

AOR 2012-16

ANGUS KING FOR U.S. SENATE CAMPAIGN

P.O. Box 368, 135 Maine Street

Brunswick, Maine 04011

March 28, 2012

Office of General Counsel

Federal Election Commission

999 E Street, NW

Washington, DC 20463

RE: Request for Advisory Opinion – Angus King for U.S. Senate Campaign/Pierce Atwood LLP

Dear Sir or Madam,

This letter is a request for an advisory opinion from the Federal Election Commission (FEC) concerning the application of the Federal Election Campaign Act of 1971, as amended (“Act”) to the Angus King for U.S. Senate Campaign and the law firm of Pierce Atwood LLP. As Treasurer of the Angus King for U.S. Senate Campaign (“Campaign”), I am submitting this request for expedited consideration by the FEC in order to enable the Campaign to benefit from Pierce Atwood LLP (“PA”) pro bono legal services on FEC compliance matters on an expedited basis.

After careful review of the controlling law, regulations, and FEC Advisory Opinions, we believe that the following arrangement complies fully with the Act and FEC regulations and precedent. But given the absence of a FEC Advisory Opinion directly confirming the application of the contribution and expenditure exceptions of 2 U.S.C.431(8)(B)(viii) and (9)(B)(vii)(II) for FEC compliance related legal services to federal contractor law partnerships advising a federal candidate or his authorized election committee, FEC information office staff suggested that we submit an Advisory Opinion request to confirm our interpretation. The purpose of this letter is to obtain FEC’s confirmation that PA may lawfully provide the following services to the Campaign:

Questions

1. May PA, a limited liability partnership law firm, provide pro bono legal services pertaining to compliance with the Act and FEC implementing regulations to the Campaign, even though PA is a federal government contractor?
2. If PA partners, associates, or staff individually contribute volunteer time in the form of legal or other services to the Campaign, will implementation of the letter of agreement between PA and the Campaign

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attached as Appendix 1 provide proper safeguards to ensure that PA does not inadvertently provide a prohibited in-kind contribution to the Campaign?

The Act carefully facilitates compliance with the Act by ensuring access by campaigns to professional legal and accounting services pertaining solely to compliance with the Act. The Act creates a specific exception to the definition of "contribution" and "expenditure" to enable legal and accounting firms to provide compliance-related services free of charge. Consistent with the Act and FEC policy, the Campaign recognizes that compliance is a top priority, and seeks to avail itself of legal services pertaining to compliance with the Act on a pro bono basis. PA is willing to provide those FEC compliance legal services on a pro bono basis, but only if the FEC confirms that the Act and FEC regulations authorize a federal contractor law firm to undertake that activity.

Factual Background

Angus S. King is a candidate for United States Senate and has designated the Angus King for U.S. Senate Campaign as his principal campaign committee (FEC Committee ID number S2ME00109). PA is a limited liability partnership law firm that includes firm Missionary Challenge Corporation (MCC) among its clients, providing legal services to the MCC under a direct contract, paid by funds appropriated by Congress. MCC is a special purpose "federal corporation" (defined in 22 U.S.C. 7703 and 5 U.S.C. 103 to be a federal corporation in the Executive Branch owned by the United States of America). From time to time PA may bid on and perform legal services for other federal agencies as well. PA operates on the assumption at all times that it may be a federal contractor, and requests that it be considered such for purposes of this matter.

Subject to FEC confirmation, the Campaign wishes to request that PA provide pro bono legal services to the Campaign only for the purpose of ensuring the Campaign's compliance with the Act and FEC implementing regulations, consistent with the provisions of 2 U.S.C. 431(8)(B)(viii) and (9)(B)(vii)(II) and 11 CFR 100.86 and 100.146. If the Campaign requests legal services from PA on any matters that do not qualify for the exception for free legal services to ensure compliance with the Act or its implementing regulations, PA will bill the Campaign in a timely manner for those services at PA's normal and usual rates.

In addition to the foregoing, some PA partners, associates, or staff may wish to volunteer their individual time to assist the Campaign. Their individual volunteer time could be dedicated to a wide range of work, and might include legal services on matters that: (a) do not qualify for the exception for FEC compliance related legal advice; and (b) would be a prohibited contribution for PA as a federal contractor if provided by PA on a pro bono basis.

