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Memorandum

To: Debra Uliana, Chief Deputy District Attorney


From: Applicant


Date: February22, 2022

Re: In re Price

Introduction

Ms. Uliana, you have asked me to prepare a memorandum addressing whether Deputy District Attorney Mark Price (Price) violated Rule 4.2 in his dealings with Howe on October 3rd and November 18th and whether Price could rely on Columbia Rule of professional conduct 5.2.

 **1. Attorney Price did not violate Rule 4.2, the "no contact rule" as it pertains to his dealings with Howe on October 3rd and November 18th.**

 **Rule 4.2** 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 other lawyer.

In **Nelson**, the court stated that a prosecutor may or may not be prohibited from communicating with a defendant known to be represented without counsel's consent before the defendant is indicted. Moreover, it permits communication when the prosecutor knows that the defendant has expressed willingness to communicate.

Here, Howe was expressing his willingness to communicate by reaching out the detective followed by reaching out to Price on his personal phone line. This demonstrates as the court in **Nelson** concluded, Price did not violate rule 4.2 because Price was conducting an investigation and Howe reached out to Price wanting to communicate.

While the **Nelson** court recognizes that a prosecutor may not communicate with a represented defendant after the defendant has been indicted, the prosecutor may do so while conducting

investigation. Howe was not formally indicted until October 5th.

On November 18th Price received a collect call from Howe while Detective Daichi was present. Both listened to Howe and took notes.

Nelson stated that the rule is not intended to preclude communications with a represented person in the course of legitimate investigative activities, authorized by law. The call on November 18th was a legitimate investigative activity.

Further, as noted in **Nelson** an equally important purpose is to protect a person represented by counsel not only from the approaches of his or her adversary's lawyer, but from the folly of his or her own well-meaning initiatives and the generally unfortunate consequences of his or her ignorance.

On September 6th, prior to Howe's release Price told Public Defender Gardner that he would like to speak with Howe about the case. Gardner replied that he would consent only if Price was willing to offer Howe complete immunity, which Price was unwilling to do.

The above is a great example of the point in **Nelson** that it is equally important for a prosecutor to protect a person represented by counsel. Gardner did not consent to communication between Price and Howe before Howe was indicted. Had Price had the opportunity to investigate, maybe immunity would have been possible.

Conclusion



As show above, Attorney Price did not violate rule 4.2 *communication with a represented person* because he was in the midst of conducting an investigation into Howe's case.



Second, the call on October 3rd was prior to his indictment, thus Price was permitted to talk to Howe which was also permitted on November 18th after his indictment, because again his purpose was to conduct a legitimate investigation and Howe expressed his willingness to communicate by contacting the detective and Price himself.

2. Attorney Price can rely on Columbia Rule 5.2 in defense of his action regarding Howe.

Rule 5.2 states that a lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or other person. (b) A subordinate lawyer does not violate these rules if that lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

On September 26th Howe called the Mill Brook Police department, in return the detective contacted Price stating that Howe wanted to discuss his case. Price then reached out to his supervisor Sayed and she advised Price that any statements Howe might volunteer would likely be admissible. And to instruct the detective to listen not to ask questions and report back to Price.

Here, Price relied on his supervisor Sayed for guidance regarding the phone call made by Howe. Price then communicated the directions to the detective which were followed. Because had no experience in his career with a defendant calling in this manner, he was unaware of what to do. Sayed advised of him of the above. Moreover, as stated in the comment to rule 5.2. "If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternative to select, and the subordinate may be guided accordingly..."



Thus, according to **rule 5.2** Price as a subordinate lawyer *does not violate these rules if that lawyer acts in accordance with the supervisory lawyer's resolution of an arguable question of professional duty.*

Concurrently, Price recalls discussing rule 4.2 with Sayed and was advised that rule 4.2 permitted prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they are conducting an investigation.

Here, Price again consulted and followed instruction with his supervisor regarding his communication with Howe.

Conclusion

Thus, Price can rely on Columbia Rule 5.2 because he was following the direction of his supervisor, Howe was communicating with Price of his own free will during the course of Price conducting an investigation.

Conclusion

Thank you for asking me to conduct this research for you today. Please let me know if I can be of additional assistance.

S./Applicant

Question #3 Final Word Count = 941

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