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TO: Debra Uliana

FROM: Applicant

DATE: February 22, 2022

RE: In re Price

Introduction

You have asked me to prepare a memorandum regarding whether Deputy District Attorney Mark Price violated Rule 4.2 in his dealings with defendant Darryl Howe on October 3 and November 18 and whether he could rely on Rule 5.2 for safe harbor. While it does seem that Rule 4.2, specifically the comments, allow for a more broad interpretation, *Nelson* is very narrow in its approach. While the *Nelson* court acknowledges that there may be allowances as provided in the comments of Rule 4.2 pre-indictment, after indictment there is no such room and the rule is clear: an attorney is prohibited from communicating with a defendant known to be represented by counsel, without the counsel's consent. Prior to a reading on *Nelson* an argument could potentially be made about shielding behind Rule 5.2, but the *Nelson* court is very clear that 5.2 cannot help an offending attorney after indictment.

Discussion

Rule 4.2

A close reading of 4.2 as it exists now is necessary to help deputy district attorneys in the future in regards to violations of this rule. Rule 4.2 clearly states that "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, unless the lawyer has consent of the other lawyer." Comment 1 says that the rule "applies even though the represented person initiates or consents to the communication."

On September 26, Howe called Daichi and said that he wanted to talk about the murder. Daichi is, as you know, a detective. Daichi immediately told Howe about the message. Price seems to sense that something is not right here and he asks his supervisor for guidance. He states that his supervisor said that this type of arrangement between Daichi, himself and Howe was proper. Sayed disputes this. On these facts, Howe could argue that this communication was proper because Howe initiated the communication. He could also argue that he was not on this date in actual communication with Howe and that it was

actually Daichi that was communicating with him. This would likely fail under the prong of Comment 3 that attempts to clarify that even when the defendant is speaking to an investigator and relaying it to the attorney this could be improper. The November 18th call fails here also per Comment 1.

Rule 5.2

Rule 5.2 effectively allows an attorney to shield under a supervising attorney where the lawyers "acts in accordance with a supervisory lawyers reasonable resolution of an arguable question of professional duty."

Here, we are told by Price that he consulted with Sayed and she said that the communications with Howe were proper. Under a reading of this rule it seems that there is potential for Price to shield under 5.2. There is still the trouble of figuring out whose story between Sayed and Price should be accepted as true.

It is therefore likely that Price would be able to initially shield himself from any finding of wrongdoing if Sayed did in fact state that the conduct was proper.

Nelson

Nelson is an important case for a few different reasons. As stated above, the most important aspect of this case is the distinction between pre-indictment and post-indictment communications. According to the Court, it is understandable that there may be arguments for or against communication with represented clients under Rule 4.2 but states that these discussions must cease post-indictment. According to the Court, indictment gives rise to a violation of the defendant's Sixth Amendment Right to Counsel. It states that this right would be rendered "meaningless" if the lawyer-client relationship could be circumvented by a prosecutor under the guise of conducting an investigation.

Here, there were communications pre-indictment on October 3 (as a result of the September 26th call) and post-indictment on November 18. While the Court could potentially allow for a reading of 4.2 that would permit the arrangement that Price had with Daichi wherein she communicated the contents of her call with him, the Court would firmly denounce any attempts to communicate with Howe post-indictment. It is important to note that the Court also makes a the point to dismiss any argument that a prosecutor is not an attorney within the context of Rule 4.2.

Thus, while *Nelson* may allow for the Oct. 3 communication, it would certainly not agree with any post-indictment communication such as on November 18.

Conclusion

It seems likely that any further policy adopted to help deputy district attorneys abide by Rule 4.2 will need to closely examine *Nelson*, specifically the post-indictment distinction.

Question #3 Final Word Count = 796

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