

# Memorandum

## DEPARTMENT OF VETERANS AFFAIRS

TO: Ronald Triolo, APT Center Director  
Suzana Iveljic, APT Director of Operations and External Relations  
Murray Altose, Cleveland VA Medical Center Chief of Staff  
Neil Peachy, Cleveland VAMC Assistant Chief of Staff for Research

FROM: Dennis M. McGuire, Regional Counsel

CC: Susan Fuehrer, Cleveland VA Medical Center Director  
Gail Burns, Executive Director Cleveland VAMC Non-Profit

SUBJ: Ethics Opinion on creation and use of the non-profit corporation known as  
the Institute for Restorative Technology in VA research programs

DATE: October 26, 2010

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Mssrs. Triolo, Altose, Peachy and Ms. Iveljic:

You requested an ethics opinion regarding the creation of a non-profit corporation formed and operated by VA employees (researchers) with the purpose of supporting research related to the Advanced Platform Technology (APT) Center of Excellence operated by the Louis Stokes Cleveland VA Medical Center and the Case Western Reserve University. The facts as I understand them are:

### **Facts:**

1. The APT Center is one of 15 Rehabilitation Research and Development Centers (RR&D) created by the VA pursuant to VHA Handbook 1203.4. These RR&D centers were created to discover new knowledge to advance rehabilitative care for veterans with disabilities. As part of their performance measures the Centers are required to have an educational impact on patient care, and are to leverage funding – specifically, by raising \$5 of additional research funding for every \$1 of “core funding” provided through VA appropriated funds. These additional leveraged funds can come in the form of grants, donations, or collaborative research agreements with private sector entities, among other possible avenues.
2. Several researchers who hold VA appointments and perform research as part of APT have created a non-profit corporation called the Institute for Restorative Technology (IRT). Though this npc is incorporated, it has performed no business to date. As

explained to me, this npc was created for the purpose of supporting rehabilitative research and partnering in some way with APT to collect funding, perform research, and foster a collaborative environment in this field of research in Cleveland. It was specifically stated to me that one purpose of IRT's existence was to "get around the rules" of funding for research that the VA places on its approved research and on researchers. Left unclear to me is whether the funding in question included VA appropriated funds. However, for purposes of this opinion and the facts as indicated, that distinction is immaterial. Use of non-appropriated funds does not change the ethical concerns with the creation of this npc, as discussed more fully below.

**Questions Presented:** The questions presented to me for review are: 1) is there any ethical prohibition to creating this npc?; 2) are there any ethical concerns with VA research funds – appropriated or non-appropriated – being transferred to this npc to support research initiatives?; and 3) are there any ethical conflicts of interest for the VA employees who are founders/members/participants in this npc?

In researching this issue, I reviewed VHA Handbooks 1203, 1203.01, 1203.03 and 1203.4; the Rehab R&D Service website, and APT's website; the Office of Research and Developments website and several policy statements; and several opinions previously issued by the Office of General Counsel. I further contacted the Deputy Designated Agency Ethics Official for the VA, and spoke with her and one of her subordinate staff attorneys. I also reviewed an OGC Opinion recently issued by the DDAEO's office on these same ethics questions posed by another VA facility.

#### **Applicable Law:**

As a threshold matter, I note that the situation posed essentially raises a question of outside employment or activities by a VA employee and the impact of those outside activities on their status as federal employees.

#### **Outside Activity Restrictions Generally**

Before providing specific advice regarding the particular non-VA activities posed in the questions above, the following summary of the rules generally applicable to all VA employees' non-VA activities (including any consulting, teaching, non-VA research, outside employment, and personal and professional activities) may be helpful.

- **Use of VA Resources**

An employee may not use any VA resources, including official duty time, in furtherance of outside activities. 5 C.F.R. §§ 2635.704 and 705. Although VA policy does permit "limited personal use" of VA office equipment and supplies by employees, this policy specifically excludes limited personal use in furtherance of outside employment or consulting activities, as well as use in furtherance of outside fundraising efforts. VA Directive 6001 ¶ 2.c. In addition, employees may not disclose or misuse any information, including trade secrets and confidential business

information, that was acquired as part of their official VA duties unless it is generally available to the public. 18 U.S.C. § 1905; 5 C.F.R. § 2635.703.

