

STATE BOARD OF ACCOUNTS
302 West Washington Street
Room E418
INDIANAPOLIS, INDIANA 46204-2769

AUDIT REPORT

OF

CIRCUIT COURT

HENDRICKS COUNTY, INDIANA

January 1, 2011 to December 31, 2011



FILED
09/21/2012

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COUNTY OFFICIALS

<u>Office</u>	<u>Official</u>	<u>Term</u>
Judge of the Circuit Court	Judge Jeffrey V. Boles	01-01-11 to 12-31-14
President of the County Council	Larry R. Hesson	01-01-11 to 12-31-12
President of the Board of County Commissioners	Eric Wathen	01-01-11 to 12-31-12



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TO: THE OFFICIALS OF HENDRICKS COUNTY

We have audited the records of the Circuit Court for the period from January 1, 2011 to December 31, 2011, and certify that the records and accountability for cash and other assets are satisfactory to the best of our knowledge and belief, except as stated in the Audit Result and Comment. The financial transactions of this office are reflected in the Annual Report of Hendricks County for the year 2011.

STATE BOARD OF ACCOUNTS

July 17, 2012

CIRCUIT COURT
HENDRICKS COUNTY
AUDIT RESULT AND COMMENT

COMPENSATION OF CIRCUIT COURT STAFF

While completing the audit of 2011 payroll transactions at Hendricks County, inconsistencies were identified in the documentation for the compensation of the Circuit Court employees. The hours worked on the employee timesheets presented for audit did not coincide with the payroll department's attendance reports. The attendance reports certified by the Circuit Court Judge documented that the full-time employees worked 70 hours in a two-week pay period and his part-time employee worked 56 hours in a two-week pay period. However, the employee's timesheets indicated only 56 hours worked for full-time employees and 42 hours worked for the part-time employee in a two-week pay period.

Based on these discrepancies, further inquiry was made. The County Auditor inquired to the Judge on March 6, 2012, about any written leave policies being followed. Judge Boles responded that the Court followed the County's policies. Examiners took this response to mean that the Circuit Court followed all County policies, which caused additional concern, as there are many differences between the County's policies and the Circuit Court procedures being followed. Based on the County policies the Court employees would need to work 35 hours per week to be considered full-time employees and should be paid hourly based on their approved timesheets.

Due to the inconsistencies between the personnel policies described in the County Employee Handbook and the actual activity that occurred in the Circuit Court during 2011, a meeting was held with the Circuit Court Judge. During this meeting, the Judge indicated that he considers the Circuit Court employees to be salaried, exempt employees. Also, subsequent to this meeting, the Circuit Court Judge provided a memorandum dated April 19, 2012, depicting the Hendricks County Circuit Court policies and procedures that were in place during 2011. This memorandum states in part: "The Judge has determined that Court Staff are at will, exempt, salaried employees, except the part-time court reporter who is an at will, non-exempt, salaried employee."

The policy provided by the Judge on April 19, 2012, was not in writing, and was only put in writing following our inquiry of the inconsistencies. The lack of a written policy documenting the procedures followed by the Circuit Court, as well as the inconsistencies in the forms provided for audit, prevented the examiners from making the determination that the circuit employees were compensated appropriately.

All types of employee benefits should be detailed in a written policy. Payments for expenses not authorized in a written policy cannot be allowed.

CIRCUIT COURT
HENDRICKS COUNTY
AUDIT RESULT AND COMMENT
(Continued)

Each governmental unit should adopt a written policy regarding the accrual and use of leave time and compensatory time and the payment of overtime. Negotiated labor contracts approved by the governing board would be considered as written policy. The policy should conform to the requirements of all state and federal regulatory agencies. (Accounting and Uniform Compliance Guidelines Manual for Counties of Indiana, Chapter 5)

All compensation and benefits paid to officials and employees must be included in the labor contract, salary ordinance, resolution or salary schedule adopted by the governing body unless otherwise authorized by statute. Compensation should be made in a manner that will facilitate compliance with state and federal reporting requirements. (Accounting and Uniform Compliance Guidelines Manual for Counties of Indiana, Chapter 5)

Governmental units should have internal controls in effect which provide reasonable assurance regarding the reliability of financial information and records, effectiveness and efficiency of operations, proper execution of management's objectives, and compliance with laws and regulations. Among other things, segregation of duties, safeguarding controls over cash and all other assets and all forms of information processing are necessary for proper internal control. (Accounting and Uniform Compliance Guidelines Manual for Counties of Indiana, Chapter 1)

