# California Bar Examination

## Performance Test and Selected Answers

## February 2022

The State Bar of California

OFFICE OF ADMISSIONS

# PERFORMANCE TEST AND SELECTED ANSWERS

## FEBRUARY 2022

### CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2022 California Bar Examination and two selected answers.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

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# California Bar Examination

# Performance Test

# INSTRUCTIONS AND FILE

# IN RE PRICE

# PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

3. You will have two separate sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with the instructions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

**Office of the District Attorney**

**County of Dixon**

**600 Gordon Avenue**

**Mill Brook, Columbia**

MEMORANDUM

TO: Applicant

FROM: Debra Uliana, Chief Deputy District Attorney

DATE: February 22, 2022

RE: In re Price

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Last December, the Superior Court dismissed an indictment charging Darryl Howe with murder. It concluded that Deputy District Attorney Mark Price committed prosecutorial misconduct. It found that Price's dealings with Howe on October 3 and November 18, 2021, without the consent of Howe's counsel, violated Howe's privilege against compelled self-incrimination and his right to the assistance of counsel under the Fifth and Sixth Amendments. In dismissing the indictment, the court stated that it had initially considered, but ultimately decided against, referring the matter to the State Bar to investigate whether, in his dealings with Howe on those dates, Price violated Columbia Rule of Professional Conduct 4.2. Rule 4.2, which is commonly referred to as the "no-contact rule," prohibits a lawyer from communicating with a person known to be represented by another lawyer without the other lawyer's consent.

District Attorney Hector Santiago has asked me to draft a proposed policy to assist deputy district attorneys in avoiding violation of Rule 4.2. As a first step, I have interviewed Price and have also interviewed Price's supervisor, Senior Deputy District Attorney Laila Sayed.

Before I begin drafting a proposed policy, I want to know whether, in fact, Price violated Rule 4.2 in his dealings with Howe on October 3 and November 18. To that end, please

prepare a memorandum addressing whether Price violated Rule 4.2 in his dealings with Howe on each date, including whether he could rely on Columbia Rule of Professional Conduct 5.2. Rule 5.2 provides 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. Do not include a separate statement of facts in your memorandum, but be sure to use the facts in your analysis.

# TRANSCRIPT OF INTERVIEW OF MARK PRICE

**February 15, 2022**

DEBRA ULIANA: Mark, thanks for sitting for an interview about the *Howe* case.

MARK PRICE: Of course, Debra. We wouldn't have to be going through this exercise if I hadn't botched the case.

ULIANA: Unfortunately, you're not the first deputy to get an indictment dismissed. I'm meeting with you because, in dismissing the indictment, Judge Gorence said she had initially considered referring the matter to the State Bar to investigate whether you violated Rule 4.2, but ultimately decided not to because this was your "first offense" in a long career. I'm meeting with you as a first step in drafting a proposed policy to assist deputy district attorneys in avoiding violation of Rule 4.2.

PRICE: I understand. I'm sorry I've put you and the office in this position.

ULIANA: That's okay. Let's get on with it. I see you've brought the chronology of events I asked you to prepare. Why don't you summarize what happened? I'll ask questions as I need to.

PRICE: Fine. Here we go.

As you know, on August 22, 2021, Billy Wilson was shot and killed in an apartment house here in Mill Brook. Within hours, Darryl Howe was arrested for Wilson's murder. Howe admitted being at the scene of the murder, but claimed he didn't do it.

On August 24, Howe was arraigned in the Superior Court before Judge Gorence. I appeared for the State; Deputy Public Defender James Gardner was appointed to

represent Howe; and Howe was ordered held without bond until a preliminary hearing could be held.

On September 6, I moved Judge Gorence to release Howe on his own recognizance pending further investigation of the case. Prior to Howe's release, I told Deputy Public Defender Gardner that I would like to speak with Howe about the case. He said he would consent only if I was willing to offer Howe complete immunity, which of course I was not.

