

42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-12 Use of state property

42 IAC 1-5-13 Ghost employment

A Staff Attorney in FSSA's Office of General Counsel sought advice to determine whether she could engage in disability advocacy and lobbying efforts. These outside professional activities would be directed towards FSSA's Division of Aging and Division of Disability and Rehabilitative Services. SEC determined that the Staff Attorney's outside professional activities would not create a conflict under IC 4-2-6-5.5. Specifically, the disability advocacy and lobbying activities do not provide her with compensation of substantial value nor would they require her recusal from matters that are critical to the performance of her state employment duties. SEC further determined that it was unlikely that the Staff Attorney would be in a position to participate in a decision or vote in which she would have a financial interest because her duties as Staff Attorney do not involve legal advice to the Division of Aging or applicable programs through DDRS; therefore her advocacy and lobbying activities would not create a conflict of interest under IC 4-2-6-9.

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No. 14-I-22

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is a Staff Attorney for the Family and Social Services Administration's ("FSSA") Office of General Counsel. She requests an advisory opinion to determine whether her outside professional activity consisting of disability advocacy and lobbying efforts complies with the Code of Ethics ("Code").

The Staff Attorney has a physical disability and has received services through Indiana's Aged and Disabled Waiver for more than a decade. Indiana's Aged and Disabled Waiver is a Medicaid Waiver program administered by FSSA's Division of Aging as well as by the State Vocational Rehabilitation ("VR") program, which is a program administered by FSSA's Division of Disability and Rehabilitative Services ("DDRS"). The Staff Attorney provides that these programs are part of the reason she currently has her position at FSSA. As an FSSA Staff Attorney, she provides legal advice to the Division of Mental Health and Addiction as well as to the Division of Family Resources. Her duties include research and trust reviews, rule drafting, Access to Public Records requests and other occasional miscellaneous assignments. She has not advised the Division of Aging at any time, and the only professional advice she has given to DDRS pertained to its First Steps Program, which serves children through the age of three.

The Staff Attorney provides that as she has worked toward her ultimate goal of independence, she has encountered a few barriers. She states that she typically deals with these barriers on an individual basis, but has recently come across issues that she believes will require a systematic change. Thus, she would like to advocate, as a private citizen on her personal time, for an expansion of consumer choice and autonomy through FSSA's consumer-directed care program. Through these efforts, she would reach out to members of the General Assembly and representatives of the Governor's Office, and she would also communicate with the Directors of

the Division of Aging and DDRS at FSSA. She states that she would communicate with these FSSA Directors in the same manner that a private citizen would communicate with them.

The Staff Attorney provides that if she is able to engage in this activity, she would do so outside of state time and refrain from using state resources. Moreover, the Staff Attorney provides that she would be clear that she is advocating on behalf of herself and other similarly-situated citizens rather than her employer. She also provides that any confidential information she becomes aware of by nature of her employment at FSSA would not be used to enhance her advocacy work, nor would she allow herself or others to benefit from such information.

ISSUE

What ethics issues arise given the state employee's position as a Staff Attorney at FSSA and her intended outside professional activity?

RELEVANT LAW

IC 4-2-6-5.5 (42 IAC 1-5-5)

Conflict of interest; advisory opinion by commission

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

(1) accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired;

(2) accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment; or

(3) use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:

(A) of substantial value; and

(B) not properly available to similarly situated individuals outside state government.

(b) A written advisory opinion issued by the commission or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

42 I.A.C. 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 I.A.C. 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

42 IAC 1-5-12 Use of state property

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation.

42 IAC 1-5-13 Ghost employment

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

ANALYSIS

A. Outside Professional Activity

An outside employment or professional activity opportunity creates a conflict of interest under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of her official duties that her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

In this case, the information provided by the Staff Attorney does not suggest that she receives "compensation of substantial value or would require her recusal from matters that are critical to the performance of her state employment duties," as her intended activities are not compensated nor would the activity relate to the FSSA divisions in which the Staff Attorney primarily works. Moreover, it does not appear the Staff Attorney would be required to disclose confidential information that she may have access to by virtue of her state employment, as she does not provide legal advice to the Division of Aging or to related programs within DDRS. Finally, as long as the Staff Attorney does not use or attempt to use her state position for any unwarranted privileges or exemptions, her intended outside professional activity should not violate this provision of the Code.

B. Conflict of Interest

IC 4-2-6-9(a)(1) prohibits the Staff Attorney from participating in any decision or vote if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Staff Attorney from participating in any decision or vote if a business organization which employs her has a financial interest in the matter.

It is unlikely that the Staff Attorney would be in a position to participate in a decision or vote in which she would have a financial interest because her duties as Staff Attorney do not involve legal advice to the Division of Aging or applicable programs through DDRS. However, if the Staff Attorney's job duties change and she is put in such a position the Staff Attorney must ensure compliance with the provisions set forth in IC 4-2-6-9(b).

C. Confidential Information

The Staff Attorney is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from, or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the Staff Attorney from accepting any compensation from any employment, transaction, or investment which is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the state employee is exposed to or has access to such confidential information in her position as a Staff Attorney for FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit anyone, including herself, in any manner.

D. Use of State Property and Ghost Employment

42 IAC 1-5-12 prohibits the Staff Attorney from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation. Likewise, 42 IAC 1-5-13 prohibits the Staff Attorney from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

To the extent that the Staff Attorney observes these provisions regarding her outside advocacy and lobbying work, such outside professional activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Staff Attorney's intended outside advocacy and lobbying efforts would not violate the Code.