Controls over the receipting, disbursing, recording, and accounting for the financial activities are necessary to avoid substantial risk of invalid transactions, inaccurate records and financial statements and incorrect decision making. (Accounting and Uniform Compliance Guidelines Manual for Counties of Indiana, Chapter 1)

CIRCUIT COURT
HENDRICKS COUNTY
EXIT CONFERENCE

The contents of this report were discussed on July 17, 2012, with Jeffrey Boles, Judge of the Circuit Court; Richard A. Smikle, Legal Counsel. The Official Response has been made a part of this report and may be found on pages 7 through 22.



Hendricks Circuit Court

55th JUDICIAL CIRCUIT

HENDRICKS COUNTY, INDIANA

JEFFREY V. BOLES
JUDGE

BOX 349
DANVILLE, INDIANA 46122
U.S.A.
(317) 745-9271

9 August 2012

Ms. Sommer Cannon, Field Supervisor
Ms. Jenny Wagner, Field Examiner I
State Board of Accounts
Room E418, 302 West Washington Street
Indianapolis, Indiana 46204

- By e-mail and Certified Mail,
Return Receipt Requested

OFFICIAL RESPONSE

Dear Ms. Cannon and Ms. Wagner:

Following my receipt of your audit results and comments on 1 August 2012, I submit the following as the official response of the Hendricks County Circuit Court. Before responding to your specific comments, I provide to you again the important background and legal authority which must frame this discussion and which appears to have been ignored or overlooked by the State Board of Account's examiners in this process.

Background

The Hendricks Circuit Court is one of six Courts in Hendricks County. One overarching goal of the Circuit Court has always been to provide the services of the judicial branch to any person who comes before the court in a timely manner. The Hendricks Circuit Court has had the highest weighted caseload average per court, according to standards set and reported by the Indiana Supreme Court, in Hendricks County for the past six (6) years. For the past eight (8) years, the Indiana Supreme Court's weighted caseload

study court rankings showed the Circuit Court is accomplishing annually the amount of work approximately equivalent to two (2) judges indicating that the Circuit Court is being operated in a highly effective and efficient manner. Hendricks Circuit Court is open and in operation on the same schedule as all the other courts in Hendricks County (8:00am-4:00pm, Monday through Friday). The Circuit Court currently has four (4) full time employees and one (1) part time employee. The full time employees are long serving public servants with tenures ranging from thirty-six (36) years to nine (9) years and those employees account for, in aggregate, nearly 100 years of service to the citizens of our State as part of the judicial system.

The Court has always been a good steward of public money and operates well within the budget approved and allocated by Hendricks County for court operation and salaries of court employees. This is reflected in the attached summary of operating expenses compared to the allocated budget. As reflected there, the Court works to operate in such a way as to be under budget and be able to return money to the County whenever possible. The Hendricks Circuit Court has been under budget on an annual basis for twelve of the last fourteen years. In 2011, the Circuit Court returned nearly \$36,000, or approximately 10% of its annual budget to the County. This fiscal summary establishes that the Hendricks Circuit Court is highly efficient and effective in both its respect for the value of people's time and the use of taxpayer money.

Employees of the Circuit Court

In order to correctly review and address any issue related to the employees of any Court in the State of Indiana, one must first understand how the Indiana Constitution, case law, and Attorney General opinions define employees of those Courts. This is not a new topic but harkens back to our State and Federal Constitutions and is well established law. Unfortunately, in my decades of service on the bench sometimes new county officials such as treasurers, auditors and human resources personnel are not familiar with the separation of powers embodied in the Constitution and the case law affirming the separate branches of government and need to be familiarized with the rights, authority and responsibilities of the judicial branch. Attached are two recent publications from the offices of the Indiana Supreme Court – State Court Administration that confirm this principle. The first is an article entitled, "Employee Handbooks: Neither Fish Nor Fowl" published in the *Indiana Courttimes* in the January/February 2011 edition which is directly on point with the issues you have raised. The article summarizes well the authority and independent status granted to the judicial branch by the Indiana Constitution Article 3 Section 1 and which authority has been repeatedly

confirmed by both case law and Attorneys General opinions. The second is a very recent letter sent to all of Indiana's judges dated 11 July 11 2012 which further highlights the separation of powers in our State's constitutional form of government in the context of employment policies. I had previously provided both this article and letter to you and your examiners for your review.

