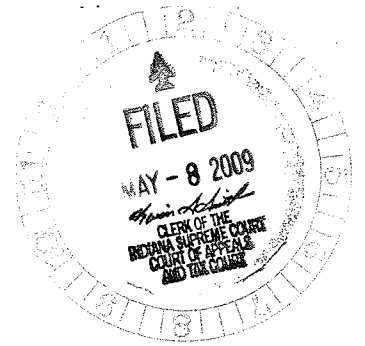


IN THE SUPREME COURT
OF THE
STATE OF INDIANA



IN THE MATTER OF:)
) CAUSE NO. 18S00-0905-DI-220
MARK R. McKINNEY)
Attorney No. 16125-18)

VERIFIED COMPLAINT FOR DISCIPLINARY ACTION

The Disciplinary Commission of the Supreme Court of Indiana, having found reasonable cause to believe the Respondent's acts, if proved, would warrant disciplinary action, by its Executive Secretary, Donald R. Lundberg, pursuant to Ind. Admin. & Disc. Rule 23 § 12, files and presents this Verified Complaint for Disciplinary Action against Mark R. McKinney. The Verified Complaint is as follows:

1. MARK R. McKINNEY ("Respondent") is an attorney in active status having been duly admitted to practice law in the State of Indiana on October 25, 1991, subjecting him to the Court's disciplinary jurisdiction. At all times relevant to this proceeding, the Respondent engaged in the practice of law in Delaware County, Indiana, where he currently practices law.

2. From 2000 through and including 2007, Respondent represented the State of Indiana in criminal cases while he also, in addition to his salary, personally profited by two primary methods: Respondent was personally paid compensation based upon the value of contracts with defendants and he was paid attorney fees for his private practice work of suing for the forfeiture of criminal defendants' property.

3. From 1995 through the end of December 31, 2006, Respondent was a salaried Deputy Prosecuting Attorney (“DPA”) employed at the Delaware County Prosecutor’s Office (“DCPO”) by Richard Reed (“Reed”), who at that time was the elected Prosecuting Attorney (“Prosecutor”) of the 46th Judicial Circuit, which includes Delaware County, Indiana.

4. On January 1, 2007, Respondent began his term as a salaried, full-time Prosecutor of the 46th Judicial Circuit and the respondent is currently so employed.

5. On June 1, 1995, Respondent and Prosecutor Reed entered into a written fee agreement, entitled “Agreement,” (“1995 Fee Agreement”), which they signed. The 1995 Fee Agreement relied upon I.C. 34-4-30.1-1, *et seq.* (1993) (currently, I.C. 34-24-1-1, *et seq.* (Supp.1998) and each version of which is referred to as “the forfeiture statute”).

6. The 1995 Fee Agreement, a true and accurate copy of which is attached as Exhibit “A” to the Verified Complaint, provided that Respondent was to be compensated in an amount equal to twenty-five percent of any judgment entered in a forfeiture action.

7. On February 9, 2004, Respondent and Prosecutor Reed entered into a written fee agreement, entitled “Agreement” (“2004 Fee Agreement”), which they signed. The 2004 Fee Agreement relied upon the forfeiture statute.

8. The 2004 Fee Agreement, a true and accurate copy of which is attached as Exhibit “B” to the Verified Complaint, provided that Respondent was to be compensated in an amount equal to twenty-five percent of any judgment entered in a forfeiture action. The 1995 Fee Agreement and the 2004 Fee Agreement are collectively referred to herein as the “Fee Agreements.”

9. Respondent represented the State of Indiana while he prosecuted a variety of criminal cases, including drug offenses.

10. Respondent, while a DPA, worked with the Muncie-Delaware County Drug Task Force (“DTF”), where Respondent, as part of his duties as a DPA, was personally involved in drug investigations and many of the resulting criminal cases.

11. Respondent reviewed DTF search warrants and their supporting affidavits before they were presented to a judge. DTF officers then executed such search warrants.