On September 26, Howe called the office of Mill Brook Police Detective Donna Daichi from his home and left a voicemail message saying he wanted to talk to her about the Wilson murder. Detective Daichi immediately told me about the message. I had had no personal experience with a defendant who contacted the police to talk about his own case. I consulted with Senior Deputy District Attorney Laila Sayed, who as you know is my supervisor as the Chief of the Felony Section. She advised me that any statements Howe might volunteer would likely be admissible. She also advised me to instruct Detective Daichi that, if Howe were to call her, she should listen but not ask any questions, and then report what he said to me. I gave those instructions to Detective Daichi.

ULIANA: Mark, did you have any discussion with Laila about Rule 4.2?

PRICE: Yes. I don't remember whether I raised the issue or whether Laila did. But I'm sure she told me 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.

ULIANA: Okay. Did Howe call Detective Daichi after September 26?

PRICE: Yes, he called her from his home on October 3. He made several statements to her about the Wilson murder. As I had instructed her, she listened but did not ask any questions, and reported to me what he said.

ULIANA: And then?

PRICE: And then, on October 5, Judge Gorence conducted a preliminary hearing, found probable cause to charge Howe with the Wilson murder, and remanded him to custody and ordered him held without bond. At the preliminary hearing, Deputy Public Defender Gardner learned of the events of October 3 and asked Judge Gorence to order Detective Daichi not to speak with Howe. Judge Gorence declined to do so, but observed that Gardner would undoubtedly instruct Howe that such dealings were not in his best interest.

On October 19, the grand jury handed up the indictment charging Howe with the Wilson murder.

Then, about a month later, on November 18, while Detective Daichi was in my office working with me on the Wilson murder case, I received a collect call from Howe from the jail on my private line. I accepted the call. I hadn't given Howe my number; he must have gotten it from Daichi. At my request, Daichi listened in on an extension. Although I advised Howe that he did not have to speak with me and that Deputy Public Defender Gardner would not be happy if he did, he nevertheless proceeded to talk about the Wilson murder for about 20 minutes while Daichi and I listened and took notes.

ULIANA: Any further discussion with Laila about Rule 4.2 around November 18?

PRICE: Probably the same as before, that Rule 4.2 permitted prosecutors conducting an investigation to communicate with defendants known to be represented by counsel without counsel's consent.

ULIANA: And then?

PRICE: Finally, as you know, on December 8, Judge Gorence held a hearing at the request of Deputy Public Defender Gardner. By this time, Gardner had learned of the events of November 18. Gardner moved to dismiss the indictment for what he claimed

was prosecutorial misconduct. Unfortunately, Judge Gorence granted the motion. And the rest is history.

ULIANA: Yes, Mark. Sad to say, it is. You've given me a good introduction. If I need to follow up, I'll let you know.

PRICE: Fine. Again, I'm sorry about all of this.

ULIANA: I understand. We've all got to be more careful in the future.

# TRANSCRIPT OF INTERVIEW OF LAILA SAYED

**February 18, 2022**

DEBRA ULIANA: Laila, thanks for coming for an interview about the *Howe* case.

LAILA SAYED: No problem.

ULIANA: You've had a chance to review any materials you might believe are relevant?

SAYED: Yes, but I must add that there were few such materials. In the Felony Section, we don't have much time to commit anything to paper.

ULIANA: I understand. Let me cut to the chase and ask about your discussions with Mark Price about the *Howe* case.

SAYED: Ready when you are.

ULIANA: Do you recall Mark consulting you, on September 26 of last year, after Howe had contacted Mill Brook Police Detective Donna Daichi and had made statements to her about the Wilson murder?

SAYED: Yes. Although I can't swear that we spoke on September 26, I remember we spoke about Howe's statements to Detective Daichi.

ULIANA: Do you recall Mark telling you something to the effect that he had had no personal experience with a defendant who contacted the police to discuss his own case?

SAYED: Yes.

ULIANA: Do you recall speaking with Mark about the admissibility of any statements Howe might make to Detective Daichi?

SAYED: Yes. I probably told him that any statements Howe might volunteer would likely be admissible.

ULIANA: Do you recall speaking with Mark about Detective Daichi's interactions with Howe?

SAYED: Yes. I probably told Mark to tell Detective Daichi to listen to Howe if he contacted her again, but not to ask him any questions, and to report to Mark what Howe said.

ULIANA: Why?

SAYED: To make sure any statements would be admissible.

ULIANA: Do you recall speaking with Mark about Rule 4.2, the no-contact rule?

