

42 IAC 1-5-8 Additional compensation

42 IAC 1-5-12 Use of state property

The Inspector General requested a formal advisory opinion to address the issue of whether the payment by an agency of its attorneys' annual registration fee was prohibited by the Code of Ethics. SEC found that the use of state funds to pay such fees—excluding late fees—would be consistent with the Use of state property rule and not violate the Additional compensation rule provided the payment of fees is for attorneys who perform legal services for the agency and are active and in good standing.

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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).

BACKGROUND

On November 25, 2009, the Inspector General requested from the Commission a formal advisory opinion to interpret the Code to determine whether payment of the annual attorney registration fee (“license fee”) by an agency would be in violation of the Code.

In December of 2008, the Commission interpreted 42 IAC 1-5-12 with regard to an agency's payment of its practicing attorneys' continuing education fees. The Commission determined that 42 IAC 1-5-12 would not be violated if an agency paid continuing education fees as long as the attorney was employed in a legal capacity for the agency. *See* No. 08-I-22 State Ethics Commission Official Advisory Opinion, December 2008.

Earlier on October 13, 2005, the Commission determined under IC 4-2-6-5 (the statutory additional compensation rule, now repealed) that the statute would not be violated by an agency paying the attorney license fee. *See* No. 05-I-14 State Ethics Commission Official Advisory Opinion, October 13, 2005. Now that IC 4-2-6-5 is repealed, the Inspector General requests an official opinion to settle this issue and give agencies guidance on what is permitted with regard to an agency's payment of an attorney's annual license fee under 42 IAC 1-5-12 and 42 IAC 1-5-8.

With the Commission having earlier addressed the payment of state agency attorneys' (1) continuing education fees (permitted in No. 08-I-22 State Ethics Commission Official Advisory Opinion, December 2008) and (2) professional association fees (prohibited in No. 08-I-22 State Ethics Commission Official Advisory Opinion, December 2008), this determination regarding (3) annual registration fees would resolve the third and final component regarding an agency's payment of attorney-related expenses.

ISSUE

Does the Code prohibit a state agency from paying the annual licensing fee for attorneys employed by the agency when working in their capacity as an attorney for the state agency?

RELEVANT LAW

42 IAC 1-5-12 Use of state property

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 1-5-8 Additional compensation

A state officer, employee, or special state appointee shall not solicit or accept compensation for the performance of official duties other than provided for by law.

ANALYSIS

To practice law in Indiana and remain in good standing with the Judicial Branch of State government, all Indiana attorneys, including state agency attorneys, must pay a licensing fee. Rule 2(b), *Registration and Fees, Indiana Rules For Admission To The Bar And The Discipline of Attorneys*. The Code, in 42 IAC 1-5-12, requires that state property be used, absent the specified exceptions, only for “official state business.” It is further recognized that state agencies have the need for legal services, often involving the interpretation, application and litigation of federal acts and regulations, state statutes, promulgation and local ordinances. Accordingly, the use of state funds to pay for a practicing attorney’s registration fees would appear to be consistent with the use of state property rule set forth in the Code. This interpretation, however, should be limited in application to the payment of the annual licensing fee for attorneys who perform legal services for the agency.

In addressing 42 IAC 1-5-8 (additional compensation rule), the Commission turns to the reasoning previously issued regarding the interpretation of IC 4-2-6-5 (statutory additional compensation rule, now repealed). *See* No. 05-I-14 State Ethics Commission Official Advisory Opinion, October 13, 2005, *supra*. The payment of continuing legal education fees is not "compensation" as considered by 42 IAC 1-5-8. The rationale for that interpretation rests in the fact that the payment of dues and fees, although a thing of value, would not necessarily be paid "in return for services rendered". Specifically, the term "in return for services rendered" implies a specific quid pro quo. The fees in these types of situations would be paid to maintain the professional standards of the attorneys involved, and not necessarily specifically in return for services rendered. As a matter of public policy the Commission recognizes that state agencies have a compelling interest to ensure that state employees have the qualifications and certifications that are required for the performance of their official duties.

CONCLUSION

The Commission finds that the use of state funds to pay for a practicing attorney's registration fees is consistent with the use of state property rule set forth in the Code and does not violate the additional compensation rule. This interpretation, however, should be limited in application to the payment of the annual licensing fee for attorneys who perform legal services for the agency and are active and in good standing. This does not include any late fees.

Respectfully Submitted,

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