



# ASSOCIATION OF INSPECTORS GENERAL

*Advancing Professionalism, Accountability & Integrity*

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## POSITION PAPER: ENSURING INDEPENDENCE AND INTEGRITY THROUGH UNOBSTRUCTED CONDUCT OF INVESTIGATIVE INTERVIEWS

### AIG POSITION

Inspectors general must be free to conduct investigative interviews without the presence of attorneys representing overseen entities in order to ensure independent and effective oversight and to protect investigative confidentiality.

### BACKGROUND

Inspectors general exist to provide independent and objective oversight to promote accountability, transparency, and integrity in government. In service of those goals, the Association of Inspectors General's ("AIG") Green Book provides that IGs should be placed in a statutory structure to "allow it to exercise independence in fact and appearance from operations, programs, policies, and procedures over which the OIG has authority." The Green Book further provides that "[f]actors external to the OIG can restrict the efforts or interfere with the OIGs [sic] ability to form independent and objective opinions and conclusions," and specifically enumerates "[i]nterference with OIG access to documents or individuals necessary to perform OIG work" among examples of external impairments to the independence of Inspectors General. *Statement of Principles for Offices of Inspectors General* ("Green Book"), at 5 and 10.<sup>1</sup> In its 2022 position paper entitled *Independence of the Inspector General – Management's Oversight Role of an Office of Inspector General* ("Management Oversight Position Paper"), AIG explained that "[management's demand for information . . . [r]egarding on-going . . . investigations . . . would be considered interference hindering IG independence and could result in the public's loss of confidence in an independent and impartial IG."<sup>2</sup>

In some jurisdictions, attorneys for the overseen governmental body demand to be present at IG investigative interviews. This practice prevents inspectors general from conducting fulsome oversight by obstructing investigations, decreasing the likelihood of obtaining full cooperation from witnesses and subjects, and unduly protecting political incumbents; it constitutes a material external impairment to the independence of Inspectors General. While the legal landscape around this issue varies for each governmental body, the duties of government attorneys to act in the best

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<sup>1</sup> Available at <https://inspectorsgeneral.org/files/2025/03/Principles-and-Standards-for-OIGs-Approved-July-1-2024.pdf>

<sup>2</sup> Available at <https://inspectorsgeneral.org/files/2022/12/IG-Independence-Mgt-Oversight.Approved.10.11.22.pdf>.



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interest of the public does not. That duty counsels in favor of allowing inspectors general to conduct investigative interviews free from the inherently coercive presence of the governmental body's attorneys.

## ANALYSIS

Government attorneys are differently situated than attorneys for private clients, in that their duties extend to protecting the public at large. Government attorneys' duties extend beyond simply defending the government entity in litigation, or heading off litigation risks—the law has long recognized that a government attorney “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

This higher duty is reflected in the rules of professional conduct governing attorneys, which warn against a win-at-all-costs approach to government lawyering. The comments to American Bar Association Model Rule of Professional Conduct 1.13 distinguish the obligations of government attorneys from attorneys representing private organizations: “[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.” *See* Comment 9 to American Bar Association Model Rule 1.13.<sup>3</sup> Indeed, courts have recognized that in the context of government lawyering, the demands of transparency and accountability require public attorneys to prioritize the pursuit of government integrity over and above other interests. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (“With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure.”); *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (“It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. . . . Therefore, when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law.”)

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<sup>3</sup> Available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_13\\_organization\\_as\\_client/comment\\_on\\_rule\\_1\\_13/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13/).



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The full range of duties government attorneys owe to the public counsel against reflexive elevation of hypothetical litigation risk over-and-above a need to root out wrongdoing in government. *See, e.g.,* Jack B. Weinstein and Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, Touro L. Rev., Vol. 1, No. 1, Art. 3 (1985) (noting that because government attorneys represent not only the government entity, but also the public, it was proper for government attorneys to refuse to allow “that the fisc take precedence over law and justice”). That complete range of duties is essential in considering the question of governmental attorney presence in inspector general investigative interviews.

Inspector general independence requires the ability to conduct investigations without interference from the overseen entity. As AIG previously noted in its 2022 position paper, that independence is vitiated by management’s demand for information, which can severely adversely affect IG investigations. In addition to creating the appearance that IG investigations are controlled by political actors or powerful officials within the overseen government entity, management interference in investigations may chill witness participation and enable potential subjects to close rank before the investigation is complete. One pernicious example of management interference is the attendance of the overseen entity’s attorneys or other representatives at IG investigative interviews.

