In the
Indiana Supreme Court

CASE NO. 53S00-1104-DI-244

IN THE MATTER OF)
)
DAVID E. SCHALK)
Attorney Number 15551-53)

MEMORANDUM REGARDING MOTION
TO CLARIFY OF PUBLISHED ORDER

Comes now David Schalk, and for his "Motion for Clarification of Published Order" says as follows:

THE PUBLICATION OF GENERAL ACCUSATIONS
WITHOUT REFERENCE TO SPECIFIC INSTANCES

The Indiana Supreme Court's "Published Order" in this matter finds that I violated two of our Rules of Professional conduct, stating:

> **Violations:** The Court finds that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:
> 8.4(b): Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
> 8.4(d): Engaging in conduct prejudicial to the administration of justice.

I came before this Court complaining about the absence of the rule of law and arbitrary manner in which courts and disciplinary commission kept saying I committed a crime while refusing to consider, or even acknowledge the existence of my well-reasoned, principled, and plainly stated legal analysis showing that it was reasonable for me to believe that my actions on behalf of Chad Pemberton on June 25, 2007 were lawful and appropriate. I showed why I could not possibly have foreseen the rationale given by the Indiana Court of Appeals for affirming my arbitrary conviction for attempted possession of

marijuana in the trial court. Like the trial court, the Court of Appeals found no fault with my analysis. It just acted as though I had not presented it and wrote that I presented arguments so lacking in merit that they would not have occurred to me, and then decided the case by refuting arguments I had not presented and reading substantive law into what is clearly nothing more than a definition. I thought that when, at long last, I arrived at the Indiana Supreme Court, my legal analysis would be considered and this Court would find that my belief in the lawfulness of my actions was reasonable. I hoped that the denial of transfer of my appeal to the Indiana Supreme Court would be reconsidered, or that the Court would publish something that could be the basis for post-conviction relief in the trial court. I believe that I was wrongfully convicted and I would like to have that blemish removed from my record.

When I read the "Published Order" I was reminded of little Dorothy in *The Wizard of Oz* when she finally got her audience with the wizard and discovered the truth. All along I have been told, in essence, "You are guilty because we say so. That's all you need to know." People will say I am naïve, but I really thought that the Indiana Supreme Court would reassert the rule of law, give me and my ideas a fair hearing, and rebuke those who have treated me so arbitrarily and unfairly. When I read the "Published Order" I saw one more arbitrary declaration of guilt, without explanation and accompanied by baffling accusations that I said and wrote things, with no hint as to what the Indiana Supreme Court thinks I wrote or said in violation of the Rules of Professional Conduct. The "Published Order" was more of the same, only worse.

I saw in the "Published Order" the bald assertion that I had made statements which are false, or made with reckless disregard for the truth. Not even one such statement was cited and, being unaware of ever having made any such a statement, and being unable to find such a statement in the record, I now ask the Court to help me out and show me the statements that were attributed to me because if any of them are false or made with reckless disregard for the truth, I am confident that I can clear this up by showing that, if the statements were made, they were made by someone other than me.

I was flabbergasted to read in the "Published Order" the bald assertions that I improperly interfered with the discovery process, solicited others to commit illegal acts, made repeated and unfounded attacks

on those involved in the criminal case and the disciplinary proceedings. I have thought long and hard about what the Indiana Supreme Court could possibly mean by these things. I guess the Court means that I solicited others to commit illegal acts by asking some people already on their way to purchase marijuana for their own use to refrain from smoking or selling any of the purchased marijuana and to take it to the police instead. That would be sanctioned by the Rules of Professional Conduct if I acted in good faith upon the reasonable belief that getting the marijuana in order to take it to the police would be legal. It was legal for the police informant to do it and our statutes make no distinctions in this regard, so this ties into my request for clarification of the assertion that I broke the law. It came out very clearly at the trial - the evidence was unambiguous and uncontroverted – that the plan to get marijuana from the informant had nothing whatsoever to do with me. I couldn't have stopped them. With regard to interfering with discovery and making unfounded attacks on people, I am completely baffled. I don't recall ever having done such things, and I can find no evidence of such things in the record. I cannot gain insight into the wrongfulness of actions attributed to me while not even knowing what the actions are, and without being able to verify that it was I and not someone else who performed these mysterious deeds.