What is established in our Constitution and is well summarized in the article and letter attached is that the employees of our State's court system are not county employees, nor are they State employees. Court employees are properly designated as judicial circuit employees and the Court alone has the authority to set their terms and conditions of employment. This authority and independent status related to these judicial employees is granted to the judicial branch by the Indiana Constitution Article 3 Section 1 and which authority has been repeatedly confirmed by both case law and Attorney General opinions. (See *Woods v. Michigan City*, 940 F.2d 275 (7th Cir. 1991), *Pruitt v. Kimbrough*, F. Supp 764, 766 (N.D.Ind.), aff'd 705 F.2d 462 (7th Cir. 1982), *Parsons v. Bourff*, 739 F.Supp. 1266 (S.D.Ind. 1989), and *State ex rel. McClure v. Marion Superior Court*, 239 Ind. 472, 158 N.E. 2d 264 (1959)). Further, the Court is not a governmental "unit" (county, municipal, township) and the judge is a constitutional official of the state, not of the county. (*Woods v. Michigan City*, 940 F.2d 275 (7th Cir. 1991)). County courts in Indiana are exclusively units of the judicial branch of the state's constitutional system, separate from the county.

This separation of the powers of the three distinct branches of government, which assures that there is an independent judiciary, is absolutely necessary to the entire success of the government of our counties, our State, and our nation and to the administration of justice for those citizens interacting with the judicial system.

Compensation of Circuit Court Staff

Your audit results and comments are incorrectly based on a premise that the employees of the Circuit Court are county employees or are subject to the same employment policies and requirements as county employees. If this were true, then the executive branch (County) would have authority over the judicial branch (Court). If the County were allowed to set the terms and conditions of employment of judicial employees, then the executive branch would have effective control of the Courts and the judiciary. This is contrary to the Indiana Constitution and the case law confirming this separation of powers. The July, 2012, letter referenced above and attached, and sent to me and all

the other judges in Indiana from the Indiana Supreme Court – State Court Administration stated as follows:

Although judges may collaborate and work with the executive and legislative branches in their counties, the courts should remain independent in setting the terms of employment for their own employees.

As either elected or appointed constitutional state officials, each circuit and superior judge in Indiana has the power to select staff for the judge's own court, and each of those judges has the power to fire court staff without review or approval by any other body. Without this power, the judiciary would not be a truly independent department or branch of government.

With the power to hire and fire employees comes the authority and responsibility for setting those same employee's terms and conditions of employment including whether they are paid hourly or by salary, whether they are exempt or non-exempt employees, the schedule they work, and the duties, responsibilities, and expectations of their job performance.

This Court has been clear and transparent in how it has carried out its authority with regard to its employees and in the use of taxpayer funds. The Hendricks County Council has been provided documentation annually from the Court for many years indicating that the Court has determined its employees to be salaried employees, not hourly rate workers. That information has been provided on County Form No. 144 which clearly has two sections related to employees – the first section is titled, "Full Time Salaried Officers and Employees" and the second section is titled, "Part Time and Hourly Rated Employees." A copy of this form was provided to you during your process. That form with those designations has been in use since at least the year 2000 and has been approved and accepted as part of the county budget process each year. The Court has determined which of its employees should be paid by salary and which should be hourly employees, and each employee and their total annual salaries and wages have been specifically set forth and approved by the County.

The County Human Resources Director, Mr. Love, was provided with a letter dated August, 2010 which directly stated to him that the Court's employees were determined to be exempt under the federal Fair Labor Standards Act ("FLSA"). Mr. Love was also provided, along with that letter, with detailed descriptions of each employee's position. The Court has evaluated and classified its exempt employees by applying the three part test of the FLSA – the duties test, the salary level test, and the salary basis test. (29

CFR Part 541) One element of the analysis, the duties test, turns on a review of the essential functions of the job, the specific duties and responsibilities, the job knowledge, experience and skill requirements, and the independent actions and judgment required of each position. These factors, in my analysis, indicate the positions the Court employees hold meet the exempt duties test of the FLSA. The Court employee's administrative positions, as defined by the job descriptions and actual work performed– not by title – are office/non-manual work, which is directly related to management and general business operations of the Court, and requires exercise of independent judgment and discretion regarding matters of significance. Further, the salaried Court employees meet the salary level test of the FLSA as they earn more than \$455.00 per week. Finally, the Court's employees meet the salary basis test of the FLSA as they are paid a weekly salary and do not experience a reduction or increase in pay as a result of fluctuations in the number of hours worked per pay period which can be changed as the Court's caseload dictates. This legal analysis forms the basis of the determination that certain Court employees are exempt employees, not non-exempt employees, and are properly classified. Unfortunately, the County Auditor and now the SBOA persists in the position that these employees are County employees who should be paid hourly and treated as County employees but provide no analysis or legal authority to support that position. If there is persuasive authority to the contrary I would be happy to review it. Even if some exists, the County does not have the authority to change any of the above terms and conditions of employment of Court employees under any circumstances.