12. During arrests and/or the execution of such search warrants, police seized money and other property from drug suspects. Criminal charges were determined by the DPA assigned to the case. DPA criminal case assignment was determined by the month in which the crime was committed. Many times, it was the Respondent who considered what criminal charges to file against these suspects.

13. Respondent charged arrestees with drug offenses and other crimes. Respondent also criminally prosecuted many of the same defendants who were charged with drug crimes.

14. As a DPA and as Prosecutor, Respondent owed his undivided loyalty to his client, the State of Indiana.

CONFIDENTIAL SETTLEMENT AGREEMENTS

15. Respondent was personally compensated based upon the value of contracts with defendants (or police suspect(s)) and Respondent called these contracts, “confidential settlement agreements” (“CSAs,” or, singularly, “CSA”). Beginning in 2002, Respondent used CSAs to transfer seized property, often including cash, from a defendant to the City of Muncie which had accounts established to receive those assets. The City of Muncie and DTF had a separate procedure whereby the DTF could request funds from those accounts.

16. It was Respondent's personal compensation based upon the value of CSAs coupled with other elements, and not the use of CSAs per se, that created violations of the Indiana Rules of Professional Conduct.

17. Respondent charged and collected, through the City of Muncie Controller, 25% of the all amounts of money transferred pursuant to any CSA.

- a. Respondent claimed compensation from the CSAs on the basis of his interpretation of the Fee Agreements and people who were aware of his compensation at the time had no objection to him doing so.
- b. Notwithstanding the Respondent's interpretation, the Fee Agreements expressly contemplated compensation only from civil forfeiture judgments, and not from any other source of forfeited funds.

18. Respondent always submitted his claims for compensation as a result of CSAs to the City of Muncie, through the Office of Controller.

19. During the relevant time period, all funds were deposited with the City of Muncie and disbursed by the Controller pursuant to the City's established procedure. The State Board of Accounts was able to account for all funds at issue during all times. All funds were seized by the police and were forfeited from persons engaged in suspected illegal activity.

20. Respondent prepared and submitted an invoice in every case. For reasons unknown to Respondent, in one matter he was also personally compensated by receiving payment directly from the private auctioneer who sold vehicles which were transferred to DTF from defendants and/or DTF suspects pursuant to CSAs.

21. Respondent prosecuted criminal defendants while at the same time Respondent also engaged in CSA negotiations with those criminal defendants or their defense attorneys regarding the criminal defendants' seized cash and property which was related to the criminal case. Sometimes, other DPAs prosecuted those criminal defendants. Respondent at times engaged in plea agreement negotiations regarding criminal cases with criminal defendants or their defense attorneys before and/or after Respondent also engaged in CSA negotiations with the same criminal defendants or their defense attorneys. Respondent did this knowing that he would invoice and receive payment as personal compensation equaling 25% of the amount transferred to The City of Muncie as a result of any CSA.

22. For example, in 2007, while he was the Prosecutor, Respondent entered into a CSA with Adrian Kirtz and Lacie Williams through their counsel. Respondent had charged Kirtz and Williams with dealing in cocaine as Class A Felonies in January 2007.

- a. Respondent signed the criminal charging Information against Kirtz and Williams as a result of a DTF investigation culminating with the execution of search warrants, with legal assistance of Respondent while he was a DPA.
- b. Kirtz and Williams, through the CSA, relinquished cash and other property to City of Muncie accounts held for the benefit of DTF. Based on that CSA, in 2007, at a time when he was the elected Prosecutor, Respondent received 25% of the cash and property relinquished which totaled \$4,193.56. While this occurred, DCPO continued its prosecution of Kirtz and Williams, handled by Respondent's DPAs. Respondent approved a plea agreement offer of a D Felony to Williams, which also stated the possibility that Williams could receive an A Misdemeanor sentence. On February 24,

2009, Respondent did not seek a special prosecutor in the Williams and Kirtz cases and filed with the criminal court his "consent" for Williams to receive an A Misdemeanor sentence.

