FEBRUARY 2022
Annotated California Bar Questions

Study edition | Original question pages with added highlights and reading pointers.

Practice first: attempt the clean question, then use the numbered notes and online sample responses to compare your reasoning. The full source packet is preserved, including its instructions and library.

Original, ungraded instructional commentary. Not official selected answers, scored student work, or a claim of attorney review.

Source: State Bar of California | 29 original pages, all retained.

Bar Exam Doctor | Published November 4, 2026

FEBRUARY 2022
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 1

Jim and Fred armed themselves with handguns and drove to a store on Avon Street. They both went into the store, drew their guns, and demanded that Salma, an employee, give them the store's money. After Salma handed Jim the money, he nervously dropped his gun. The gun discharged when it hit the floor, and the bullet hit and killed Chris, a store customer. Salma then got a shotgun from under the counter and shot Fred, killing him. Jim picked up his gun, ran out of the store, and drove back to his apartment.

Later that evening, Jim saw Salma while walking down Park Street. Thinking that he could eliminate her as a witness, Jim shot at Salma with his gun, but the bullet missed her. Jim then drove away in his car.

A few minutes later, Police Officer Bakari saw Jim driving down the street. Officer Bakari, who had no knowledge of the events at the store or on Park Street, pulled Jim over because Jim looked nervous. When Jim got out of his car, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found Jim's gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun.

1. With what crime(s) could Jim reasonably be charged regarding the events at the store? Discuss.

2. With what crime(s) could Jim reasonably be charged regarding the incident on Park Street? Discuss.

3. Under the Fourth Amendment to the United States Constitution, can Jim successfully move to suppress Jim's gun from being introduced into evidence at trial? Discuss.

READING POINTERS

1 Separate accident from felony murder

An accidental shot can satisfy felony murder during robbery without an independent intent to kill.

2 Identify the shooter's relationship

A resisting victim's act raises the agency/proximate-cause distinction.

3 Analyze the first seizure

The later bulge does not retroactively supply reasonable suspicion for the traffic stop.

QUESTION 2

Harry had premarital savings of $10,000 in a bank account when he married Winona in California in 2015. After the wedding, Harry started working at a new job and deposited his $3,000 salary check into the account. Shortly afterward, he paid $2,000 for rent and $2,000 for living expenses with checks drawn on the account. He then bought $1,000 in Acme stock in his own name with another check drawn on the account. The Acme stock increased in value over time.

During the marriage, Winona purchased disability insurance out of her salary. She later became disabled and could no longer work. As a result, she became entitled to monthly disability insurance payments, which will continue until she reaches the age of 65.

Thereafter, Harry and Winona decided to live separately, but to go to counseling with the hope of reconciling. After Harry moved out of the family home, he used his earnings to gamble at a local casino, winning a large amount of money with which he opened an investment account in his own name. Harry did not tell Winona about his winnings or investment account because she did not approve of gambling.

Subsequently, after a period of counseling, Harry and Winona concluded that they would not reconcile and Harry filed for dissolution. A few days later, Harry took out a loan to pay for a sailboat, hoping that sailing would relieve the stress of the divorce.

What are Harry's and Winona's rights and liabilities regarding:

1. The Acme stock? Discuss.
2. Winona's post-separation disability insurance payments? Discuss.
3. The investment account? Discuss.
4. The loan for the sailboat? Discuss.

Answer according to California law.

READING POINTERS

1 Exhaust community funds first

The $4,000 family spending consumes the $3,000 salary deposit before reaching premarital savings.

2 Identify the replaced income

A working-life disability payment differs from retirement rights earned during marriage.

3 Do not use residence alone

A complete final break requires intent and consistent conduct, not simply moving out.

4 Separate nonnecessary debt

The later recreation loan ordinarily is assigned to the spouse who incurred it.

QUESTION 3

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.

2. What remedies may Pedro reasonably seek? Discuss.

READING POINTERS

1 Measure substantial interference

Use concrete effects on ordinary home life, not only the fact that the music is loud.

2 Distinguish utility from immunity

Jobs and cultural value weigh in the balance without automatically defeating liability.

3 Intent concerns the entry

A helpful purpose does not supply the owner's consent to enter.

FEBRUARY 2022
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

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READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 4

Dan is facing trial in the Superior Court of California for the murder of Victor. Dan entered into a valid retainer agreement with Attorney Anita for her to represent him. Anita met with Dan to discuss Dan's defense. In their interview, Dan claimed he had spent the entire evening when the murder occurred with his father, Frank. The next day, Anita sent an email to Dan expressing her concern that his alibi was weak. Dan replied to the email and admitted that he had lied about his alibi, but denied that he killed Victor.

1 Anita visited Dan's apartment and spoke with Dan's roommate, Ben, who said that Dan confided in him that he had killed Victor. Ben gave Anita a pair of Dan's pants that were
3 covered in blood. The next day, Anita gave the prosecutor the bloody pants and the
2 email exchange about Dan's alibi.

