

ARNOLD & PORTER

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STEPHEN M. SACKS
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November 20, 1995

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

AOR 1995-43

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Commissioners:

I write on behalf of the firm of Arnold & Porter to seek an advisory opinion from the Commission, pursuant to 2 U.S.C. § 437f, with respect to the matters set forth below.

Arnold & Porter served as legal counsel for Senator Bob Packwood for a period until December 1993. During the period of its representation, Arnold & Porter's legal fees were paid by funds from the Senator's Legal Expense Trust Fund and the Re-Elect Packwood Committee [hereinafter "the Committee"].

On October 24, 1994, Arnold & Porter wrote to the Senate Select Committee on Ethics seeking permission to refund \$200,000 of the fees already paid to it to the Senator's Legal Expense Trust Fund. A copy of the firm's letter to the Committee, as supplemented by correspondence sent on November 10, 1994 and December 16, 1994 is attached hereto at Tab A. That correspondence sets forth the reasons for the request being made by Arnold & Porter.

On June 9, 1995, the Senate Select Committee on Ethics wrote to Arnold & Porter with respect to its request, giving Arnold & Porter permission to refund \$50,000 of the \$200,000 to the Legal Expense Trust Fund and indicating that the remaining amount should be refunded to the Committee. A copy of this letter is at Tab B.

This letter to you concerns Arnold & Porter's desire to refund \$150,000 to the Committee pursuant to

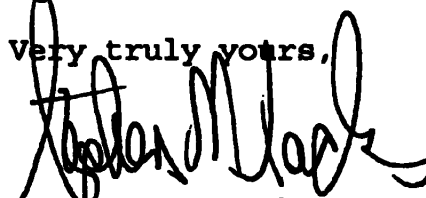
ARNOLD & PORTER

Federal Election Commission
November 20, 1995
Page Two

the Senate Committee's decision. For the reasons set forth in the correspondence with and the decision of the Senate Select Committee on Ethics, it is our view the refund of \$150,000 to the Committee is no more a "contribution" for the purpose of influencing a federal election than the refund of \$50,000 was a "gift" under Senate ethics rules. Accordingly, in our view it is not subject to the Federal Election Campaign Act's prohibitions and limitations on political contributions. The purpose of this letter is to request an advisory opinion from the Commission that the refund of \$150,000 to the Committee is lawful.

We would be pleased to provide you with any further information you may require to assist you in your consideration of this request.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen M. Sacks", written over the typed name below.

Stephen M. Sacks

cc: Robert Muse, Esq.

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TOKYO, JAPAN

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JOHN D. HAWKE, JR.
DIRECT LINE: (202) 872-8856

October 24, 1994

BY HAND

Victor Baird, Esq.
Chief Counsel
The Senate Select Committee
on Ethics
220 Hart Senate Office Building
Washington, D.C. 20510-6425

Dear Mr. Baird:

We write to you concerning our intent to refund payments made to Arnold & Porter from the Packwood Legal Expense Trust Fund in connection with the Committee's inquiry into certain activities relating to his service in the Senate. As you are aware, Arnold & Porter represented Senator Packwood in that matter until early December 1993, at which time we terminated our representation of Senator Packwood. As a result, Senator Packwood needed to retain new counsel to represent him in the ongoing matter, which was quite active.

As a consequence of these developments, and consistent with our responsibilities under the D.C. Rules of Professional Conduct Section 1.16(d), the firm determined at that time, and made an oral commitment, to refund to the Trust Fund \$200,000 of the fees already paid to it for its representation, provided that such a refund was consistent with all applicable rules.¹ The firm now wishes to make that payment. We are writing to you at this time because we want to be sure that the Committee has no concerns with our planned actions.

* * *

Under Section 1.16(d) of the D.C. Rules of Professional Conduct, when a client/lawyer relationship

¹ Arnold & Porter received payments both from the Packwood Legal Expense Trust Fund and from Senator Packwood's campaign committee, consistent with Senate Rules.

terminates, the "lawyer shall take timely steps to the extent reasonably practicable to protect a client's interest" This requires a lawyer to do whatever he or she can reasonably do to avoid prejudicing the position of his client: "a duty remains to protect the welfare of the client." Hansen v. Wightman, 538 P.2d 1238, 1251 (Wash. App. 1975); see also Lake County Bar Assoc. v. Needham, 419 N.E.2d 1104, 1107 (Ohio 1981) (disciplining attorney for, inter alia, withdrawing from representation "without taking reasonable steps to avoid foreseeable prejudice to the rights of his client"). The District of Columbia Bar recognizes the importance of abiding by this principle in the context of the transition to new counsel: "[A]n attorney must facilitate the client's transition to a substitute attorney at least to the extent that such assistance is necessary to avoid 'foreseeable prejudice.'" D.C. Bar Opinion No. 168 (April 15, 1986) (applying predecessor rule).

