BEFORE THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF

DAVID E. SCHALK **CAUSE NO. 53S00·1104·DI·244**
Attorney No. 15551·53

DISCIPLINARY COMMISSION'S RESPONSE AND BRIEF REGARDING SANCTIONS

Comes now the Disciplinary Commission, by staff attorney Seth T. Pruden, and submits the Commission's Response to the respondent's "Response to Hearing Officer's Findings, Conclusions and Recommendation;" and "Respondent's Brief.

I.
Introduction

1. The hearing officer submitted his "Findings of Fact, Conclusions of Law and Recommendation," on or about September 27, 2012 (hereinafter referred to as "Hearing Officer's Findings.")

2. For purposes of this response it is assumed that the respondent's "Response to Hearing Officer's Findings, Conclusions and Recommendation" (hereinafter "Response to Findings") is a "Petition for Review" pursuant to Admis.Disc. R. 23 § 15.

II.
Hearing Officer's Factual Findings As To Criminal Conduct

The hearing officer correctly found and concluded that the respondent engaged in a criminal act that in turn violated Rule 8.4(b) and Rule 8.4(d) of the Rules of Professional Conduct as alleged in the Verified Complaint. There is no dispute that the respondent was

convicted of attempted possession of marijuana and that the conviction was affirmed on appeal. (Ex. 3) The respondent contends that he did not violate the law, despite the conviction and appeal, and therefore did not violate Rules 8.4(b) and (d) of the Rules of Professional Conduct.

Collateral Estoppel

Although a lawyer may be subject to discipline for engaging in a criminal act irrespective of any criminal charges or conviction, a conviction serves as conclusive proof of the facts of the crime. See In re Scott, 98 Ill 2d 9, 16,455 N.E.2d 81, 83 (Federal conviction conclusive proof of facts); In re Frick, 694 S.W.2d 473, 477-78 (Mo. 1985) (Attorney in discipline case stopped from challenging underlying facts of prior criminal conviction); In re Lowell, 88 A.D.2d 128, 462 N.&S.2d 621 (1982) (Court in discipline case rejected proffered evidence casting doubt on respondent's guilt).

Issue preclusion, or collateral estoppel, is a doctrine in which a party is precluded from relitigation of the same fact or issue that was necessarily adjudicated in a former legal proceeding and that same fact or issue was presented in a subsequent case. National Wine & Spirits, et al, v. Ernst & Young, LLP, 976 N.E.2d 699, (Ind. 2012), citing Hayworth v. Schilli Leasing, Inc. 669 N.E.2d 165, 167 (Ind. 1996). This rule applies even if the second adjudication is on a different claim. National Wine and Spirits, Id., at 704.

The Indiana Supreme Court has not expressly held that a conviction conclusively proves the underlying facts of the criminal conduct in a discipline case, but it has implicitly done so. There are numerous examples of attorney discipline cases in which the underlying misconduct supporting a conclusion that the lawyer engaged in criminal acts in violation of Rule 8.4(b) of the Rules of Professional Conduct. See Matter of Transki, 620 N.E.2d 16 (Ind. 1993)

(Respondent was convicted of tax evasion and the conviction served as prove of the violation of Rule 8.4(b) of the Rules of Professional Conduct.) In re Garvin, 894 N.E.2d 981(Ind.2008) (Respondent convicted of operating a vehicle while intoxicated with previous conviction.) Matter of Colman, 691N.E.2d1219 (Ind. 1998) (Respondent convicted of tax evasion); In re Hurst, 871N.E.2d968 (Ind. 2007) (Respondent convicted of battery); Matter of Gariepy, 775 N.E.2d 1091 (Ind. 2002) (Respondent convicted of filing false tax returns. In that case the Court said: "We fmd that by his conviction ... the respondent violated Prof.Cond.R. 8.4(b) ... "); Matter of Headlee, 756 N.E.2d 969 (Ind. 2002) (Respondent convicted of possession of cocaine). Respondent Admitted the Acts \Vhich Constitute the Crime

Notwithstanding the application of collateral estoppel, the respondent in this case has admitted the material facts proving his criminal conduct. In his Brief in support of his Response to Findings the respondent stated:

