

Public Funds
The Law, its Use and Its Accounting

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Newly Elected Prosecutor's Conference
Indiana Prosecuting Attorneys Council
December, 2014

Edited November, 2014 (from William O. Smith, Prosecuting Attorney, Decatur County)
Revised December, 2010
Originally Published 2002, 2006

Public Funds in Indiana, 2014

The law and issues of public funding and accounting often change. The following resources are available to answer accounting and expenditures questions that arise from the administration of the Office of Prosecuting Attorney or any other public office:

1. The County Auditor's Manual, is very readable, published by the State Board of Accounts, and available at www.in.gov/soba/2960.htm
2. The County Bulletin published quarterly by the State Board of Account explains current issues, recent changes and the opinions of the State Board of Accounts on accounting or funding issues, available at www.in.gov/sobal2395.htm It has an index for locating an issue or subject matter.
3. Debra Gibson, Supervisor of Counties, Indiana State Board of Accounts
Telephone: 317-232-2512 or email at dgibson@Sboa.in.us

The Law, its Use and its Accounting

The use of Indiana taxpayer money is heavily regulated by statute. The primary authority for regulating accounting and expenditures of public funds is Indiana Code 5-11. At the center of this statute is the Indiana State Board of Accounts. The Board of Accounts issues rules and regulations concerning the application of Indiana Code Title 5.

There are two reasons the Prosecuting Attorney must understand this body of law. First, an understanding is necessary for the proper operation of the office of Prosecuting Attorney. Second, malfeasance, nonfeasance, and misfeasance by public officials are frequently a cause for criminal investigations and prosecutions. Often, prosecutors are asked to serve as special prosecutor in another county for these local investigations.

This presentation is divided into two parts. Part One introduces the statutes related to public funds and also some of the crimes under Indiana Code 5-11. For purposes of this paper, the term "public office" includes the Office of Prosecuting Attorney and also any other public office within a county.

Part Two is a general outline of the primary functions for appropriation funding and payment of expenses by the Office of Prosecuting Attorney.

PUBLIC FUNDS IN INDIANA, PART ONE

Indiana State Board of Accounts and Public Accounting

All public offices, agencies, and entities are subject to the audit and the accounting authority of the Indiana State Board of Accounts ("SBOA") under Indiana Code 5-11-1-9. This statute also extends the authority of the State Board of Accounts to examine many entities that might appear to be private organizations or foundations because such organization receives or uses, even indirectly, public funds or tax paid funds. These entities include nongovernment organizations that receive any grants from the state, gambling tax revenue, or taxpayer funding at any level.

The Indiana Attorney General is responsible for civil proceedings or enforcement for any public wrongdoing such as malfeasance, misfeasance or nonfeasance showing that public money has been unlawfully expended, obtained by fraud, or is being wrongfully withheld from the public treasury. This authority can include nonprofit organizations. Indiana Code 5-11-6-3. But the prosecution for the crimes remains the job of the prosecuting attorney, particularly theft, forgery, official misconduct or corrupt business influence.

Indiana Code 5-11

The following is a partial outline of the statutory issues under the jurisdiction of the Indiana State Board of Accounts:

1. To establish a uniform set of accounting practices and a required set of forms that account for all public funds, the expenditure of all public funds, and all public owned property or proceeds derived from public property; Indiana Code 5-11-1-2
2. All public officers must adopt and use the prescribed State Board of Accounts systems and forms, failure to do so is a *Class C infraction that requires forfeiture of/he public office by the public officer*; Indiana Code 5-11-1-21
3. To conduct all audit examinations
 - (a) without notice to the public official or entity being examined,
 - (b) *with authority to enter any premise* and examine anything within the premise,
 - (c) issue subpoenas, and conduct oral examination of witnesses under oath;Any person who discloses a proposed SBOA audit in advance commits a Class B misdemeanor; Indiana Code 5-11-1-9(d) and 5-11-1-18
4. Any public officer who fails to file a required report with the State Examiner, fails to follow instructions by the State Examiner, refuses to allow access to all books and records, or interferes with a state examination commits a *Class B infraction and forfeits the office*; Indiana Code 5-11-1-10
5. Must conduct examinations of counties, cities, large towns and public hospitals *every year*, and all other municipalities or entities *every two years*; Indiana Code 5-11-1-25

6. Must prepare a written report of all examinations that becomes public record including specific findings of any failure by a public official to observe State Board of Account guidelines or failure of the entity to comply with a specific law; Indiana Code 5-11-5-1

7. Must report any malfeasance, misfeasance or nonfeasance in any public office to the Indiana Attorney General for civil proceedings and recovering any lost public funds; Indiana Code 5-11-5-1

8. Must *report the commission of any crimes to the Grand Jury* where the crimes were committed and provide all of its evidence necessary to investigate and prosecute the crime, [Most prosecutors believe they can act without using a grand jury, but the statute does specifically say, "report to grand jury."]; Indiana Code 5-11-5-1 (c)

9. Is empowered, on its own, to collect all unpaid fines for statutory violations, bond forfeitures or user fees including the power to compromise the amount due; Indiana Code 5-11-5-7

10. The State Board" of Accounts examiner or any private examiner *have unlimited access* to any accounting document or process on demand, including the right during normal business hours to examine depository records involving public funds. Indiana Code 5-11-1-9(f) and (g)

11. When such a report is completed and certified by the State Board of Accounts, the report can be admitted "*in any and all courts as prima facie evidence of the facts stated and contained in the report*". Indiana Code 5-11-6-1(h)

Taxpayers are empowered to require a State Board of Accounts investigation or audit of a state agency or nongovernmental agency that receives public funds. If twenty-five (25) interested taxpayers sign a petition and claim that effective local relief has not or cannot be obtained, the State Board of Accounts is required to conduct an inquiry, examination or investigation of "any public contract" or "public work". Indiana Code 5-11-6

The accounting books and records of any money collected by any public office [*including the office of Prosecuting Attorney*] are public record that may be inspected by the public any time during regular office hours. Indiana Code 5-11-1-11

This accounting information is also subject to public examination under the Indiana "access to public records" statute. Indiana Code 5-14-3

Expenditure of Public Funds: Claims and Vouchers

The actual payment for any expenditure of public funds is regulated by a specific statute.

