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**MEMORANDUM**

**To:** Debra Uliana, Chief Deputy District Attorney

**From:** Applicant

**Date:** February 22, 2022

**RE:** In re Price

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I have read the enclosed file regarding Rules 4.2, 5.2, and *Nelson* with respect to the matter concerning Deputy District Attorney Price. To facilitate your policy objective, I have prepared the following analysis of the matter with recommendations regarding the same. The matter turns specifically on whether Howe's Sixth Amendment right to counsel had attached at the time of the communications, and whether under the circumstances, a question of law existed with respect to the law. Under the current precedent, a lawyer is "not authorized by law to communicate with a represented defendant who has been indicted." *Nelson*. If the defendant has not yet been indicted, there are circumstances where a defendant known to be represented may be contacted by prosecutors. However, here, Howe had been arraigned by October 3 and was formally charged for his crimes after a preliminary hearing on October 5.

October 3 and November 18 Conduct:

If Howe was not indicted on October 3, Price's conduct may be proper.

Rule 4.2 explicitly 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 lawyer in the matter unless the lawyer has the consent of the other lawyer. Comment [8] to Rule 4.2 states that the law recognizes that prosecutors and other government lawyers are authorized to contact represented persons ... in the context of investigative activities. The

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comment continues to state that the rule is not intended to preclude communication with represented persons in the course of such legitimate investigative activities. However, the court in *Nelson* makes it clear that the comment [8] to the rule is meant that a prosecutor is not prohibited from communicating with a represented defendant to the extent the law allows, but the law does not allow communication with indicted individuals. Therefore, if Howe was indicted prior to October 3, the act of speaking with him at all without his counsel's consent is prohibited. However, since Howe was merely arraigned and not yet charged with the crime before him, it could be argued that the detective could speak with Howe.

However, the way in which the detective gained the information is questionable. Price had an officer contact Howe with the express direction that he not ask questions of Howe, but instead, that he listen to what Howe had to say. At the time, Howe had been trying to get in touch with the detective. The court held that such circumstances include, "whether the prosecutor knows that the defendant has expressed a willingness to communicate ... and whether the prosecutor knows that counsel has expressed an unwillingness to consent." However, it was made clear in *Nelson*, that the "silence" tactic was an impermissible tactic used to gain advantage over an "unsophisticated lay person." Therefore, the tactic itself, irrespective of 4.2 is reprehensible, and questionable.

By November 18, the defendant had been properly indicted and held to answer at the preliminary hearing. At that time, his Sixth Amendment rights had attached, and it was impermissible under the Rule 4.2 according to *Nelson* to accept communication from Howe regardless of whether Howe consented, or showed a willingness to communicate. If, at that time, there was a genuine question as to the law, Price should have contacted his supervisor to approach the question as to what the law actually meant. Of course, from the transcript, it does not appear that had happened at all. If it had, the compliance officer would have been notified. This should be the standard policy, as the compliance officer is able to accept responsibility for the subordinates conduct under rule 5.2. However, it should be noted that reliance on 5.2 does not actually permit a subordinate attorney to violate the law simply because there is a colorable question of law, it only shifts the responsibility of the consequences to the supervisor by the plain meaning of the text.

All told, a policy should be in place respecting Rule 4.2 as it relates to the defendant's Sixth Amendment Rights. If there is a question, the attorney may ask the supervisor, but they are not permitted to actually act in contrast to the law itself, and the supervisor takes responsibility.

Question #3 Final Word Count = 733

**END OF EXAM**