> I freely admitted that on June 25,2007, I met with persons to discuss the purchase of marijuana, provided funds for the purchase of marijuana, and provided an audio recorder to record the purchase of marijuana in Monroe County, IN." (Brief of Respondent, p. 6)

The respondent admitted throughout this proceeding that he represented Chad Pemberton in Pemberton's criminal drug case. He admitted that he was contacted by Lisa Edwards about her buying drugs from Brandon Hyde, the informant in the Pemberton case. He admitted that he set up a meeting at Arby's with Edwards and that she and two others came to the meeting, one of which was a juvenile. He admitted that he gave $200 to Edwards or the others for the purchase of the marijuana and also gave someone in the group a tape recorder to record the transaction. The respondent admitted that he gave instructions to Edwards about what to do with the marijuana. In short, he admitted that he assisted others with the purchase of marijuana.

The respondent's assertion of innocence is not a dispute of facts. Rather, his assertion is that the law prohibiting the purchase of marijuana was not intended to be applied under the circumstances related to this case. His assertion has already been rejected by the Indiana Court of Appeals and his petition to transfer was denied. Thus, the matter is closed. Even if the matter was not dosed, the respondent has presented no authority in support of his claim that because he was seeking evidence or trying to remove drugs from the "stream of commerce," it was lawful for him to try to obtain marijuana and he had no reasonable basis that such a position was correct.

III.
Hearing Officer's Findings as to Aggravating Circumstances

The hearing officer correctly determined there were aggravating factors. Those factors are set forth below, along with a discussion of each:

- The solicitation of others in committing his criminal act. (Finding No. 70)
- No acceptance of the wrongfulness or unlawfulness of his conduct. (Finding No. 71)
- Making false statements or statements with reckless disregard of the truth as to the integrity of Judge Kellams and the Court of Appeals. (Finding No. 72)
- Claims that his criminal prosecution was based upon vindictiveness. (Finding No. 73)
- Engaging in conduct during the disciplinary hearing intended to interfere with the discovery process, including, but not limited to trying to get a witness to be uncooperative as to the location of the deposition, and offering to represent him for that purpose (Finding No. 74)
- Lack oflnsight. (Finding No. 75)

Solicitation of Others

The respondent engaged the services of Lisa Edwards and two other persons, one who is a juvenile, to assist him to gather evidence by buying pot from a drug dealer. The respondent

makes much of the fact that it was Lisa Edwards who came to him with the idea to buy pot from Brandon Hyde, the informant in the Pemberton case. It is immaterial who came up with the original idea. The fact is, the respondent decided to participate in Edwards' plan, gave her the money to buy the pot, gave her a recorder, and gave her and the others instructions. The respondent said and did nothing to dissuade Edwards or the others from their illegal act. [1]

As the Commission pointed out in its brief to the hearing officer, this is not a case where the client just wanted to get a little pot to smoke. This is a case where the respondent engaged the services of several strangers, one a juvenile, with the respondent's money, to purchase drugs from a known drug dealer in order to set that drug dealer up to discredit him in a pending case. The hearing officer correctly found the use of the juvenile, the commission of a crime to gather evidence, and the potential danger the respond=v ıı ıı ıt. them in as aggravating factors.

Does Not Appreciate Wrongfulness of Conduct

The hearing officer correctly concluded that the respondent did not understand the wrongfulness of his actions in committing a crime to gather evidence in a criminal case. He still doesn't:

> I have to say that I acted reasonably and in good faith with no way of anticipating that I would be arbitrarily convicted of a misdemeanor and that het conviction would be affirmed in a published Opinion that makes no sense at all. (Respondent's Brief, p. 3)

> I am convinced more than ever that my case was wrongly decided. To some extent at least, the opinion even proclaims a police state in Indiana. (Brief of Respondent, p. 11)

The respondent believes he should be praised for his good work.

[1] The respondent apparently believes that his participation in Edwards' plan to buy illegal drugs made her acts lawful.

