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MEMORANDUM

TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In Re Price

You have asked me to draft a memorandum addressing whether Price violated Rule 4.2 in his dealings with Howe on October 3 and November 18, including whether he could rely on Columbia Rule of Professional Conduct 5.2 to establish he did not violate any rule of Professional Conduct if he acted in accordance with a supervisor's reasonable resolution of an arguable question of Professional Duty.

1. Whether Price violated Rule 4.2 of the Columbia Rules of Professional Conduct

Under Rule 4.2 of Columbia Rules of Professional Conduct, describing communication with a represented person, in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the lawyer. Rule 4.2., comment 1 states that this rule applies even though the represented person initiates or consents to the communication. 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. State v. Nelson. Such circumstances include whether the prosecutor knows that the defendant has expressed a willingness to communicate, 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. State v. Nelson. In all circumstances, however, a prosecutor is prohibited from communicating with a defendant known to be represented by counsel, without counsels consent, after the defendant has been indicted. State v. Nelson. Indictment gives rise to the defendant's Sixth Amendment right to rely upon counsel as a medium between him and the state. State v. Nelson. The defendant's Sixth Amendment would be meaningless if one of its critical components, a lawyer-client relationship characterized by trust and confidence, could be circumvented by a prosecutor under the guise of conducting an investigation. State v. Nelson.

In State v. Nelson, the court held that the prosecutor violated Rule 4.2 because the prosecutor communicated with a defendant known to be represented by counsel, without counsel's consent, post-indictment. In State v. Nelson, the prosecutor met defendant twice in his office including a meeting in which prosecutor sent defendant a proposed plea agreement, these meeting occurred behind the defendant's attorney's knowledge. Even though no Sixth Amendment right was violated in prosecutor speaking with defendant's because defendant was not deprived of his attorney's assistance. In State v. Mann, the court held that a "prosecutor is no less subject to the Columbia Rules of Conduct than any other lawyer."

a. October 3 phone call

Here, unlike in State v. Nelson, when the prosecutor met with the defendant to discuss possible plea agreement, Price did not talk to Howe about possible plea agreements. On the contrary, Howe made several statements to the detective on the line about the Wilson murder voluntarily. Further, the call was initiated by Howe and the detective and Price did not ask any questions, but merely listened and received a report as to what was said. Like in State v. Nelson, however, where the defendant was represented by counsel and the prosecutor knew about it, Price also knew that Howe was represented by counsel, because on August 24, attorney James Gardner was appointed as his Public Defender. Even though Howe expressed a willingness to communicate, Price knew that Attorney Gardner would not consent to the communication between Howe and Price, because on September 6, Gardner told him he would not consent to it unless he was offered immunity. The phone call took place on October 3, after the above mentioned events had taken place, leaving no doubt that Howe was represented by counsel. Additionally, it also means that Howe's Sixth Amendment right to be represented by counsel had attached and thus violated when during the October 3 phone call his counsel was not present.

Thus, Price did violate rule 4.2. on October 3 because he knew Howe was represented by counsel.

b. November 18 phone call

Here, on October 5, Public Defender found out about the October 3 phone call and once again asked the court to not have detective Daichi to speak with Howe. Even after this, request was made by the Public Defender indicating that he would not consent to the communications, on November 18 a call by Howe was directly made to Price on his private office line. Price advised Howe that he did not have to speak and that Public Defender Gardner would not be happy, Price decided to continue the phone call and take notes about all Howe talked about. Again, even though Howe expressed a willingness to communicate, Price knew that he was represented by counsel, that Public Defender Gardner would not consent and therefore should not have kept Howe on the line without Public Defender Gardner's knowledge or presence.

Thus, Price violated rule 4.2 on November 18 because he knew Howe was represented by counsel.

3. Whether Price acted in accordance with a supervisor's reasonable resolution of an arguable question of professional duty, under Columbia Rule of Professional Conduct 5.2

Under Rule 5.2 of Columbia Rules of Professional Conduct, describing responsibilities of a subordinate lawyer, a lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or other person. A subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. Rule 5.2.

Here, even though Price violated Rule 4.2, he states that he acted in accordance to the supervisory lawyer's reasonable resolution of an arguable question of professional duty. Price states he was told by his supervisor on September 26 that under Rule 4.2, prosecutors were permitted to communicate with defendant's known to be represented by counsel without counsel's consent, so long as they are conducting an investigation. The interactions between Howe and Price would indicate that Price was following his supervisor's advice because on both occasions Price merely listened to all Howe was saying, never did he conduct any questioning of Howe. On the other hand, Price's supervising attorney states that she never advised Price on the matter, thus it would be necessary to determine whether supervising attorney Laila Sayed in fact directed Price to proceed as he did to make a determination on whether Price violated rule 4.2 or not.

Thus, unless Supervisor Sayed states she did advise Price as he states, Price will not be able to use rule 5.2 to establish that he did not violate any rule.

For the reasons stated above Price violated Rule 4.2 in his dealings with Howe on October 3 and November 18. Price cannot rely on Columbia Rule of Professional Conduct 5.2 to establish he did not violate any rule of Professional Conduct if he acted in accordance with a supervisor's reasonable resolution of an arguable question of Professional Duty. Please let me know if I can be of further assistance.

Question #3 Final Word Count = 1208

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