23. Pursuant to the process described in Paragraph's 17, 18 and 19, above, Respondent invoiced the Controller for the City of Muncie. Respondent presented invoices in the name of "Mark R. McKinney, attorney at law" to the Controller, who in turn paid Respondent as being self-employed or an independent contractor and not as an employee of any entity. Regarding more than eighteen CSAs, from 2000 through and including 2007, Respondent received thousands of dollars.

A PLEA AGREEMENT

24. In 2003 a defendant, David King, relinquished \$2368 to the "State" as part of a plea agreement filed in a Class D Felony Possession of Marijuana case. The Respondent did not offer or sign the plea agreement. In 2007, the Respondent while Prosecutor, upon learning that the \$2368 which was earlier relinquished pursuant to the 2003 plea agreement had not been tendered to the City, invoiced the City of Muncie Controller for 25% of that amount and Respondent was paid \$670.75.

- a. Respondent claimed compensation in the King matter on the basis of his interpretation of the Fee Agreements.
- b. Notwithstanding the Respondent's interpretation, the Fee Agreements did not expressly contemplate compensation by means other than civil forfeiture judgments.

CIVIL FORFEITURE ACTIONS

25. Respondent, representing the State of Indiana and others under the Fee Agreements, acted in Delaware County civil forfeiture cases that were filed against individuals who were the subject

of drug investigations during which police seized property, including cash. A named plaintiff in those actions was the DTF. The Respondent filed forfeiture actions pursuant to the Fee Agreements. Respondent, acting pursuant to his Fee Agreements and not in his capacity as Prosecutor or a DPA, filed these civil forfeiture actions in Delaware County courts on behalf of the State and the DTF or other local police agencies, regarding property, including cash, which police seized from defendants in Delaware County criminal cases which the Respondent prosecuted criminally. Sometimes, other DPAs prosecuted those criminal defendants, while Respondent handled the civil forfeiture actions pursuant to his Fee Agreements.

26. Respondent sought his 25% fee based on the amount forfeited in the civil forfeiture actions.

27. In the civil forfeiture actions, Respondent filed his appearance and commonly noted his title as "attorney for plaintiffs" and not as a DPA or Prosecutor.

28. In many instances, the criminal cases were open while the related civil forfeiture action cases were also open.

29. Respondent criminally prosecuted defendants while at the same time Respondent pursued civil forfeiture actions against those criminal defendants' cash and/or property knowing that Respondent would invoice and receive a 25% fee on the forfeited amount. Respondent at times engaged in plea agreement negotiations regarding the criminal case with his criminal defendants or their defense attorneys before and/or after Respondent engaged in settlement negotiations regarding the related civil forfeiture actions with the same criminal defendants or their defense attorneys.

30. Most of the civil forfeiture actions were resolved by default judgments or agreed entries entered as judgments, other cases went to trial, and in some instances property was simply returned.

31. For example, during the time he was Prosecutor in April 2007, Respondent, as “attorney for plaintiff’s” filed for and was granted a default judgment regarding \$2,898, which police seized from Kelvin Lampkins in 2005. After that default judgment was entered, Respondent invoiced the City of Muncie Controller for his fee as “attorney at law” and was paid 25% of \$2,898, or \$724.50. All of the work on the civil forfeiture case, with the exception of actually signing and filing the Motion for Default Judgment, had been completed prior to January 1, 2007.

- a. Also in 2007, Respondent, as Prosecutor, had responsibility for the criminal case against Kelvin Lampkins which was open and pending in Delaware County courts, prosecuted by one of Respondent’s DPAs.

32. In another example, in January 2004, Respondent, as deputy prosecutor, charged Anthony Kanazeh with two Class C Felony counts of Dealing in Marijuana after a DTF investigation.

