

penitent privilege found at 735 ILCS 5/8-803¹ which relieves any reporting requirement and the Illinois law otherwise requiring mandated reporting of sexual misconduct.

When that conflict of law arose, Michael Penkava sought the legal advice of legal counsel with Jehovah's Witnesses at their national headquarters in New York state.

Michael Penkava was told by a licensed attorney he had no legal obligations under the Illinois law to disclose any information. Michael Penkava is prepared to waive his attorney-client privilege at the upcoming bench trial as to his conversations with New York counsel and seeks an advance ruling that he may testify to what he was told regarding what if any legal obligation he had to report information to law enforcement.

This testimony is reasonable and relevant to an affirmative defense of advice of counsel. Illinois statutory law provides:

Sec. 4-8. Ignorance or mistake.

(a) **A person's ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) above, is a defense if it negatives the existence of the mental state** which the statute prescribes with respect to an element of the offense.

(b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(1) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge

¹ Sec. 8-803. Clergy. A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline **enjoined by the rules or practices of such religious body or of the religion which he or she professes**, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor. (Source: P.A. 82-280.) (Emphasis ours.)

by the exercise of due diligence pursuant to facts known to him; or

(2) he acts in reliance upon a statute which later is determined to be invalid; or

(3) he acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed; or

(4) he acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.

(c) Although a person's ignorance or mistake of fact or law, or reasonable belief, described in this Section 4-8 is a defense to the offense charged, he may be convicted of an included offense of which he would be guilty if the fact or law were as he believed it to be.

(d) A defense based upon this Section 4-8 is an affirmative defense. (Source: P.A. 98-463, eff. 8-16-13.) (720 ILCS 5/4-8) (from Ch. 38, par. 4-8) (Emphasis ours.)

The instant offense with which Michael Penakava is charged punishes, “Any person who knowingly and willfully violates any provision of this Section...” (325 ILCS 5/4(m). [Also of interest is the fact the same statute provides, “A member of the clergy may claim the privilege under Section 8-803 of the Code of Civil Procedure.” 325 ILCS 5/45/4(g)]. “Knowingly” and “willfully” are also defined at 720 ILCS 5/4-3.²

² (720 ILCS 5/4-5) (from Ch. 38, par. 4-5)

Sec. 4-5. Knowledge. A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

(b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct.

Even if the New York lawyer's advice was wrong, a person's mistake as to a matter of law can form the basis of a defense if it negates the mental state element of the offense charged. The fact that negation of mental intent is applicable even where the legal advice was erroneous was addressed in *People v. Abdul-Mutakabbir*, 295 Ill.App.3d 558 (1st Dist. 1998) where the defendant was charged with eight counts of unauthorized practice of law. The defense theory was that although he was aware that the Illinois Supreme Court had entered an order suspending him from the practice of law prior to the alleged offenses, he believed that the filing of his petition to stay the order of suspension and the mandate stayed the suspension.

In reversing his conviction, the Appellate Court noted the defendant was wrong in his belief that the filing of his petition stayed the effect of the order suspending him from the practice of law and went on to address the effect that the defendant's mistaken belief had upon his mental state at the time of the offenses. The Appellate Court ruled:

A person's mistake as to a matter of law can form the basis of a defense if it negates the mental state element of the offense charged. *People v. Sevilla*, 132 Ill.2d 113, 125, 138 Ill.Dec. 148, 547 N.E.2d 117 (1989); see also 720 ILCS 5/4-8(a) (West 1996). In this case, our focus is on the question of whether the defendant knew that he was not authorized to practice law at the time he made the representations alleged in the complaint. "Knowledge generally refers to an awareness of the existence of facts which make an individual's conduct unlawful." *Sevilla*, 132 Ill.2d at 126, 138 Ill.Dec. 148, 547 N.E.2d 117.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the term "wilfully", unless the statute clearly requires another meaning.

When the law provides that acting knowingly suffices to establish an element of an offense, that element also is established if a person acts intentionally.
(Source: P.A. 96-710, eff. 1-1-10.)

Section 4-5 of the Code which defines knowledge states, in pertinent part, that:

“A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.” 720 ILCS 5/4-5(a) (West 1996).

Had the jury been properly instructed on the mental state necessary for the commission of an offense under section 32-5 of the Code and accepted the defendant's testimony that he believed that the filing of his petition on December 14, 1993, stayed the mandate on the order suspending him from the practice of law, they could have found that the State failed to prove that the defendant knew that he was not authorized to practice law on January 7, 1994, the date upon which count I of the complaint charged that he violated the statute. *People v. Abdul-Mutakabbir*, 295 Ill.App.3d 558, 565 (1st Dist. 1998). (Emphasis ours).

Similarly, any legal advice received by Michael Penkava, correct or incorrect, should be presented to this Court as the fact-finder as it has bearing on whether he knowingly and willfully violated Illinois law regarding mandated reporting. [See also *United States ex rel. Sheet Metal Workers International Ass'n, Local Union 20 v. Horning Investments, LLC*, 828 F.3d 587 (7th Cir. 2016) : "In some situations, reliance on the advice of a professional, such as an attorney or an accountant, "can negate the mental state required for some crimes." *United States v. Roti* , 484 F.3d 934, 935 (7th Cir. 2007) ; see also *United States v. Boyle* , 469 U.S. 241, 250, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (recognizing that a taxpayer who "relie[s] on the erroneous advice" of counsel, an accountant, or a tax adviser, may have "reasonable cause" for failing to

file a return); *United States v. Urfer* , 287 F.3d 663, 665–66 (7th Cir. 2002) (“the fact that he was acting on the advice of counsel ... bears on whether he knew that he was violating the statute”). A defendant may not rely on this type of advice, however, unless she establishes that (1) before taking action (2) she “in good faith sought the advice of [the professional] whom [she] considered competent,” (3) about the lawfulness of her future conduct, (4) she made a “full and accurate report” of all relevant facts to the professional, and (5) she acted in strict accordance with the advice. *United States v. Cheek* , 3 F.3d 1057, 1061 (7th Cir. 1993) (on remand from Supreme Court, internal quotation marks omitted) (quoting *Liss v. United States* , 915 F.2d 287, 291 (7th Cir. 1990)). *United States ex rel. Sheet Metal Workers International Ass'n, Local Union 20 v. Horning Investments, LLC*, 828 F.3d 587, 594-95 (7th Cir. 2016)].

Motion in Liminie #2 – Testimony of New York Counsel via Zoom

To corroborate the testimony of Michael Penkava as to what he was told, the defense wishes to have the New York attorney with whom he spoke testify at this bench trial. Due to the risks inherent in traveling during the pandemic, the defense wishes to have the New York lawyer testify via Zoom. The defense will arrange to have an appropriate New York official in the room with the New York lawyer to simultaneously administer an oath prior to the lawyer testifying.

Testimony from Mr. Penkava and the New York lawyer would be limited in scope to the topic of discussing what if any mandatory reporting requirements Mr. Penkava needed to follow on the Arturo Hernandez-Pedraza matter and related issues.

Conclusion

For the reasons stated herein, the defendant prays for an Order granting this Motion in Liminie #1 and #2 and for such other relief as this Court deems just and appropriate.

Respectfully Submitted,

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