Employees may not use their public office for the private gain of an outside employer or other outside entity. In addition, an employee may not give the appearance that VA sanctions or endorses his/her personal views or outside activities or the views or activities of any outside entity. 5 C.F.R. § 2635.702.

- **Conflict-of-Interest & Impartiality Rules**

An employee may not participate in a particular matter as part of his/her VA duties if that matter will have a direct and predictable effect on his/her financial interests or on the financial interests of a person or entity whose interests are imputed to them. The interests of a spouse, minor child(ren), and general partner(s) are imputed to the employee, as are the interests of any outside entity where the VA employee serves as an employee, officer, director, trustee, or general partner. 18 U.S.C. § 208, 5 C.F.R. § 2635.402. Therefore, if he/she is an employee, officer, director, trustee, or general partner of a non-VA entity, a VA employee may not participate in VA matters (such as research activities) that would have a direct and predictable effect on the financial interests of that outside entity.

In addition, to avoid the appearance of favoritism, the VA employee must avoid participation in VA matters that would have a direct and predictable effect on the financial interests of any entity with which they have a “covered relationship.” For purposes of outside activity restrictions, it is important to note that an employee has a covered relationship with (1) any entity that he/she has, within the preceding year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee, (2) any entity that the employee’s spouse, parent, or dependent child is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee, and (3) any organization (other than a political party) in which the VA employee is an active participant. One of VA’s “Agency Designees” may authorize participation in such a VA matter despite the possibility that a reasonable person might question the employee’s impartiality. However, this determination must be made by an authorized Agency Designee; the employee cannot make it himself. 5 C.F.R. § 2635.502. The Secretary of Veterans Affairs has authorized Medical Center Directors and Regional Counsels, among others, to act as Agency Designees.

- **Fundraising & Representation**

A VA employee may not personally solicit charitable contributions from a subordinate VA employee or any entity he/she knows to be a “prohibited source.” *Id.* § 2635.808(c). A prohibited source is any entity that (1) is seeking official action from any part of VA, (2) does or seeks to do business with any part of VA, (3) conducts activities regulated by any part of VA, or (4) has interests that could be substantially affected by the performance or non-performance of the VA employee’s duties. A membership organization is also a prohibited source if a majority of the organization’s members fall into one or more of these four categories. *Id.* § 2635.203(d). In addition, a VA employee may not, with or without compensation,

represent any outside entity to VA or another Federal entity. 18 U.S.C. §§ 203 and 205.

*The Institute for Restorative Technology and VA Research*

At the outset, I note that the Institute for Restorative Technology (IRT) is not, and cannot legally be, an official VA entity, nor may it be used to carry out official VA functions. VA may only establish corporations when specifically authorized to do so by statute. 31 U.S.C. § 9102. Although VA is authorized to establish non-profit corporations (NPCs) to facilitate VA research and education activities, those corporations must be established and operated in accordance with specific statutory provisions. *See generally*, 38 U.S.C. §§ 7361-7366. Issues/concerns related to the creation of IRT and involvement in IRT by VA employees are as follows:

1. **Potential VA Research Donors Must Be Directed to VA NPCs** – VA policy requires that any VA employee approached by a prospective donor about supporting VA research activities direct that potential donor to VA or a VA NPC. VHA Handbook 1200.2 (Note following ¶ 3.b.(2)(a)(2)). VA research funds may be administered only (1) directly by VA, (2) by official VA NPCs, or, (3) in certain limited circumstances, by VA-affiliated universities. *Id.* ¶3.b.(2)(a). Therefore, it is incorrect and inappropriate to advise a potential donor that the IRT may administer VA research funds.
2. **Outside Activity Restrictions Apply** - Each of the restrictions on Federal employees' outside activities discussed above applies to any VA employee's activities with the IRT. An employee may not use any official VA resources (even on a "limited personal use" basis), including duty time, information that is not publicly available, computers, email accounts, research facilities, or office supplies, in support of activities with the IRT. 18 U.S.C. § 1905; 5 C.F.R. §§ 2635.703-705; VA Directive 6001 ¶ 2.c. Employees may not give the appearance that VA sanctions or endorses IRT or an employee's activities with it. 5 C.F.R. § 2635.702. Further, a VA employee may not represent the IRT, with or without compensation, to VA or any other Federal agency (e.g., the National Institutes of Health or the Internal Revenue Service). 18 U.S.C. §§ 203 and 205.

