive the results; again, a higher fee may be charged to nonmembers. Many other rules apply, depending on the type of statistics being compiled.

Q18 Does accreditation involve specific legal issues?

Yes. As is the case with any activity that has the potential to adversely affect another party, due process is a fundamental consideration. The avoidance of antitrust problems is also an issue.

Q19 Does professional credentialing – such as the ALA-APA certification program – involve legal issues?

Yes. There are some key questions to ask during the establishment of such a program: (1) Are the criteria for certification carefully matched to legitimate professional goals? (2) Are the criteria for certification pro-competitive (vs. anti-competitive)? (3) Is the analysis thorough and objective? Further, as is true for accreditation, due process is a fundamental consideration in developing and administering certification procedures.

Q20 In what other types of legal transactions is the ALA routinely involved?

- ALA trademarks and copyrights significant marks and publications – e.g., READ, @YOUR LIBRARY, etc.
- ALA licenses content from authors and may, in turn, license content to other publishers.
- As an employer, ALA is concerned about a broad range of federal and state laws affecting human relations.
- ALA signs a broad range of contracts – ranging from individual speaker and author contracts, to hotel and convention center contracts, to supplier contracts.

- ALA has legal issues arising from its ownership and leasing of real estate.
- ALA must comply with the rules of numerous regulatory bodies: the Internal Revenue Service (taxes); Attorneys General (charitable solicitations); Federal Communications Commission (communications via regulated media, such as facsimile); Federal Trade Commission (surveys).
- ALA must collect money from parties, dispute bills, act as a creditor in bankruptcy and otherwise make sure that it receives everything to which it is entitled and only pays what is due, like any other business.