The firm evaluated the fact that it would not be continuing its representation of Senator Packwood in this ongoing matter in light of this professional obligation. Two factors led us to conclude that we should remit \$200,000 of the fees previously collected by us in order to protect Senator Packwood's interests in his transition to new counsel.

First, because of the nature and scope of the inquiry into Senator Packwood's activities, the firm's lawyers had expended significant time becoming familiar with the factual and legal issues that had been raised by the Committee's inquiry. There was a clear expectation that these initial efforts would inure to the benefit of Senator Packwood in any further Committee hearings or proceedings. Much of that investment of lawyers' time and effort was not, by its very nature, transferrable to successor counsel -- although our files and work product were, of course, turned over. Thus, when the relationship was terminated, Senator Packwood faced the prospect of having to expend additional resources to bring new counsel up to that same level of knowledge.

Second, at the time our services were discontinued in late 1993, it was our understanding that the resources available to Senator Packwood had been virtually exhausted and that he did not have substantial prospects

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October 24, 1994
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of raising significant additional resources for his legal defense fund. Indeed, that factor had already led us to notify the Committee in late November 1993 that we would be proceeding in the matter on a pro bono basis. Thus, when the relationship was terminated, it appeared to us that Senator Packwood's interests could be adversely affected if he were left without resources to pay replacement counsel to carry on the representation -- particularly in light of the need for any successor counsel to replicate some of the work we had already done, the benefits of which could not readily be transferred.

Accordingly, our firm took a number of steps to protect Senator Packwood's interests as he was retaining new counsel. First, the firm agreed to provide "transition" services on a pro bono basis to help his replacement counsel get familiarized with all the issues. Second, the firm committed, as set forth above, to the adjusting of the amount Senator Packwood had paid previously for its legal services by the firm's refunding \$200,000 of those fees.

Our decision is consistent with the firm's ethical obligations to protect the client's interests and to take reasonable steps to ensure that he would suffer no prejudice by the termination of the representation. Had we not taken these steps, we believe it might have been difficult or impossible for Senator Packwood to engage skilled counsel to continue representing him in these complex matters.


Therefore, we propose to return the \$200,000 to the Legal Defense Fund. It is our opinion that the remission of this amount is properly viewed as an adjustment to the fees previously collected. Under the circumstances, we do not believe it would be appropriate to view the return of these fees as a "contribution" to the trust fund under the applicable Senate regulations, nor as a "gift" under Senate Rule XXXV. We believe this adjustment in fees is consistent with our ethical obli-

ARNOLD & PORTER
Victor Baird, Esq.
October 24, 1994
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gations. Therefore, we intend to proceed in this manner as soon as possible, unless you advise us to the contrary.

Sincerely,

ARNOLD & PORTER

By: 
John D. Hawke, Jr.
Chairman

cc: Jacob Stein, Esq.

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JOHN D. HAWKE, JR.
DIRECT LINE: (202) 872-6856

November 10, 1994

BY HAND

Victor Baird, Esq.
Staff Director and
Chief Counsel
Select Committee on Ethics
United States Senate
Hart Senate Office Building, Room 220
Second and Constitution Ave., N.E.
Washington, D.C. 20036

Dear Mr. Baird:

This is to acknowledge receipt of your October 26, 1994 letter concerning an action our firm proposed to take regarding the Packwood Legal Expense Trust Fund.

I want to clarify one matter described in my October 24 letter and referenced in your October 26 letter. As indicated in my October 24 letter, after Arnold & Porter ceased serving as Senator Packwood's counsel, we wrote to the Committee concerning our request to provide transition services to Senator Packwood on a pro bono basis. By letter dated December 6, 1993, James F. Fitzpatrick of our firm indicated that, on behalf of the firm and all individuals who would be involved in providing such pro bono services to Senator Packwood, we made a commitment and did "expressly consent to the restriction that neither the firm nor its lawyers will lobby Senator Packwood during the course of the provision of pro bono services or for six months after the conclusion of the provision of these services . . ."

