

AO-96-105

Issues:

1. Whether the payment of fees to a private attorney retained by the county executive to investigate alleged misconduct in the enactment of certain legislation, violates the ethics laws where the attorney subsequently represents private plaintiffs in a lawsuit challenging that legislation?
2. Whether any of the actions of the participants in the investigation and subsequent lawsuit violate the ethics law?

Background:

In June 1995 the County Exec. hired an attorney to conduct a confidential investigation into possible criminal activities that may have occurred during the preparation of the appointed and elected officials pension law. On December 7 1994, the attorney and a private investigator traveled to Florida as part of their investigation, to interview a former employee. The cost to the County of this investigation was \$10,620.00, which included the amount of \$3,558, the charges submitted by the private investigator, and \$7,062.00 in legal fees submitted by the lawyer. All but about \$500.00 of this total bill was paid by the county.

On or about December 20, 1995, the attorney sued Anne Arundel County on behalf of the Anne Arundel County Taxpayers Association, Inc., and an individual plaintiff, seeking a declaratory judgment and injunctive relief. The suit alleged that the county, in enacting the pension plan, acted in a *ultra vires* manner and that the plan should be declared void. The county executive and the county attorney encouraged the taxpayers' association and the named plaintiff to file the suit as a means to challenge a pension plan that the officials felt was not in the best interests of the county. The attorney subsequently submitted a bill for legal services in connection with the lawsuit, under the assumption that the county had agreed to pay his legal fees. The payment of the legal fees, in the range of \$10,000.00 was disallowed.

Discussion:

The ethics law is limited in jurisdiction and does not address the scope of the powers of the executive branch of government. When an official's actions are prompted by personal or other financial interests or other improper influences, the ethics law is involved.

The provisions of Article 9 of the Anne Arundel County Charter require only that County officials and employees pursue the county business with undivided loyalty. The ethics provisions do not address the wisdom of political judgments, or general criminal activities, or other *ultra vires* acts that may be undertaken on behalf of the county. Those issues are not within the jurisdiction of the Ethics Commission to review or resolve. The Commission concludes that this request for an advisory opinion presents no issues that involve ethical violations by any county officials.

However, there are issues presented involving §3 -107, disclosure of confidential information and §3-109, representation by former employees. The private attorney involved in the investigation and subsequent lawsuit would be subject to these provisions if he is considered an "employee" of the County for purposes of the ethics law. In a previous opinion, the Commission has concluded that in some instances, a private attorney retained by the county could be an "employee" and therefore subject to the ethics laws. See, Op. 96 - 108. Among the criteria used to decide whether a private attorney would be considered an independent contractor or an employee, is whether the county would have the power to ". . . control and direct the employee in the performance of the work and the manner in which the work is to be done." *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145, 180(1993). Although there are other criteria used in deciding the existence of an employer - employee relationship, it is generally held that absent the existence of the right of control, the relationship is one of independent contractor. Here it appears that the county executive retained the attorney to investigate certain allegations and to report. The methods used by the attorney were apparently within his discretion and his fee was determined according to his billing methods and not by County prescribed limits or requirements. This level of discretion suggests that the attorney was not an employee, but an agent, or independent contractor of the county, and therefore, not subject to the provisions of Article 9, the public ethics laws of Anne Arundel County.

Conclusion:

The Commission advises that there are no violations of the ethics laws presented by the facts of this case.