It is not currently anticipated that any PA attorney or staff person would be taking a leave of absence to work for the Campaign, or otherwise volunteering so much of their individual time to the Campaign that their volunteer time is likely to intrude significantly upon productive PA compensated work time, or to require more than occasional use of PA facilities. However, to ensure that systems are in place to address the use of PA facilities by all PA employees and attorneys who may provide volunteer services of any type to the Campaign, these topics will be addressed in a letter of agreement between PA and the Campaign, attached as Appendix 1. The letter is designed to ensure compliance with the relevant

provisions of the Act and regulations by the Campaign and PA, and to detail the responsibilities of the parties in that regard.

Proposed Legal Analysis and Conclusions

In light of our request for expedited consideration, we are providing a proposed legal analysis and conclusions for the FEC staff's review and consideration.

A combined reading of the Act, FEC regulations and Advisory Opinions indicates that the FEC should conclude that the provisions of 2 U.S.C. 431(8)(B)(viii) and (9)(B)(vii)(II) and 11 CFR 100.86 and 100.146 enable federal contractor law firms to contribute free legal services pertaining to compliance with the Act to federal campaign committees, and that implementation of the Appendix 1 draft agreement terms and conditions will enable PA to avoid a prohibited in-kind contribution to the Campaign.

Response to Question 1. PA may provide pro bono legal services pertaining to compliance with the Act and FEC implementing regulations to the Campaign, even though PA is a federal government contractor.

Under the Act and FEC regulations, a federal contractor is prohibited from "making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure, to any political committee or other person for any political purpose or use." 2 U.S.C. 441c(a)(1); 11 CFR 115.2.

The term "contribution" is defined to mean a "gift, subscription, loan, advance, or deposit of money, or anything of value made for the purpose of influencing the nomination or election of any person to federal office." 2 U.S.C. 431(8)(a)(i). Similarly, the term "expenditure" is defined in an identical fashion as relating to payments made for the purpose of influencing a person's nomination or election to federal office. 2 U.S.C. 431(9). The Act also defines "contribution" to include the "payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. 431(8)(A)(ii); (political committee is defined to include a Senate candidate's authorized campaign committee). 11 CFR 100.5(f)(1).

The Act establishes an exception from the defined terms "contribution" and "expenditure" in 2 U.S.C. 431(8)(B)(viii) and (9)(B)(vii)(II) for FEC compliance related legal services. 11 CFR 100.86 provides that "[l]egal or accounting services rendered to or on behalf of an authorized committee of a candidate or any other political committee are not contributions if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely to ensure compliance with the Act or 26 U.S.C. 9001 et seq. and 9031 et seq. For purposes of this section, a partnership shall be deemed to be the regular employer of a partner. Amounts paid by the regular employer for these services shall be reported by the committee receiving such services in accordance with 11 CFR 104.3(h)." The regulations addressing "expenditures" have a similar provision. 11 CFR 100.146.

The ambiguity arises because the federal contractor provisions of 2 U.S.C. 441c(a)(1) provide that it is unlawful for a federal contractor "directly or indirectly to make any *contribution of money or other things of value*, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office..." (emphasis added). The additional phrase "or anything of

value” in the federal contractor provision does not appear to have any substantive significance because the definition of “contribution” in 2 U.S.C. 431(8)(A)(i) includes the phrase “ gift. . . or anything of value.” The FEC rules pertaining to definition of contribution provide in 11 CFR 100.53(d)(1) that for the purposes of section 100.53 the term “anything of value” includes all in-kind contributions, and provides further that goods or services provided without charge or at a charge that is less than the “usual and normal charge” are considered to be a contribution. Thus, it appears that free legal services from a law firm pertaining to FEC compliance related matters would be included under this specific definition of contribution but for the express exemption provided in the Act and regulations. There is nothing in the Act or the FEC regulations on the federal contractor prohibition to suggest that the federal contractor prohibition is intended to apply to a broader universe of activities than contributions or expenditures as defined in the Act. The logical reading is that the pro bono FEC-compliance related legal services exemption of 2 U.S.C. 431(8) and 11 CFR 100.86 is intended to provide the same safe harbor for providers of legal services, whether those providers are corporate law firm partnerships or law firm partnerships that qualify as federal contractors.

