

Anne Arundel County Ethics Commission

Advisory Opinion 02-151

Issues:

1. Whether the legislative counsel to the county council violated §3-104(a) of the Public Ethics Law by serving as a compensated expert witness for a party in a lawsuit based on his experience as an assistant county attorney specializing in land use.
2. Whether the legislative counsel violated §3-105(c)(1) of the ethics law by assisting a private entity in a matter in which the county had an interest, where the counsel acted as a compensated expert witness in a trial where his legal opinion was in direct opposition to a legal opinion expressed by the county.
3. Whether the legislative counsel violated §3-109 of the ethics law by providing assistance to a party in a lawsuit in a matter in which the counsel had formerly exercised substantial responsibility while serving as an assistant county attorney.

Facts:

In March of 2001, the employee who requested this advisory opinion ("the employee") was appointed to the position of legislative counsel to the county council. Prior to his appointment the employee had served as an assistant county attorney in the county's office of law since 1976. In his current position as legislative counsel, he drafts legislation, analyzes pending legislation and serves as the council's parliamentarian. The employee does not provide legal advice to the county council which receives legal advice from the office of law.

In his prior position as an assistant county attorney, the employee specialized in land use issues and worked closely with the planning and zoning office, providing legal advice, representing the county before various agencies, and litigating land use related cases where the county was a party. He also served as an expert witness on behalf of the county on numerous occasions.

In the early 1980's a developer sought to build a subdivision in the county known as Heritage Harbor. As part of the subdivision process, the developer sought and received a number of waivers from the office of planning and zoning. One of the waiver requests became the subject of a lawsuit between the plaintiff community association that serves the residents of the now developed Heritage Harbor community, and the defendant developer. One of the issues in the case was whether a particular waiver involving dry land recreational space had been granted to the developer. Another issue was whether it was necessary for the developer to comply with subdivision regulations that were stricter than the more general PUD provisions of the county code. As to these issues, the employee, by testimony, affidavit, or deposition, stated opinions that were directly in opposition to the county's stated positions.

The county was not a party to the lawsuit. Both plaintiff and defendant were private entities. The county's public records were available for both parties to review and county employees testified and provided other assistance to the parties during the proceedings. However on at least two occasions, the county rejected the plaintiffs requests to participate in any active way in the lawsuit.'

Discussion:

There are three provisions of the Public Ethics Law that are relevant to this case. The first one, §3-104(a), prohibits an employee from using "the prestige, title, or authority of the employee's office of position for the employee's private gain or the gain of another." If the employee used his title in his role as a compensated expert witness, he would have violated this provision. It is not apparent that he did so. The ethics commission is aware of three affidavits submitted by the employee in this lawsuit. In one affidavit, dated July 19, 2002, the employee stated that he was employed in the county's office of law for over 24 1/2 years and that he was the primary attorney advising the planning and zoning office. In the second affidavit, dated November 26, 2002, the affiant stated that he was an attorney authorized to practice law in the State of Maryland, that he was an attorney with the Office of Law for 24 1/2 years and that he was the primary attorney advising the planning and zoning office. In the third affidavit, dated December 3, 2001, he stated that he worked in the office of law until March 30, 2001. In none of the affidavits did he use his present title of legislative counsel, or claim any land use expertise because of his current position. In his testimony in court, the employee identified himself as the legislative counsel only in response to questions about his current job. He also described the duties of his current position. A reasonable person would not conclude from his current title or from his current duties that the employee is an expert in land use issues. In the absence of any evidence to the contrary, the ethics commission concludes that the employee did not use the prestige, title or authority of his current position for his own private gain. There is no prohibition against using a former title or reciting a job history in response to a question soliciting that information.