This should hardly be new information to the County as the Courts of Hendricks County advised the County Auditor way back in 1983, by way of letter, signed by all the judges of Hendricks County at that time and file-marked on April 21, 1983, by County Auditor Patricia Stamper, that they all elected to retain their judicial prerogative relating to the operation and management of the Court and its employees when the then County Commissioners attempted to impose the County's employee timekeeping policy upon the Courts. That letter, which I have already provided to you and your examiners, stated in part:

The Courts, by exempting themselves from this policy, have adopted the position that time keeping practices should be made applicable only to those functions of county government which are subject to fixed hours of employment and which by their nature, require employees to be present only during the normal work-day. Further, it is the opinion of the Judges that the attempt by the Board of Commissioners to impose this requirement on the Courts is an unwarranted intrusion on judicial prerogatives which related to the operation and management of the

Courts which duty, by statute, is left solely to the discretion of the individual judges.

Written Employment Policies

There is no legal requirement for a Court to have a written employee policy handbook. This Court had no need for a published handbook because of the small staff, with only five (5) employees, who have many, many years of experience. The Court and each employee has a firm grasp of their responsibilities for the successful operation of this Court, as well as the terms and conditions of their employment. This staff has been able to accomplish the work of two courts, as measured by the weighted caseload study rankings of the Supreme Court all while working within or under the allocated budget. This has been accomplished without an employee policy handbook. Contrary to what your comments imply, the Court is not required to have a written policy as the County may be required to do for its employees by the "Accounting and Uniform Compliance Guidelines Manual for Counties". This reflects the SBOA's apparent inability to understand and apply the legal proposition that the Court is not a County nor is it subject to the County's control. The SBOA's apparent accounting mindset that all employees should be the same and that all forms and people should be uniform creates this problem.

Even though written employment policies are not required, we gladly complied with your request to prepare and circulate a written memorandum of our policies to assist you in your work and have made it available to our employees.

County Auditor's Attendance Report Form

Your audit and subsequent comments appear to be primarily the result of an ambiguous form created by the Hendricks County Auditor's Office and submitted to the Circuit Court on a bi-weekly basis for purposes of processing employee payroll which you state has produced "inconsistencies" in record-keeping. Your comments seem to imply that by complying with the Auditor's form, the Court has certified a certain number of hours worked by its salaried employees. This is not the case because the employees listed on that form are salaried employees as set forth in the annual budget submitted to and approved by Hendricks County and are not hourly workers. Yet the Auditor, who has sole and exclusive control of her form and its content persists in sending this incorrect format. Fortunately, the pay amounts on the form are correct for the salaried and

hourly employees and the certification on the form is correct when it states that I have examined the employees' time records and that:

...each employee has performed the services for which the salary or compensation is paid... (emphasis mine)

Since that statement references either a "salary" or "compensation", that statement can appropriately be applied to both types of employees: salaried and hourly. But, just as Hendricks County has no authority over the Court's employment practices, the Court has no authority over the forms the County Auditor insists on sending to the Court. The Auditor insists on sending a form for salaried employees that also has an incorrect hourly reference in it. The Court has completed the Auditor's payroll form to allow the Auditor to do her job and issue the pay for the Courts employees, even though the Auditor has incorrectly listed the Court's salaried employees as "hourly" on one of the three (3) pages of her form.

For those employees who are paid on an hourly basis, we provide the Auditor with our record of the actual number of hours they worked during the pay period. For those employees who are paid on a salary basis, my staff and I have checked the form to insure that the pay amount listed corresponds with the budgeted salary amount and it always has. It is not my responsibility, nor do I have the authority, to advise the County Auditor how to process payroll or how to set up her forms. In all honesty, I do not know and have not inquired if her payroll software has the capability to simply insert a weekly salary amount or if it must be set up in a total hours multiplied by an effective hourly rate mathematical formula even for salaried employees. We presumed that was the case since her forms had the correct salary amount listed and our County Form No. 144 submitted annually to and approved by the County Council clearly listed the employees as salaried. I certainly believe there are other salaried employees paid by the County so it would seem there should be a method to prepare the form. If that is the case, unfortunately then this would appear to be more of a petty county politics power play made by the Auditor to control the Courts which would be unconstitutional and a profound waste of time and resources.