> Of course, the thing that would do the most to rehabilitate my much maligned reputation would bean Order finding no misconduct on my part, and praising me from my dedication to Chad Pemberton ... (Brief of Respondent, p. 15)

Reckless Statements as to Integrity of Judicial Officers

The hearing officer correctly found that the respondent had made reckless and unfounded statements concerning the integrity of Judge Kellams and the judges of the Court of Appeals. Remarkably, the hearing officer's findings on this point have had no deterrent effect on the respondent. **i**11 his Response to Hearing Officer's Findings he made the following statements regarding the integrity of Judge Trockman and the Commission staff attorney:

•One naturally tends to assume that counsel for the Disciplinary Commission knew about the false allegations and phony references in the document he filed .... How could he have possibly imagined that he might get away with it. .. " (Response to Findings, p. 1)

<Saying that page "20" of the transcript says what is alleged in finding "5" demonstrates a reckless disregard for the truth (or worse) on the part of the Disciplinary Commission attorney who wrote it; and it illustrates the negligence of the hearing officer who rubber stamped the hearing officer's proposed findings ... (Response to Findings, p. 5]

• I have to wonder if counsel for the Disciplinary Commission thinks the best way for him to win approval for his work on this case is to fiercely defend the Court of Appeals and attack me for saying ... (Response to Findings, p. 21)

- The unfounded and untrue statement, 'Respondent first gave the tape recorder to the juvenile, but it was too large for him to conceal' serves a purpose in the hearing officer's attack on me ... (Response to Findings, p. 9)

- That shows a lack of understanding on the part of counsel for the Disciplinary Commission, but it is his deviousness, and his recklessness in brazenly causing false information to this honorable court in an effort to deprive me of the ability to nourish educated (sic) and provide a decent home from my eleven-year-old son that I find appalling. Yes, it was the hearing officer that signed the Findings, etc., but he is just a rubber stamp for the Disciplinary Commission ... (Response to Findings, p. 10)

- He [referring to the hearing officer's findings] doesn't cite the record or any authority for the proposition that drug dealing 'is a dangerous activity at any level.' Maybe he didn't make that one up; maybe he got that from watching gangster movies and police dramas on TV. It might surprise him to learn that some very gentle people are involved in the distribution of psilocybin mushrooms, LSD, marijuana and even cocaine and heroin ... ' (Response to Findings, pp. 11-12).

- [Referring to Hearing Officer Finding No. 74 the respondent writes:] This irrational diatribe, coming from someone who has proven himself to be deceptive and without compassion or insight, is disgraceful in my opinion. (Response to Findings, p. 42)

- [Referring to the hearing officer's recommendation] I have addressed this nonsense elsewhere in this document and the Brief of Respondent. The Disciplinary Commission, the Indiana Supreme Court, and the people of Indiana deserve better than they have gotten in this case from Mr. Seth Pruden and Hon. Wayne S. Trockman. [Emphasis added] (Response to Findings, p. 44).

Claims of Vindictiveness

The respondent made numerous statements in this proceeding and in his criminal case implying that those associated with his conviction and appeal was motivated by some sort of vindictiveness to punish him for working hard for criminal defendants. In his Brief now before the Court, the respondent continues that claim, despite the hearing officer's finding that making such an unfounded claim was an aggravating factor:

> And I am here asking the Court to say something to encourage and embolden criminal defense attorneys throughout the state of Indiana to work harder on behalf of their clients, free from fear of arbitrary retribution. (Brief of Respondent, p. 2)[2]

> I think the State's attacking me for doing for my client what the State did to his detriment reflects badly on our profession. (Brief of Respondent, p. 2)

[2] There was no evidence presented supporting the respondent's claims of retribution. The respondent simply does accept the fact that making an unlawful drug buy and putting others in danger is not justified by his desire to win the client's case.

Interfering with Witness/ Conflict

The hearing officer correctly concluded that the respondent's offer to represent Sheriff Kennedy, a witness in this discipline case, in order to change the venue of a deposition was an aggravating factor. The offer to represent a witness in a case in which the respondent was a party reinforces the fact that the respondent has difficulty recognizing conflicts of interest, as he did in the Pemberton case.[3] The respondent apparently did not and still does not see any problem in intentionally becoming a witness in the same case in which he was representing a party. When Judge Kellams disqualified the respondent from representing Chad Pemberton, due to the obvious conflict, the respondent did not acknowledge the conflict. Instead, he attacked the integrity of Judge Kellams.