The second relevant provision of the ethics law is §3-105(c)(1). This provision prohibits an employee from assisting or representing any person or entity in any matter in which the county has an interest. The ethics commission has interpreted this provision to be limited to interests of the county that may be adversarial or competitive with the interests of the entity represented or assisted by the employee. In the present case, the employee certainly assisted a private entity in a matter in which the county had expressed an adversarial position to the entity. The question is whether the county had "an interest" in the matter. The ethics commission believes that it did not have an interest. An "interest" as defined in §1-101(n), has been consistently interpreted by the commission to involve either a legal interest or an economic interest. See, AO-96-112, AO-96104, AO-96-45, IO-01-177, IO-00-64. If the county had been a party to the suit, it would have a legal interest in the outcome. If county agency personnel believed that the outcome of this lawsuit could subsequently affect the future conduct of its business, the county could have intervened, or tried to intervene as a party. It did not do so. Because the county was not a party to the suit, it had no legal or economic interest that would be affected by a decision that will impact only private parties. The county may have been very interested in the proceedings and in the outcome of the case but that does not mean that it had a "legal interest" in the case for purposes of the ethics law. Therefore, the ethics commission concludes that the employee did not assist a person in connection with a matter in which the county had an interest.

The third provision of the ethics law that is relevant to this inquiry is §3-109(a)(1), which provides that "a former employee may not assist or represent a person in connection with a specific matter in which the former employee, as a County employee... acted on behalf of or represented the County in a matter involving substantial responsibility on the part of the employee." The ethics commission concludes that as far as the office of law is concerned, the employee is in fact a "former employee" and is bound by the limitations of this provision. So, if the employee exercised "substantial responsibility" in a matter relating to the lawsuit, he would be prohibited from then testifying as to that matter, regardless of whether the employee had left the county or had switched to another agency or branch of the county government.

¹ Letter from office of law to Heritage Harbor Community Association, Inc., dated July 15, 2002.

The "matter" to be considered in this inquiry is the development of the county's position in response to allegations and demands raised in a letter from the plaintiffs attorney to the county, dated July 15, 1997.² The county's position was set forth in a return letter, dated August 4, 1997, from the Chief Administrative Officer of the county to the plaintiffs attorney. In the letter, the CAO, who was also serving as the Land Use Officer, stated that he had "reviewed the [plaintiffs] letter point-by-point" with specific staff members of the planning and zoning office, and with the assistant county attorney - the employee in this inquiry. The letter reflects that a copy was sent to the employee as well as other staff members. The employee stated that he had no recollection of seeing the letter or meeting with the CAO or other staff members on this matter. He further stated that he did not have any input into the letter sent by the CAO. In trial testimony given some five years after the issuance of the letter, the now former CAO stated that he had no recollection of actually talking to the employee, although he stated that he probably would have, since the office of law is generally consulted when legal issues are raised that may affect the county. Other staff members who were involved in the development of the letter have no recollection of talking to the employee either generally, or point-by-point, although they agree that they probably would have talked to a county attorney because of the legal issues involved. There are no file letters, memoranda, or other documents directly from or to the employee relating to this matter. The possible or even probable participation of the employee does not conclusively establish that he exercised "substantial responsibility" in the matter. There is simply no evidence from which the ethics commission can conclude that the employee exercised "substantial responsibility" in developing a response to the plaintiffs letter. But even if a former employee exercised substantial responsibility in a matter, the ethics commission is authorized to waive the prohibition of §3-109(a) if the commission determines that the assistance provided by the employee to the plaintiff would not have "adversely affected" the county's interests. Since the county does not appear to have had an interest that would be adversely affected by this private lawsuit, a waiver, had it been applicable, may well have been granted.

Conclusion:

The ethics commission advises that the legislative counsel did not violate §3-104(a), §3105(c), or §3-109(a) of the Public Ethics Law by serving as a compensated expert witness for one of the parties in the case of Heritage Harbor Community Association. Inc. v U .S Home Corporation.

Date: February 10, 2003

By: The Anne Arundel County Ethics Commission

² The employee had no input into the original waiver of dry land open space and although he reviewed and signed off on the plats for portions of the Heritage Harbor development, he did not review the plat for the PUD that was included in the disputed waiver.