"No warrant or check shall be drawn by a disbursing officer in payment of any claim unless the same has been fully itemized and its correctness certified to by the claimant or some authorized person in the claimant's behalf and filed and allowed as provided by law. "

Failure to obey this statutory requirement is a *Class A Misdemeanor*.

Indiana Code 5-11-10-1(b) and-2

Indiana Code 5-11-10-3 and Indiana Code 35-44.2-2-3

The fiscal officer of a governmental entity [county auditor] may not draw a warrant or check for payment of a claim unless:

(1) there is a fully itemized invoice or bill for the claim;

(2) the invoice or bill is approved by the officer or person receiving the goods and services;

(3) the invoice or bill is filed with the governmental entity's fiscal officer;

(4) the fiscal officer audits and certifies before payment that the invoice or bill is true and correct;

and

(5) payment of the claim is allowed by the governmental entity's legislative body having jurisdiction over the allowance of payment of the claim. Indiana Code 5-11-10-1.6

For many years, all claims had to be publicly published before payment. Since 2006, the statutory changes have somewhat modernized the procedure for public expenditures to conform to the realities of modern commerce and business, particularly since vendors have shortened payment grace periods for payments without interest charges. Most government vendors know and understand the statutory claims process.

With a few exceptions, an expenditure claim cannot be made or paid until

(1) the product has been delivered or service completed, and

(2) the claim has been processed under the statutory procedure under Indiana Code 5-11-10.

Under some circumstances, the statutes do allow continuing "preapproved" or authorization of some recurring transactions, such as the payment of rent or utilities.

Indiana statutes also allow local government to establish payment standards or limits, in advance, such as mileage, meal allowance or similar expenditures for expenses that must be paid immediately.

As a general rule, an office holder should not authorize payment of any claim until the purchase has been delivered or the service has been totally performed. If a problem arises, then look for an exception under statute. Talk with the county auditor or call the State Board of Accounts to confirm if an exception applies to your transaction.

This rule against advance payment absolutely applies to any salaries. *"No public officers may receive or draw salaries in advance."* Indiana Code 5-7-3-1

The application of these statutes by the prosecutor's office is presented more specifically in Part Two.

The Law on Deposit of Public Funds

The statutes require prompt deposit of any funds received by a public office or officer. This statute particularly applies payments received by public officials instead of the county auditor. A good example is probation user fees which are paid directly to the Probation Department. Such funds must be "*deposited not later than the business day following the receipt of the funds on business days of the depository ... by the officer having control of the funds.*"
Indiana Code 5-13-6-1

If a public official *knowingly or intentionally fails* to deposit public funds the penalty is Class A misdemeanor, if the amount is under \$750, a Level 6 felony if between \$750 and \$50,000, a Level 5 felony if over \$50,000. Indiana Code 5-13-14-3, Indiana Code 35-44.2-2-1.

Procedure for Purchase Transactions

Any purchase using public funds is regulated by statute. In general, the person with authority to make purchases using public funds is the purchasing agency designated by law or by rule of the local governmental body.

The Indiana State Board of Accounts believes that the purchasing agency for the county belongs to the County Commissioners under Indiana Code Indiana Code 5-22-1-1, Indiana Code 5-22-4-5 and Indiana Code 36-2-20. This can be a problem for the office of Prosecuting Attorney and has been an area of legal dispute discussed later in Part Two.

The statutes distinguish between the purchase of property and contracting for services. A governmental body may purchase "*services*" using any procedure the governmental body considers appropriate. This section of statute has been used to cover or disguise a host of transactions that are "defacto" purchases. Lease agreements for equipment are frequently considered a "service", but are the economic equivalent to a purchase of the property. Indiana Code 5-22-6-1

Regulation by Amount of Purchases

Purchases under \$50,000 by a governmental entity are regulated by only the purchasing policies of the governmental entity. Indiana Code 5-22-8-2

Purchases between \$50,000 to \$150,000 require the purchasing agency to solicit at least three (3) reputable sources for quotations for the purchase. The solicitation must be mailed to the solicited sources at least seven (7) days before the time designated for receiving purchase quotations. The purchasing agency must award the purchasing contract to "the lowest responsible and responsive offer". The purchasing agency can reject all quotations. If no quotations are received, then the purchasing agency may negotiate a special purchase without further bidding. Indiana Code 5-22-8-3 and 5-22-10-10

As a general rule, purchases above \$150,000 must comply with the formal bidding process under Indiana Code 5-22-7. However, since 2006, the statutes have created a number of exceptions to the bidding process such as "negotiated bidding". See Indiana Code 5-22-7.3.

A purchase cannot be artificially divided into smaller sub parts to create a smaller purchase price to avoid the formal public bidding statute Indiana Code 5-22-8-1(b)

Bidding Procedure for Purchases

It is beyond the scope of this to explain the bidding procedure for purchases using public money. However, there are a variety of purchase procedures depending upon the nature of the transaction. The statutory categories include:

- Purchases of Services, IC 5-22-6,
- Competitive Bidding, IC 5-22-7,
- Request for Proposals, IC 5-22-9
- Special Purchasing Methods, IC 5-22-10.

Crimes and Enforcement of Indiana Code 5-11

As stated earlier, SOBA audit examinations may reveal evidence that requires criminal prosecution. This is a frequent cause for the appointment of special prosecutors.

The primary criminal enforcement statutes for these violations are the crime of under Indiana Code 35-44.1-1 consisting of official misconduct, bribery, ghost employment, conflict of interest, and profiteering from public service. All of these are Level 6 felonies except Bribery which is a Level 5.

The conviction of a public official/or *any type of felony crime* [including crimes *unrelated to public office*] during a term of office· requires removal from office under Indiana Code 5-8-1-37.