Lack of Insight

The finding that the respondent lacks insight is, in a sense, another way of expressing that he does not appreciate or cannot understand why his actions, both the criminal conduct and the attacks on judges and others, is wrong or improper. Simply stated, the respondent believes what he believes and will not change his views regardless of how many courts have rejected them and, as his pattern proves, will continue to attack those who dare to disagree with him. The respondent believes that the persons who have brought actions against him (criminal or in this discipline case) must be motivated by some personal desire to harm him. He cannot understand that the persons are simply charged with enforcement of the rules assigned to them. The

[3] Judge Kellams disqualified the respondent from representing Pemberton as a result of the respondent's arrest after the respondent tried to "set up" Brandon Hyde, a witness in the Pemberton case. The respondent's actions in attempting to buy pot from Hyde not only made him a witness in the Pemberton case, but also created adverse legal interests with that of his own client.

respondent believes and has expressed that the judicial officers who have ruled against him are also motivated by personal reasons and have abdicated their professional integrity.

The Indiana Supreme Court has found in several cases that such lack of insight, especially when it results in personal attacks against judicial officers, is a very serious aggravating factor. This point is discussed further in the following section.

IV.
Sanction

The Indiana Supreme Court is the final arbiter of the facts, conclusions and sanction. Matter of Brooks, 694 N.E.2d 724 (Ind. 1998); Matter of Kerr, 640 N.E.2d 1056 (Ind. 1994). There are four broad factors to consider in imposing sanctions in an attorney discipline case. They are:

(a) the duty (duties) violated;

(b) the lawyer's mental state;

(c) the potential or actual harm caused by the lawyer's misconduct;

(d) the existence of aggravating or mitigating circumstances.

See Matter of Sniadecki, 924 N.E.2d 109 (Ind. 2010); Section 3.0, ABA Standards for Imposing Lawyer Sanctions ("ABA Standards")

A. Nature of Duty

As an officer of the court, the respondent is entrusted with "the duty of upholding the integrity of the legal system and the laws of this state." Matter of Klagiss, 635 N.E.2d 163 (Ind. 1994). Attempted possession of marijuana, on the surface, is a relatively minor act. However, as pointed out by the hearing officer, this is not a case of a lawyer wanting to buy a little pot to smoke. This is a case where a lawyer, in representing a client in a very serious drug case sought

to gather evidence by engaging in a criminal act (ironically, similar to the crime for which his client was charged). In addition, he did not engage in this conduct alone. He had others involved in the actual drug transaction and provided the funds for it.

The defense, 'I had a reasonable belief that it was lawful' or 'if the police do it, 1 can to,' demonstrates a lack of insight that is quite profound regarding the role of defense attorneys in our system. The attempt by the respondent to create evidence in a criminal case, by engaging in a "set up" of the state's witness seems wrong on many levels, but is particularly egregious when the "set up" is also a criminal act. Such illegitimate conduct, which seems proper only to the respondent, undermines the legal process and, unfortunately, diminishes the already low esteem lawyers are held in our society."

B. Mental State

As the hearing officer determined, the respondent's state of mind while he engaged in the criminal conduct had two parts. The first is the respondent's motive in his actions. There is no doubt that it is laudable to try and find lawful means to defend a client. (H.O. Recommendation, p. 43) The "goodness" of the motive, however, does not justify the means or methods, especially when such methods involve the commission of crimes. It is extremely disconcerting that the respondent lack insight regarding this point. (H.O. Recommendation, p. 43)

There is another aspect as to the respondent's state of mind that should be considered, regarding both the criminal conduct and the aggravating factors. All of the actions of the respondent have been deliberate and purposeful, not sudden or impulsive. In the criminal case, when Edwards contacted him about buying drugs he scheduled a meeting to be held at Arby's at

[4] Whether our police should engage in "undercover" drug buys in order to find and convict drug dealers is not an issue in this discipline case.

a later time. He brought money with him to fund the sale. He took the time to write down the serial numbers of the bills he gave to Lisa Edwards. He procured a tape recorder. He considered a plan to retrieve the pot.

As for the statements concerning the lack of integrity of Judge Kellams, the Court of Appeals, Judge Trockman and others, they have all been made in written submissions to a tribunal. The respondent therefore had time to deliberate on those statements, to think about whether to make such statements, and to restrain such intemperate statements. Thus, they were made with reflection and deliberation and not made as an "excited utterance" or off the cuff remark.