Our firm provided such pro bono services for Senator Packwood in connection with the transition to new counsel until May 19, 1994 when all such services ceased. During the time we provided such pro bono services to Senator Packwood and since that time, I can confirm that neither the firm nor its lawyers have engaged in any form of lobbying activity with either Senator Packwood or his staff. Consistent with our

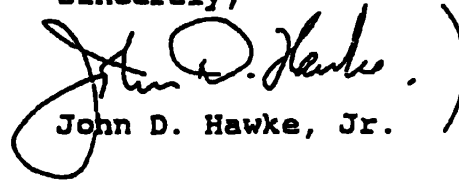
ARNOLD & PORTER

Victor Baird, Esq.
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Page 2

representation to the Committee, this restriction on lobbying activity will remain in place until November 20, 1994.

Please let me know if you need any further information.

Sincerely,

A handwritten signature in cursive script that reads "John D. Hawke, Jr." followed by a closing parenthesis. The signature is written in black ink on a white background.

John D. Hawke, Jr.

cc: Jacob Stein, Esq.

NEW YORK, NEW YORK

DENVER, COLORADO

JOHN D. HAWKE, JR.
DIRECT LINE: (202) 872-6886

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LOS ANGELES, CALIFORNIA

TOKYO, JAPAN

December 16, 1994

BY HAND

Karen Bovard
The Senate Select Committee
on Ethics
220 Hart Senate Office Building
Washington, D.C. 20510

Dear Karen:

As you know, in our October 24, 1994 letter to the Committee, Arnold & Porter proposed to pay \$200,000 to Senator Packwood's Legal Defense Fund as an adjustment to the fees of approximately \$800,000 that the firm had charged the Senator. I write to you again at this time in response to your request that I address certain matters concerning this proposed adjustment of fees that we discussed in our meeting on December 8, 1994.

As we discussed, in November 1993, Arnold & Porter withdrew as Senator Packwood's counsel. Prior to the date of our withdrawal, the firm had sent bills to the Senator reflecting the work it had performed. When the firm withdrew, it recognized that its billings calculated solely on the basis of hourly rates did not accurately reflect the fair market value of the services

Karen Bovard
December 16, 1994
Page 2

that it had performed for Senator Packwood. The value of the work that the firm had performed to that date depended to an appreciable extent on the continued provision of services by our firm, so that the investment we had made in familiarizing our lawyers with the facts and issues in the case and in developing our expertise and knowledge would be available to the Senator throughout the proceeding. Once the firm withdrew, the value of that expertise and knowledge was no longer available to the Senator and the Senator was required to pay successor counsel to replicate it.

The firm then made its best estimate -- \$200,000 -- of what it would cost Senator Packwood to replicate with new counsel the expertise and knowledge that we had developed at his expense and was no longer available to him. At the same time as the withdrawal, the firm made a commitment to Senator Packwood to adjust its fees for prior services, in the amount of \$200,000, provided it could do so in a lawful manner.

This proposed adjustment by the firm was not a gift by the firm to Senator Packwood, nor was it a voluntary or requested "forgiveness" of fees or a different form of providing pro bono services to the Senator.

Karen Bovard
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Page 3

Quite the contrary, it was a reflection of a loss to the Senator of a portion of the value of the services we had performed, occasioned by the change in circumstances, and was intended to assure that he was not charged more than fair market value for those services. The process the firm went through in proposing the adjustment was not unique to Senator Packwood. It is a process the firm has gone through and would go through in comparable situations for any of its clients.

It is important for the Committee to recognize that the hourly billing rates upon which most law firm statements are based are only the starting point for assessing the fair market value of legal services. Statements submitted by law firms to clients are frequently adjusted after they are rendered, and sometimes even after they are paid. This is not because the firms wish to make a gift to their clients or are settling overcharge claims. Such adjustments are made to conform billings to the fair market value of the legal services actually rendered.

For example, when a firm is compelled to withdraw from a matter due to a conflict of interest that develops during the course of the matter, it is common to

ARNOLD & PORTER

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recognize, in light of the changed circumstances, that the fair market value of its services were less than the amount calculated on the basis of hourly rates alone since the client did not receive the benefit of the firm's continuing expertise and knowledge and was confronted with a need to incur duplicative expense. Fee adjustments in such circumstances do no more than assure that the client is not overcharged.