A misdemeanor conviction for a crime under 35-44.1-1 can result in removal from office, Indiana Code 35-50-5-1.1

The list of crimes involving public misconduct may include:

Destruction of Public Records, a Level 6 felony, applies to any person who *recklessly, knowingly or intentionally destroys or damages any public record*; Indiana Code 5-15-6-8

Counterfeiting, applies to almost any altered or false document without any need to prove an intent to defraud; Indiana Code 35-43-5-2(a)

Forgery, if a written instrument purports to have different provisions or an altered date but must prove intent to defraud as an element of the crime; Indiana Code 35-43-5-2(b)

Theft or Conversion, the crime of conversion particularly if a document has been taken or hidden, by "unauthorized control" without the requirement to prove an intent to deprive or defraud, such as a public servant hiding public records at home; Indiana Code 35-43-4-2 or 3

Mischief, if public documents are damaged, altered or destroyed to cover up errors, theft or statutory violations, is a Level 6 felony if it involves a public record; Indiana Code 35-43-1-2

Obstruction of Justice, if the person *makes, presents or uses* a false record, document or other thing with the intent that the record, document or thing ...appear in evidence in an official proceedings or investigation.... Indiana Code 35-44-3-4(a)(3)

or

alters, damages or removes any record, document or thing, with intent that the record, document or thing ...[is prevented]...from being produced or used as evidence in any official proceeding or investigation; Indiana Code 35-44-3-4(a)(3)

RICO may apply, if there are two or more incidents involving theft, forgery, bribery, official misconduct or conflict of interest. Indiana Code 35-46-6

Offenses against State Public Administration in Indiana Code 35-44.2

PART TWO

PUBLIC FUNDS IN INDIANA

The Office of Prosecuting Attorney *Its Budget, Accounts and Account Funds*

Every expenditure by the office of Prosecuting Attorney must be charged against a specific account. There is no budget account such as a "miscellaneous fund", a "general fund", or "office operating fund". However, there is a special statutory procedure to create a "petty cash" fund if needed.

Document Forms

The statutes require that all forms used in the public funding and accounting process must be approved by the State Board of Accounts. A new prosecutor should look at the forms that have been used in the past in the prosecutor's office as a source for this information. If forms used in the past are not helpful, the new prosecutor should ask the county auditor for this information. Some counties use their own digital forms approved by the State Board of Account.

The Prosecutor's Budget and its Accounts

Getting a budget approved by the county council can vary from County to County. A new prosecutor must understand the past practices and policies of the county council and then skillfully work within the existing political budgeting process. In late spring or early summer, the Auditor will inform officeholders of the budget calendar, when documents must be provided and when council will meet.

Begin this process by examining the office's Budget Form #1 for the previous year. This proposed office budget is a request for appropriations from the county general fund for use by the prosecutor's office for the next calendar year. Budget Form #1 is divided into these four categories. The prosecutor must understand these categories to manage the appropriated budget.

The office budget is divided into specific accounts which are further divided into categories and then designated for a specific type of expenditure.

There are four general categories of expenditures:

100 or 10000 series is for the payment for personal services (personnel),

200 or 20000 series is for the payment of consumable purchases (supplies),

300 or 30000 series is for the payment of services provided to the office (services),

400 or 40000 series is for the purchase of capital assets (capital)

100 or 10000 account series. If the first digit begins with "1", such as "10302", the first digit says the account falls in the category of personal services such as salaries, employee benefits, etc; Each salary office position will be identified and have its own unique second number;

200 or 20000 account series. If the first digit begins with "2", such as "21300", the first digit says the account falls in a category of account expenditures used or consumed during the year, such as supplies, law books, etc;

300 or 30000 account series. If the first digit begins with "3", such as "31100" the first digit says the account falls within a category of expenditures for services, such as depositions, computer repairs, copier maintenance agreements, utilities, postage, trial witness fees or expenditures for which no physical property is delivered;

400 or 40000 account series. If the first digit begins with "4", such as "44800", the first digit says the accounts falls within a category of expenditures used for all capital assets such as computers, furniture, and equipment.

When submitting Budget Form #1, the prosecutor must submit a proposed specific amount for each numbered account. An account on Budget Form #1 is often called a "line item".

The county council by statute holds a hearing to review the proposed budgets that the prosecutor and all other county offices have submitted to finance the office operation for the next calendar year. After the hearing, the county council determines the amount allowed and appropriated for *each specific account*.

Budget Expenditures

When bills and invoices for office expenses are received by the prosecutor, the prosecutor must present it to the county auditor for payment and certify the claim. When the prosecutor submits the certified claim to the Auditor for payment, the following rules apply:

1. the claim must designate and show the account name and number within the appropriated budget from which the claim is to be paid;
2. he must attach to the claim form the invoice and any other information needed to show the purpose of the expenditure;
3. Certify that the purchased item or service has been delivered or the service completed.

In some counties, this system has been digitized and modernized. In others, the processing of claims is a manual task using hard copy paper. See County Auditor's Manual, Chapter VII Section D, 7-2

The county Auditor will designate dates with a month or biweekly deadlines for submitting these claims. The Auditor may require the prosecutor to include other supplemental information on the claim, such as a "vendor number" for the payee on each claim.

The prosecutor should keep his own copy of every claim and the invoices that support these payment claims. The prosecutor should also keep a ledger for each account with a continuing calculation of the remaining account balance.

Every two or three months, the prosecutor should request from the Auditor a computer printout on the status of all account balances within the prosecutor's budget.

The very best Auditor and the best prosecutor will make some mistakes in claim payment processing. Common mistakes include the following:

1. The prosecutor or auditor key-punch the wrong account number on the claim or ledger which directs payment of the claim from the wrong account;
2. The prosecutor or auditor key punch the wrong dollar amount or enter a decimal at the wrong place resulting in payment of the wrong amount;
3. Prosecutor submits duplicate claims for an invoice that has already been paid;
4. A claim from another public office is charged against the prosecutor's accounts -

Example: Both the courts and the prosecutor's office pay for the Lexis-Nexis service. The auditor, inadvertently, charges the court's Lexis-Nexis bill against the prosecutor's budget;

Example: Both the criminal enforcement office and the 4D child support office order printer paper at the same time. Inadvertently, the auditor charges all of the paper purchased under the invoices of both offices to the 4D child Support budget.

