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**Office of the District Attorney**

**County of Dixon**

**600 Gordon Avenue**

**Mill Brook, Columbia**

**MEMORANDUM**

TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In re Price

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Thank you for allowing me to prepare a memorandum in order to assist your efforts to draft a proposed policy to assist deputy district attorneys in avoiding violation of Columbia Rule of Professional Conduct ("CRPC") 4.2. Per your instructions, I will first address whether Deputy District Attorney ("DDA") Mark Price violated CRPC 4.2 in his dealings with Darryl Howe on the dates of October 3, 2021 and November 18, 2021. Additionally, I will provide my legal opinion as to whether Mr. Price can rely on CRPC 5.2, which states that a lawyer does not violate any rule of professional conduct if the lawyer acts in accordance with a supervisor's reasonable resolution of an arguable question of professional duty. Please find my analysis below:

**1. Whether Deputy District Attorney Mark Price violated CRPC 4.2 on October 3, 2021**

The first question we need to address is whether DDA Price violated CRPC 4.2 on October 3, 2021. CRPC 4.2(a) states that ". . . 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

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lawyer in the matter, unless the lawyer has the consent of the other lawyer. In Howe's matter, on September 6, DDA Price moved to release Howe on his own recognizance pending further investigation of the case. Prior to Howe's release, DDA Price told Deputy Public Defender ("DPD") Gardner that he wanted to speak with Howe about the case. DPD Gardner responded that he would only consent if DDA Price was willing to offer Howe complete immunity, which he could not. Therefore, this illustrates that DDA Price did not have consent to speak with Howe.

CRPC 4.2(c) states that "[t]his rule shall not prohibit: (1) communications with a public official, board, committee, or body; or (2) communications otherwise authorized by law or a court order. In the matter of Howe, Howe was the one who initiated the call on October 3, 2021 to Detective Daichi of the Mill Brook Police Department and wanted to speak to the Detective Daichi about the Wilson murder. Because the Mill Brook Police Department would be considered a public body, it allows an exception to CRPC 4.2. Additionally, the CRPC 4.2(c) allows for communications otherwise authorized by law. It was not against the law for Howe to call Detective Daichi. Therefore, it seems as if Howe's call to the police department did not violate CRPC 4.2.

Comment [1] for CRPC 4.2 states that "[1] this rule applies even though the represented person initiates or consents to the communication." In the Howe matter before us, he initiated the call on October 3, 2021 to Detective Daichi. However, Comment [1] provides that even with an initiation and consent by the represented person to discuss matters, it is still a violation of CRPC 4.2. Therefore, under Comment [1], there would still be a violation of CRPC 4.2.

Furthermore, Comment [3] for CRPC 4.2 states that "[3] the prohibition against communicating "indirectly" with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator, or the lawyer's client." In Howe's case, he did initiate the phone call to Detective Daichi, but Detective Daichi immediately called DDA Price after to tell him about the message. After consulting with his supervisor, Senior DDA Laila Sayed, Sayed instructed DDA Price that any statements Howe might volunteer would likely be admissible. She also advised DDA Price at that time to instruct Detective Daichi that, if Howe were to call her, she should listen but not ask any questions, and then report what Howe said to DDA Price. This would be considered under CRPC 4.2, Comment [3], to be an "indirect" communication with a person represented by counsel. Although DDA Price did not willingly do this, and followed the instructions of a supervisor, he may still be liable under Comment [3]

Comment [8] for CRPC 4.2 states that "[8] . . . The law recognizes that prosecutors and other government lawyers are authorize to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by

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relevant federal and state constitutions, statutes, rules, and case law. Further, the rule continues by stating, "[t]he rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities authorized by law. Here, however, in Howe's case, the instructions to Detective Daichi were likely not in violation of Comment [8], because the instructions to listen, not say anything, and report back would be considered to be legitimate investigative activities. This is because Mr. Howe was released on his own recognizance on September 6, 2021 while pending further investigation of the case. Therefore, Comment [8] serves as an exception that allows DDA Price to use Detective Daichi for legitimate investigative purposes only, and contact Howe.