SAYED: No.

ULIANA: You don't recall telling him that the no-contact rule or 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?

SAYED: No.

ULIANA: Are you sure?

SAYED: Yes, I'm sure.

ULIANA: Why?

SAYED: Debra, you know that we have to refer any non-trivial question about professional conduct to Senior Deputy District Attorney Lamar Lewis, the Compliance Officer. And dealing with a defendant who is known to be represented by counsel without counsel's consent is certainly a non-trivial question. Had Mark raised any question about the no-contact rule with me, I would have referred it to Lamar. I didn't refer it to Lamar. That means that Mark didn't raise it with me.

ULIANA: Let's proceed to November 18. Do you recall Mark consulting you around that date, for a second time, about Howe and his statements to Mark as well as Detective Daichi?

SAYED: No. After speaking with Mark in September about Howe and his statements to Detective Daichi, I did not speak with him about the matter again, at least not before Judge Gorence dismissed the indictment. After Judge Gorence dismissed the indictment, as I believe you know, I had a long and unpleasant "discussion" with Mark about the matter.

ULIANA: Yes, I know about the "discussion." But you're sure you don't recall a second consultation on or around November 18?

SAYED: I'm sure. In my 20 years in the office, I've never heard of a defendant contacting a deputy district attorney. Had Mark told me that Howe had contacted him, I would have immediately referred the matter to Lamar Lewis. And I would certainly have remembered it.

ULIANA: Well, Laila, you've answered the questions I have now. If more occur to me, I'll let you know. Thanks.

SAYED: You're welcome.

# February 2022

# California Bar Examination

# Performance Test

# LIBRARY

# IN RE PRICE

LIBRARY

# SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

## Rule 4.2. Communication with a Represented Person

(a) 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 in the matter, unless the lawyer has the consent of the other lawyer.

. . . . .

(c) This 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.

. . . . .

*Comment*

[1] This rule applies even though the represented person initiates or consents to the communication. . . .

. . . . .

[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.

. . . . .

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person that would otherwise be subject to this rule. The law recognizes that prosecutors

and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. The rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.

. . . . .

* * * * *

**Rule 5.2. Responsibilities of a Subordinate Lawyer**

(a) 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 a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

*Comment*

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 reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). 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. . . .

# State v. Nelson

## Columbia Supreme Court (2015)

We granted review in this case to address the question whether a prosecutor violates Rule 4.2 of the Columbia Rules of Professional Conduct, which is commonly referred to as the no-contact rule, by communicating, post-indictment, with a defendant known to be represented by counsel, without counsel's consent. The answer, as will appear, is yes.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

James Nelson and Philip Brooks were indicted for conspiracy to distribute cocaine in the Superior Court of the County of Pleasanton. Nelson retained attorney Barry Tarlow to represent him, and Brooks retained attorney James Young.

While awaiting trial, Nelson was detained with Brooks at the Pleasanton County Jail. Tarlow informed Nelson that he believed that he and Brooks had a viable entrapment defense and that, in any case, it was his general policy not to negotiate a plea agreement with the State at this stage in the proceedings.

Young had agreed with Tarlow to coordinate a joint investigation. In so doing, Young often spoke to both Nelson and Brooks by telephone and in person during visits to Pleasanton.

One day, Nelson and Brooks telephoned Young and expressed an interest in negotiating a plea agreement. Without informing Tarlow, Young twice traveled to Pleasanton in order to discuss negotiating a plea agreement with Nelson and Brooks. Nelson asked Brooks and Young not to reveal their discussions to Tarlow because he feared that, if Tarlow learned that he was involved in negotiating a plea

agreement, Tarlow would withdraw as his counsel and thereby deprive him of his services in the event the case were to go to trial.

Young contacted Deputy District Attorney Joan Lyons, who was prosecuting the case against Nelson and Brooks, on behalf of both men. Subsequently, along with Brooks and Young, Nelson met with Lyons twice in her office. Following the second meeting, Lyons sent Young a proposed plea agreement for Nelson and Brooks. After talking with Young, Nelson and Brooks rejected the proposal.