FEC administrative precedent supports this interpretation. Advisory Opinion 2006-22 (Jenkins & Gilchrist) (corporate law firm may not provide free legal services that would not come within the exception to the definition of “contribution” for legal services provided to a political committee solely to ensure compliance with the Act) makes clear that the FEC interprets the Act to authorize corporate law firm contributions of free legal services to political committees solely to ensure compliance with the Act. In the opinion, the FEC concluded that a law firm organized as a corporation is barred by the corporate contribution prohibition of the Act from donating litigation services to a federal congressional candidate to challenge ballot access by a competing candidate because the services did not fall within the exception to the definition of “contribution” for legal services solely to ensure compliance with the Act in 2 U.S.C. 431(8)(B)(viii)(H). With its implicit recognition that the contribution exception would apply to FEC compliance-related services by the otherwise barred corporate law firm, the FEC sets the foundation for an analogous argument for an otherwise barred federal contractor law firm.

As noted above, this interpretation furthers the clear intent of the Act that campaigns have access to the professional legal and accounting advice required to enable Campaign compliance with the complex regulatory requirements of the Act and FEC regulations, regardless of Campaign budget limitations.

2. Response to Question 2. If PA partners, associates, and staff who individually contribute volunteer time in the form of legal or other personal services to the Campaign comply with the Appendix 1 terms of agreement between PA and the Campaign, the use of PA facilities would not constitute a prohibited in-kind contribution to the Campaign.

Compliance with the proposed terms and conditions of the agreement attached as Appendix 1 to this request will enable PA to avoid an in-kind contribution to the Campaign.

The Act exempts from the definition of “contribution” “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee.” 2 U.S.C. 431(8)(B)(i), 11 CFR 100.74; Federal Election Commission Campaign Guide Congressional Candidates and Committees, August 2011, p. 39 (“Campaign Guide”) (example that attorney may work as volunteer in campaign if he receives no compensation from anyone for that work); *see also* Advisory Opinions 2007-08 (King)(individual may volunteer his time to arrange entertainment); 1980-42 (Hart) (entertainer

may agree to provide free services to a political committee without the value of those services being considered as a contribution) and 1982-04 (Apodaca) (uncompensated volunteer services provided by tradesmen in renovating political committee building were not contributions).

PA's status as a federal contractor would not undercut a PA partner's ability to make an uncompensated contribution of voluntary time. Partners in and employees of a federal contractor partnership may make contributions or expenditures in the person's individual name from their personal assets. 11 CFR 115.4(b) and (c); *see also* Advisory Opinion 1984-10 (Arnold & Porter)(partners in federal contractor law firm could make contributions to candidates for federal office so long as the partner make the contribution in his own name, out of the partner's personal funds).

The proposed agreement between PA and the Campaign attached as Appendix 1 includes provisions in paragraphs 6 and 7 to ensure that the individual volunteer will not be compensated by PA for the individual's volunteer work for the Campaign, thereby avoiding an in-kind contribution under 11 CFR 100.54. Paragraph 6 ensures that the any volunteer time must be from an individual's vacation time, non-work time, or that work time used for the volunteer work is made up within a reasonable time. Paragraph 7 ensures that if a PA partner or associate's volunteer time with the Campaign prevents the individual from meeting his or her targeted productivity levels anticipated by their respective employment arrangements with the Firm, the individual must notify the Managing partner in advance, and the Managing Partner and the affected partner or associate will modify the individual's employment arrangement with PA to reflect the reduced productivity. As emphasized in paragraph 7, the effect of any reduced productivity of a PA partner or associate due to individual volunteer time for the Campaign will be no different from the effect on the compensation of any other partner or associate with reduced productivity during 2012 under long established firm partner and associate compensation plans.

These provisions track FEC guidance in the Campaign Guide pp 39-41 and several prior FEC Advisory Opinions, including Advisory Opinion 2006-13 (Saudler, Reiff & Young) (so long as firm follows established compensation plan in compensating firm partner who is candidate for Congress, assuring that he is paid the same as any equity partner who is paid with the same past productivity and upward adjustment criteria factors, the Firm's compensation to candidate will not constitute a contribution); 2000-01 (Taveras) (an associate of Brown and Rudnick, a corporate law firm, who was a candidate for Congress, could not receive partial compensation for a leave of absence from firm during candidacy because the salary would not be paid pursuant to a bona fide compensable vacation time or earned leave time); Advisory Opinion 1979-22 (Carter Mondale Campaign) (law firm compensation schedule for part-time associate who was also employed by presidential campaign did not result in any kind of an in-kind contribution by firm to campaign so long as schedule accurately reflected the relative amounts of time that the associate devoted to duties on behalf of firm and campaign; includes agreement between firm and campaign with schedule of charges for use of firm resources).

