Filed in District Court
State of Minnesota
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STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Derek Chauvin,
Defendant.

AFFIDAVIT OF WILLIAM J. WERNZ

MNCIS No. 27-CR-20-12646

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

The undersigned, being duly sworn on oath deposes and says:

1. I have been a licensed Minnesota attorney from 1977 through the present. From 1981 to 1992, I was an Assistant Director, then Director, of the Minnesota Office of Lawyers Professional Responsibility. From 1981 through 2012, I practiced law primarily in the areas of attorney ethics, malpractice, fiduciary standards, and related areas. From 1992 through 2012, I was affiliated with Dorsey & Whitney LLP ("Dorsey"), serving as Ethics Partner from 1993 until 2011. From 2012 through the present, I continue to represent and advise lawyers and others in ethics matters including advisory and expert opinions, ethics complaints, and contested proceedings.

2. I have spoken on legal ethics and related topics at approximately 200 Minnesota and national CLE seminars. I have written over 80 published articles on topics of legal ethics. I am the author of *Minnesota Legal Ethics,* an eBook treatise whose principal subject is interpretations and applications of the Rules of Professional Conduct. I am also the author of *Dealing With and Defending Ethics Complaints,* an eBook. These eBooks are hosted by the Minnesota State Bar Association ("MSBA"). I am also the principal author of the *Minnesota Judicial Ethics Outline,* posted on the website of the Minnesota Board on Judicial Standards. I have served as an expert witness many times in matters involving attorney ethics, attorney fiduciary duty, etc.

3. I am a past president of the Association of Professional Responsibility Lawyers, a national organization of several hundred lawyers practicing in the areas of lawyer ethics, malpractice, and related areas. I served as chair of the Minnesota Board on Judicial Standards, as chair of the MSBA Task Force on ABA Model Rules of Professional Conduct Amendments in 2002 and 2003, and as an adjunct professor at the University of Minnesota Law School and the Mitchell Hamline College of Law, teaching professional responsibility.

4. I have opined on numerous occasions on possible applications of Rule 3.7, "Advocate as Witness," Minnesota Rules of Professional Conduct (MRPC). I have written articles and a section of my treatise, *Minnesota Legal Ethics* (10th ed. 2020), on Rule 3.7.

5. Prior to the disqualification order, dated September 11, 2020, I have had no dealings with any of the parties regarding the above matters. I am not being compensated for my time or for this affidavit. As in the *Mulligan* case below, I am acting without a client and solely for what I believe to be the interests of proper understanding and application of a Rule of Professional Conduct.

6. I have been asked to assume the understandings of relevant facts found in Exhibit 1.

7. I was personally involved in a case that is important to the application of Rule 3.7 in this case. That case is *In re Mulligan,* File No. A19-1932 (Minn. Feb. 11, 2020). *Mulligan* initially involved an erroneous application of Rule 3.7 by the Office of Lawyers Professional Responsibility (OLPR) and the Minnesota Supreme Court. After I brought the error to OLPR's attention, OLPR petitioned the Court for a corrected order, and the Court issued a corrected order.

8. The facts and issues of the Mulligan case are described in William J. Wernz, *Quandaries & Quagmires: To Err is Human, What Comes Next?,* Minn. Law., Feb. 5, 2020, a copy of which is attached as Exhibit 2.

9. Mulligan represented T.N., a criminal defendant, charged with possession of drugs and a weapon. Believing that T.N.'s wife might state that she was the actual possessor of these items, Mulligan interviewed Ms. T.N. Mulligan was not accompanied by any associate or assistant at the interview.

10. OLPR charged Mulligan with violating Rule 3.7. Mulligan admitted the charge and admitted charges of other rule violations. OLPR and Mulligan filed a joint stipulation with these admissions and a recommended discipline. On December 30, 2019, the Minnesota Supreme Court entered an order pursuant to stipulation, including the Rule 3.7 violation. A copy of the order is attached, with an OLPR news release, as Exhibit 3.

11. I read the *Mulligan* Order. I consulted with several other ethics experts. We all agreed that the Order was erroneous as to Rule 3.7 and that it was also erroneous also as to Rule 4.3(d), a rule not relevant here. The errors and omissions as to Rule 3.7 included the following.

    a. The Court has held numerous times that every element of a MRPC rule must be proved for the rule to apply. *See, e.g., In re Panel File No. 42735,* 2019 WL 1051406 (Minn. 2019).

    b. The petition made no allegation regarding what Ms. T.N. did or did not say in the witness interview. If she had refused to talk, or denied possession, or admitted possession and did not later recant, Mulligan would not be a "necessary witness" under Rule 3.7. The petition did not include any allegation that Mulligan was in fact likely to be a necessary witness.

c. The petition made no allegation that Mulligan had "act[ed] as advocate at a trial" in some improper way. Rule 3.7 does not apply to pre-trial activities, but instead applies only "at a trial."