Do not wait until the end of the year to reconcile the prosecutor's ledgers with the auditor's statement of accounts and then correct errors. Again, the prosecutor should reconcile account balances with the auditor's records every two months. The "over drafting" of any account balance is a violation under Indiana Code 5-11 discussed in Part One.

Management of Appropriated Accounts

As stated earlier, the prosecutor cannot mix "apples and oranges" when spending from the appropriated accounts. Office supply expenses must be paid from the "office supply account".

The prosecutor submits a budget for the next calendar year before he has a good start using the appropriated budget for the current year. The appropriated budget is merely a reasoned guess. Funds in some accounts will be exhausted very early in the calendar year while funds in other accounts may remain untouched.

When a specific appropriated account has exhausted its balance, the prosecutor must "find" money to add to the exhausted account. The prosecutor has three alternatives for adding money to a specific account to maintain a viable budget for the office operation. Those alternatives are as follows:

Transfers within an account category (i.e. within the "30000" series accounts,)

Transfers between account categories (i.e. from a "20000" series to "30000" series account), or

Additional Appropriations from the county general fund.

More details about these transfers and also the appropriation process are published in the County Bulletin.

Transfers within Account Category

The first alternative is simple. The prosecutor can, at his own discretion, transfer funds from accounts that are within the same budget category; that is within the 100 series or within the 200 series or within the 300 series.

However, the transfer must be done by giving written notice of the transfer to the county auditor so the auditor can officially change the appropriated account balances of the prosecutor's office. The auditor may, as a matter of policy, report this transfer to the county council, *but it does not require any county council approval.*

This transfer is effective immediately after the auditor acknowledges written notice of the transfer. The prosecutor can almost immediately begin to buy postage stamps again. The auditor's office probably has a required form for this type of transfer notice.

Transfers between Account Categories

As described earlier, all accounts fall into one of four categories.

If the transfer within the same category of accounts is not possible, the next alternative is to transfer between account categories to cover a shortage of funds in a specific account. This transfer does require county council approval. These transferred funds are not available and cannot be spent until the approval process is completed.

The approval for this transfer may require attendance at a county council meeting. Each county may have its own system for this process. Consult with the county auditor. Since county councils usually meet just once a month, the prosecutor must timely submit the transfer information to the county auditor for the agenda. As a result, the funds being transferred will not be available for possibly 4 or 5 weeks. In addition, there is some chance the county council will not approve the transfer. The county auditor may have a specific form for this process.

Additional Appropriations

If the prosecutor does not have funds to transfer from any other account using the first two alternatives, the only remaining alternative is to request an additional appropriation into that account from the county council from the county general fund. This often happens in unexpected situations.

An "additional appropriation" is a request to put "new" money into a specific budget account. County councils usually impose a heavy burden of proof upon any office that requests an additional appropriation. Check with the county auditor and other county office holders. The county council may have unwritten policies and practices that govern approval of additional appropriations. See County Auditor's Manual, Chapter VIII, 8-12.

This request must be presented in writing, usually in the form of a letter, addressed to both the Auditor and county council. The Auditor may have specific forms for additional appropriation requests. This request must be advertised before it can be considered by the county council. Then the prosecutor must present evidence of an extraordinary or special circumstance that requires the additional appropriation. The prosecutor must use good practical and political judgment when presenting this evidence and getting more "new" money.

Reverting and Non Reverting Funds

Most accounts, particularly funds that come from the county general fund are “*reverting*” funds which close on December 31. Any remaining funds not used in an appropriated account revert (goes back) back to the county general fund at the close of the year and cannot be used in the next year's office budget. An encumbrance is a small exception to this general rule. This exception only arises at the end of the calendar year.

Encumbrances at Year End

Under state law, all county records must close on December 31 for each year. To comply with this requirement, the auditor will impose a deadline, like December 10 or December 15, as the last day that any office can file payment for claims against the current calendar year budget. However, the prosecutor's office is still incurring expenses until December 31. Often, the prosecutor may spend money in December, but the vendor does not send the invoice to enable a claim until January or even February. Unless the prosecutor files an "encumbrance" to cover those expenditures under the current year appropriations, these expenses must be paid from the next year's appropriations. See County Auditor's Manual, VIII, Section U, 8-16.

Using the encumbrance procedure, the prosecutor may be able to capture some of the appropriated funds for transfer into the next budget to pay for expenses incurred the current year.

This problem also arises in the salary accounts when days worked in December are paid in January of the next year. Contact the county auditor in November of each year for instructions on how to adjust the year end budget for salary payments.

Any encumbrance is limited to the amount of the amount of the expense and it does not extend to the entire unused account balance. The invoice must clearly show the expense was lawfully incurred in the current year. The prosecutor must contact the county auditor about the county's encumbrance procedure and comply with that procedure.

Supplemental Salaries for Elected Prosecutor and Chief Deputy

As you know, the elected Prosecuting Attorney and his state-paid deputies are employees of the State of Indiana and paid by the State of Indiana. This salary is part of the state salary system. Any increase in pay is subject to the state's salary system, as controlled by the Governor and the Chief Justice of the Indiana Supreme Court.

All of these state-paid salaries are not part of the county appropriated budget system but there are two exceptions.

Under the first exception, the Prosecuting Attorney may ask the county to add up to but not more than \$5,000.00 as an addition to his state paid salary. If the elected prosecuting attorney is asking for this supplemental pay from the county general fund under Budget Form #1, this supplemental salary must be an appropriated budget item appropriated and approved by the county council. This also applies to any supplemental, additional salary paid to a chief deputy. However, the supplement to the Chief Deputy does not have a limitation.