Attorneys for government bodies may assert a right to attend IG investigative interviews,<sup>4</sup> with several purported justifications. Among them is the notion that those attorneys must be present to prevent the disclosure of the government body’s privileged information to the IG. For the reasons discussed at length in AIG’s accompanying position paper on IG access to privileged information, this is not a suitable justification for entity interference in IG investigations: the government body’s privileged information *should be provided* to its IG where it is responsive, so preventing the disclosure of privileged information cannot justify entity attorney attendance at IG investigative interviews.

Fundamentally, the presence of government body attorneys in IG investigative interviews compromises the independence of IG investigations. One of an IG’s chief purposes is to promote integrity in government, a paramount facet of which is ensuring its investigations are independent

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<sup>4</sup> Attorneys for overseen entities also often purport to represent witnesses or subjects in their “official capacity” as government employees or officials, or to represent both the entity and the witness. Regardless of how entity attorneys’ presence in investigative interviews is characterized, their presence remains inherently obstructive for the reasons outlined in this position paper. Moreover, some jurisdictions sharply circumscribe, by law, the circumstances under which entity attorneys may represent individual government employees or officials. *See, e.g.,* Mass. Gen. L. c. 268A, § 4(c) (prohibiting state employees from representing “anyone other than the commonwealth or a state agency . . . in connection with any particular matter in which the commonwealth or state agency is a party or has a direct and substantial interest”), § 17 (applying analogous prohibition to municipal employees). While the legal landscape around the right to representation in IG investigative interviews varies among jurisdictions, some IGs may be able to preclude entity attorney representation of investigative witnesses on the ground that their jurisdiction does not provide the witness with a right to counsel.



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and free from the influence of powerful actors within the overseen government body. The presence of the attorneys for the overseen body creates the specter of undue influence—it makes it appear as though political actors, who the attorneys may report to, are directing or putting a thumb on the scale of the IG investigation. Their presence undercuts IG legitimacy by creating the perception that the IG investigation is not truly independent from the rest of the government body. *See, e.g., Green Book* (prohibiting “restrict[ions]” or “interfere[nce]” with “the OIG’s ability to form independent and objective opinions and conclusions” including, “[i]nterference or undue influence in the OIG’s . . . approach to be used”); *Management Oversight Position Paper* (noting that “[m]anagement’s demand for information . . . regarding on-going . . . investigations . . . would be considered interference hindering IG independence,” and that such demands “could result in the public’s loss of confidence in an independent and impartial IG”).

In addition, entity attorney presence at IG investigative interviews inherently chills information sharing with the IG, as witnesses may (rightly) fear that the attorneys will report what information they provided to the IG to those under investigation or to those in a position to retaliate against the witness. Entity attorneys often report to or work for political actors or institutional leaders or managers who may have interests in investigative outcomes distinct from the interests of the public. Because those leaders or political actors may exercise significant power over the employment, work conditions, or contract status of potential witnesses, those witnesses may reasonably believe that they will suffer adverse consequences if they disclose unflattering information to an IG in the presence of entity attorneys. The chilling effect created by entity attorney presence at investigative interviews can profoundly affect an IG’s effectiveness at identifying misconduct and abuse.

Entity attorney presence also renders IG investigations less effective by providing entity leaders or political actors a window into the IG investigation. Attorney monitoring of investigative interviews threatens the premature disclosure of information to those who (1) may be or become subjects of the IG investigation; or (2) who may take steps to obstruct the IG investigation, armed with information needed to do so. Moreover, the power to attend IG interviews enables the more explicit protection of political actors or existing institutional leadership; government body attorneys may be more interested in attending and interfering with interviews that have a potential to embarrass those to whom they report. Protection of powerful incumbents or political actors is not a legitimate governmental aim.

As with the privilege issue, speculative litigation risk is not basis for government attorney interference in IG investigative interviews. The notion that government attorneys will somehow protect the body’s litigation interests in an IG interview necessarily contemplates that those attorneys will, via their attendance, prevent the disclosure of information to an IG. That conduct would destroy the truth-seeking function of the IG. And, as discussed above, government attorneys owe a broad duty to the public that extends far beyond protecting the government body from any



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hypothetical, marginal litigation risk—they are duty-bound to ensure that IGs can effectively root out corruption and misconduct. Most fundamentally, a government body’s litigation interests are best served by government operations free from waste, fraud, and abuse, rather than a government apparatus that seeks or operates to shield bad actors from discovery. An effective, robust, and independent IG functions to serve the government entity’s litigation and fiscal interests by deterring the commission of acts that give rise to litigation. Entity attorney attendance at IG investigative interviews is a barrier to achieving those aims, as it prevents inspectors general from conducting fulsome oversight that can prevent costly corruption, waste, and misconduct.