However, the Supreme Court of Columbia states the contrary. The court in *State v. Nelson* (Columbia Supreme Ct., 2015) stated that their interpretation of Comment [8] is 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 (Nelson)*. They continue by stating that in Columbia, however, a prosecutor is *not* authorized by law to communicate with a represented defendant where the defendant has been indicted. Here, Howe was already arraigned and charged, but was released on his own recognizance. This is after the charges were brought against him, so the court in *Nelson* would likely consider the call of October 3, 2021 to be a violation of CRPC 4.2

## **2. Whether Deputy District Attorney Mark Price violated CRPC 4.2 on November 18, 2021**

The next question we need to address is whether DDA Price violated CRPC 4.2 on November 18, 2021. "The prosecution is no less subject to the Columbia Rules of Professional Conduct than any other lawyer." *State v. Mann* (Columbia Supreme Ct., 1976). Here, on November 18, 2021, while Detective Daichi was in DDA Price's office, DDA Price received a collect call from Howe from jail on his private phone line. The facts indicate that DDA Price did not give out his phone number. DDA Price then accepted the call and Detective Daichi listened in on the other phone line. Although DDA Price informed Howe that he did not have to speak with him, and that DPD Gardner would not approve, he continued to listen to Howe proceed to talk to him about the murder. Therefore, DDA Price may very well be liable for violation of CRPC 4.2 for the phone call on November 18, because this was to him directly and prosecutors are not exempt from this rule.

Furthermore, the Court further states in *Nelson* that "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 (Nelson)*. the court continues by stating that such circumstances include whether the

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prosecutor knows that the defendant has expressed a willingness to communicate . . . and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would mitigate in favor of communication (*Nelson*). As stated previously, DDA Price was aware that Howe was represented by Gardner, and chose to extend the phone call and listen to Howe. Because this was post-arraignment, and after the charges have been brought, DDA likely committed a violation of the CRPC 4.2 on the November 18, 2021 phone call.

The court continues by stating that in all circumstances, a prosecutor is prohibited from communicating with a defendant known to be represented by counsel, without counsel's consent, *after the defendant has been indicted* (*Nelson*). 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. Here, Howe's Sixth Amendment right has likely been violated because DDA Price communicated with Howe *after* being arraigned and after charges had been brought against him for murder.

Lastly, the court in *Nelson* states that while one purpose of CRPC 4.2 is to prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person, an equally important interest is to protect a person represented by counsel . . . from the folly of his or her own well-meaning initiatives and the generally unfortunate consequences of his or her own ignorance (*Nelson*). As such, the court is essentially saying that it is against the rules both to *speak* to someone represented by counsel, but also to actively *listen*. DDA Price would likely contend that he did not *speak* directly with Howe about the murder, he did *listen*. Although we do not have facts to the sophistication of Mr. Howe, it is presumed that this is still a violation of Howe's Sixth Amendment Right to Counsel.

### **3. Whether Deputy District Attorney Mark Price can rely on CRPC 5.2**

CRPC 5.2 (a) states that "a lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or person. Here, DDA Price could contend that he was under the direction of Senior DDA Sayed. DDA Price contends that Senior DDA Sayed advised him to instruct Detective Daichi to listen but not say anything, and then report back to DDA Price. Therefore, if this is true, DDA Price may be able to rely on CRPC 5.2 in avoiding a violation of the CRPC with the State Bar of Columbia.

Further, CRPC 5.2(b) states that 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. Unlike DDA Price's story, Senior DDA Sayed contends that she never instructed him those directions with Detective Daichi. Senior DDA Sayed stated that she must refer any non-trivial professional conduct questions to Senior DDA Lamar Lewis, the

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Compliance Officer. Therefore, it would be a factual determination that would require further investigation before making a determination whether DDA Sayed gave these instructions to DDA Price or not, and also whether or not she consulted with Senior DDA Lewis, as she's supposed to in accordance with Columbia policies. Therefore, it will be a question of fact for the State Bar of Columbia to determine.

Moreover, the *Comment* section of CRPC 5.2 states that "when lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules and the question can be reasonably answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it." However, the *Comment* section further states that "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 . . ." This means that if DDA Price's matter can be interpreted in more than one way, which it appears it can be, that the supervisory lawyer (Senior DDA Sayed) *may* take responsibility on behalf of them both. However, from reading the transcript of your interview with Senior DDA Sayed, it appears she may elect not to take responsibility, as she denies it happened. Therefore, DDA Price would be responsible for violating CRPC 5.2.

Thank you again for the opportunity to provide you with this analysis, and I sincerely hope it helped. If you have any questions, comments, or concerns, please feel free to reach me by phone or email.

Best Regards,

Applicant

Question #3 Final Word Count = 2011

**END OF EXAM**