Prosecutors & Disqualifications, Supervisory Duties, and More

WILLIAM J. WERNZ

December 4, 2020

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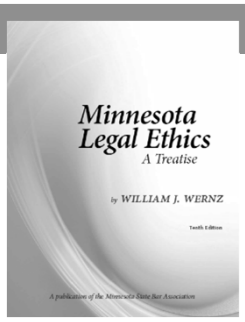
Minnesota Legal Ethics



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State v. Chauvin et al. – Aug. 2020 DQ Motion

- **Citing Rule 3.7 and *In re Mulligan* (Minn. Dec. 31, 2020), defense counsel sought "an order disqualifying the Hennepin County Attorney's Office from prosecuting or participating in the prosecution of this matter."**
- **"Mr. Freeman and several of his assistant attorneys are potential witnesses due to their interviews of Hennepin County Medical Examiner Dr. Andrew Baker regarding his autopsy of George Floyd without a having non-attorney witness present."**

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State v. Chauvin – DQ Order #1

- **Sept. 11, 2020 Order: HCAO disqualified from participation in Floyd-related prosecutions, at trial and pre-trial.**
- **Order's Basis: A non-attorney note-taker must be present for prosecutors' witness interviews.**
- **Authority: Rule 3.7(a): "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . ."**

Rule 3.7 & Witness Interviews: *In re Mulligan*

- ***In re Mulligan*, File No. A19-1932 (Minn. Dec. 31, 2020) (vacated); (Minn. Feb. 11, 2020) (final).**
- ***communities at* my.mnbar.org blog, William J. Wernz, *To Err is Human. What Next?* (June 26, 2020).**

In re Mulligan - Facts

- **Mulligan represented T.N. T.N. was charged with felony possession of a gun and drugs.**
- **Mulligan interviewed the wife of T.N., as the "possible alternate" possessor of the gun and drugs.**
- **Mulligan did not bring a note-taker to the interview.**

Mulligan & Chauvin: PROBLEM #1: "At a Trial"

- **Petition for Disciplinary Action: Mulligan's conduct, "in interviewing T.N.'s wife as a potential trial witness without a third person present violated Rules 1.1, 3.7(a) and 8.4(d)."**
- **Rule 3.7(a): "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . .:"**
- **Mulligan admits violation. Supreme Court disciplines Mulligan.**
- **PROBLEMS: A pre-trial interview cannot violate Rule 3.7. Only acting as an advocate at trial can violate Rule 3.7. No discipline for looming problem.**
- **DQ at trial but not pre-trial.**

Mulligan & Chauvin: PROBLEM 2: Was Mulligan a "Necessary Witness"

- **What did T.N.'s wife tell Mulligan? The discipline petition does not say.**
- **The petition does not allege Mulligan was *actually* a necessary witness. There is no reason to believe Mulligan had any relevant testimony.**
- **No one called Mulligan as a witness.**

Mulligan / State v. Chauvin – "Necessary Witness"

- **PROBLEM 2: A "necessary witness" under Rule 3.7 is one whose testimony is "(1) relevant, (2) material, and (3) not available from an alternative source." *State v. Casler,* 2003 WL 22014550 (Minn. App. Aug. 26, 2003).**
- ***Chauvin*: Other attorneys in a public office are *not* "necessary witnesses" and are *not* disqualified where their testimony is cumulative to that of an attorney-witness. *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987).**

In re Mulligan: Vacating and Replacing

- **Letter to Office of Lawyers Professional Responsibility.**
- **OLPR Motion to Vacate and Replace.**
- **Order Granting Motion.**
- **As of Feb. 11, 2020, OLPR, Supreme Court agree with Wernz: interviewing a witness without a note-taker does *not* violate Rule 3.7.**
- **Because such interviews *might* cause DQ *at trial,* best practice – depending on the circumstances – *might* be to use a note-taker.**

State v. Chauvin. Motion to Reconsider. Order #2.

- **Attached materials include HCAO Brief and Wernz Affidavit.**
- **11/4/20 Order:**
- **"The State, in its motion for reconsideration, correctly notes that the Court's removal order was too broad. As is noted in *Fratzke*, 325 N.W.2d at 11-12, the remedy is not to prohibit the attorneys' participation in the case, but to preclude their participation as advocates at trial. Accordingly, the Court admits its error and issues this Order narrowing the scope of the removal."**

State v. Chauvin DQ Order #2

- **"[In interviewing Dr. Baker], the attorneys made themselves potential witnesses in the case. While it is unlikely that Dr. Baker's testimony would be impeached, it remains a possibility that the attorneys could be called as witnesses to impeach his testimony. Accordingly, they cannot act as advocates in this case at trial. Minn. R. Prof. Conduct 3.7(a); *State v. Fratzke*, 325 N.W.2d 10, 11-12 (Minn. 1982).**
- **"A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . .:" Rule 3.7(a).**

State v. Chauvin – "Necessary Witness"