In the alternative, the prosecutor may decide to pay this supplement from an account under the prosecutor's discretion, such as the infraction deferral fund. Even if the source of supplemental salaries is from one of these funds, this appropriation must be approved by the county council even though it is paid from a special fund under the prosecutor's discretion and not the county general fund. In other words, the elected prosecutor cannot approve his own additional salary payment.

Under the second exception, the prosecutor can pay additional supplemental salary to state-paid deputy prosecutors. This supplemental salary pay may be subject to county council approval depending upon the ordinance that may govern the fund being used for the salary payment. However, there is no limit on the amount of additional supplemental pay that can be given to state-paid deputy prosecutors. Theoretically, with no limit on local supplemental salary paid to a state-paid deputy prosecutor, that deputy prosecutor could receive a gross annual salary higher than the elected prosecutor.

Determining Salaries

The prosecutor must propose a specific salary for every job position in the office. This includes any job position that is paid by the hour or at a daily rate. Each employment position has its own unique account number within the "100" series or "10000" account. As part of the general budget approval process, the county council will approve a specific salary amount that can be paid to an employee under that budget account number for the next calendar year.

When the budget is submitted, every employment position in the office has its own specific account number just like any other account for any other purpose under the appropriated office budget. Each account should have a well-defined job description.

Once a salary amount from the county general fund is approved, the prosecuting attorney can pay less than the approved amount, but not more than the county council approved amount. No annual salary can increase above the appropriated amount without county council approval.

Once the salary amount is established for each employee, the prosecutor must process a biweekly "Payroll Voucher" that authorizes salary payroll for each salary account. The salary amount on this form must be the total amount paid to the employee, regardless of the source of funds used to pay the salary.

The prosecutor must also keep an attendance record, on a State Board of Account approved form for every one receiving a salary or any hourly wage except the elected official himself. See Indiana Code 5-11-9-4.

Every year during the county's general audit, the State Board of Accounts will usually request the attendance record of at least one employee of the prosecutor's office for a period of time, sometimes for the entire year. The SBOA is reviewing whether attendance records are being kept and their accuracy.

The payroll voucher amount for salary accounts will change from time to time particularly if the prosecutor is paying any employee based upon an hourly wage or per day wage. The voucher amount will also change when an employee resigns, takes unpaid leave days or is suspended without pay for a disciplinary reason.

This amount declared on each biweekly payroll voucher is the total wage or salary paid for each particular employee regardless of the fund or funds used as the source for paying the salary.

The Prosecuting Attorney must have a defined attendance policy. Whether the prosecutor is required to adopt the county personnel policy or may implement his own is an issue in controversy. However, if there is any "accumulated leave" or accumulated "paid time off (PTO)" the prosecutor must accurately record the leave or PTO time of each employee for each year along with that employee's accumulation of leave or PTO.

Overtime Allowance and Policy

The prosecutor should read the county policy on overtime or compensatory time and follow it. If the prosecutor decides to go a different direction than the county policy, the prosecutor must have this policy in writing, make sure the policy is understood by every employee, and then enforce that policy. The policy should specifically list the employment positions that qualify for overtime/compensatory time and those employees who are not eligible for overtime compensation and are only paid a salary.

Employees and Their Expenses

Mileage and Meal Reimbursement

Prosecutors, deputy prosecutors, and investigators are entitled to reimbursement for necessary expenses, such as mileage if the expense is necessary and related to their duties under Indiana Code 33-39-6-8. These expenditures are limited in two ways. The appropriated budget accounts limit the total amount that can be spent in this category. In addition, there are limitations on the amount that can be paid under each specific expense claim. Expense claims must be "itemized" on the claim and include specific documentation for the amount spent.

If the county has designated rules for these expenditures, then those county rules apply. If no such rules exist, then the State rules of limitation apply to these expenses.

Reimbursement for mileage expense directly related to the office operation is filed on a special mileage claim form that requires more specific information on SBOA Form 101. The State mileage rate of reimbursement is \$.44 per mile. Some counties have a higher mileage reimbursement rate.

The State rate for reimbursement is the actual cost of the meals *if travel is overnight* but not more than \$26.00 for three (3) meals for the entire day within state and \$32.00 when out of state. The individual county meal reimbursement limit may be different.

An employee is only entitled to reimbursement for the *actual cost* and payment of meals if the amount is less than the daily allowance. Check the local county policy. It may be different as applied to the county public offices.

If meals are provided by the conference or out of town meeting, then meal reimbursement cannot be claimed for those meals. In that case, the allowance is limited to \$6.50 for breakfast, \$ 6.50 for lunch, and \$13.00 for dinner.

No meal allowance is allowed if it is same day travel and the departure and return is less than 12 hours.

The State of Indiana has a rather large regulation on mileage, meals and travel expenses. Unless the county has enacted its own policy and published it, the State rules apply to any employee of the prosecutor's office claiming reimbursement for such expenses. For example, the maximum lodging allowance is \$ 89.00. These rates are established by the Indiana Department of Administration. For the most recent post of this information, see www.IN.gov/idoa.

"Personal" Related Expenses

The prosecutor and his staff are not entitled to reimbursement for personal expenses or expenses that are not directly related to the function of the employee's job. All employees should avoid personally purchasing items for the office. Use your office supply vendor. They have almost everything needed any way. *"The practice of purchasing items for the office and being [personally] reimbursed is discouraged."* *The County Bulletin*, Vol. 354, p. 9 (April, 2006)

You can pay Indiana Supreme Court Disciplinary fees, but not bar association dues for full time employees.

However, if the prosecutor or deputy prosecutor is "part time", and receiving income from other sources, then such fees should be paid personally from that other income, not the prosecutor's budget. Be careful. County reimbursement for these types of expenses may not be worth the wrath that comes from public scrutiny.

If a prosecutor is a part-time prosecutor and the prosecutor's office is within his private office for which he charges the county rent for that office space, read *The County Bulletin*, Vol. 354, page 8 (April, 2006). If any property or equipment is owned by the prosecutor and rented to the county, that prosecutor must file a conflict of interest statement. The same rule applies to any deputy prosecutor or other staff renting any property to the county. See *The County Bulletin*, *ibid*.