Not long thereafter, Tarlow discovered what had transpired and filed a motion to dismiss the indictment. Tarlow alleged that Lyons violated the Sixth Amendment, which granted Nelson the right to Tarlow's assistance, and also violated Columbia Rule of Professional Conduct 4.2, which prohibited her from communicating with Nelson without Tarlow's consent. After a hearing, the Superior Court concluded that Lyons did not violate the Sixth Amendment, since Nelson was not deprived of Tarlow's assistance. But it also concluded that she did indeed violate Rule 4.2. In the exercise of its supervisory powers, it dismissed the indictment against Nelson.

The State appealed from the dismissal. The Court of Appeal, however, affirmed. The State petitioned for review. We granted review, and now affirm the Court of Appeal's affirmance.

DISCUSSION

The State does not dispute that, *if* Lyons violated Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory power. The State claims only that Lyons did not violate Rule 4.2.

In support, the State argues that Rule 4.2 was not intended to apply to a

prosecutor. It is too late in the day to present such an argument. Years ago, we held that a "prosecutor is no less subject to the Columbia Rules of Professional Conduct than any other lawyer." *State v. Mann* (Columbia Supreme Ct., 1976). 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, without counsel's consent, *before the defendant is indicted*. Such circumstances include whether the prosecutor knows that the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication. But it is also true 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*. Indictment gives rise to a defendant's Sixth Amendment right to rely 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.

The State then argues that Rule 4.2 does not prohibit a prosecutor from communicating with a defendant known to be represented by counsel, without counsel's consent, *if the prosecutor is conducting an investigation*. The State relies on Comment [8] to Rule 4.2, which states that "[t]he rule is not intended to preclude communications with represented persons in the course of … legitimate investigative activities as authorized by law." We read Comment [8] 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*. In Columbia, however, a prosecutor is *not* authorized by law to communicate with a represented defendant where, as here, the defendant has been indicted.

Finally, the State next argues that, even if Rule 4.2 prohibits a prosecutor

from communicating with a defendant known to be represented by counsel without counsel's consent, it prohibits a prosecutor only from *speaking* and not from *listening*. While certainly one purpose of Rule 4.2 is to prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person, 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.

CONCLUSION

Because Lyons did indeed violate Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory powers.

And because the Superior Court properly dismissed the indictment against Nelson, the judgment of the Court of Appeal affirming the dismissal must be, and hereby is,

AFFIRMED.

# PT: SELECTED ANSWER 1

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

**FROM: Applicant**

**RE: In Re Price**

As you requested, below is a memorandum addressing whether Price violated Columbia Rule of Professional Conduct 4.2 ("Rule 4.2") in his dealings with Howe on October 3 and November 18, 2021, including whether he could rely on Columbia Rule of Professional Conduct 5.2 ("Rule 5.2") as an exception in each instance.

## I. THE OCTOBER 3 DEALING LIKELY DOES NOT CONSTITUTE A BREACH OF RULE 4.2 UNDER THE TOTALITY OF THE CIRCUMSTANCES.

### A. Price's October 3 Dealing with Howe Constitutes a Prima Facie Violation of Rule 4.2 Because He Used an Agent to Listen in On a Conversation with Howe.

Rule 4.2, referred to as the "no-contact" rule, provides that "a lawyer shall not communicate directly or indirectly . . . 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." Rule 4.2(a). The Columbia Supreme Court, whose interpretation of Rule 4.2 is binding on Columbia courts, has held that a prosecutor is subject to Rule 4.2. *State v. Nelson*, Columbia Supreme Court (2015) (hereinafter "*Nelson*").

Indirect communication encompasses situations where a lawyer seeks to communicate with a represented person through an intermediary, such as an agent or investigator. In addition, the Columbia Supreme Court has held that Rule 4.2 applies even where the prosecutor is only *listening* rather than *speaking*, on the ground that barring the former

as well as the latter serves the purpose of protecting a defendant from his own folly as well as the advances of the prosecutor.

Here, Price was aware that Howe was represented (by Defender Gardner), per Price's interview transcript regarding the August 24 arraignment hearing. Price's interview transcript also shows that he instructed Detective Daichi to listen to Howe when he called her and report to Price what Howe said. Thus, Price used Daichi as an intermediary to indirectly communicate with Howe, who he knew to be represented.