- ***State v. Fratzke*, 325 N.W.2d 10 (Minn. 1982).**
- **"[W]e believe that the trial court erred in holding that defendant had established the necessity of removing the county attorney and his assistants as prosecutors. In fact, it appears that the county attorney will not likely be a necessary witness and that his testimony at best may be cumulative, there being at least two other people (one a BCA agent, the other an assistant prosecutor) who witnessed the entire interrogation of Lucking."**

State v. Chauvin DQ Order #2

- **DQ #2 amends "sloppy" to "careless" for HCAO not having a non-attorney note-taker.**
- **Does the court regard the pre-1987 version of Rule 3.7 as still effective?**
- **In 1987, Rule 3.7 was amended to provide, "(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless [the testimony is adverse to the client]."**

Judicial Disqualification for Relationships to County Attorneys

- **William J. Wernz, *Judicial Disqualification in Minnesota*, Bench & B. of Minn., Nov. 2016.**
- **William J. Wernz, *Judicial Ethics Outline*, http://www.bjs.state.mn.us/education-materials**
- **Three cases: *Jacobs, Pratt, Troxel.***

In re Jacobs – Spousal Relationship

- ***In re Jacobs*, 802 N.W.2d 748 (Minn. 2011).**
- **Disqualification required where "a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." 802 N.W.2d at 753; Rule 2.11, Code Judicial Conduct.**
- **The "reasonable examiner" is "an objective unbiased layperson with full knowledge of the facts and circumstances." *Id.***

In re Jacobs – Judicial DQ?

- **Jacobs sought a writ of prohibition against Judge Moreno continuing to preside, because Judge Moreno did not disclose that his wife was an Assistant County Attorney in the office prosecuting the case.**

In re Jacobs – Disqualification Denied

- **HCAO is a large organization handling many and varied cases.**
- **Judge's spouse "has had no personal involvement with the case and has no financial interest in its outcome."**
- **Although spouse was once an appellate attorney in the HCAO Criminal Division, she transferred out of that division and to other roles well before this case was filed.**

In re Jacobs – Disclosure Obligation?

- **"*A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.*" Rule 2.11 cmt. 5.**
- **"But the use of the word 'should' indicates that the comment is not mandatory. 'Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question.'" *In re Jacobs.***

State v. Pratt – Judge as Expert Witness

- ***State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).**
- **Pratt's felony convictions were reversed because the judge failed to disclose a business relationship with the prosecutor.**
- **The presiding judge was retired. The judge had an agreement to serve as expert witness for the county attorney in a matter unrelated to *Pratt*. Although the matter was dormant, the relationship still existed in principle.**

Troxel v. State: Employment Negotiation

- ***Troxel v. State*, 875 N.W.2d 302 (Minn. 2016).**
- **Judge presided over a murder trial prosecuted by the Pennington County Attorney.**
- **Judge disclosed he was negotiating for employment with a firm that acted as county attorney for a neighboring county.**
- **Troxel was convicted. Troxel appealed, alleging that a reasonable person would question the judge's impartiality.**

Troxel v. State – Same Team?

- Conviction affirmed, 4-3 vote.
- Dissent: "a reasonable examiner would see that the judge was seeking to leave his position as umpire in order to join one of the teams: the State. In fact, he did just that; he joined the State's team about two months after he sentenced Troxel."
- Do all county attorneys belong to the same team for conflicts purposes?

Troxel v. State – Same Team?

- If all county attorneys belong to the same team, how can they refer cases to each other to cure conflicts?
- Rule 1.10(e): "The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11."
- Rule 1.11 does not impute all conflicts within a government law office.
- If one county attorney's office is not a firm for conflicts purposes, how are two different offices one for conflicts purposes?

ABA Formal Opinions 488 and 494

- Opinion 488: Judicial Disqualifications for Close Personal Relationships with Parties or Counsel.
- Opinion 494: Attorney Disqualifications for Close Personal Relationships with Opposing Counsel.

Rule 5.1: Supervisory Responsibilities

- **"(a) A partner in a law firm, and a lawyer who . . . possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."**
- **"(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct."**

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Rule 5.1 – OLPR Interpretations

- **"Policies and procedures should exist on any ethics topic relevant to your area of practice. You need to include training for lawyers and nonlawyers, and an audit or review program to understand effectiveness. Only then, it seems to me, can you feel confident that you have "measures" in place to "assure" compliance, which is what the rule requires."**
- **Susan Humiston, *Your Ethical Duty of Supervision*, Bench & B. of Minn., Dec. 2019.**
- **OLPR's aggressive Rule 5.1 campaign.**

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Prosecutor's Rule 5.1 Failures- *Pertler*

- ***In re Pertler,* 948 N.W.2d 146 (Mem) (Minn. 2020) (Disbarment).**
- **"Respondent's conduct in failing to timely implement a *Brady* policy, disclose information to those who needed to know the information, and train the Carlton County attorneys, violated Rules 5.1(a) and (b)."**
- **OLPR: Rule 5.1 requires knowledge management.**

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Knowledge Management & Rule 3.8(d)

- Rule 3.8(d): "The prosecutor in a criminal case shall. . .(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;"

Rule 3.8(d) Exceeds Constitutional Disclosure Requirements

- "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution." ABA Formal Op. 09-454.