12. On January 9, 2020, I contacted OLPR and pointed out the errors and omissions regarding Rule 3.7 (and 4.3(d)) in the *Mulligan* petition and order. OLPR considered my explanation and reported to me that OLPR would move the Court for a corrective order that did not include these alleged violations. On January 24, 2020 OLPR filed such a motion, together with an amended discipline petition. A copy is attached as Exhibit 4. The motion expressly stated that Mulligan's interview with Ms. T.N. did not violate Rule 3.7 and that Mulligan would have violated Rule 3.7 only if he had been identified as a trial witness. The amended petition deleted the allegation of a Rule 3.7 violation.

13. On February 11, 2020, the Court vacated its earlier order and filed a corrective order, deleting the erroneous findings regarding Rule 3.7 (and 4.3(d)). Copies of the corrective order and a related OLPR news release are attached as Exhibit 5.

14. My *Minnesota Lawyer* article refers to other rules that Mulligan violated in his interview of Ms. T.N. The referents here are Rules 4.3(b) and (c). Mulligan was required to disclose that the interests of T.N. and Ms. T.N. were adverse and was also required to clearly explain his role. Rule 4.3(b) and (c) do not apply to the circumstances of the HCAO interview of the medical examiner.

15. The requirement of Rule 3.7 that "the lawyer is likely to be a *necessary* witness" sometimes requires interpretation where the lawyer and one or more others can testify to the same facts. (Emphasis added.) I have opined on numerous occasions that the lawyer who will act as advocate at trial is not a "necessary witness" where another person – lawyer or non-lawyer – is available to give the same testimony as the advocate would give.

16. In rendering my "necessary witness" opinions, I have relied on what ethics experts regard as the leading case on the advocate-witness rule, as it applies to government attorneys, *Humphrey ex rel. State v. McLaren,* 402 N.W2d 535 (Minn. 1987). In that case, McLaren attempted to disqualify the entire Minnesota Attorney General Office (AGO). One basis for McLaren's motion was that certain attorneys in the AGO were "necessary witnesses."

17. The Court denied McLaren's disqualification motion, on several bases. In so doing, the Court construed the "necessary witness" requirement as being inapplicable where the testimony that could be given by the lawyer slated to be the trial advocate could be given by another attorney in the same office who would not act as advocate at trial. The Court explained, "If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary

as a witness. If the lawyer's testimony is merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel." *Id.* at 541 (citing *State v. Fratzke*, 325 N.W.2d 10 (Minn. 1982)).

18. I have frequently advised attorneys who wished to comply with Rule 3.7 and to avoid disqualification at trial that they may do so by interviewing witnesses with a note-taker present, and that the note-taker may be a non-lawyer or may be another attorney in the advocate's office.

19. In approximately 1981-83, when I was an Assistant Director at OLPR, OLPR employed only one legal assistant. Assistant Directors conducted many witness interviews. Sometimes I would be accompanied to an interview by the legal assistant, sometimes by another Assistant Director, and sometimes I would be unaccompanied. Much depended on the particular circumstances of a case and on the availability of personnel at relevant times.

20. I have advised lawyers on numerous occasions that Rule 3.7 applies only "at a trial." OLPR has taken the same position. OLPR's former Director stated, "Virtually all authorities agree that even a lawyer who knows she is likely to be a necessary witness at trial is not prohibited from handling that matter throughout investigation, discovery and settlement negotiations. Since a significant number of civil matters never go to trial at all, the impact of Rule 3.7 is frequently negated." Martin A. Cole, *Three Rules of Professional Conduct*, Bench & B. of Minn., July 2011, at 16, 16 (footnote omitted). See also, Martin A. Cole, *Lawyer-As-Witness Rule Often Misunderstood*, Minn. Law., Sept. 6, 1999, at 2. OLPR's view is shared by ABA Informal Opinion 89-1529 (1989).

21. I have acted as advocate at trial where another attorney in my firm was a material witness. As Ethics Partner at Dorsey & Whitney, I have approved other lawyers doing likewise. In my nearly 20 years as Ethics Partner, to the best of my recollection, no Dorsey lawyer was ever disqualified on the basis that another lawyer in the firm would be a witness. The only basis in the MRPC for disqualification in such circumstances would be if the testimony was adverse to the client's interests.

22. For the reasons stated above, in my opinion the interviews of the Hennepin County Medical Examiner by the HCAO did not furnish any basis for a conclusion that they violated Rule 3.7, nor that any of them who acted as advocate at trial would violate Rule 3.7 by so doing.

W J Wernz

William J Wernz

Subscribed and sworn to before me this 14th day of September 2020.