- a. In February 2004, Respondent filed his Complaint in a civil forfeiture action against the \$2,300 seized from Kanazeh relating to the criminal case Respondent prosecuted.
- b. Respondent offered Kanazeh a plea to a D Felony and Kanazeh accepted.
- c. On October 13, 2004, Kanazeh was sentenced in the criminal case and on the same day an Agreed Entry in the civil forfeiture action was completed with the signatures of Respondent, Kanazeh and his attorney. The Agreed Entry provided that the \$2,300

would become property of the plaintiffs. The Agreed Entry was signed and entered by a judge.

d. Respondent later invoiced and was paid his 25% attorney fee which was \$575.

33. Regarding civil forfeiture actions, Respondent invoiced (as "Mark R. McKinney, attorney at law") the City of Muncie Controller who in turn paid Respondent as self-employed or an independent contractor and not as an employee of any entity. In more than twenty-two civil forfeiture actions, from 2000 through and including 2007, Respondent received thousands of dollars in compensation.

34. There is no evidence that the Respondent ever agreed to offer a plea agreement to lesser charges or that he ever agreed to charge any suspect with lesser charges in exchange for money transferred either by CSA or an agreed entry in a civil forfeiture action. Respondent maintains no such agreement ever occurred. There is no evidence of any *quid pro quo*. Nonetheless, there was a significant risk that the Respondent's representation of the State as Prosecutor or DPA would have been materially limited by his personal financial interest in CSAs or the outcomes of civil forfeiture actions.

35. By his foregoing conduct, Respondent represented his client, the State of Indiana, when his representation of that client may have been materially limited by Respondent's own interests and the State of Indiana did not and could not consent, and by so doing Respondent violated Indiana Rule of Professional Conduct 1.7(b) (effective Jan. 1, 1987).

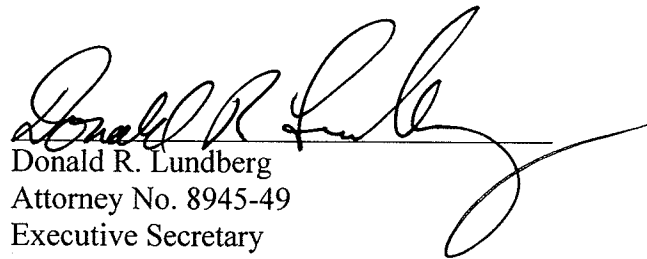
36. By his foregoing conduct, Respondent represented his client, the State of Indiana, when his representation involved a concurrent conflict of interest by presenting a significant risk that

the representation of the State of Indiana would be materially limited by the personal interests of the Respondent, and the State of Indiana did not and could not consent, and by so doing Respondent violated Indiana Rule of Professional Conduct 1.7(a)(2) (effective Jan. 1, 2005).

37. By his foregoing conduct, before January 1, 2007, Respondent represented the State of Indiana as a client in his capacity as a private attorney in matters wherein existed an issue upon which Respondent had statutory prosecutorial authority or responsibilities, and by so doing Respondent violated Indiana Rule of Professional Conduct 1.8(l) (which during a portion of the relevant time period was formerly subsection "(k)").

38. By his foregoing conduct, Respondent engaged in conduct that is prejudicial to the administration of justice, and by so doing Respondent violated Indiana Rule of Professional Conduct 8.4(d).

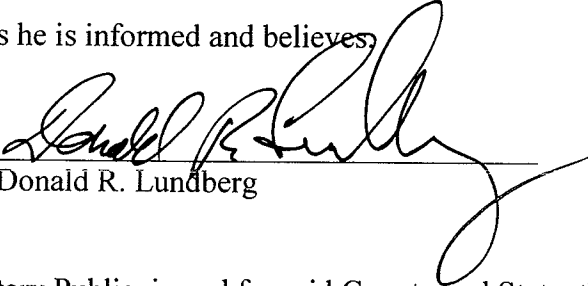
WHEREFORE, the Executive Secretary prays that Mark R. McKinney be disciplined as warranted for professional misconduct, and that the Respondent be ordered by the Court to pay such expenses to the Clerk of the Court as shall be prepared and submitted to the Court by the Executive Secretary as an itemized statement of expenses allocable to this case incurred in the course of investigation, hearing and review procedures, pursuant to Admin. & Disc. Rule 23 § 16.