Conflict of Interest

For some reason, this issue is often overlooked in the administration of public offices. In summary, if an employee of a prosecutor's office gains any private advantage or other payment from an activity at the prosecutor's office, that employee, including the Prosecuting Attorney, probably must disclose that activity or transaction in a "Conflict of Interest Disclosure Statement", a statutory form, available online. This is particularly true if prosecutor's staff get extra or separate pay for typing transcripts, doing DNA testing, etc and are getting paid separately for that work outside the weekly pay check.

This form must be filed at both the Court Clerk's office and mailed to the State Board of Accounts. *If a prosecutor's spouse or child is in any way employed by the prosecutor's office or files claims paid from the prosecutor's office*, then that activity should be disclosed as here described.

Failure to file the disclosure is a Level 6 felony as further described in Indiana Code 35-44-1-3 and can result in removal from office. This is always an area of inquiry by the State Board of Accounts in any audit.

Technically, this disclosure applies to any other paid relationship the employee has with the county. If deputy prosecutors receive another payment from the county as an area plan commissioner

attorney, board of health attorney, etc., that "dual role" or the receiving of more than one check from the county will usually require the filing of a statutory disclosure statement.

This disclosure requirement is not an issue of the merits or value of the service or payment. The county's other payment to a county employed person is completely legitimate and given for full value. The fact about the second source of payment *only requires disclosure.*

If the prosecutor or employee need clarification on a potential conflict of interest, the prosecutor may want the issue reviewed by the Indiana Ethic Commission as provided under Indiana Code 35-44.1-1-4(c)(5).

Credit Cards

A purchase by credit card basically contradicts the statutory accounting and payment procedures generally required for expenditures of public funds. Under a credit card, the purchase is made and the legal obligation of payment arises before the payment has been advertised and approved by the governing body.

However, the State Board of Accounts is willing to accept the use of a credit card by a prosecutor's office if the governing body by ordinance or resolution has approved the use of a specifically designated credit card and that approval is recorded in the official meeting record. The State Board of Accounts has established certain requirements that must be part of the ordinance. See: *Counties manual*, State Board of Accounts, 2001, pages 1-5 and 1-6.

Separate Special Funds and their Accounting

The prosecutor's office has a number of other special designated accounts. Many of these special funds may have their own rules based upon the statute. Use of these funds may also be regulated' with special rules within the enabling ordinance that created the fund. The source of money for these accounts comes as a result of a specific activity. The list of special, dedicated accounts includes the following:

- Infraction deferral fund,
- Pretrial Misdemeanor Diversion fund,
- "Bad" Check enforcement fund,
- Marijuana Eradication fund,
- Asset forfeiture under Indiana statutes, IC 34-24-1,
- Federal Adoptive Asset Forfeiture fund,
- Indiana Criminal Justice grants, and other grant funds,
- /VD Incentive fund,
- APS

In general, the year end balances in these accounts (funds) *do not revert back* into the county general fund. The funds in these accounts remain in the account until the specific purpose of the account is accomplished and can accumulate from year to year for the specific purpose of the fund. However, the prosecutor is either limited in the use of these accounts or spending from the account is regulated by a procedure.

When drafting an ordinance to create any special fund for the Office of Prosecuting Attorney, make sure the ordinance specifically declares that *"the fund is not a reverting fund and the balance of the account continues into the next calendar year"* (or words to that effect).

Unfortunately, prosecutors are relying heavily on these special funds as a primary source for financing the operation of the office of prosecuting attorney. These funds have issues that often get special public scrutiny.

Any expenditure or payment from any of these funds must still follow the "claims and voucher" procedure previously described in this essay under Indiana Code 5-11-10-1 and Indiana Code 5-11-10-1.6.

Never Accept Cash

In general, when administering these special funds, Prosecutor's office should avoid being an intermediary for taking any kind of payment for any purpose.

However, in practice the check enforcement fund may be a necessary exception. Under NO CIRCUMSTANCE, at any time, should the prosecutor's office accept a cash payment for any purpose or fund. If a payment must be made at the prosecutor's office, require the payer to deliver a money order or similar document of payment.

The following is a quick annotation of these funds and its accounting requirements. *Any expenditure* from the following described "deferral fund" or the "pretrial diversion fund" must, by statute, follow guidelines established by the Indiana Prosecuting Attorneys Council. Indiana Code 33-39-8-5 (6) [2005]

The prosecutor must read the County Bulletin, online, as follows:

Volume 354, pages 8-12,

Volume 381, page 6

These special funds and the source of these funds are briefly described as follows.

Infraction Deferral Fund. Courthouse staff frequently confuse the "*infraction deferral fund*" and the "*pretrial diversion fund*". The authority for these two different funds arise from two different statues and must not be confused for accounting purposes.

The authority for this "deferral" fund is specifically Indiana Code 34-28-5-1 (f). *However, this fund must be created by a county "enabling" county ordinance.* The ordinance should be carefully drafted designating the fund as "*a non reverting fund* for the limited or specific use of the office of prosecuting attorney". *If the ordinance fails to segregate this fund* as a special designated account for the office of prosecuting attorney, the funds are presumed to belong to the county general fund and provide no special benefit for the prosecutor. By statute and State Board of Accounts guidelines, *all payments into this fund must be made directly to the Clerk of Court.* The *prosecutor's office should not act as "intermediary" in any way* in the payment or delivery of this fee.

This fund is considered a "county user fee" by the State Board of Accounts under Indiana Code 33-37-8-5. The prosecutor does not have discretion in the use of this fund. The prosecutor must secure an "appropriation" approved by the county council to use from this fund. Again, read the County Bulletin for the SBOA guidelines for this fund.

Pretrial Diversion Fund. The authority for this fund is specifically Indiana Code 33-39-1-8. This fund also requires a county enabling ordinance. The appropriation and claim payment rules are the same for this fund as just previously described for the "Infraction Deferral fund." This fund, like the "Infraction Deferral fund" is also a "county user fee" under Indiana Code 33-37-8-5. However, the Pretrial Diversion Fund is also regulated by its own statute under Indiana Code 33-37-8-7.