Sandra J Colbert

Notary Public

SANDRA J. COLBERT
NOTARY PUBLIC – MINNESOTA
My Commission Expires Jan. 31, 2025
Commission #6165314

Wernz Affidavit, Exhibit 1: Pertinent Facts

On the evening of May 25, 2020, Defendant was a police officer for the Minneapolis Police Department. Shortly after 8:00 PM, he responded to a South Minneapolis business, in front of which he and three other police officers (the "Codefendants") had a public encounter with the victim in this case, George Floyd. Within minutes of the encounter, the Codefendants restrained Mr. Floyd until Mr. Floyd lost consciousness, became nonresponsive, and died. At approximately 8:27 PM, Mr. Floyd's body was taken by ambulance to the Hennepin County Medical Center. Several hours later, Mr. Floyd's body was received by the Hennepin County Medical Examiner's Office for the purposes of an autopsy.

In the early morning of May 26, 2020, video footage of Defendant's actions and Mr. Floyd's death were broadly disseminated on the Internet, and the case immediately became an unparalleled matter of public interest and unrest. The state agency investigating Mr. Floyd's death, the Minnesota BCA, issued a press release, noting that it would present its results to the Hennepin County Attorney's Office (HCAO) for the consideration of criminal charges against Defendant and his Codefendants. The HCAO assigned two very experienced, skilled, and conscientious prosecutors to review the case, Ms. Sweasy and Mr. Lofton.

It would be difficult to *overstate* that, at that point, Mr. Floyd's death became a matter of substantial local, national, and international public interest. Without exaggeration, prosecutors were well-aware that the autopsy presentation by Dr. Baker with respect to Mr. Floyd would, perhaps, be the most significant in their careers, if not the most consequential autopsy in the history of Minnesota.

On May 26, 2020, Dr. Baker conducted the autopsy of Mr. Floyd's body. Following the autopsy, Dr. Baker held a video conference with investigators from the BCA, investigators from

Exhibit 1

the FBI, Ms. Sweasy, and Mr. Lofton. During this conference, Dr. Baker discussed his preliminary findings and explained that he would need to review multiple sources of additional evidence, including video evidence and toxicology results, before rendering a final opinion on Mr. Floyd's cause of death. Mr. Lofton summarized the meeting's subject matter in a one-page memorandum.

On May 27, 2020, Dr. Baker went to Hennepin County Attorney's Office for an in-person meeting with Mr. Lofton and Ms. Sweasy to discuss his preliminary findings. At this meeting, Mr. Lofton and Ms. Sweasy were joined by Mr. Freeman and Mr. LeFevour. Mr. Freeman and Mr. LeFevour oversee the entire criminal division of the HCAO and did not attend this meeting expecting to be *trial counsel*; they attended the meeting to receive the highly sensitive preliminary autopsy findings directly from Dr. Baker and to support Ms. Sweasy and Mr. Lofton. Joining this meeting was well within the professional managerial responsibilities of Mr. Freeman and Mr. LeFevour, and, forthrightly, it would have been irresponsible and an abrogation of duty to *not* attend the meeting at that time.

Regarding the limited attendance at the meeting (specifically the lack of a "non-attorney witness"), it must be recalled that, on May 27, the prosecutors knew that Dr. Baker's findings were preliminary, private, and intricate. The prosecutors were profoundly aware that any inadvertent revelations of Dr. Baker's findings could affect public safety, and they were aware that unauthorized dissemination of any Mr. Floyd's personal and private health information would be deleterious in untold ways. As a result, while still conducting their legal obligations as ministers of justice, these prosecutors took efforts to protect the integrity of the investigation–and the privacy and dignity of Mr. Floyd–by limiting the number of attendees to *four*: the assigned attorneys, their chief managing attorney, and the county attorney himself. As stated above, limiting the meeting to these four prosecutors was not any sort of "sloppy" act or unethical shortcutting; it was a reasoned decision made by conscientious public servants.

Regarding the *subject matter* of this May 27 conference, Mr. Lofton summarized the meeting's subject matter in a one-page memorandum. Mr. Lofton's summary states that Mr. Baker "provided the *same* autopsy information" that he provided on May 26 (emphasis added). Per Mr. Lofton's summary, Dr. Baker provided several additional details, including additional information about Mr. Floyd's prior injuries/hospitalization and the cause of Mr. Floyd's death. Dr. Baker again "reiterated that his findings [were] preliminary and that he ha[d] not issued a final report" and that he "had not seen any videos [of Defendant's encounter with Mr. Floyd]."

On May 31, 2020, Dr. Baker held another video conference with Mr. Lofton and Ms. Sweasy to discuss the final toxicology results which Dr. Baker received from an outside lab. Dr. Baker essentially described the lab results and his initial interpretation of those results to Mr. Lofton and Ms. Sweasy.

On June 3, 2020, for unrelated reasons, Mr. Lofton and Ms. Sweasy withdrew from the prosecution team and ceased involvement in the case. Assistant Minnesota Attorney General Matthew Frank was assigned as lead prosecutor, and Mr. Frank has remained the lead prosecutor to date.

SAINT PAUL LEGAL LEDGER
MINNESOTA LAWYER

Quandaries and Quagmires: To err is human ... what comes next?

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