C. Potential Harm

In our present case, the respondent committed a criminal act, which by defmition is conduct that is deemed harmful by our legislature. However, he also had others assist him with his crime. One of those "others" was a juvenile. Despite the respondent's odd and immaterial assertion that many drug dealers are gentle souls, the hearing officer correctly determined that there was real potential for harm by encouraging or helping others to make a drug deal with a known drug dealer.f The potential danger to Lisa Edwards and the others was not only that they faced the possibility of physical harm had the drug dealer known he had been set up, but they could have been arrested and charged for buying pot, just as the respondent was. The belief of the respondent that his actions were lawful would create no immunity to an arrest or prosecution to Lisa Edwards or the others.

s The point is not that some drug dealers are dangerous and some aren't. The point is the respondent had no way of knowing how this particular drug deal would end. It is only good fortune that Edwards and the others were not harmed or arrested.

There is also actual harm to the public when a lawyer encourages others to commit a crime when he had the opportunity to discourage it. Getting the marijuana out of the "stream of commerce" is not a lawful justification for paying strangers (and a juvenile) to buy such drugs in Indiana, regardless of the motive.

D. Aggravating and Mitigating Circumstances Found by the Hearing Officer

The aggravating factors were discussed above.

Recommended Sanction is Insufficient

As the Commission views it, the facts of this case necessitate a suspension for a period of greater than 180 days, without automatic reinstatement for two reasons.

First, the crime was committed by the respondent to gather evidence in a case. The commission of a crime by a lawyer to gather evidence is antithetical to the duties of lawyers, even defense lawyers who are zealous advocates for their client. It is not reasonable for a lawyer to believe that drug deals made by civilians are alright so long as the motive is to use the drug transaction as evidence. It is not reasonable for a lawyer to believe that the legislature intended to grant some sort of immunity or exception to defense lawyers for the commission of drug crimes, even if such immunity is implied for police who are investigating such crimes.

Second, the respondent's lack of insight into his misconduct, and his repeated and unrelenting attacks on judicial officers and his expressions of disdain for the discipline process create immeasurable harm to the perception of the public about the legal process and our profession.

In the discipline cases described below, such conduct has been found to be substantial aggravating circumstances.

In re Winkler, 834 N.E.2d 85, 90 (Ind. 2005).

In Winkler, the Court said:

> In this regard, the most troubling aspect of this case is [Respondent's] insistence, even in the proceedings before the hearing officer, that she had done nothing wrong ... It is this lack of insight that lead us to conclude that a significant sanction is necessary to ensure that the seriousness of her misconduct is impressed upon her.

In re Patterson, 888 N.E.2d 752, 755 (fud. 2008):

> In Patterson, the Court said: The Court notes that most of the misconduct occurred in 2000 and Respondent has apparently avoided ethical lapses in the intervening years. We give this little weight in mitigation, however, because Respondent to this date still denies his most serious misconduct and thus has shown no insight into why it happened or how to prevent a recurrence.

In re Rocchio, 943 N.E.2d 797 (fud. 2011)

In Rocchio, the lawyer had violated our advertising rules, a relatively minor offense. However, substantial aggravating circumstances existed wherein the respondent expressed his displeasure at the process. Some of his expressions included personal attacks and founded claims against the hearing officer and the Commission staff attorney, including, but not limited to:

> 'It must be stated, at the risk of offending others that anyone who has not suffered a full frontal cranial lobotomy knows that the words published on a Michigan lawyer's law office ...
>
> This rather bizarre and foolish disciplinary process regarding my alleged attorney misconduct long ago moved away from the focus upon misdeeds described in the Verified Complaint ...
>
> . .. My experience with the Indiana attorney discipline system is hideous aberration of justice; a Disciplinary Commission and staff attorney with a self-image of pompous arrogance; a hearing officer who permits herself to be used as a rubber stamp ... '

In Rocchio, the respondent received a suspension of 180 days, without automatic reinstatement.