In addition, for any VA employee who serves as an officer of the IRT, its interests are imputed to the employee for purposes of the conflicts-of-interest rules and that employee has a covered relationship with it for purposes of the impartiality rules. This means that the VA employee may not participate in a particular VA matter, such as a research grant or contract, if the VA matter would have a direct and predictable effect on the financial interests of the IRT. For example, if the IRT holds more than \$15,000 in stock in a medical device manufacturer, a VA employee could not participate

in VA research related to that manufacturer. 18 U.S.C. § 208; 5 C.F.R. § 2635.402. Even if the VA employee were to leave any current official position with the IRT, he/she would still have a covered relationship with it for one year after leaving the position. During this time, the impartiality rules would continue to bar that employee's participation in particular VA matters affecting the IRT. However, if the VA employee left his/her position with the IRT, the conflict-of-interest rules would no longer apply and a VA Agency Designee could, in appropriate circumstances, authorize the employee's participation in matters affecting the IRT. 5 C.F.R. § 2635.502.

Even outside VA facilities and on personal time, a VA employee may not personally solicit funds for the IRT from a subordinate employee or a prohibited source. *Id.* § 2638.808(c). Prohibited sources include any entity that (1) is seeking official action from any part of VA (e.g., veterans), (2) does or seeks to do business with any part of VA (e.g., pharmaceutical companies and medical device manufacturers), (3) conducts activities regulated by any part of VA, or (4) has interests that could be substantially affected by the performance or non-performance of the VA employee's duties (e.g., companies affected by the results of your research). *Id.* § 2635.203(d).

### **Opinion and Recommendation:**

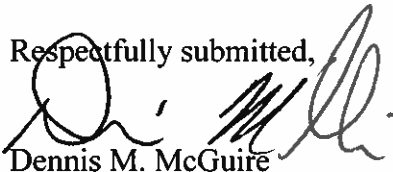
I note that the Cleveland VAMC already has in place a valid and authorized non-profit research and education corporation that serves as the flexible funding mechanism to support VA research at that facility. I emphasize that said non-profit is the *only approved corporation authorized to support VA research*. It is certainly the case that APT is authorized – and indeed mandated – to seek outside sources of funding for its research activities, and certainly if those sources of funding are private sector or other type, those funds can be deposited and managed on behalf of VA research by the authorized VA non-profit corporation. However, in no event could VA appropriated funds or non-appropriated funds - that would otherwise go to VA or its authorized NPC to fund research – be directed instead to an entity such as IRT. Could IRT raise funds and then donate or otherwise collaborate in VA research? Probably not without running afoul of the prohibitions against diverting potential VA donors to another entity. Even assuming the “diversion of donations” issue could be avoided, the probability of a conflict of interest arising for officers or directors of IRT - who are also VA researchers - is high; in fact, so high that it is nearly impossible to think of a circumstance where a conflict would not result. I further note that in other instances in which these types of “unauthorized non-profit corporations” have been created VA researchers have suffered investigations by the criminal unit of the Inspector General's Office, and where violations of the ethics rules were found, those researchers were both disciplined and barred from participating from further VA research.

Therefore, I recommend that any researchers employed by VA involved with the APT Center of Excellence avoid activating or utilizing the Institute for Restorative Technology as a mechanism either to develop funding for research associated with the

VA research program; or attempting to divert any funds of any nature that would otherwise go to support APT to this outside non-profit corporation. I further recommend that the VA employees who are officers of the IRT ensure that they are in no way conducting IRT business on VA time or using VA equipment and that they have appropriate and identifiable processes in place to track time at IRT and identify it as separate from their VA time and research. I also recommend that there be no commingling of research of any similar nature between VA and IRT by the same researchers. I further recommend that if any VA employee seeks to commence a project under IRT that might be a potential conflict with his/her VA employment, that they immediately seek an ethics opinion regarding that specific project or venture.

If you have further questions or concerns in light of the above opinion and recommendations, please do not hesitate to contact me further.

Respectfully submitted,



Dennis M. McGuire  
Regional Counsel  
Office of General Counsel  
Dept. of Veterans Affairs