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MEMORANDUM

TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In re Price

Good Afternoon Ms. Uliana,

Attached below is an analysis as to 1) whether Mark Price (Mr. Price) violated Rule 4.2 in his dealings with Darryl Howe on October 3 and November 18 and 2) whether Mr. Price can rely on Columbia Rule of Professional Conduct 5.2.

I. Whether Mr. Price violated Rule 4.2 in his dealings with Mr. Howe on October 3 and November 18.

A prosecutor violates Rule 4.2 of the Columbia Rules of Professional Conduct, also known as the "no-contact" rule, by communicating, post-indictment, with a defendant known to be represented by counsel, without counsel's consent. Nelson. Comment [8] further clarifies that Rule 4.2 "is not intended to preclude communications with represented persons in the course of ... legitimate investigative activities as authorized by law." Id.

Depending on the circumstances, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by counsel, without counsel's consent, before the defendant is indicted. Id. Such circumstances include whether the prosecutor knows that the defendant has expressed a willingness to communication, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication. Id.

A. October 3

In Nelson, the Columbia Supreme Court held that a prosecutor is not authorized by law to communicate with a represented defendant who has already been indicted. Unlike our case, the defendant in Nelson communicated with the prosecutor through another attorney. In this case, it was

the defendant, Mr. Howe, who reached out to Mill Brook Police Detective Donna Daichi to talk about the Wilson murder. This fact militates in favor of communication according to the rationale stated in Nelson. Since a prosecutor is authorized by law to listen to voluntary statements made by a defendant to law enforcement, and such voluntary statements militates in favor of communication, Mr. Price did not violate Rule 4.2 on October 3.

B. November 18

On November 18, Mr. Price received a call from Mr. Howe. Although this fact militates in favor of communication, Mr. Price also advised Mr. Howe that his attorney, Deputy Public Defender Gardner, would not be happy to find out that Mr. Howe spoke with Mr. Price. Therefore, Mr. Price violated Rule 4.2 on November 18 since his statement militates against communication since it shows that Mr. Price knows of Ms. Gardner's unwillingness to consent to Mr. Howe speaking with him.

II. Whether Mr. Price can rely on Rule 5.2.

A subordinate lawyer does not violate Rule 4.2 "if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." See Rule 5.2. The comments further clarify that "When lawyers in a supervisor-subordinate relationship encounter a matter involving profession judgment as to the lawyer's responsibilities under these rules and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it ... If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly ..."

Here, Mr. Price consulted with his supervisor Senior Deputy District Attorney, Laila Sayed, with respect to the admissibility of Howe's statements and was informed that the Rule 4.2 permits prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they are conducting an investigation. However, as previously held in Nelson, prosecutors are not authorized by law to communicate with a represented defendant when the defendant has been indicted. In addition, the statements that Ms. Sayed made during her interview further bolster this argument as she explains, "dealing with a defendant who is known to be represented by counsel without counsel's consent is certainly a non-trivial question."

Since Mr. Price's question can reasonably be answered by only one way, the duty of both lawyers is clear and they are both equally liable.

III. Conclusion

Thank you for allowing me to do this research for you. If you need any more assistance on the matter, please do not hesitate to ask.

Respectfully,

Applicant

Question #3 Final Word Count = 731

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