

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

The ICJI's Ethics Officer sought advice concerning the approval of the ICJI's proposed screening and recusal process for members of the ICJI Board of Trustees and the Domestic Violence Prevention and Treatment Council. SEC found that a conflict of interest arises for Board and Council members under IC 4-2-6-9 if they were to participate in a decision or vote in which they, or more likely, a business organization in which the member is serving as an officer, a director, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter. Moreover, SEC found that while the screen proposed by ICJI for Board and Council members who identify a potential conflict of interest appears to be satisfactory, the SEC still requires that such individuals comply with the provision set forth in IC 4-2-6-9 (b) and request an opinion from the SEC when the potential conflict is identified.

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No. 14-I-21

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") 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 the Ethics Officer for the Indiana Criminal Justice Institute ("ICJI"). He requests an advisory opinion from the Commission concerning the screen and recusal process for potential conflicts of interest involving members of the ICJI Board of Trustees ("Board") and the Domestic Violence Prevention and Treatment Council ("Council").

The ICJI is a state agency charged with developing policy, strategic planning, research, and administering funds associated with criminal justice, juvenile justice, traffic safety, and victim services. *See IC 5-2-6 et seq.* The ICJI also acts as the designated state administering agency for a large variety of federal grants, and administers a number of funds which are appropriated by the General Assembly. *Id.*

The Board

The ICJI is governed by the Board which is comprised of 16 voting members. IC 5-2-6-4. Eight of the members are recommended for appointment by the Governor and are from various organizations such as the Chief of Police for the West Lafayette Police Department. The remaining eight members serve based on a statutory requirement such as the Attorney General or his/her designee. These members are specifically identified and are statutorily required to sit on the Board.

The duties of the Board include the review and approval of grants and funds controlled by the ICJI. Some of the current Board members represent entities who receive funding from one or more of the many funding streams administered by the ICJI.

The Council

In addition to the Board, the ICJI also has statutory authority over a number of other boards, commissions and councils. An example of one of these entities is the Council. *See* IC 5-2-6.6-4. The Council is an advisory council made up of 13 members who are appointed and serve at the pleasure of the Governor. The Council is staffed by the Victim Services Division of the ICJI and is charged with reviewing and making recommendations on various grant requests submitted to the Board.

IC 5-2-6.6 establishes that Council Members are appointed to the Council by the Governor. The language of the statute, which seems to differ from typical language found in other statutes establishing boards, commissions and councils in the Indiana Code, establishes the Council within the ICJI's Victim Services Division. The Division is to provide staff support to the Council.

Several members of the Council represent or are employees of entities who receive funding from the ICJI through various federal and state funds. Several potential conflicts may arise because of the individuals who fill the seats on the Council. Specifically, the seats that may have conflicts are those seats recommended by the Indiana Coalition Against Domestic Violence ("ICADV"), the Latino Coalition Against Domestic and Sexual Violence, the current member who represents the service providers to children, and any other member who may represent or have an interest in a domestic violence treatment center as outlined in IC 5-2-6.7-2. An example of a potential conflict would be the fact that a portion of the individual's salary from ICADV is funded by grants reviewed by the Council. These individuals are not specifically required to serve on the Council.

The ICADV is Indiana's federally recognized domestic violence coalition and receives federal funds along with state and federal funds administered by the ICJI. ICADV provides training, assists in program development, and provides public awareness, legal assistance, and legislative advocacy for domestic violence shelters and centers. These shelters and centers are the same entities that apply to receive domestic violence prevention and treatment funding from the ICJI, and whose grants may potentially be reviewed by members on the Council who are recommended by ICADV.

As part of the terms and conditions associated with a vast majority of federal funds, the ICJI must agree to and ensure that all sub-recipients to federal funds agree to not only the State of Indiana's conflict of interests laws, but also the federal conflicts of interest rules known as, "The Common Rule" and those found in the Office of Management and Budget Circular A-110. These federal rules require the ICJI and any sub-recipient of federal funding to ensure that no employee, agent, representative or subcontractor of the ICJI, who may participate in a decision making process, derive any personal or financial interest in any of the activities funded by the same money.