As I indicated I would, in an attempt to bring this matter to resolution, I have communicated to the County Auditor how I believe she could correct the headings of her form on the page where the salaried employees are listed so that page accurately reflects the terms and conditions of employment of these employees.

I have also explained to the County Auditor the constitutional and legal authority that the Circuit Court employees are not county employees and therefore, the County does not have the authority to determine their terms and conditions of employment and

where the Court has determined an employee to be salaried, the County cannot change them to hourly.

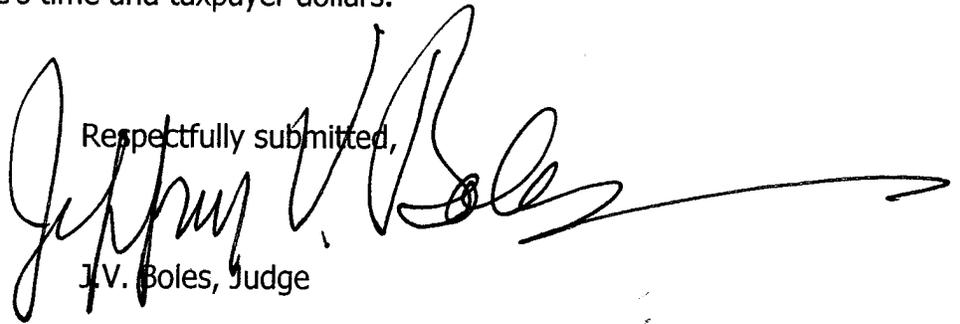
I have also explained this means the County does not determine the hours and days the Court employees work. The Court sets the work schedules of its own employees in line with efficient and effective operation of the Court as its caseload requirements dictate. Our employees understand they will work when the Court caseload requires it, whether that is an early emergency hearing, through the lunch hour, or a jury trial that may go into the night. This is the nature of the judicial system and is very unlike County government work which typically runs on a regular and predictable schedule.

The Court determines how the judicial employees are paid within the Court's allocated budget. Our Court is operated with a results-driven outcome-based approach and our employees are employed and paid based on their specific work performance and exemplary completion of their job responsibilities. Instead of having employees who are concerned only with punching a clock and "putting in time", this Court has determined that its highly experienced veteran staff members, with nearly 100 collective years of outstanding service and expertise, are better designated and employed as salaried and exempt, as has been specifically reported to the County for many years annually. This allows us to accomplish the most efficient and effective operation of this Court and the best use of the people's time and the people's money. Our staff knows the job they have to do, they know their important roles in the efficient operation of the Court, they know how to do their jobs well, and they work until the job at hand is successfully completed. The results – an efficiently operating Court with a Supreme Court weighted caseload average equal to twice the expected caseload of one court and staying at or under the allocated budget every single year for over a decade – should speak for themselves. Why the County or the SBOA is now attempting to force the Court into a County model of employment is inexplicable and contrary to our State's constitution.

In summary, the County and the executive branch do not have any authority to set the terms and conditions of employment of judicial employees of the Courts of our State. As you correctly noted, I have designated four (4) of my five (5) employees as at-will, exempt, salaried employees and I set their work schedules in line with efficient and effective operation of Hendricks Circuit Court. How the County sets the employment terms of its employees does not have any bearing on the Court's employee's status as judicial employees or how I staff the Circuit Court in an effort to provide knowledgeable and efficient service to our citizens. I have insured that the Court's employees are paid their County approved salary amounts within the County approved budget for Circuit Court and they have been. The one page in the Auditor's form where the salaried Court

employees are titled as "hourly" is inaccurate and does not match the County Council approved budget and status or the information this Court has provided the Auditor. That should be corrected. I will continue to communicate with the Auditor to attempt to bring this issue related to her forms to resolution and address your concern that these forms be unambiguous. However, the separation of powers makes this entirely out of my control. Regardless, as I have for many years, I will continue to strive to operate the Hendricks County Circuit Court in the most efficient and effective manner I can to provide access to the judicial system to citizens in a timely manner while continuing to be a good steward of people's time and taxpayer dollars.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey V. Boles", with a long horizontal flourish extending to the right.