There is a further somewhat unsettled point of whether merely listening while using an *intermediary* would fall under *Nelson's* extension of Rule 4.2 to listening-only conduct since *Nelson* did not squarely so hold, but a court would likely find that it does, because to find otherwise would allow prosecutors to defeat Rule 4.2 by using intermediaries such as detectives or other agents to silently listen to represented defendants without consequence.

Thus, Price committed a prima facie violation of Rule 4.2 in his October 3 dealing with Howe.

<u>B. Because Price's October 3 Dealing with Howe Was Pre-Indictment, A Court Will Look to The Totality of the Circumstances and Likely Determine that Price Reasonably Relied on Howe's Attempts to Contact Daichi to Justify the Indirect Communication.</u>

Although Rule 4.2 applies to prosecutors, it does make a fact-dependent exception for pre-indictment communications. *Nelson* held that Rule 4.2's application to prosecutors depends on whether the contact with the defendant is pre- or post-indictment. If it is pre-indictment, then courts will look to various circumstances, including whether the prosecutor knows that defendant has expressed a willingness to communicate (which

would militate in favor of communication) and whether the prosecutor knows that defense counsel has expressed an unwillingness to consent (which would militate against communication). *Id.*

Here, Price's October 3 indirect communication with Howe occurred before Howe's indictment by the grand jury on October 19. *Price Interview Tr.* Thus, a court would look to the circumstances surrounding Price's communication with Howe, mediated by Daichi. The *Nelson* factors cut both ways: prior to the October 3 conversation, Price reached out to Howe's counsel, who said he would consent to Howe speaking with Price only if Price was willing to offer Howe complete immunity. *Id.* However, a few weeks later, on September 26, Howe--apparently of his own accord--called Daichi affirmatively offering to speak with her about the Wilson murder, and in fact called Daichi back again, apparently unprompted, on October 3, when the relevant communication occurred.

On balance, these facts would seem to cut against Price, since he received a clear indication from Howe's counsel that he was not permitted to speak with Howe. Price might argue, however, that Howe's subsequent attempts to contact Daichi countermanded that lack of consent. Further on Price's side is that Judge Gorence, at the October 5 preliminary hearing, refused to order Daichi not to speak with Howe, instead placing the onus on Howe's counsel to instruct his client accordingly. *Price Interview Tr.* Considering all of the circumstances above, while it is a close call, it does appear that Price was likely within the boundaries of Rule 4.2 and *Nelson* to initiate the indirect communication with Howe, especially given the court's *post hoc* unwillingness to find an ethical violation.

C. The Rule 5.2 Exception Might Absolve Price of His Rule 4.2 Liability as to the October 3 Dealing, But the Facts Require Additional Investigation.

In the event that the court finds against Price on the pre-indictment totality of circumstances question, there is an exception under Rule 5.2 that must be considered. Rule 5.2 provides that, while a subordinate lawyer must comply with Rule 4.2 (among other rules) notwithstanding a supervisory lawyer's supervision, that subordinate lawyer will not be found in violation of Rule 4.2 where he acts in accordance with the supervisory lawyer's "reasonable resolution of an arguable question of professional duty."

The comment to Rule 5.2 makes clear, however, that if the question of a breach of an ethical rule can only reasonably be answered in one way, both lawyers are "equally responsible" for adhering to the duty imposed by the rule. If the question can be reasonably answered in more than one way, only then may the supervisory lawyer assume responsibility for which of the reasonable alternatives to select, and the subordinate may be "guided accordingly." Rule 5.2 Comment. This comment logically implies some duty of investigation and clarification on the subordinate lawyer's part, who cannot simply rely blindly on the supervisory lawyer's guidance, at least not without first determining whether the answer to the potential breach question can reasonably be answered in more than one way or not.

Here, the interview transcripts of Price and his supervisory lawyer, Laila Sayed, are conflicting on the extent of the advice given by Sayed to Price with respect to the October 3 communication with Howe. While Price stated that Sayed told him that Rule 4.2 permits prosecutors to communicate with defendants known to be represented

without counsel's consent, so long as they are conducting an investigation, Sayed denied that she told Price this, even suggesting if Price *had* raised the Rule 4.2 issue, she would have had to refer the matter for consultation with another attorney at the office.