The respondent's attacks on the hearing officer and disciplinary process in our present case are very similar to those of the respondent in Rocchio. For example our respondent in this case has also referred to the hearing officer as a "rubber stamp," and made the following statement:

> Parts of the hearing in my case were reminiscent of the Grand Inquisition, the blasphemy this time being to criticize the Indiana Court of Appeals. (Brief of Respondent, p. 2)

Although the respondent's conduct in this case is similar to that of the respondent in Rocchio, there are some significant factors which necessitate a higher sanction in this case. Rocchio started with relatively minor advertising violations, but our present case began with the commission of a crime for the purpose of gathering evidence in a case, which, in the Commission's view, is a very serious violation of lawyer ethics. In addition, this case includes repeated attacks on judicial officers outside the discipline case. In addition, this case includes the respondent's conduct of seeking to interfere with the discovery process by his offer to represent a witness in this discipline case, as well as the lack of insight into the consequences of becoming a witness in the Pemberton criminal case.

For all of the reasons stated above, the appropriate sanction in this case is a suspension for no less than two (2) years, without automatic reinstatement.

V.

Improper Submission of Statements and or Information Not in the Record

In his Response to Findings, the respondent has made factual assertions, references to conversations with others and references to documents that were never offered or made part of the record, including, but not limited to the following:

- Alleged conversations with a Detective Forston, Detective Forston's "sworn testimony" in another case, the respondent's discussion of his actions pertaining to the private sting operation in which he referenced testimony in his own criminal trial. Note that the transcript of the respondent's criminal trial was not an exhibit in this discipline case, yet the respondent cited to that transcript repeatedly. (Response to Findings, pp.3-64)

- Statements pertaining to plea agreements in the Chad Pemberton case, good time credit, the parole board and other irrelevant information about Pemberton's prison time not offered in this discipline case (Response to Findings, p. 6)

- Statements made by or about "Cody Forster" and references to a hearing that took place in another case that was not offered as evidence in this case (Response to Findings, p. 7)

- Statements made by a Lisa Edwards regarding the drug use of Brandon Hyde and references to the trial transcript of the respondent's criminal case, which, again, was not offered as evidence in this case. (Response to Findings, p. 11)

- Reference to "testimony at my trial" regarding the conduct of the juvenile. (Response to Findings, p. 12)

- Comments about the "drug dealers I have encountered in my profession are mostly people who crave drugs ... " which is not evidence presented at the hearing in this case (Response to Findings, p. 13)

- The statement about Chad Pemberton knowing nothing about the private sting operation and statements about playing the recording at a deposition. (Response to Findings, p. 15)

- Statement about how respondent has heard people to refer to Judge Najam (Response to Findings, p. 25)

- Statements allegedly made by Commission staff to the respondent. (Response to Findings, p. 37)

- Statements regarding how the public views the respondent (Response to Findings, p. 38)

Because the above information was not presented at the hearing in this matter, there has not been a determination regarding the relevance, materiality, or truthfulness of such statements, nor was there an opportunity to challenge the information by the Commission through cross-examination or other means. A primary purpose of having evidentiary hearings in discipline cases is to establish a safeguard that the information ultimately presented to the Court for its review has been thoroughly determined to be relevant, material, truthful, and so forth. See *Matter of Coale*, 775 N.E.2d 1079, 1082 (Ind. 2002).[6] We submit that the *de novo* review by the Supreme Court in discipline cases is a review of the record, not a proceeding to create a new one.

There is real danger in permitting unsubstantiated statements to be submitted after the record is closed because of the risk that the consideration of such information could result in an erroneous result and would obviously defeat the purpose of the hearing. Such a danger exists whether the submission of material was done inadvertently or intentionally.[7] The Court should issue an order in this case specifically addressing the respondent's improper submissions. Such an order might also act as a deterrent to those who would use the not-so-rare tactic of waiting until the hearing officer rules to submit additional unchallenged "evidence."

Respe:~

Seth T. Pruden
Staff Attorney

[6] The beauty of our "adversarial" system is that the whole story is told, not just selected parts.
[7] As a courtesy, the Commission made a request to the respondent that he withdraw references to information not found in the hearing record. The Commission has received no reply to the request as of the date of filing this response.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Disciplinary Commission's Response to 'Respondent to Hearing Officer's Findings, Conclusions and Recommendation"' was served by depositing it into the U.S. Mail. postage prepaid. this~~ay of ~~.....- , 2013, upon:

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