"Bad Check" Fund. This fund is not created by a specific statute. This fund arises from a combination of the Indiana Code 35-43-5-5(e) and the county's use of its "home rule" power under Indiana Code 36-3 so that the prosecutor can collect a fee.

Since a penalty fee is involved, this county ordinance must be enacted by the County Commissioners. Again, the enabling ordinance must designate the fund as a "non reverting" fund for use by the prosecuting attorney. Otherwise, the fee is part of the county general fund and available for general appropriation to any office.

IPAC has created a management system for this "bad check" fund in the Prosecutor's Management System (PMS). However, the procedure for handling this fund must still be reviewed and approved by the State Board of Accounts. See County Bulletin, Volume 307, page 9 (April 1996).

To use this "bad check" fund, the prosecutor must request appropriation of an amount from the fund into an existing budget account ("line item") either as part of the annual budget process or by an additional appropriation request.

Third Party Vendors for Bad Checks

If you use a third party vendor, be aware of a recent American Bar Association formal ethics opinion, #469. It states, "*A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).*"

Marijuana Eradication Fund, under Indiana Code 33-37-5-7, a county under local ordinance can create a marijuana eradication fund for law enforcement use for the elimination of marijuana. This fund is actually regulated by its own board. The fee is charged to any conviction of a defendant under Indiana Code 35-48-4. The court cannot impose a fee greater than \$300.00.

Asset Forfeiture Fund, under Indiana Code 34-24-1.

There still remains controversy over this fund and how it should be used and administered. Attorney General Opinion #1 (2010) addresses issues with the Common School Fund. Pitfalls include defining "law enforcement costs". This is still an ethical minefield. Be careful. We will probably see legislative activity in the next few years.

Federal Adoptive Asset Forfeiture Fund. Before 1997, asset forfeiture for criminal activity was processed under the state's forfeiture statute 34-24-1 and still can be. In 1997,

both state and federal statutes changed to allow what is called, "adoptive forfeiture". Under this procedure, the prosecuting attorney waives the more complicated proceedings under state law and transfers the seized property by "in rem" action to the US District Attorney. This forfeiture action proceeds in US District court, the asset is liquidated, and the proceeds are shared with the local law enforcement agencies involved; federal authorities and specifically the county's office of prosecuting attorney. This is done under the authority of Indiana Code 34-24-1-9. *However, the prosecuting attorney must have a "Claim" against these proceeds filed with the US District Attorney, or the prosecuting attorney will be left out of the distribution.*

When this process is completed, a check is sent from the US Justice Department to the Prosecuting Attorney. However, before an Indiana prosecutor is eligible to participate in this program, that prosecutor *must have an "adoptive forfeiture agreement" on file* with the US Justice Department.

The Agreement

The Indiana prosecutor can secure a copy of this form on the Internet. The agreement runs on a periodic cycle and is in effect for three (3) years.

However, a new agreement must be filed whenever there is a change in administration even if the existing agreement has not expired. As a result, all newly elected prosecutors and Sheriffs need to file a new agreement with the Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice in Washington, DC. Under this agreement, *the prosecutor accepts a number of obligations and regulations concerning the use and accounting for this fund.*

Some of the Federal Forfeiture Fund Regulations

1. The fund must be used for a new program or an increase in an existing program. The funds cannot be used to "supplant" or replace the funding of an existing program.
2. A report must be filed within thirty (30) days from the close of the fiscal year every year, even if the prosecutor does not have or has never received any funds under this agreement. If the fund has more than \$100,000, the prosecutor must file an independent audit report. This audit can be paid from the fund itself.
3. The fund can be placed in an interest bearing account, but any interest earned must remain in the forfeiture fund. The annual report must account for interest earned or state *a reason why the funds have not been held in an interest bearing account.*
4. The US Justice Department has a list of "*pre-approved uses*" for this fund.

This fund is not understood by some of the State Board of Account field representatives and some county auditors have been misled about this fund. Some auditors have been instructed to place this money in the general fund. *By statute, this is a "non reverting" fund.*

By Federal regulation, the money received by a law enforcement agency must only be "*used for the benefit of {the} agency participating in the seizure or forfeiture for purposes consistent with federal laws and regulations*". Further, Federal regulations *specifically prohibit a governing body from decreasing a law enforcement agency budget by the amount of shared forfeiture funds it receives.*

These funds can generally not be used for salaries and the fund is unpredictable.

Note:

1. Contact the office of the US District Attorney for example forms for adoptive forfeitures.
2. Almost everything a prosecutor needs to know about this fund, the form and the process is available online.

Indiana Criminal Justice Institute Grants and other grants

Grants from various agencies are a helpful source for funding a specific project or program. The funds from that program must be separately identified even if the county auditor has "stored" the funds in the county general fund. Keep careful records on the expenditure of any grant. Almost all grants require a closing accounting and a specific accounting statement or report. The statutory "claim and voucher" procedure applies to every expenditure from the fund.

Sometimes the easiest way to account for "grant money" so the auditor can understand and the expenditures are recorded against the proper fund, is to create a "grant receipt and expenditure" account line on the general budget, Form #1. When grants are received for specific purposes, the amount is entered as a credit on the prosecutor's budget in this account [even though the actual money has been deposited in the county's general fund bank account.]

When expenditures are made from the grant's purpose, a claim for payment is processed under this account number. This specific grant money must still be expended using the statutory claim and voucher procedure previously explained. Hopefully, this may prevent the common mistake of charging the claim against the regular, county council appropriated budget. Grant funds are a frequent target of auditors.

Enactment of Enabling Ordinances

Indiana Code 36-1-3, known as the "Home Rule" statute, gave incredible jurisdiction and ordinance authority to the county "legislative body". It reversed the rule of law in which local authority could only enact if that legislative authority was specifically given to the local government by statute. Under the "home rule" statute, the old rule of law is completely reversed. Local government can now generally legislate by ordinance on any matter that is not prohibited by statute or where the legal jurisdiction has been given to another governmental unit.

