

IN RE PRICE

Instructions.....

FILE

Memorandum from Debra Uliana to Applicant

Transcript of Interview of Mark Price

Transcript of Interview of Laila Sayed

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

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.