THE IMPORTANCE OF FREE SPEECH IN A SOCIETY GOVERNED BY THE PEOPLE

My disciplinary hearing seemed, at times, to be an inquisition to find out if I would criticize any trial court judges or judges on the Indiana Court of Appeals. The attorney for the Commission seemed to think it was his job to shield our appellate courts from criticism. A disinterested observer might think the Disciplinary Commission enjoys reciprocal shielding by the appellate courts since I now stand accused in this Court's "Published Order" of making "repeated and unfounded attacks on those involved in his criminal case and this disciplinary proceeding." Emphasis added. I think most observers would think I presented my defense in a thoughtful and reserved manner. It is the hearing officers refusal to consider, or even acknowledge, the defense I presented in the findings and recommendations he presented to this Court that I find offensive; along with the fact that he rubber stamped the Commissions proposed findings and recommendations, word for word, including errors that I thought I brought to his attention in the briefs I submitted to him.

A feeling for what the public might think of Indiana lawyers' fear of saying anything members of the appellate courts don't want to hear might be gathered from the introductory section of our public records law:

> **A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.**

It is the lawyers who know how well or how badly our courts are functioning. They are the ones who know where there is room for improvement. They could provide the overview and the details, if they were not afraid to speak their minds. Disgruntled litigants are easily ignored, and since the attorneys seem to be satisfied, the public is complacent. The press covers the chief justice's "state of the judiciary" speeches to the state legislature and all seems well. I have endured almost six years of the absence of the rule of law and the imposition of the "rule by law" of judges who disregard my defense and who seem to me to be saying, in essence, that I am guilty for no reason other than the only reason that counts: they say so.

People have told me that they think it is unfair to allow prosecutors to encourage and facilitate drug sting operations to obtain evidence of drug dealing, while at the same time prohibiting defense attorneys from doing the same thing for his clients. Defense attorneys are authorized to perform, encourage, and facilitate citizen's arrests of drug-dealing police

informants, but nothing at all is written in our statutes about sting operations. So the courts in my case have felt emboldened, it seems to me, to set aside the presumption of innocence, the void-for-vagueness doctrine, the rule of lenity, our tradition of citizen involvement in law enforcement, and basic fairness, declaring from their benches and conference rooms that my actions were criminal. What I did was try to persuade some people who were already on their way to buy marijuana to take the contraband to the police for use as evidence during our case in chief in the upcoming Pemberton trial. They didn't do as I asked, but it was one week before the scheduled trial, lies were going to be told, and I thought it was worth a try to bring out the truth about the motivations and access to illegal drugs of the State's key witness. Chad Pemberton was facing up to fifty years in prison.

I knew some police detectives and the prosecutor would be angry with me, but I was confident that there was no way for them to harm me legally. That confidence was, at least for a time, shattered by the "Published Order." This probably nothing but sophistry, but I wonder if am legally convicted (and for all practical purposes disbarred) without ever having my legal presentation addressed or even acknowledged? A video clip of Richard Nixon saying, "If the president does it, that means that it is not illegal" can be found at http://www.youtube.com/watch?v=ejvyDn1TPr8. He was obviously wrong about that, but if the Indiana Supreme Court declines to reveal its legal analysis, and declines to reveal what exactly it was that they think I did; it the Court just arbitrarily upholds the prior arbitrary findings that I broke the law on June 25, 2007, would that be legal; or would it mean that our state constitution has failed and we now have rule by law rather than the rule of law? I don't want either alternative to be true. Our constitutional framework is a work of genius, and the guarantees of Article 1 of the Constitution of Indiana are the culmination of centuries of

struggle for the dignity and fair treatment of the common people, and for holding at bay all who would like to be tyrants. I still hope the "Published Opinion" was a mistake, and that the members of the Indiana Supreme Court will personally consider the matters I carried on my long journey to their door.