J.V. Boles, Judge

Enclosures

CIRCUIT COURT
PAST BUDGET HISTORY

<u>YEAR</u>	<u>\$ APPROPRIATED</u>	<u>\$ RETURNED</u>	<u>TOTAL \$ SPENT</u>
2012	\$337,908		
2011	365,534	35,906	329,628
2010	398,535	0	410,535
2009	385,068	7,393	377,675
2008	262,895	12,588	250,307
2007	245,495	15,470	230,025
2006	240,665	16,738	223,927
2005	241,011	70	239,941
2004	236,011	32,829	203,182
2003	231,812	49,770	182,042
2002	228,112	13,436	214,676

9 Aug., 2012 Budget Hearing

INDIANA
courttimes

INcite
**a Framework
for Innovation**

A look at the
award-winning
INcite framework for
court data sharing

INSIDE

State of the Judiciary

Court Reform Grants

Dealing with Self-Represented Litigants

EMPLOYEE HANDBOOKS:

Neither fish nor fowl

The legal status of court employees is both unique and confounding. A myriad of statutes require the counties to provide space and funding so that the courts may operate. The circuit and superior courtrooms are the showpiece of most county facilities. The healthcare and pension benefits provided to court employees are the benefits provided to other county employees. The court employees receive a paycheck and W-2 from the county that looks like every other county employee's payroll information. When a county employee has questions about benefits, the employee most likely goes to the county auditor, and the county auditor may well have distributed a county employee handbook to the court employees. If it looks like a duck, quacks like a duck, and walks like a duck, then you are probably looking at a duck. Except in this case, you're not.

Court employees are not county employees, despite receiving a W-2 from the county, working in a county-owned building, and using the county healthcare plan. They are also not regular state employees. They are public employees of the judiciary, also known as judicial or judicial circuit employees.

Article 3, § 1 of the Indiana Constitution establishes that the judiciary is an independent state power separate from

the legislative and the executive departments. The judges of appellate courts, circuit courts and superior courts are constitutional officials of the state, not of the counties. As set forth in *Woods v. Michigan City*, 940 F.2d 275, 279 (7th Cir. 1991):

Indiana law reveals that judges of Indiana's circuit, superior and county courts are judicial officers of the State judicial system: they are not county officials. *Pruitt v. Kimbrough*, 536 F.Supp. 764, 766 (N.D.Ind.), aff'd 705 F.2d 462 (7th Cir. 1982). County courts in Indiana are exclusively units of the judicial branch of the state's constitutional system. *Id.* Also see *Parsons v. Bourff*, 739 F.Supp. 1266 (S.D.Ind. 1989), and *State ex rel. McClure v. Marion Superior Court*, 239 Ind. 472, 158 N.E.2d 264 (1959).

As either elected or appointed constitutional state officials, each judge in Indiana has the power to select staff for the judge's own court, and each judge has the power to fire court staff without review or approval by any other body. Without this power, the judiciary would not be a truly independent department or branch of government. Along with

the power to hire and fire is the power to set terms and conditions of employment.

The principle of the right of the judiciary to set its own terms and conditions of employment has been repeatedly addressed in Indiana. 1963 OAG No. 42 was written in response to an inquiry as to whether a statute regulating city employees applied to employees of the city judiciary. Attorney General Edwin K. Steers determined that the legislature did not intend that executive branch powers should be extended to control of court officers and employees, and that responsibility for court staff rests with the judge of the court. The opinion relied on the case of *State ex. rel. Bailey v. Webb*, 21 N.E. 2d 421, 422-23 (1939).

This fundamental principle was repeated more recently in the case of *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000). The Court wrote:

The judiciary is one of the three co-equal branches of government and its independence is essential to an effective running of the government. See *Board of Comm'rs v. Stout*, 136 Ind. 53, 58-59, 35 N.E. 683, 685 (1893) (Courts are an integral part of the government, and entirely independent; deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary.)

In particular, it has been held in a variety of contexts that the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business.



Despite the Constitutional provision and the clear case law upholding the principle of judicial independence, the question of court versus executive authority continues to arise, particularly at the county level.