Assuming for the moment that Price's recollection is correct, Sayed's purported guidance likely would have been sufficient to absolve him of breach of Rule 4.2. Per that purported guidance, Sayed was correct that Rule 4.2 does not foreclose communication with defendant where prosecutor is conducting an investigation ***pre****-indictment***,** i.e., as authorized by law (here, *Nelson*) to do so. Price's independent research into this matter would have confirmed Sayed's guidance, and shown that, at the very least, Sayed could be correct, so the Rule 4.2 breach question could be answered in more than one way. However, given the factual uncertainty, there is a severe doubt that has been raised regarding Price's veracity by the two interview transcripts, and it would be prudent for our office to investigate further. Thus, in assessing Price's potential violation of Rule 4.2 here as to the October 3 dealing, we should not rely on this purported Rule 5.2 exception since it is unclear whether Sayed even provided the requisite guidance to trigger it.

However, as discussed above, a court would likely find that the pre-indictment circumstances as to Howe's repeated attempts to contact Daichi, along with the court's imposition of the duty on Howe's counsel rather than Price or Daichi, shows that the indirect communication with Howe on October 3 was not a breach of Rule 4.2.

## II. THE NOVEMBER 18 DEALING LIKELY CONSTITUTES A RULE 4.2 VIOLATION BECAUSE IT OCCURRED POST-INDICTMENT AND BASED ON NO REASONABLE SUPERVISORY ADVICE TO THE CONTRARY.

A. Price's November 18 Dealing with Howe Constitutes a Prima Facie Violation of Rule 4.2 Because He Directly Communicated with Howe by Listening.

Please see the above rule described in Section I.A, *supra*. Here, even more egregiously than in the October 3 phone communication, Price not only utilized Daichi as an intermediary to listen in, but according to his own interview transcript, Price accepted a collect call from Howe and directly listened to Howe for 20 minutes. Thus, Price's November 18 communication with Howe constitutes a *prima facie* violation of Rule 4.2.

B. Because Price's November 18 Communication with Howe Was Post-Indictment, It Was a Per Se Violation of Rule 4.2.

As noted above, *Nelson* held that Rule 4.2's application to prosecutors depends on whether the contact with the defendant is pre- or post-indictment. Where the contact is ***post***-indictment, a prosecutor is subject to a blanket prohibition on communicating with a defendant known to be represented by counsel, without counsel's consent. As *Nelson* explained, this blanket prohibition is justified because a defendant's Sixth Amendment right to counsel would be "meaningless" if it could be "circumvented by a prosecutor under the guise of conducting an investigation."

Here, Price's direct communication with Howe on November 18 occurred almost a month after the grand jury indicted Howe on October 19. Thus, a court will not attempt to examine the circumstances around the communication (such as if Howe initiated); what is dispositive here is that Price knew Howe was represented and did not seek the

consent of Howe's counsel before listening to Howe for 20 minutes.

C. The Rule 5.2 Exception Does Not Absolve Price of His November 18 Breach of Rule 4.2 Because Price Failed to Conduct a Reasonable Investigation of Whether the Breach Question Could Be Answered in More Than One Way.

Please see the above rule described in Section I.C, *supra.* Here, in the interview transcripts of Price and his supervisory lawyer, Sayed, are once again in conflict. Price claimed that Sayed likely reiterated to him that Rule 4.2 permits prosecutors to communicate with defendants known to be represented without counsel's consent, so long as they are conducting an investigation. In contrast, Sayed strongly denied that she told Price this, again claiming that if Price had raised the Rule 4.2 issue, she would have been obligated to raise and investigate it.

This factual discrepancy need not be resolved, however, because as explained above, Rule 5.2 and its accompanying comment imply a duty on the part of the subordinate attorney (as well as the supervisory attorney) to first determine whether the breach of a rule question can be determined reasonably in more than one way. Here, if Price had conducted the minimal amount of research into Rule 4.2 and its case law--in particular, *Nelson*, which is squarely on-point Supreme Court case law that should have been immediately evident to Price--he would have noticed that *Nelson* ***forecloses*** the precise interpretation of Rule 4.2 that Sayed purportedly conveyed to Price, namely, that Comment 8 to Rule 4.2 only authorizes a prosecutor to communicate with a defendant known to be represented "*if and to the extent that the prosecutor is authorized by law to do so"*--such as where the defendant has been indicted.