PUBLIC PERCEPTION OF THE JUDICIARY AND THE LEGAL PROFESSION

The incident at issue here occurred on June 25, 2007. Almost ten months later, on April 17, 2008, I filed a petition for post-conviction relief on behalf of Chad Pemberton alleging that I had no conflict of interest in representing him and that there was, therefore, no reason for denying him a speedy trial. Success would mean reversal of his conviction. Eighteen days later, on May 5, 2008, a false probable cause affidavit and criminal charges were filed alleging that Chad Pemberton said he and I planned the sting operation together. I obtained the audio tape of the interview and played it at the detective's deposition. Contrary to what the officer swore in the affidavit, Chad Pemberton did not say we planned or even discussed any such sting operation. He said the opposite. He was genuinely perplexed by the detective's leading question. The statement in the sworn probable cause affidavit was a fabrication, but it apparently was enough to cause a panel of the Indiana Court of Appeals to decide the Pemberton petition for post-conviction relief without ordering remand for a hearing as required by statute. At a hearing, I would have explained why my actions were lawful, and also shown that the June 25, 2007 incident was not planned in advance and that my interests and those of Chad Pemberton coincided completely. But the Pemberton panel of the Indiana Court of Appeals refused to grant me that opportunity, implying that I committed a criminal act and that I had a conflict of interest that was still present. They not only held that the trial court judge was correct in removing me on grounds of a (actually non-existent) conflict of interest, but also

held that the conflict persisted. They remanded back to the trial court with instructions to disqualify me again and dismiss the Pemberton petition for post-conviction relief "without prejudice." "Without prejudice" they said, while deciding Chad Pemberton's only viable issue with no hearing having been conducted and hence, only the pleadings for a record. The Court of Appeals wrote that I had not shown that Chad Pemberton waived the perceived conflict, although he had done so on the record after consulting with independent counsel. That would have been part of the record if the statutorily required hearing had been allowed. This Court denied transfer.

Disciplinary proceedings exist, in large part, to maintain public confidence in the legal profession and in our judiciary. I think the public would take a very dim view of the arbitrary rulings in the Pemberton case. After the Pemberton appeal was concluded and transfer denied, a panel consisting of a Bloomington, Indiana resident and two of the members of the Pemberton panel sat on the panel in my case. I haven't said, and I don't say that the two panel members who decided I was guilty in the Pemberton case without a hearing didn't re-think the matter in light of the briefs when my case came up on appeal; nor have I said nor do I say that the Bloomington resident who sat on the panel might have discussed my case with local prosecutors at a time when the case was front page news. Obviously, having criminal charges filed against me helped vindicate the trial court judge over his decision not to rule against Chad Pemberton without conducting the required hearing, but I haven't said and I don't say that he had something to do with charges being filed against me, or that the false affidavit was an orchestrated ploy to keep Chad Pemberton in prison, or anything of the kind. For Indiana lawyers, speculation based on circumstantial evidence is too risky. "Lawyers are completely free to criticize the decisions of judges. However, as licensed professionals, they are not free to

make recklessly false claims about a judge's integrity." *In re Wilkins*, 782 N.E.2d 985, 986 (Ind.2003), cert. denied, 540 U.S. 813, 124 S.Ct. 63, 157 L.Ed.2d 27 (Ind. 2003). That is a fact because the Indiana Supreme Court says it is a fact, but a reading of the Wilkins case shows that a "recklessly false claim about a judge's integrity" can be what most people would characterize as speculation about possible impropriety. I will only venture to say that, to most members of the public who are aware of these matters, the events might reflect adversely upon some of the judges and other lawyers involved in my case, but they don't reflect adversely upon me. People who perceive many defense lawyers to be ineffectual and easily intimidated have expressed appreciation of me for having some courage and dedication to duty, even in the face of predictable attempts at retribution.