Rule 3.8(d) / *Brady* – OLPR Position

- "In 2009 the ABA made clear, and I find persuasive, the opinion that Rule 3.8(d), is *not* co-extensive with constitutional case law regarding disclosure, but rather is separate and broader. The distinction lies in the issue of materiality."
- "For all of the reasons cited in the ABA opinion, I'm persuaded that this is correct."
- Susan Humiston, *Prosecutorial Ethics: Holding to Account "Ministers of Justice,"* Bench & B., Oct. 2020.

OLPR Warning

- **"The tone is set from the top. If your office rewards or permits bad behavior – or behavior 'close to the line' – you may be placing your license at risk, as well as the licenses of those you supervise." Susan Humiston, *Prosecutorial Ethics: Part Two*, Bench & B. of Minn., Nov. 2020.**
- ***See also,* "Managerial and Supervisor Obligations of Prosecutors Under Rule 5.1 and Rule 5.3." ABA Formal Op. 467 (2014).**

Trial Publicity – Rule 3.6(a)

- **Rule 3.6(a): "A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter."**

Were Prosecutor's Statements Prejudicial?

- **Appeal denied notwithstanding some problematic public statements by prosecutor because:**
- **(1) A full year passed between the statements and the trial, lessening the chance of impact.**
- **(2) The evidence against Parker was strong.**
- **(3) The jurors appeared unaware of the prosecutor's statements.**
- ***State v. Parker*, 901 N.W.2d 917 (Minn. 2017).**

Prosecutor's "Derogatory" Statements

- ***In re Scannell*, 861 N.W.2d 678 (Minn. 2015).**
- **In a blog, Scannell briefly posted statements about two unnamed defendants in minor criminal, property tax matters:**
  - **"This rich obnoxious manipulative defendant;"**
  - **"He's an ass;"**
  - **"Self-absorbed, entitled wealthy older men;"**
  - **"I have no respect for anyone who refuses to pull his own weight and pay his (or her) fair share."**

"Derogatory Statements"

- **<u>Petition for Disciplinary Action</u>: "Respondent's conduct in making derogatory statements about criminal defendants in matters he was prosecuting while those matters were pending violated Rules 3.6(a) and 8.4(d)."**
- **No allegation that Scannell's statements "will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter."**
- **Scannell admitted 3.6(a) violation and Supreme Court order included 3.6(a) violation.**

ABA Model Rule 3.8

- **"A prosecutor in a criminal case shall: (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . ."**
- **No Minnesota counterpart.**

In re Mulligan – Rule 4.3(d) Alleged Violation

- **"In dealing on behalf of a client with a person who is not represented by counsel: . . . (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client."**
- **Petition for Disciplinary Action: Rule 4.3(d) required Mulligan to advise T.N. to secure counsel.**

Mulligan – Rule 4.3(d)

- **Rule 4.3(d) does not command a lawyer to take any action – it does not have a "shall" provision.**
- **The rule is prohibitory - a lawyer "shall *not* give legal advice" to an unrepresented person with adverse interests.**
- **This prohibition has one exception –the lawyer *may* give "the advice to secure counsel." The rule *permits but does not require* the lawyer to advise the unrepresented adverse party to secure counsel.**

Mulligan – Ethics Knowledge Management

- **In 1997, OLPR issued a Rule 4.3(d) admonition to a lawyer who conducted a deposition of an unrepresented adverse witness but did not begin the deposition by advising the deponent to secure counsel. The lawyer appealed and a Board panel reversed.**
- **Minnesota Lawyers Board Panel File No. 97-2.**
- **Described and cited in *Minnesota Legal Ethics* (10th ed.) at 1108.**

Mulligan – Ethics Knowledge Management II

- ***In re Mulligan,*** **including the Rule 3.7 initial error and final correction are described in *Minnesota Legal Ethics* (10th ed.) at 1010.**
- ***Minnesota Legal Ethics*** **includes authorities not readily available through normal legal research.**
  - **Private disciplines and dismissals.**
  - **Supreme Court Memorandum Orders.**
  - **Articles.**
  - **ABA Formal Opinions.**

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Materials

- ***communities at*** **my.mnbar.org blog, William J. Wernz, *To Err is Human. What Next?* (June 26, 2020).**
- **William J. Wernz, *Personal Relationship Conflicts - ABA Formal Ops. 488 and 494,* Minn. Law. (Nov. 23, 2020).**
- **William J. Wernz, *Judicial Disqualification in Minnesota*, Bench & B. of Minn., Nov. 2016.**
- **William J. Wernz, *Discipline for Prosecutor's 'Derogatory' Statements*, Minn. Law (Feb. 23, 2016).**

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Materials

- ***State v. Derek Chauvin et al.***
  - **Affidavit of William J. Wernz with attachments.**
  - **HCAO Brief.**
  - **Disqualification Orders.**
- **Susan M. Humiston, *Prosecutorial Ethics: Holding to Account 'Ministers of Justice',* Bench & B. of Minn., Oct. 2020.**
- **Susan Humiston, *Prosecutorial Ethics: Part Two,* Bench & B. of Minn., Nov. 2020.**

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