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Atty Advice Relevant In Securities Fraud Cases: Colo. Panel

By **Daniel Ducassi**

Law360 (September 21, 2023, 6:56 PM EDT) -- A lawyer's advice to a defendant in a securities fraud prosecution about the legality of business conduct is relevant to whether such a defendant had the necessary state of mind to back up a conviction, a Colorado appellate panel ruled Thursday, reversing or vacating all 28 of a businessman's fraud convictions.

In the published opinion Thursday, the panel concluded that Kelly James Schnorenberg should have been able to testify about what his lawyer told him that led him to believe that he was in the clear when he secured more than \$15 million in investments for his companies. According to the opinion, he solicited those investments without disclosing the significant debt the companies had, that he had previous bankruptcy or that he had been banned for life from selling securities in the state, among other things.

Schnorenberg had argued at trial that the loan agreements, which the opinion said entitled lenders to an interest in one of his companies if the money was not paid back in time, were not securities. But he also argued that he relied on the advice of his securities lawyer that what he was doing was legal, and that he did not have to disclose certain information about himself or his companies. The lawyer was out of the country during the trial, and the trial court rejected a request to delay proceedings so he could testify.

In the opinion Thursday, the appellate panel found that the trial court was wrong to bar Schnorenberg from testifying about what advice the lawyer gave him, and that it built on that error by refusing to instruct the jury that relying on advice of counsel is relevant to whether he had intent. Beyond that, the court agreed with Schnorenberg that seven of his convictions were for charges that were brought after the statute of limitations, an issue the state did not dispute.

"The trial court erred by preventing Schnorenberg from testifying about the advice his securities lawyer had provided him because this testimony might have been highly probative of whether Schnorenberg had the requisite mental state to commit securities fraud," Judge Daniel Taubman wrote on behalf of the panel.

If Schnorenberg had been able to testify about what his attorney had told him, his testimony might have made all the difference in jurors' minds, the opinion said. The opinion pointed out that the trial court prevented Schnorenberg from testifying about what his lawyer told him about whether he needed to disclose his bankruptcy and securities ban to investors on the basis that the questions called for hearsay. And the trial court refused to relay to Schnorenberg a question from the jury about what advice his lawyer had given him.

"Though no Colorado case has addressed whether advice of counsel regarding the materiality of a misstatement or omission is relevant to determining if a defendant had the requisite mental state to commit securities fraud, we conclude that it is," Judge Taubman wrote. "If a defendant can demonstrate that the defendant's lawyer told the defendant that certain information would not be material, this would tend to show the defendant lacked awareness that the information was material to investors."

Further, the panel agreed with Schnorenberg that testimony about what exactly the lawyer had said would not be hearsay because it would not have concerned its veracity, but rather what effect it had on his beliefs about the situation.

The panel rejected the state's argument that the testimony would have been prejudicial, concluding that issue could have been handled by instructing jurors that the testimony was not about getting at the truth of the matter, an instruction Schnorenberg had sought, and by the opportunity prosecutors had to cross-examine him.

The opinion **echoed the skepticism** of the state's position that appellate judges on the panel expressed in July during oral arguments in the case.

"How can a defendant present advice of counsel if that defendant is not permitted to tell the jury what the attorney said?" Judge Lino S. Lipinsky de Orlov asked an attorney representing the state in July. "Isn't that the heart of advice of counsel?"

Schnorenberg's attorney, Lynn C. Hartfield of the Law Office of Lynn C. Hartfield LLC, welcomed the decision Thursday.

"I think the court made the right decision," Hartfield told Law360. "It was a clear denial of the right to present a defense, and we look forward to Mr. Schnorenberg being released."

The Office of the Colorado Attorney General declined to comment.

Judges Lino S. Lipinsky de Orlov, Daniel Taubman and Timothy J. Schutz sat on the panel for the Colorado Court of Appeals.

Schnorenberg is represented by Lynn C. Hartfield of the Law Office of Lynn C. Hartfield LLC.

The state is represented by Brittany Limes Zehner and Philip J. Weiser of the Office of the Colorado Attorney General.

The case is The People of the State of Colorado v. Kelly James Schnorenberg, case number 2019CA223 in the Colorado Court of Appeals.

--Editing by Peter Rozovsky.