Anita then decided she did not want to represent Dan any longer because she was tired of his lies. Anita petitioned the court to withdraw as Dan's attorney. The court granted permission for Anita to withdraw. Frank then immediately hired another lawyer to represent Dan.

At Dan's trial, the prosecutor called Ben as a witness to testify to Dan's statement that he killed Victor. The prosecutor then called Anita to testify: (1) about Dan's statement that he had been with Frank on the night of the murder; (2) that Anita had received the bloody pants from Ben and turned them over to the prosecutor; and (3) that Ben had told Anita that Dan said he killed Victor.

1. Assume all proper objections have been made. Should the following items be admitted into evidence:

   a) Ben's testimony? Discuss.

   b) Anita's testimony regarding Dan's statement that he was with Frank the night of the murder? Discuss.

   c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor? Discuss.

   d) Anita's testimony that Ben told her that Dan said he had killed Victor? Discuss.

Answer each according to California law.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Identify the actual privilege relationship

An ordinary confession to a roommate is not a confidential lawyer-client communication.

2 Privilege belongs to the client

An unauthorized lawyer disclosure does not itself establish the client's waiver.

3 Distinguish tangible evidence

Taking possession creates evidence-preservation and turnover duties without making the item privileged.

2. What ethical violations, if any, did Attorney Anita commit by:

   a) Turning over the bloody pants to the prosecutor? Discuss.

   b) Turning over the email exchange regarding Dan's alibi to the prosecutor? Discuss.

1 c) Withdrawing from representing Dan? Discuss.

Answer each according to California and ABA authorities.

READING POINTERS

1 **Approval is one requirement**

Court permission does not replace a proper ground and reasonable protection against prejudice.

QUESTION 5

1 Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. They agreed to share all profits and to act as equal owners. Betty agreed to contribute $100,000 to the business venture. Arnold agreed to contribute his patent for durable paint. Arnold told Betty that he thought the patent was worth $100,000. He did not tell Betty that he had previously tried to sell the patent to

3 several reputable paint companies but was never offered more than $50,000. Arnold and Betty agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and taking care of any other steps needed to start the enterprise.

Arnold first located a building within which to operate the business, owned by Landlord Co., and entered into a one-year lease in the name of Durable Paint, Inc. Subsequently, after Arnold took the necessary steps, Durable Paint, Inc. was incorporated. At the corporation's first board of directors meeting, Arnold and Betty were named as sole directors and officers. During that meeting, Arnold and Betty voted for

2 the corporation to assume all rights and liabilities for the lease and to accept assignment of Arnold's patent rights.

Over the next six months, Durable Paint, Inc. faced unforeseen and costly manufacturing and supply problems. At the end of the first six months, the corporation had exhausted all its capital and was two months behind on rent. To make matters worse, a competitor developed a far superior product, making Durable Paint, Inc.'s patent effectively worthless. Durable Paint, Inc. had no other assets.

Landlord Co. sued Arnold and Betty personally for damages for breach of the lease.

Betty sued Arnold.

1. On what theory or theories might Arnold be found personally liable for damages to Landlord Co.? Discuss.

2. On what theory or theories might Betty be found personally liable for damages to Landlord Co.? Discuss.

3. On what theory or theories might Arnold be found personally liable for damages to Betty? Discuss.

READING POINTERS

1 Test the organizing-stage entity

A present co-owned venture can create partnership obligations before incorporation.

2 Adoption does not equal release

Landlord's agreement is needed for a novation discharging an existing personal obligation.

3 Separate opinion from concealment

The withheld offers may matter even though they do not conclusively establish market value.

February 2022

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

IN RE PRICE

Instructions……

FILE

Memorandum from Debra Uliana to Applicant ..... ……

Transcript of Interview of Mark Price .....

Transcript of Interview of Laila Sayed .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

READING POINTERS

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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.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

1

READING POINTERS

1 Follow the memorandum format

Use facts in each legal analysis rather than opening with a separate facts section.

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

READING POINTERS

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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?

READING POINTERS

1 Do not manufacture consent

Counsel's unaccepted condition is a refusal, even though the defendant later initiated contact.

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.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

READING POINTERS

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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. 1

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.

READING POINTERS

1 Separate three questions

Admissibility advice does not necessarily resolve constitutional or professional-conduct duties.

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.

READING POINTERS

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February 2022

California Bar Examination

Performance Test

LIBRARY

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

IN RE PRICE

LIBRARY

Selected Columbia Rules of Professional Conduct.....

State v. Nelson
Columbia Supreme Court (2015) .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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. . . .

. . . . .

[2] 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.

. . . . .

[3] 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

READING POINTERS

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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.

1

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. . . .

READING POINTERS

1 Apply every safe-harbor requirement

Actual advice, arguability, reasonableness, and compliance must each be supported.

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

READING POINTERS

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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.

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Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

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.

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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.

READING POINTERS

1 Use the indictment boundary

Nelson gives the post-indictment ethical prohibition a different treatment from pre-indictment contact.

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.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.