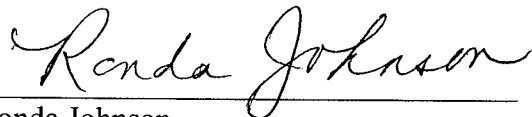
Donald R. Lundberg
Attorney No. 8945-49
Executive Secretary
Indiana Supreme Court
Disciplinary Commission
30 South Meridian Street, Suite 850
Indianapolis, Indiana 46204
(317) 232-1807

STATE OF INDIANA)
)
COUNTY OF MARION) SS:

Donald R. Lundberg, being duly sworn upon his oath, deposes and says that he is the Executive Secretary of the Disciplinary Commission of the Supreme Court of Indiana appointed pursuant to Admin. & Disc. Rule 23 § 8(a), that he makes this affidavit as Executive Secretary of the Disciplinary Commission, and that the facts set forth in the above and foregoing Verified Complaint For Disciplinary Action are true as he is informed and believes.


Donald R. Lundberg

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 8th day of May 2009.


Ronda Johnson
Notary Public

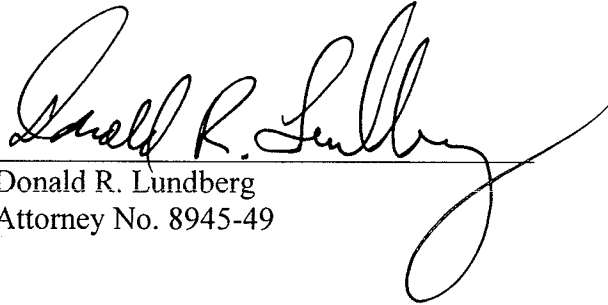
My Commission Expires: October 16, 2014

County of Residence: Marion

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Verified Complaint For Disciplinary Action was deposited in the United States Mail, certified, postage prepaid, on this 8th day of May 2009, addressed to the following:

Mr. Mark R. McKinney
c/o Mr. Kevin McGoff
Bingham McHale
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204



Donald R. Lundberg
Attorney No. 8945-49

Indiana Supreme Court
Disciplinary Commission
30 S. Meridian Street, Suite 850
Indianapolis, Indiana 46204
(317) 232-1807

AGREEMENT

This Agreement entered into this 1st day of June, 1995, at Muncie, Indiana, by and between Richard W. Reed, Prosecuting Attorney for the 46th Judicial Circuit of the State of Indiana, hereinafter referred to as "Prosecutor" and Mark R. McKinney, a Deputy Prosecuting Attorney for the 46th Judicial Circuit of the State of Indiana, hereinafter referred to as "Attorney".

WHEREAS Prosecutor is empowered by statute, I.C. 34-4-30.1-3, to bring an action for reimbursement of law enforcement costs and forfeiture as to any property seized pursuant to I.C. 34-4-30.1 et seq. by law enforcement officers in Delaware county, Indiana, and;

WHEREAS Prosecutor is further empowered by statute, I.C. 34-4-30.1 et seq. to retain an attorney to bring such actions and to collect, as law enforcement costs, the expenses of Prosecutor associated with costs of the proceedings associated with the seizure, and;

WHEREAS Prosecutor desires to employ Attorney to bring and prosecute such actions and to compensate Attorney for such efforts and Attorney desires to be so employed.

