

# Ex-prosecutor disciplined for handling forfeitures, plea deals at same time

## License suspended after court finds conflict of interest

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For the third time in two months, Indiana prosecuting attorneys have come under fire for their handling of forfeiture cases involving cash and property seized from criminal defendants.

This time the target was former Delaware County Prosecutor Mark R. McKinney, who was suspended Thursday from practicing law for 120 days for professional misconduct in his work on forfeiture cases as a deputy prosecutor from 1995 to 2006.

During that period, McKinney also contracted with the prosecutor's office to handle forfeitures in a deal that allowed him to keep 25 percent of what was collected.

The disciplinary order issued Thursday says McKinney's dual role "created a conflict of interest between his duties as a public official and the private gain he realized in forfeiture proceedings."

Even more troubling, the ruling adds: "On numerous occasions when the ethics of the asset forfeiture procedures were called into question, (McKinney) turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property."

Earlier this year, an Indianapolis Star investigation showed that many Indiana prosecutors keep all or most forfeiture proceeds, rather than sending the money to the state's Common School fund as outlined in Indiana law.

That practice came under fire in a Supreme Court decision and then from Gov. Mitch Daniels. Both the governor and the court decision questioned the constitutionality of prosecutors and police keeping the money.

The sanction against McKinney follows an investigation by the court's disciplinary commission that in October concluded McKinney's actions qualified as misconduct. The hearing judge at that time recommended a public reprimand rather than a suspension of McKinney's law license.

But the Supreme Court deemed a stronger sanction appropriate, noting "the public trust in (McKinney's) ability to faithfully and independently represent the interests of the state was compromised" by his financial interest in the forfeiture cases.

In many of the cases, McKinney was prosecuting criminal defendants -- including negotiating plea deals -- at the same time he was negotiating forfeiture settlements. The ruling says there was no evidence that McKinney "explicitly agreed to offer favorable treatment to a criminal defendant in exchange for money transferred" through a forfeiture action.

But while there was no obvious quid pro quo, the ruling notes, "it would doubtless be evident to such a defendant, and to his or her attorney if represented, that prosecutorial discretion in how to proceed with the criminal case was held by one who stood to reap personal financial gain if the defendant agreed to the forfeiture of his or her assets."

McKinney was elected Delaware County's prosecutor in 2006 and served from 2007 to 2010. The investigation into his conduct as a deputy prosecutor began after his election. He sought re-election in 2010 but was defeated in the Democratic primary.

McKinney did not return a call from The Star, but his attorney sent a statement: "Mark is relieved that the case is over. He will serve his suspension and then move forward with his career."

Indiana University School of Law-Indianapolis Professor Joel Schumm said he does not see McKinney's penalty as an effort by the court to send a message to all prosecutors, because McKinney's misconduct was an extreme case.

"Probably a lot of prosecutors aren't technically following the law," Schumm said, but McKinney's misconduct went on for an extended period and benefited him personally.

The suspension comes as lawmakers and prosecutors grapple with how forfeitures should be handled in the wake of questions raised by The Star's investigation.

The Star found most prosecutors appear to be violating state law by keeping, or splitting with law enforcement agencies and private attorneys, millions of dollars in forfeiture proceeds every year. Marion County seized more than \$1.3 million in property and cash last year.

The practice came under more fire when the Supreme Court and governor raised doubts about the approach of many prosecutors, who have been keeping nearly all proceeds from forfeitures by claiming those funds as law enforcement expenses.

Advisory opinions by the Indiana Prosecuting Attorneys Council and Attorney General Greg Zoeller supported the prosecutors' actions.

But a state Supreme Court ruling in April questioned that common practice.

That ruling also was cited by Daniels in May when he vetoed a proposed revision of the state law intended to clarify the murky process -- and officially hand over the bulk of proceeds to police and prosecutors.

That bill would have granted 85 percent of the money to law enforcement and 15 percent to the Common School fund, which lends money for school construction, technology projects and charters.

Daniels said last month that the Indiana Constitution requires "that the proceeds from 'all forfeitures' shall go to the Common School fund." Diverting the majority of the money from the school fund and to police and prosecutors, he said, "is unwarranted as policy and constitutionally unacceptable."

The bill's sponsor, Sen. Richard Bray, R-Martinsville, said he will try again next year to clarify the law in a way that follows the constitutional directive.

Schumm, the law professor, said the issue will be tough to resolve because few people are likely to advocate for the school fund. Zoeller, one key person who can help clarify the law, has staunchly defended prosecutors' practice of keeping the money, even after the governor declared the practice unconstitutional.

"I'm sure (Zoeller) is sympathetic of the importance of money being available for law enforcement," Schumm said. "The Common School fund doesn't really have a constituency. Law enforcement and prosecutors do."