



## Alerts

### Attorney Who Engaged in Criminal Conduct to Exonerate Client Not Immune as a "Law Enforcement Officer"

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*Lawyers for the Profession® Alert*

*Schalk v. State of Indiana*, \_\_\_ N.E.2d \_\_\_, No. 53A01-1005-CR-210 (Ind. Ct. App. Feb. 28, 2011)

#### Brief Summary

A criminal defense attorney was convicted for attempted possession of marijuana. He claimed that he had engaged in the subject conduct for the sole purpose of impeaching a confidential informant who was to testify against his client. An Indiana appellate court affirmed the conviction, rejecting the argument that the lawyer was acting in the defense of his client and that what he did was no different than other law enforcement officers, including prosecutors.

#### Complete Summary

While defending a client for dealing in methamphetamine, a criminal defense attorney learned the identity of the state's witness, a confidential informant. The lawyer asked two of his client's friends to purchase \$200 worth of marijuana from the informant to impeach him. The friends purchased \$50 of marijuana, spent the remaining \$150, and smoked the "evidentiary" marijuana. When the attorney tried to turn the evidence in to law enforcement, thereby implicating the informant, he was himself charged with conspiracy to possess marijuana. The lawyer was subsequently convicted on a lesser charge of attempted possession of marijuana.

The attorney's main argument centered on his position as a criminal defense lawyer and the assertion that he held the same status as any other law enforcement officer, thereby immunizing him from criminal responsibility for actions done to further justice. The attorney claimed that his only intent was to arrange an illegal drug buy and deliver marijuana either to law enforcement or to the trial court, for use in defending his client at trial.

The court analyzed the statutory definition of "law enforcement officer" in the immunity statute and concluded that it did not immunize criminal defense attorneys from prosecution for attempted possession of marijuana. Furthermore, the court was not persuaded that Indiana's "citizen's arrest" statute authorized an illegal drug buy for purpose of collecting exculpatory evidence, particularly when the lawyer did not actually perform a citizen's arrest. Finally, the court rejected the attorney's argument that his client was entitled to

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a full and robust legal representation under the Bill of Rights. The court held that the Sixth Amendment does not authorize attorneys to engage in criminal activity, even if purely to defend a client.

### **Significance of Opinion**

This case stands for the proposition that a criminal defense attorney does not have the same immunity from prosecution as a law enforcement officer for the purpose of conducting an illegal drug buy in an effort to discredit a witness against his client. More broadly, it illustrates and reinforces that a lawyer generally cannot resort to illegal activities to justify a positive result for a client.

For more information, please contact your regular [Hinshaw](#) attorney.

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