Thus, even if Sayed did in fact advise Price of Rule 4.2 as claimed, that advice was

unreasonable, and Price had his own independent duty to investigate and confirm that he could not rely on it.

**III. CONCLUSION**

In sum, Price's October 3 dealing with Howe is likely excused under the totality of circumstances test advanced in *Nelson.* However, Price's November 18 dealing with Howe was strictly prohibited as it occurred post-indictment, and Price cannot rely on Sayed's purported guidance under Rule 5.2. I additionally recommend further investigation into Price's veracity as to what Sayed said.

# PT: SELECTED ANSWER 2

MEMORANDUM

TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In Re Price

As you have requested, below please find a memorandum that addresses whether Deputy District Attorney Mark Price violated Columbia Rule of Professional Conduct 4.2 in his dealings with Darryl Howe on October 3 and November 18, and whether Price could rely on Columbia Rule of Professional Conduct 4.2 with respect to such dealings.

I. **October 3 Dealings**

***Whether Price Violated Rule 4.2 in His Dealings with Howe on October 3***

Rule 4.2 provides 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 in the matter, unless the lawyer has the consent of the other lawyer. However, this does not prohibit communications otherwise authorized by law or court order. In order to determine if this rule was violated on October 3, it's necessary to examine and analyze several different elements of this rule.

Rules for Prosecutors

First, it is necessary to determine if Rule 4.2 applies to prosecutors. State v. Mann established that a prosecutor is no less subject to the Columbia Rules of Professional Conduct than any other lawyer. Thus, even though Price is a prosecutor, Rule 4.2 applies to his conduct.

Direct or Indirect Communication

It is also necessary to determine if the dealings that took place on October 3 amounted to a "direct or indirect" communication. The prohibition against communicating "indirectly" with a person represented by counsel 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 (Comment 3 to Rule 5.2).

On October 3, the communication that is at issue that took place was a call between Police Detective Donna Daichi and Howe. Thus, it was not direct because Price was not involved. It is therefore necessary to determine if it was indirect and to do this, we must examine how the call came to take place. On September 26, Howe called Donna and left a voicemail saying that he wanted to talk to her, and Donna immediately told Price about the message. Based on instructions from his supervisor, Price advised Daichi that if Howe were to call her again, she should listen and not ask any questions, and then report what was said to Price. Accordingly, Price, a lawyer, sought to communicate to Howe, who was represented by James Gardner, through Daichi, an intermediary. Even though Daichi was only instructed to listen, a person's silence in order to listen and then report back on what was said still qualifies under the broad umbrella of communication, as further discussed below.

Thus, on October 3, indirect communication took place when Daichi listened to Howe when he called her, as instructed by Price.

Person Initiates or Consents to Communication

Rule 4.2 applies even if a person initiates or consents to communication. Here, on

October 3, Howe called Daichi and initiated their conversation, in which he made several statements to her about the Wilson murder. Thus, Rule 4.2 applies even though it was initiated by Howe.

Government Investigations

Rule 4.2 recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigations, but this is limited by relevant federal and state constitutions, statutes, rules and case law. In Columbia, a prosecutor is not authorized by law to communicate with a represented defendant when the defendant has been indicted (State v. Nelson). Prior to indictment, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by counsel based on circumstances including whether the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication (Id.).

The conversation on October 3 took place before indictment, which occurred on October 19. Thus, whether or not Price was prohibited from contacting Howe is based on the circumstances. In this case, Howe expressed a clear willingness to communicate when he called the detective on September 26th and then called her back on October 3rd, even though the facts don't indicate that she called him back. This militates in favor of communication. However, on September 6, when Price had asked Howe's attorney Gardner that he would like to speak with him on the case, he was unwilling to let Howe do so unless complete immunity was offered. This militates against communication.

Accordingly, it is hard to say if this factor clearly weighs in Price's favor.

Listening v. Talking

Finally, Rule 4.2 also prevents a prosecutor from listening because one of the primary purposes of the rule is to protect a person represented by counsel from the folly of his or her own well-meaning initiatives and generally unfortunate consequences of his or her ignorance.