With regard to the second violation cited in the suspension order, "engaging in conduct prejudicial to the administration of justice," public opinion would likely be that attempting to get the whole story to the jury, prevent perjury, and prevent a fraud on the Court is conducive to the administration of justice. Sanctioning me for what I did seems to me, and I would think to most other people, prejudicial to the administration of justice. The police and the informant intended to say the informant was not dealing drugs at any time relevant to the Pemberton case. A detective had admitted that the informant was sent on a mission to compromise Pemberton so an attempt could be made to coerce him into testifying against a man named Carlton White at his upcoming trial. The authorities wanted to keep the jury in the dark about some of the informant's motives for testifying and about his access to illegal drugs, even though that information would have been useful to the jury in reaching a verdict.

CONCLUSION

I know of no other case in which the Indiana Supreme Court disciplined an attorney for

doing things without specifying what exactly it was that he or she did. That might not be so bad for an attorney who already knew what he did wrong. I don't know. I don't have a clue. For me, this is akin to traveling across the ocean, back in time to the infamous final years of the Star Chamber. This Court apparently found my legal analysis to be unreasonable and substituted one if believes I should have thought of back on June 25, 2007. Nowhere is there a clue as to nature of the flaw, or of the better way of analyzing the situation which should have been obvious to me in 2007. I cannot think of what these could possibly be. If it was so obvious, I wonder why no one seems to have thought of it prior to the issuance of the "Published Order" indefinitely suspending my license. I wonder why this Court did not share its insight with me and the public to whom it published its "Published Order." I keep thinking of The Wizard of Oz and then banishing the thought. I don't want things that way. I want our Indiana Constitution to be alive and well, and our Supreme Court to be admired and revered throughout the land and around the world. When my twelve-year-old son heard the bad news and saw that I was dismayed, he said, "Dad, didn't you know that society is corrupt." It pains me to know that he thinks the public sector of society is endemically corrupt. I want to show him that he is wrong about that, even though sometimes a person needs to go all the way to the Indiana Supreme Court to obtain justice.

I am sanctioned for saying and writing things I do not recall and which I cannot find in the record. Not being able to find them, I have to wonder if the "Published Order" was a mistake. Maybe the Court, with so many complex and pressing issues on its agenda, relied on a clerk who did not bother to read the hearing transcript, the exhibits, or my briefs; or who read some of it and did not know what to suggest as a response and so decided to just ignore the facts of the case and publish only incomprehensible conclusions. I do not know enough about how the

Court operates to do anything more than guess what might have happened. I framed my briefs in the larger context of the state of our judiciary in Indiana so the Court would not use its valuable time just to make sure injustice was not visited upon me and my son over an isolated incident that occurred almost six years ago.

If the Court is inclined to re-visit this matter, I ask that it quickly rescind the suspension order or else grant an indefinite stay of effectiveness. Things are moving fast for me now. I have no savings, assets, 401K's, or anything to fall back. I could express sincere remorse if I knew why my analysis of the situation on June 25, 2007 was unreasonable, and if I am shown the statements which were deemed to constitute violations of the Rules of Professional Conduct. Without that information, I am effectively disbarred, and I will go to my grave never having known why. If the members of the Indiana Supreme Court know, I ask that they divulge the information as soon as possible. If they are going to look into this matter further, I need to know that as soon as possible. I ask the Supreme Court to kindly tell me what I did to offend so there will be possible for me to realize the wrongfulness of my acts and experience remorse.

If the members of the Court are themselves unsure of the legal issues and the facts discussed in this document and the motion to clarify the suspension order, I ask that they issue an order forthwith rescinding or suspending the effectiveness of the suspension of my license. I have already turned down several fees and now I am financially in dire straits. I am not asking for sympathy; I just want the Court to know that I need to make some important decisions now, and those decisions will hinge on the Court's response or lack thereof during the days leading up to the cancellation of my license to practice law in Indiana.

Respectfully submitted,

David E. Schalk
Attorney Number 15551-53

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I served a copy of this document by First Class U.S. Mail, postage pre-paid on:

Seth T. Pruden
Supreme Court Disciplinary Commission
30 South Meridian Street, Suite 850
Indianapolis, IN 46204

David E. Schalk
Attorney Number 15551-53

David E. Schalk
Attorney at Law
1706 South Olive Street
Bloomington, IN 47401

812-336-9093
812-360-1655 (cell)
812-336-9970 (fax)

schalk@schalk.net