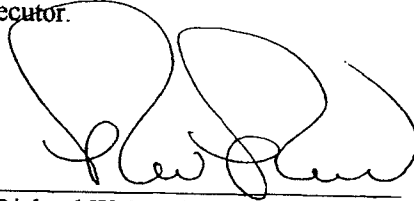
IT IS THEREFORE AGREED:

1. That the Prosecutor will retain Attorney to bring and prosecute such actions for reimbursement and forfeiture as the Prosecutor desires.
2. That Attorney will devote such efforts as are necessary to complete such actions in a timely manner and so as not to interfere with his current duties as Deputy Prosecuting Attorney.
3. That Attorney will be compensated for such services by Prosecutor in an amount equal to twenty-five percent (25%) of any judgment entered in such actions referred to Attorney pursuant to this agreement or the attorney fee allowed by the court in such actions, whichever is less. Attorney acknowledges that any amounts received as attorney fees in such actions are first subject to distribution according prior agreement between Deputy Prosecutor Louis Denney and Prosecutor.

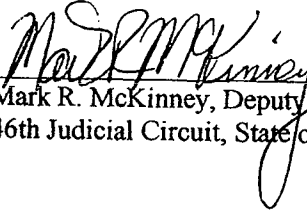


4. That either party may terminate this agreement upon thirty days (30) notice to the other party and that compensation to Attorney for causes filed but not concluded at the date of termination will be paid at the discretion of the Prosecutor.

Dated this 1st day of June, 1995.



Richard W. Reed, Prosecuting Attorney
46th Judicial Circuit, State of Indiana



Mark R. McKinney, Deputy Prosecutor
46th Judicial Circuit, State of Indiana

AGREEMENT

This Agreement entered into this 9th day of FEBRUARY, 2004, at Muncie, Indiana, by and between Richard W. Reed, Prosecuting Attorney for the 46th Judicial Circuit of the State of Indiana, hereinafter referred to as "Prosecutor", Mark R. McKinney and Eric Hoffman, Deputy Prosecuting Attorneys for the 46th Judicial Circuit of the State of Indiana, hereinafter referred to as "Attorneys".

WHEREAS Prosecutor is empowered by statute, I.C. 34-24-1-3, to bring an action for reimbursement of law enforcement costs and forfeiture as to any property seized pursuant to I.C. 34-24-1-1 *et seq.* by law enforcement officers in Delaware County, Indiana, and;

WHEREAS Prosecutor is further empowered by statute, I.C. 34-24-1-1 *et seq.* to retain an attorney to bring such actions and to collect, as law enforcement costs, the expenses of Prosecutor associated with the costs of any proceedings associated with the seizure, and;

WHEREAS Prosecutor desires to employ Attorneys to bring and prosecute such actions and to compensate Attorneys for such efforts and Attorneys desire to be so employed.

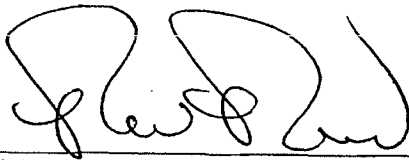
IT IS THEREFORE AGREED:

1. That the Prosecutor will retain Attorneys to bring and prosecute such actions for reimbursement and forfeiture as the Prosecutor desires.
2. That Attorneys will devote such efforts as are necessary to complete such actions in a timely manner and so as not to interfere with their current duties as Deputy Prosecuting Attorneys.

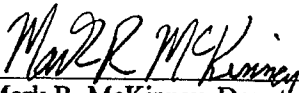


3. That Attorneys will be compensated for such services by Prosecutor in an amount equal to twenty-five (25%) of any judgment entered in such actions referred to attorney pursuant to this agreement or the attorney fee allowed by the court in such actions, whichever is less.
4. That any of the parties may terminate this agreement upon thirty (30) days notice to the other parties and that compensation to Attorneys for causes filed but not concluded at the date of termination will be paid at the discretion of the Prosecutor.

Dated this 9th day of FEBRUARY, 2004.



Richard W. Reed, Prosecuting Attorney
46th Judicial Circuit, State of Indiana



Mark R. McKinney, Deputy Prosecutor
46th Judicial Circuit, State of Indiana



Eric Hoffman, Deputy Prosecutor
46th Judicial Circuit, State of Indiana