

INDIANA
OFFICE OF INSPECTOR GENERAL

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January 17, 2023

The Honorable Todd Rokita
Indiana Attorney General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204

Re: Order on Summary Judgment
Barbary Tully v. Theodore ("Todd") Rokita; Cause No. 49D06-2107-PL-025333

Dear Attorney General Rokita,

Your office recently forwarded the Office of Inspector General (OIG) a copy of the Order on Summary Judgment in the case of Barbara Tully v. Theodore ("Todd") Rokita; Cause No. 49D06-2107-PL-025333. We appreciate your office keeping us informed of developments in this case. We wanted to share our concerns regarding the Order for you and your staff's consideration.

First, the Order recognizes that the Inspector General (IG) is tasked with rulemaking pursuant to Ind. Code §4-2-7-3(5); however, it fails to recognize the IG is also tasked with preparing "interpretative and educational materials and programs" in Ind. Code §4-2-7-3(16). The OIG promulgated 42 IAC 1-8-1 to provide procedures for state executive branch officers, employees and special state appointees to seek interpretative guidance on the Code of Ethics (Code), which is found in Ind. Code 4-2-6 and 42 IAC 1, through the informal advisory opinion process.

The OIG has been providing state workers confidential informal advisory opinions on how the Code applies to specific circumstances since the OIG's creation in 2005. The OIG has issued hundreds of informal advisory opinions each year. A large percentage of those informal advisory opinions address questions of outside employment or outside professional activity. For the last three years, the OIG has issued the following:

- 2022 – 234 total informal advisory opinions; 82 on outside employment/professional activity (or 35 %)
- 2021 – 246 total informal advisory opinions; 71 on outside employment/professional activity (or 29%)
- 2020 – 218 total informal advisory opinions; 75 on outside employment/professional activity (or 32%)

Again, the OIG has the authority to issue these informal advisory opinions in Ind. Code §4-2-7-3(16), and the OIG promulgated 42 IAC 1-8-1 to define the procedures for the OIG to provide this significant service to state workers.

EXHIBIT C

Second, the Order asserts that 42 IAC 1-8 is “not harmonious” with Ind. Code §4-2-6-5.5, the Code’s provision on outside employment and professional activity. The OIG strongly disagrees. Ind. Code §4-2-6-5.5 provides that a written advisory opinion from the State Ethics Commission (Commission) that an individual’s outside employment does not violate subsection (a)(1) or (a)(2) of section 5.5 “is conclusive proof that the individual’s outside employment does not violate subsection (a)(1) or (a)(2).” The statute does not prohibit the OIG from providing an informal advisory opinion on outside employment but only assigns weight to the Commission’s advice on outside employment.

Furthermore, the Order fails to recognize the purpose and limitations of informal advisory opinions issued by the OIG. They allow the OIG to issue these opinions without undermining the Commission’s authority to issue formal advisory opinions pursuant to Ind. Code §4-2-6-4(b)(1) and 40 IAC 2-2-1. 42 IAC 1-8-1 provides that informal advisory opinions are “not binding on the [C]ommission” and that “the [C]ommission may consider that the person acted in good faith” if the person relied on an informal advisory opinion that the OIG issued. Informal advisory opinions allow a state worker to receive quick, written advice without having to wait until the Commission holds one of its monthly meetings to issue formal advisory opinions. In contrast, under 40 IAC 2-2-1, a formal advisory opinion issued by the Commission “is binding on the Commission in any subsequent allegations concerning the person who requested the opinion” unless certain conditions are met. These rules explain that informal and formal advisory opinions have different weight and consequences for state workers who fail to comply with the advice provided. As such, 42 IAC 1-8-1 is harmonious with Code provisions that make the Commission the ultimate authority on interpreting the Code.

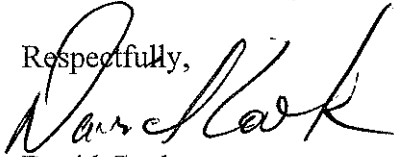
Also, in practice, the OIG advises state workers on the difference between informal and formal advisory opinions. In every informal advisory opinion that the OIG issues, the OIG informs the individual requesting advice that only the Commission can issue “an official advisory opinion” and that the informal advisory opinion allows the OIG to give an individual “quick, written advice.” The OIG also advises in every informal advisory opinion on outside employment that “only the . . . Commission can provide conclusive proof that an outside employment or professional activity is not in conflict with a state employee’s official duties.” As such, the OIG advises every individual requesting advice on outside employment that he or she has the option to request a formal advisory opinion from the Commission and that such an opinion will be weighed more heavily than the informal advisory opinion.

Third, the Order mistakenly concludes that permitting confidential informal advisory opinions from the OIG on outside employment results in a “work around [that] would allow the IG to promulgate rules which clearly exceed the IG’s statutory authority.” This reasoning makes no sense and leads to the absurd result that because the statute provides that incompatible outside employment is within the “purview” of the Commission to interpret, the OIG is precluded from issuing informal advisory opinions on the same topic. Informal advisory opinions are specific to the requester and to a specific set of facts. They are not rules, and as noted above, they have limited weight, as recognized both by 42 IAC 1-8-1 and standard language in the IG’s informal advisory opinions. The OIG has not exceeded its statutory authority by promulgating 42 IAC 1-8-1, which has been in place since 2005, or by issuing confidential informal advisory opinions.

Furthermore, confidential informal advisory opinions provide a critical service to state workers. They allow state workers to obtain upfront advice on actions they are contemplating from the OIG, the agency tasked with investigating allegations of Code violations. If the OIG is no longer allowed to issue confidential informal advisory opinions, it will have a chilling effect on future state officers,

employees and special state appointees from asking questions on potential outside employment matters and will likely increase the number of Code violations relating to outside employment.

Respectfully,

A handwritten signature in black ink, appearing to read "David Cook". The signature is fluid and cursive, with a large initial "D" and "C".

David Cook
Indiana Inspector General

Cc: Jefferson Garn; Section Chief; OAG Administrative and Regulatory Enforcement Litigation
Caryn N. Szyper; Assistant Section Chief; OAG Administrative and Regulatory
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Sean Gorman; OIG State Ethics Director
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