Proposed Screening Process

The ICJI proposes the following procedure be taken to ensure members of the ICJI's boards and councils disclose and are screened from all potential conflicts with voting:

- 1) Information regarding a particular response to a grant solicitation is not provided to any board, council, or commission member who may have a perceived or actual conflict or financial interest in the outcome of the decision.
- 2) Notice of the screening process is provided to members of the Board or Council prior to discussion or any official actions at a public meeting.
- 3) All members of a board, council, or commission at the opening of a public meeting must disclose all conflicts of interest in voting on, discussion of, and input on financial or other matters outlined on the meeting agenda.
- 4) When any grants come before a board, council, or commission for discussion, the same member(s) is/are asked to refrain from discussion and asked to leave the room during the discussion and voting on the grant at issue.
- 5) The ICJI asks that no other member of the board, Council, or commission speak to the member with the conflict regarding the score of or discussion about the matter.
- 6) The same member is not allowed to make any recommendations to any other member of the board or council regarding the matter.

ISSUE

1. Would a conflict of interest arise for the Board, Council and/or other ICJI council, board or commission members under IC 4-2-6-9 in certain situations arising from financial interests of its members and/or their employers?
2. If so, would the implementation of the screening procedures proposed by ICJI satisfy the statutory requirements set forth in IC 4-2-6-9(b) for the members when a potential conflict of interest is identified?

RELEVANT LAW

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.

ANALYSIS

IC 4-2-6-9(a) prohibits a special state appointee from participating in any decision or vote if they have knowledge that various persons may have a “financial interest” in the outcome of the matter, including the *special state appointee themselves*, a member of their immediate family, or *a business organization in which the special state appointee is serving as an officer, a director, a trustee, a partner, or an employee*. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest in a contract and an interest involving services. However, the term does not include an interest that is not greater than the interest of the general public or any state employee.

In this case, a conflict of interest would arise for the Board and Council members if they were to participate in a decision or vote in which they, or more likely, a business organization in which the member is serving as an officer, a director, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter. For example, it is possible that a non-profit entity that a Board or Council member is employed by would apply for a specific grant awarded and administered by ICJI. The ICJI has indicated that the Board or Council members can be involved in decisions and/or votes related to or ultimately awarding grants. Unless the Board or Council member’s service on the board has been specifically required by statute, the Board or Council member would be prohibited from participating in any decision or vote related to any matters related to their employer’s grant applications. This prohibition becomes even clearer if the member’s salary is dependent on the grant awarded by ICJI because the individual member, in addition to their employer would have a financial interest in whether a grant is awarded to their employer. It should be noted that while the composition of the Board and Council calls for representatives of various sectors/interest groups, the statutes do not specifically identify a specific nonprofit organization by name.

IC 4-2-6-9(b) provides that an employee or 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. IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter.

In this case, the ICJI proposes screening procedures that would prohibit the members who have potential conflicts of interest from having *any* participation in decisions or votes related to the award of grants. However, ICJI seeks advice to determine whether the Commission would require the members to request an advisory opinion from the Commission on a case-by-case basis or whether the implementation of the proposed screening procedures when a potential conflict of interest would suffice to be in compliance with the conflict of interest rule. Historically, the Commission has required every individual that identifies a potential conflict of interest to request an advisory opinion to review the proposed screen or make a determination that the interest is not so substantial that the individual should be screened from the decision. Moreover, this requirement makes the conflict of interest public.

CONCLUSION

The Commission finds that a conflict of interest arises for Board and Council members under IC 4-2-6-9 if they were to participate in a decision or vote in which they, or more likely, a business organization in which the member is serving as an officer, a director, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter. Moreover, while the screen proposed by ICJI for Board and Council members who identify a potential conflict of interest appears to be satisfactory, the Commission still requires that such individuals comply with the provision set forth in IC 4-2-6-9 (b) and request an opinion from the Commission when the potential conflict is identified.