The peculiar status of court employees causes unusual results, particularly in litigation. At least one court has held that in an action brought under the Fair Labor Standards Act, both the state and the county may be liable. Because the court is a distinct unit, there are federal decisions that exempt most courts from liability under the various discrimination laws because the small number of employees will not meet the minimum threshold. This is another reason to maintain the separateness of the court unit from the rest of the county. On the other hand, being a small work unit does not negate constitutional rights and other laws, such as the Family Medical Leave Act, which may apply regardless of the separation of judiciary and executive.

Because their employees are neither state nor county employees, courts have the ability to manage their offices more efficiently and provide more options for management. This independent status also gives the court an opportunity to discuss with employees the unique privilege and responsibility of being a judicial employee, as well as discussing the application of the Code of Judicial Conduct to judicial employees.

Because courts are independent, most courts will find it beneficial to have their own employee handbooks; however, some courts find it is a good option to adopt the county employee handbook for the sake of consistency. The decision depends upon how well crafted the county handbook is and

what the judge prefers as far as hours of work and other provisions related to the functioning of the court. Before adopting a county handbook, it is important to review carefully and make certain that the handbook does not take away necessary control from the court. For example, for both practical and policy reasons, a court would not want to adopt a provision that allows the county commissioners to hold a hearing when a court employee is fired. There could also be provisions in a general county handbook that conflict with the Judicial Code of Conduct.

If there are no objectionable provisions, and the court decides to adopt the county handbook, the court should do so by letter to the County Commissioners. This action will preserve the court's own powers and remind the commissioners of the court's independent authority. A letter might state: "Indiana County Circuit Court has determined to adopt and apply the provisions of the Indiana County Employee Handbook for court employees. The Court reserves the right to withdraw its adoption of the Handbook at any time without notice. The Court may also supplement and/or amend portions of the Handbook with the Court's specific provisions." A warning: if the responsible judge does not notify the court's employees of the decision to adopt or not adopt the county handbook, employees may assume that the county employee handbook applies to them. This wrong assumption can cause problems for both the judge and the employees. Even if the decision is to have no handbook at all, employees need to have the guidance of knowing the judge's decision.

If a judge needs assistance and advice in reviewing and determining whether to adopt the county handbook, contact Brenda Rodeheffer at (317) 234-3936 or brodehef@courts.state.in.us.



SPOTLIGHT

Marion County Judges announced the results of their election of new officers.

The Executive Committee is: Judge John Hanley, Presiding Judge, Judge David Certo, Judge Becky Pierson-Treacy and Judge Marc Rothenberg.

The new Criminal term chair is Judge Linda Brown. The new Civil term chair is Judge Ted Sosin.

Best Practices

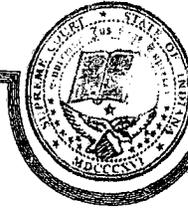
CONTINUED FROM PAGE 7

relatively simple hearing, such as dissolving a marriage or modifying child support, the judge may lead the parties through the process by asking questions such as, "What is your gross income? How many children do you have? Do you have day care costs for those children?" Judges are permitted by this Rule "to make reasonable accommodations to ensure *pro se* litigants [have] the opportunity to have their matters fairly heard" (See Comment 4, Code of Judicial Conduct Rule 2.2).

Judges should be aware that Indiana Code Section 31-19-2-2(a) provides that an Indiana resident who seeks to adopt a child under eighteen years of age may "by an attorney of record" file a petition for adoption. Adoptions are one type of action for which self-representation may not be authorized.

The Indiana Supreme Court has established a Self-Service Legal Center on the Indiana judicial website to ensure access to the judicial system by providing basic resources to self-represented individuals at courts.in.gov/selfservice. Judges should have this information available to any individual appearing before them who is considering self-representation.

SUPREME COURT



OF INDIANA

DIVISION OF
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Dear Judicial Officers:

In the last legislative session, HEA 1005 added Chapter 20.2 to Title 36, Article 1, of the Indiana Code to address nepotism at the county level. The new chapter requires counties to adopt policies and provide certifications regarding nepotism or face financial penalties. Some counties have asked judges and prosecutors to consent to the county's actions to comply with the anti-nepotism laws. After researching this matter, it is my opinion that this new law does not apply to judicial employees.

While Ind. Code § 36-1-20.2 does not apply to judicial employees, judges are bound by the anti-nepotism provisions of the Code of Judicial Code. Rule 2.13 of the Code requires:

- (A) In hiring court employees and making administrative appointments, a judge:
- (1) shall exercise the power of appointment impartially and on the basis of merit; and
 - (2) shall avoid nepotism, favoritism, and unnecessary appointments.