In sum, we believe that the \$200,000 payment to which we committed is completely in keeping with the Committee's rules authorizing legal services to be received by Senators provided Senators are charged fair market value for those services.

Finally, we note that the firm has complied with the Committee's pro bono rules. The firm wrote to the Committee upon its withdrawal and requested that certain legal fees which it had rendered and would be rendering in connection with the transition to new counsel be considered pro bono services. The firm agreed to comply with the lobbying ban in the Committee's rules during the period such pro bono services were provided and for six months thereafter. The firm in fact has complied


ALVIN D. PORTER

Allen Bovard
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with such rules and any ban on lobbying activities by
the team has expired.

We would be pleased to provide you with any fur-
ther information.

Sincerely,


John D. Hawke, Jr.

cc: Jacob Stein

United States Senate

SELECT COMMITTEE ON ETHICS

HART SENATE OFFICE BUILDING, ROOM 220
SECOND AND CONSTITUTION AVENUE, NE.
WASHINGTON, DC 20510-6425
TELEPHONE (202) 224-2961

June 9, 1995

Mr. John D. Hawke, Jr.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D. C. 20004-1202

Dear Mr. Hawke:

This responds to your correspondence of October 24, November 10, and December 16, 1994 relating to Senator Packwood.

Your letters concern a commitment given to Senator Packwood by Arnold & Porter upon termination of the firm's representation of the Senator in late 1993. At that time, the firm had been paid approximately \$800,000 in fees. Prior Committee rulings have permitted legal fees in cases such as Senator Packwood's to be paid directly with excess funds from a member's principal campaign committee, or funds from a Legal Expense Trust Fund (LETF) established under Committee Regulations. Pursuant to those Regulations, excess campaign funds may not be transferred or contributed to a LETF. In this case, the Committee understands that about three-quarters of the firm's total fees were paid directly with funds from the Senator's principal campaign committee and one-quarter in funds from the Senator's Legal Expense Trust Fund (LETF), consistent with the Committee's prior rulings and Regulations governing such trust funds.

As a result of the firm's withdrawal as counsel, the Senator was required to retain new counsel to represent him the ongoing matter before the Committee. Because of the nature and scope of the Committee's inquiry, the firm's lawyers expended significant time becoming familiar with factual and legal issues with the clear expectation that these initial efforts would inure to the benefit of the Senator in any further Committee proceedings. Much of that investment in time and effort was not transferable to successor counsel. Based upon these and other considerations set out in your letters, on the date of its withdrawal as counsel Arnold & Porter gave the Senator a commitment to make a \$200,000 adjustment to its fees for prior services, provided it could do so in a lawful manner. The firm's October 1994 request to the Committee was in furtherance of the firm's 1993 commitment. The Committee understands that, within the meaning of Chapter Three, Part B. of the Committee's Regulations Governing Legal Expense

Trust Funds, the firm has not lobbied the Senator or persons supervised by him since submission of the October 1994 request.

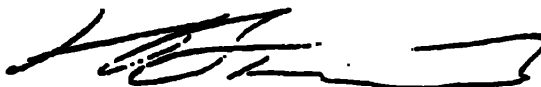
The Committee has concluded that under these circumstances the proposed \$200,000 fee adjustment may appropriately be made under the following circumstances.

The adjustment to fees should be made on a pro rata basis between the campaign committee and the LETF reflecting the relative amount of fees initially paid by each respective source. Thus, under the circumstances, approximately one-quarter of the fee adjustment may take the form of a contribution to the LETF, where it may be treated in the same manner as a contribution of pro bono legal services, provided that for a period of thirty days from the date of actual payment to the LETF the firm does not lobby the Senator or persons supervised by him. The Federal Election Commission has jurisdiction over funds received by campaign committees and should also be consulted regarding the adjustment for fees previously paid by the campaign.

Prior to payment of these amounts, the firm's managing partner is to provide the Committee an affidavit attesting that the firm's proposed fee adjustment is consistent with and based upon the firm's standard practice in analogous situations, and is the result of arms-length business considerations not related to Bob Packwood's membership in the Senate. The Committee will also separately inform the LETF Trustee of his obligation to make a factual determination as to these circumstances prior to accepting such fee adjustment on behalf of the LETF.

Thank you for bringing this matter to the attention of the Committee.

Sincerely,



Victor Baird
Staff Director and
Chief Counsel