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TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In re Price

In accordance with your instructions, I have drafted a proposed policy regarding the application of Columbia Rules of Professional Conduct 4.2, which is commonly referred to as the "no-contact rule," prohibiting a lawyer from communicating with a person known to be represented by another lawyer without the other lawyer's consent. The following draft policy evaluates when a Prosecutor and can be found liable under Rule 4.2. As the evaluation has shown below, Deputy Price will not found liable under the communication with Howe on October 3, 2021, but could be liable under the communication with Howe on November 18, 2021 under Rule 4.2 and for violating the defendant's Sixth Amendment right for counsel after the defendant is indicted.

A. Communication with Howe on October 3, 2021

On October 3, 2021, Defendant Howe had not yet been indicted yet. This is because Deputy Price moved Judge Gorence to

release Howe on his own recognizance pending further investigation of the case. Then, Deputy Price told Howe's counsel that he would like to speak with Howe about the case for the purpose of further investigation.

Next, on September 26, Howe called the office of Mill Brook Police Detective Donna Daichi and left her a voicemail message saying he wanted to talk to her about the murder case of which he was arraigned. When Deputy Price got the message from Donna, he consulted with Senior Deputy District Attorney Laila Sayed who advised Price that she should listen, but not ask any questions, and then report what he he said to the Senior Deputy.

Under Columbia Rules of Professional Conduct Rule 5.2 - Responsibilities of a Subordinate Lawyer - Section (b) provides, "A subordinate lawyer does not violates these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. Thus, it is the responsibility of a supervisory lawyer to have such knowledge regarding the implication under Rule 5.2.

In *State v. Nelson*, the Columbia Supreme Court affirmed the trial court below in dismissing a criminal indictment in exercising its supervisory power. The Court cited *State v. Mann*, an earlier decision, that it is true that depending on the circumstances, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by

counsel before the defendant is indicted. Such include whether the prosecutor know defense counsel expressed a willingness to communicate.

In this case, Deputy Price did in fact after the arraignment to ask counsel whether he can communicate with Howe to further conduct investigation. Counsel expressed willingness, but the proffer in exchange of the bargain was rejected by Deputy Price.

Nevertheless, Rule 4.2 does not prohibit a prosecutor from communicating with a defendant known to be represented by counsel without consent if the prosecutor is conducting an investigation. This is the case here because prior to or on October 3, 2021, Howe had not been formally indicted yet. Deputy Price had the opportunity to conduct further investigation prior to the preliminary hearing.

Furthermore, Comment 8 to Rule 4.2 which states that "the rule is not intended to preclude communications with represented persons in the course of ...legitimate investigative activities as authorized by Law. (Nelson). The court then read the comment to mean that a prosecutor is not prohibited from communicating with a represented defendant if and to the extent that the prosecutor is authorized by law to do so.

Based on the reasonings enunciated in Nelson and the comment 8 under Rule 4.2, Deputy Price had the legitimate reason to communicate with Howe since he had not been

formally indicted which entitled him to conduct further investigation.

B. Communication with Howe on November 18

Defendant Howe was indicted on October 19, 2021 by the grand jury for the murder of Wilson. In this situation, Rule 4.2 will be applicable since Howe has been indicted. On November 18, 2021, Deputy Price received a telephone collect call from Howe from jail and he accepted the call. Deputy Price alerted Detective Diachi to listen in on the conversation. Although Deputy Price advised Howe that defense counsel would not be happy if he talk to him, Howe nevertheless proceeded to talk about the Wilson murder for about 20 minutes while Price and Daichi listened in and took notes.

When asked whether Deputy Price had discussed the November 18 communication with Howe with his Supervisor Laila, Deputy Price responded that it probably the same as before, that Rule 4.2 permitted prosecutor conducting an investigation to communicate with defendants known to be represented by counsel without consent. Here, it is the problem because under Columbia Rules of Professional Conduct, Section (a), "A lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or other person."

In addition, it is well established that a prosecutor is prohibited from communicating with a defendant known to be represented by counsel without his consent, after the defendant has been indicted. Indictment gives rise to a defendant a Sixth Amendment right to reply upon counsel as a medium between him and the state. The defendant's Sixth Amendment right 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. (Nelson.)

Therefore, Deputy Price has violated the Rule 4.2 "no contact clause" and the defendant 6th Amendment right.

CONCLUSION

In sum, Deputy Price has not violated Rule 4.2 on his communication with Howe on October 3, 2021 because no formal charge had occurred and the prosecution is entitled to further investigation. However, Deputy Price has violated Rule 4.2 on his communication with Howe on November 18, 2021 because defendant was already indicted on October 19, 2021. More importantly, the Prosecution Office should advise their Deputies to strictly adhere to the Columbia Rules of Professional Conduct, most importantly the Supervising Deputies and to instruct correctly to their respective subordinate in order to avoid future violation under Rule 4.2 and

worse getting prosecuted for prosecution misconduct by
violating a defendant's Sixth Amendment right to fair counsel.

Question #3 Final Word Count = 1054

END OF EXAM