The proposed agreement paragraphs 8, 9 and 10 ensure that PA partners and employees will limit their use of PA facilities to occasional, isolated, and incidental use, or that employees will reimburse the firm for the use of those resources at normal and usual rates. In drafting these provisions, PA drew upon the criteria of 11 CFR 114.1(u)(2)(vii) and 114.9(a) and (b) which apply to use of corporate and labor organization facilities. Although those provisions do not specifically apply to the PA law firm partnership and federal contractor context, the regulations do set forth clear guidelines that assure that an

entity that is otherwise barred from making a contribution can assure that an in-kind contribution does not inadvertently occur through employee individual volunteer activity and use of firm resources. The guidance has been provided to enable the FEC to confirm that compliance with the agreement terms will ensure that PA does not contribute "anything of value" in the form of in-kind services as defined in the term "contribution" under 2 U.S.C. 431(8) and clarified in 11 CFR 110.1(e) and 100.53(d)(1); *see also* Advisory Opinion 1979-22 (Carter/Mondale Presidential Committee, Inc.) (FEC approves law firm partnership legal services agreement with political committee as exception for legal services rendered for purpose of ensuring compliance with the Act and approves the letter of agreement arrangements for reimbursement schedule to be followed with regard to the occasional use of firm resources).

Thank you for your consideration of this advisory opinion request. Please do not hesitate to contact Elizabeth Butler (207 791 1226) or me (207-831-1115) if you need any additional information.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "J. Maurice Bisson". The signature is fluid and cursive, with the first name "J." being particularly prominent.

J. Maurice Bisson

Treasurer

cc: Angus S. King, Jr.

Pierce Atwood, LLP/Elizabeth R. Butler, Esq.

APPENDIX 1

DRAFT

J. Maurice Bisson

Angus King for U.S. Senate Campaign

PO Box 368

185 Maine Street

Brunswick, Maine 04011

Re: Legal Services - Scope of Services

Dear Mr. Bisson

If the Federal Election Commission (FEC) approves the proposed legal services by Pierce Atwood LLC to the Angus King for U.S. Senate Campaign as set forth in our Advisory Opinion request to the FEC, the following terms and conditions will apply to the firm's services to ensure full compliance with the Federal Election Campaign Act of 1971 and implementing regulations.

PA Services Related to FEC Compliance

1. PA will track time expended by PA partners, associates and staff according to standard firm procedures under a non-billable account reflecting time expended to advise the Campaign on matters pertaining to compliance with the Act and FEC regulations. PA will send a monthly statement to the Campaign listing the date and nature of the services provided and providing the value of that service at normal and usual rates of the firm for such services. PA considers these rates to be the "amounts paid for these services by the regular employer of the person providing such services" within the meaning of 11 CFR 100.86. The Campaign will report the reported value of the services in accordance with 11 CFR 104.3(h).

2. PA will utilize existing PA partners, associates and employees to perform the legal services in paragraph 1, and will not hire additional employees or contractors for the purpose of rendering those legal services.

3. PA will bill any out-of-pocket disbursements (e.g. long distance telephone charges, overnight delivery fees, courier fees) incurred by PA in the course of providing the paragraph 1 services to the Campaign. But the use of PA resources (e.g. use of computer equipment, Internet connection, certain subscription research services or secretarial time) necessary for the partner or employee to provide the service will not be billed.

PA Services Not Related to FEC Compliance

4. For all legal services other than those pertaining to compliance with the Act and implementing regulations authorized to be treated as pro bono services under 11 CFR 100.86, PA will track time expended by PA partners, associates and staff according to standard firm procedures on a billable account, and timely bill the Campaign for those service fees and disbursements at normal and usual rates charged by PA for such services. The Campaign will pay those legal services invoices in accordance with PA's standard billing and payment policy and report the payment as required by FEC regulations.

PA Individual Partner, Associate, or Employee Volunteer Time and Incidental Expenses

5. A PA partner or employee of the firm (including associates), independently and of his own volition, may volunteer his individual time to the Campaign. This individual volunteer time is strictly an individual decision, and shall not be considered part of PA's work for the Campaign. PA will not ask any partner or employee to provide individual volunteer services for the Campaign.