Comment (2) to Rule 2.12 defines nepotism as:

. . . the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

Section (3) of the Comment states that:

A judge shall consult the staff of the Indiana Commission on Judicial Qualifications or its advisory opinions to determine whether hiring or appointing a relative as defined by Comment (2) may be justifiable under the circumstances.

The Code of Judicial Conduct is more restrictive than the new county anti-nepotism laws pertaining to the judge's own relatives, but less restrictive as it applies to relatives of employees of the judiciary. Nevertheless, my consistent advice has been as a good management practice to never hire a relative or close friend of an existing employee.

Ind. Code § 36-1-20.2 prohibits a county employee from being in the direct line of supervision of a relative. Relative is defined as a spouse; parent or stepparent child or stepchild; brother, sister, stepbrother or stepsister; niece or nephew; aunt or uncle; and daughter-in-law or son-in-law. There are some exceptions. For example, it does not apply to current employees nor to wives of Sheriffs who serve as prison matrons. Ind. Code § 36-1-20.2-9 requires the legislative body of local governmental units to adopt a policy that is at least as stringent as the Code and to file an annual report with the state board of accounts that includes a statement as to whether the policy has been implemented. Ind. Code § 36-1-20.2-18 mandates that if a unit has not implemented a policy, the local government finance department may not approve the unit's budget for additional appropriations. Because the county faces penalties for non-compliance, many of you have or will be requested by your county to adopt the county's anti-nepotism policy, to provide information as to your staff's family relationships, and/or to provide other information showing compliance.

I also took the liberty to consult with Lilia Judson, the Executive Director of our office, and Jane Seigel, the Executive Director of the Judicial Center, about their thoughts about the applicability of this new statute to the judiciary, as a separate branch of government. We all agree that the Courts should have their own employee policies, and we have so advised courts in the past. Although judges may collaborate and work with the executive and legislative branches in their counties, the courts should remain independent in setting the terms of employment for their own employees. The basis for our opinion is Article 3, § 1 of the Indiana Constitution which established that the judiciary is a separate state power from the legislative and the executive departments. The judges of appellate courts, circuit courts and superior courts are constitutional officials of the state, not of the counties. As set forth in *Woods v. Michigan City*, 940 F.2d 275, 279 (7th Cir. 1991):

Indiana law reveals that judges of Indiana's circuit, superior and county courts are judicial officers of the State judicial system: "they are not county officials." *Pruitt v. Kimbrough*, 536 F.Supp. 764, 766 (N.D.Ind.), *aff'd* 705 F.2d 462 (7th Cir.1982). County courts in Indiana are exclusively units of the judicial branch of the state's constitutional system. *Id.* Also see *Parsons v. Bourff*, 739 F.Supp. 1266 (S.D.Ind.1989), and *State ex rel. McClure v. Marion Superior Court*, 239 Ind. 472, 158 N.E.2d 264 (1959).

As either elected or appointed constitutional state officials, each circuit and superior judge in Indiana has the power to select staff for the judge's own court, and each of those judges has the power to fire court staff without review or approval by any other body. Without this power, the judiciary would not be a truly independent department or branch of government.

Another reason that Ind. Code § 36-1-20.2 does not include judicial employees is because the chapter specifically applies to "units" and Ind. Code § 36-1-2-23 defines units as "county, municipality or township." Attorney General opinions and Indiana case law opinions have been consistent in exempting judicial and prosecutorial staff from the

definition of county and the provisions that apply to counties. Rather, each of you is part of an independent judicial circuit.

Hiring the relative of a current employee is fraught with potential peril, and should be avoided. Nevertheless, this is a decision that should be made by you as the independent judicial arm of the government and not due to a county policy. If you are contacted by your county for the purpose of showing compliance with Ind. Code § 36-1-20.2, please feel free to share this letter with the county. I am available to assist you in any other way you feel is appropriate.

I want to stress that this letter in no way represents an opinion of the Indiana Supreme Court, either on the general topic or on the particular issues raised by the legislation, and it is not intended to bind the Supreme Court to any position. This letter represents my understanding of the law. If you have any questions, please feel free to contact me.

Yours truly,

A handwritten signature in black ink that reads "Brenda F. Rodeheffer". The signature is written in a cursive style with a large, stylized initial "B".

Brenda F. Rodeheffer