Here, even though Daichi was only instructed to listen on October 3, Rule 4.2 still applies.

Conclusion

Price will be found to have violated Rule 4.2 only if a governing body were to find that the government investigation rule did not protect his actions based on the totality of the circumstances.

***Whether Price Could Have Relied on Columbia Rule of Professional Conduct 5.2 with Respect to Same***

A lawyer must comply with rules notwithstanding that the lawyer acts at the direction of another lawyer or another person. A subordinate lawyer does not violate these rules if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. If a question can be answered in 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.

Here, Price will argue that when he spoke with Sayed on September 26, he is "sure" that she told him that Rule 4.2 permitted prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they were

conducting an investigation. This was a resolution because he had gone to her because he had never had a defendant reach out to a member of law enforcement after arrest. This resolution is also for an arguable question of professional duty because as mentioned above it's unclear if the investigation exception applied since it took place before indictment, when a totality of circumstances approach governed. Because a final decision on this duty could have gone either way, it was reasonable.

Conclusion

Howe could have relied on 4.2 if the conversation with Sayed happened, but it's unclear if it did since the parties have different recollections.

II. **November 18 Dealings**

***Whether Price Violated Rule 4.2 in His Dealings with Howe on November 18***

Rules for Prosecutor

See rule above. Even though Price is a prosecutor, Rule 4.2 applies to his conduct.

Direct or Indirect Communication

It is also necessary to determine if the dealings that took place on November 18 amounted to a "direct or indirect" communication. The prohibition against communicating "indirectly" with a person represented by counsel 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 (Comment 3 to Rule 5.2).

On November 18, the communication that is at issue that took place was a call between Howe and Price. Thus, direct communication took place.

Person Initiates or Consents to Communication

Rule 4.2 applies even if a person initiates or consents to communication. Here, on November 18, Howe called Gardner through a collect call on his private line. Thus, Rule 4.2 applies even though this communication was initiated by Howe.

Government Investigations

Rule 4.2 recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigations, but this is limited by relevant federal and state constitutions, statutes, rules and case law. In Columbia, a prosecutor is not authorized by law to communicate with a represented defendant when the defendant has been indicted (State v. Nelson).

In State v. Nelson, the prosecutor communicated with a criminal defendant without such defendant's counsel, even though his alleged accomplice's attorney was present, after indictment in order to negotiate a plea deal. The court found that Rule 4.2 was violated in this case. Here, similar to Nelson, the conversation on November 18 took place after the indictment, which occurred on October 19. Thus, the government investigation exception does not apply.

Listening v. Talking

Finally, Rule 4.2 also prevents a prosecutor from listening because one of the primary purposes of the rule is to protect a person represented by counsel from the folly of his or her own well-meaning initiatives and generally unfortunate consequences of his or her ignorance (Nelson).

Here, even though on the November 18th call, Howe spoke about the Wilson murder for

20 minutes while Price took notes, this doesn't change the fact that Rule 4.2 applies. Additionally, although Gardner advised Howe that he didn't have to speak to him and his lawyer would be happy if he didn't, this also isn't relevant and doesn't change the fact that Rule 4.2 applies.

Conclusion

Price will be found to have violated Rule 4.2 because he spoke to Howe after indictment, when the government investigation exception did not apply.

***Whether Price Could Have Relied on Columbia Rule of Professional Conduct 5.2 with Respect to Same***

A lawyer must comply with rules notwithstanding that the lawyer acts at the direction of another lawyer or another person. A subordinate lawyer does not violate these rules if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. If a question can be answered in 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.

Here, Price and Sayed don't agree on whether they spoke about Rule 4.2 regarding the November 18th conversation. It seems likely that it didn't take place because Howe called him out of the blue and he wouldn't have had time to confer with Sayed. However, even if they did speak and Sayed approved of Price's conduct, this resolution was not reasonable because case law is very clear that the government exception does not apply following indictment.

Conclusion

Even if Price and Sayed did speak on Rule 4.2 regarding the November 18th

conversation, he couldn't have relied on Rule 5.2 because Sayed's resolution wasn't reasonable.