6. Subject to paragraph 7 below, any PA partner or employee who is acting as a Campaign volunteer must work the number of hours anticipated by the partner or employee's employment arrangement with the firm, and any time used by the PA employee from the PA work period must be made up or completed by the employee within a reasonable time; or the time used by the employee to volunteer on the Campaign must be reported as earned vacation or leave time.

7. A PA Partner or associate who decides to volunteer time to the Campaign that would prevent him from meeting his targeted productivity levels anticipated by his employment arrangement with PA will notify the Managing Partner in advance. The Managing Partner and the affected partner or associate will modify any employment arrangement to anticipate the reduced hours, in accordance with PA's established compensation policy for partners and associates. In the case of a partner, that policy takes into account an equity partner's historical and current productivity levels (including billable hours), the partner's participation in PA leadership and marketing, the partner's role in generating revenue for PA in the current year by originating and servicing clients during the calendar year, and other contributions. In the case of an associate, the plan takes into account essentially the same factors. The effect of any reduced productivity of a PA partner or associate due to individual volunteer time for the Campaign will be no different from the effect on the compensation of any other partner or associate with reduced productivity during the 2012 year.

8. A PA partner, associate or employee may make occasional, isolated, or incidental use of PA facilities while undertaking volunteer work for the Campaign during working hours. At a minimum, use of facilities for up to one hour per week or up to four hours per month will be considered occasional, isolated, or incidental use.

9. If the PA partner or employee's occasional, isolated, or incidental work for the Campaign performed by the individual at PA facilities does not involve any increase in the firm's operating or overhead costs, then no reimbursement of the portion of such usual overhead costs by the Committee would be required. The volunteer's use of PA facilities for individual volunteer Internet activity need not be reported as an overhead cost to be reimbursed, so long as the use complies with PA general computer and Internet use policy, and the other requirements of this Agreement for volunteer activity in the workplace. If individual

volunteer PA partner or employee makes use of Campaign office or internet on a similar basis in order to perform work for the benefit of PA, PA would not be required to reimburse the Campaign.

10. If an individual volunteer who is a PA partner, associate or employee under paragraph 6 or 7 makes more than occasional, isolated, or incidental use of PA resources (e.g. long distance telephone, photocopying, secretarial assistance, legal research services) in the course of performing his individual volunteer legal services under Paragraph 6 or 7, then the volunteer shall track and report the charges to PA, the volunteer shall reimburse PA, and the volunteer shall report the reimbursed amounts as in kind contributions by the individual to the Campaign. PA shall charge the following fixed schedule of charges that reflect the usual and normal rental fee or actual costs incurred by PA for use of PA resources:

- Use of Conference Room: \$240/day or \$30/hour and \$22 for coffee and water service
- Use of Secretarial Service: \$26.00/hour (average hourly rate, including comm and benefits)
- Messenger: Actual cost
- Photocopying: 20 cents per page black and white; 29 cents per page color
- Telephone: Long distance calls - actual cost
- Postage Actual cost

11. The arrangements and procedures of this letter will be reviewed periodically by PA and the Campaign and adjustments will be made if necessary to reflect any significant variations in the respective work needs of PA or the Campaign.

Pierce Atwood LLP

By: Its Managing Partner

Angus King for U.S. Senate Campaign

By: Its Treasurer



"Elizabeth Butler"
<ebutler@pierceanwood.com>
>

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To <jselinkoff@fec.gov>
cc <mbisson@angus2012.com>

bcc

Subject FEC Advisory Opinion

History: This message has been forwarded

Jessica,

This email confirms that:

1. Pierce Atwood LLP is a limited liability partnership (LLP), not a limited liability company.
2. The Advisory Opinion request is properly considered a mutual request by both the Angus King for U.S. Senate Campaign and the law firm of Pierce Atwood LLP, seeking to confirm that the proposed arrangement for legal services between the Campaign and the law firm is fully compliant with FEC requirements.
3. Both the Angus King for U.S. Senate Campaign and Pierce Atwood, LLP understand that the request for advisory opinion and related correspondence, including this email, are public documents.

The Treasurer of the Angus King for U.S. Senate Campaign, J. Maurice Bisson, is copied on this confirming email.

If you have any questions, please do not hesitate to call me.

Best regards,
Elizabeth Butler

Elizabeth R Butler, Esq.	
PIERCE ATWOOD LLP	PH 207.791.1226

In accordance with I.R.S. Circular 230 we advise you that any tax advice in this email is not intended or written to be used, and cannot be used, by any recipient for the avoidance of penalties under federal tax laws.