In some circumstances, this local legislative authority can be very helpful to the operation of the prosecutor's office. In other circumstances, it can be a nightmare.

As described earlier, some of the specific funds within the office of Prosecuting Attorney *require a county enabling ordinance*. The legislative authority to enact a county ordinance varies according to the population and the nature of the cities within an Indiana county.

However, most Indiana counties are governed by a form of governance in which both the executive authority and also the legislative authority in county government are given to the same body consisting of a three person oligarchy call the "Board of County Commissioners". Indiana Code 36-1-2-5 and 36-1-2-9

In these counties, the only governmental authority that is not held by the county commissioners is the budget authority given to a "fiscal body", namely the county council. Indiana Code 36-1-2-6

The county council can only enact ordinances that exclusively involve fiscal issues or specific issues authorized by statute. This includes creating reverting funds, non reverting funds or special accounts. But the county council has no authority to impose a fee, penalty or other charge that can be collected and put funds into the account.

Only the county commissioners have the legislative ordinance authority to impose a penalty, fee or service charge. Since the "bad check" fund involves the assessment of a penalty, that fund must be created by ordinance of the county commissioners.

In some cases, the creating of a fund may involve collecting a penalty or fee and also regulating the handling of the funds. When the subject matter of the ordinance appear to contain a penalty and also have fiscal significance, it may be appropriate for both the county commissioners and the county council enact the same ordinance. This should resolve any question concerning the legal authority for the fund and its expenditure. This also prevents either the county commissioners or the county council from acting alone from repealing an ordinance used by the prosecuting attorney.

In general, the State Board of Accounts requires a county council ordinance to enable any "non reverting" fund that is not specifically so declared by statute.

Purchasing Authority of Prosecuting Attorney

Indiana Code 5-22 regulates all expenditure of funds by any governmental body.

Indiana Code 5-22-4 establishes who has the purchasing authority for a governmental unit. Under Indiana Code 5-22-4-5, the governing body has the power to designate the purchasing agency. In other words, according to the State Board of Accounts, the County Commissioners determine the purchasing agent for all offices within the county. If this is an issue, ask the county commissioner to enact an ordinance appointing the prosecuting attorney as the purchasing agent for this budget and office.

See: County Bulletin, Volume 307, page 7 (April, 1996) based upon Indiana Code 5-22-1-1 and 522-4-5 when combined with Indiana Code 36-2-20. The State Board of Accounts reaffirmed its position that the County Commissioners are the purchasing agent for the prosecutor. *See The County Bulletin, Volume 354, page 9 (April, 2006).*

Once a purchasing agency is established in a county, Indiana Code 36-2-20 requires a county office or court submit a "written requisition" to the county's purchasing agent who then purchases the item under Indiana Code 36-1-9.

Inventory and Surplus Property

The prosecutor's office and all county offices must keep an inventory of all capital assets. Under statute and in many counties, an asset must be listed on the inventory if the purchase price was more than \$ 1,000. The county can establish a lower purchase price for assets that must be included

on the asset inventory. This inventory also includes any property acquired by grants or other resources from outside county funds.

The inventory should include the following information for each item: a description of the item, the serial number of the item, date of purchase of the item, the cost of the item, and the account number of the fund used to purchase the item. This inventory must be on file with the county auditor. Each item should have its own identification tag provided by the county auditor.

If an item of property becomes obsolete or surplus property, it can be disposed of according to statute as described earlier under Indiana Code 5-22-22. This rule of law is further applied to counties under Indiana Code 36-1-11.

Indiana Sales Tax Exemption

The prosecutor's office should keep on file several copies of the county's "Indiana Sales Tax Exemption" certificate. Purchases and some other expenditures by the prosecutor's office are exempt from Indiana Sales Tax.

The exemption certificate is presented to the seller or vendor when making a "*qualifying purchase*" at the time of purchase. If Indiana sales tax is paid on the purchase, some county auditors will disallow payment or reimbursement for the amount of any sales tax paid. If the employee has personally paid Indiana Sales tax on purchase or expense for the prosecutor's office, the auditor may deny reimbursement payment for the sales tax part of the claim. As a result, the employee is personally stuck paying the Indiana sales tax from his own pocket.

It is possible to secure reimbursement of erroneously paid sales tax by filing a refund with the Indiana Sales Tax Division.

However, this sales tax exemption does not apply to lodging if paid by individuals in hotels and motels. To obtain this tax exemption, payment must be made by a county issued check or on a county approved credit card. See *The County Bulletin*, Volume 354, page 20 (April, 2006).

Grants or Similar Funding Programs

The state examiners will often review the management of any grant funds received by the prosecutor's office. The state examiners prefer and may request the following documents or document procedure:

1. A separate file for each, individual grant. That file should hold:
 - a. copy of the notice of the award of the grant,
 - b. a copy of the grant agreement,
 - c. copies of any other approvals required such as an enabling ordinance by the county commissioners or county council, if required.
2. A separate file should be maintained for each calendar year of the grant, if the award is a continuing grant over a period of years.
3. Communicate with the county auditor about requirements for using the grant because the county auditor is usually required to certify the closing of such grant. Send a letter

memorandum of understanding to the county auditor to assure payments and the management of the grant complies with grant requirements, so that closing and certification is an easy process.

The prosecutor's office is frequently involved in processing the disposition of evidence or property seized during an investigation. These are possible areas for future State Board of Accounts scrutiny. This evidence or property may fall under disposition under the following statutes:

Search and Seizure evidence, investigation evidence IC 35-33-5, 35-33-5-5
[which does not include firearms]

Firearms, confiscated weapons IC 35-47-3

When the prosecutor obtains disposition orders under these statutes, the court order should be very specific and precise about every aspect of the disposition of the property and probably should include statutory citation. Any State Board of Account examination of these subjects is simply to assure compliance with the applicable statute. If the prosecutor's files on these matters have good documentation of complying with the statute, there will be no problem with the SBOA scrutiny.