

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

---

State of Minnesota,

Plaintiff,

**AFFIDAVIT OF WILLIAM J. WERNZ**

vs.

MNCIS No. 27-CR-20-12646

Derek Chauvin,

Defendant.

---

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.

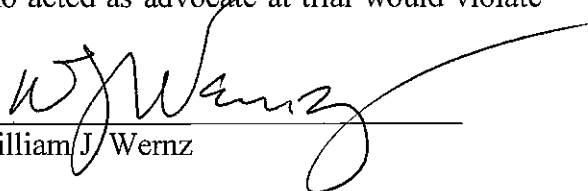
4. I have opined on numerous occasions on possible applications of Rule 3.7, “Advocate as Witness,” Minnesota Rules of Professional Conduct (MRPC). I have written articles and a section of my treatise, *Minnesota Legal Ethics* (10<sup>th</sup> ed. 2020), on Rule 3.7.
5. Prior to the disqualification 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.

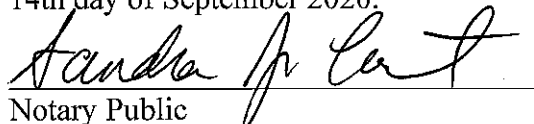
- c. The petition made no allegation that Mulligan had “act[ed] as advocate at a trial” in some improper way. Rule 3.7 does not apply to pre-trial activities, but instead applies only “at a trial.”
12. On January 9, 2020, I contacted OLPR and pointed out the errors and omissions regarding Rule 3.7 (and 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

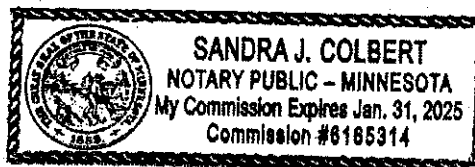
as a witness. If the lawyer's testimony is merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel." *Id.* at 541 (citing *State v. Fratzke*, 325 N.W.2d 10 (Minn. 1982)).

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.

  
William J. Wernz

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

  
Notary Public



### **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

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.

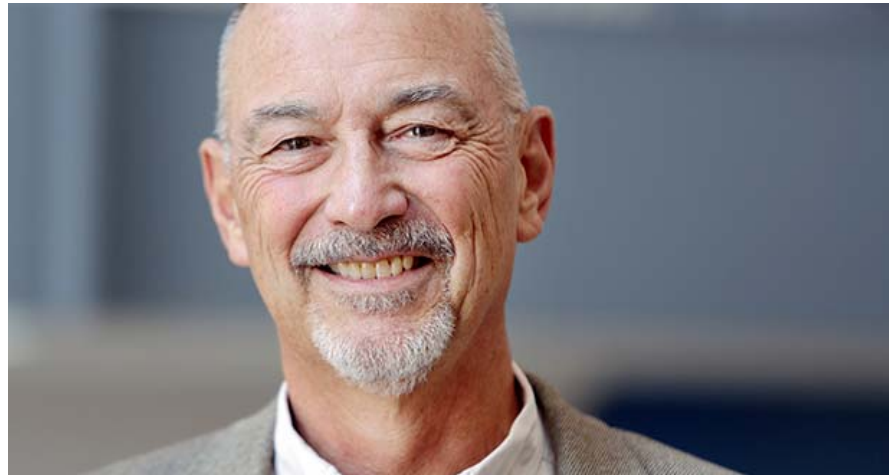
Regarding the *subject matter* of this May 27 conference, Mr. Lofton summarized the meeting’s subject matter in a one-page memorandum. Mr. Lofton’s summary states that Mr. Baker “provided the *same* autopsy information” that he provided on May 26 (emphasis added). Per Mr. Lofton’s summary, Dr. Baker 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

Your direct source for  
lawyers professional liability  
800.982.1151



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

By: William J. Wernz   February 5, 2020

A familiar legal ethics maxim is, "We all make mistakes. What matters is what we do next." All too many attorneys have turned manageable problems into catastrophes by refusing to recognize errors or trying to cover them up. Other attorneys have corrected the errors, but failed to correct a system's deficiency that helped cause the error.

The Office of Lawyers Professional Responsibility has provided a model for recognizing and correcting errors. On Jan. 24, OLPR filed a motion asking the Minnesota Supreme Court to correct a disciplinary order by deleting findings that a lawyer had violated Rules 3.7(a) (the advocate-witness rule) and 4.3(d) (no advice to unrepresented adverse party).<sup>1</sup> The errors and corrections are worth examining.

OLPR's petition for disciplinary action alleged that an attorney, 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 did not advise Ms. T. N. of T.N.'s adverse interests, nor did Mulligan advise Ms. T.N. to secure counsel.

In a standard stipulation with OLPR, Mulligan admitted all of the petition's allegations, including, "Mulligan's conduct in failing to advise T.N.'s wife ... to seek counsel regarding her possible testimony during T.N.'s trial violated ... Rule 4.3(d)." Rule 4.3 provides, "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."

Some may think that a lawyer should advise an unrepresented person to secure counsel before the lawyer elicits an admission of guilt to a felony. A divided 8th Circuit panel showed such concerns.<sup>2</sup> A defendant alleged ineffective assistance of counsel because standby defense counsel advised a possible alternate possessor of drugs to secure counsel. Two judges affirmed the conviction, reasoning that counsel, "was permitted — and arguably

## Exhibit 2



obligated” to give such advice. A third judge dissented, “interpreting the rule in the way that the court does leads to the extraordinary conclusion that a lawyer has an ethical duty to act in a way that is contrary to the duty of loyalty that he owes to a party ... .”

There is, however, clear error in interpreting Rule 4.3(d) to *discipline* a lawyer for not advising an unrepresented, adverse party to secure counsel. Such an interpretation has textual, practical, and knowledge management systems problems.

The textual problem is that Rule 4.3(d) does not command a lawyer to take any action — it does not have a “shall” provision. The rule does not mandate that a lawyer give the advice to secure counsel, or any advice at all. Instead, 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.

The practical problem if one reads “shall” into Rule 4.3(d) is that the rule will have extremely broad, surprising, and undesirable applications. For example, transactional lawyers would be required to advise unrepresented persons on the other side of deals that they should secure counsel. OLPR and the rules themselves find directly adverse conflicts in ordinary transactions such as buy/sell or lend/borrow.<sup>3</sup> Transactional lawyers would be subject to discipline for doing what they have always done — negotiating and closing deals with unrepresented parties, without warning them to retain counsel.

The knowledge management systems problem revealed by the Rule 4.3(d) charge is that board precedents are not systematically saved and retrieved. 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.<sup>4</sup> OLPR likely would not have made the Rule 4.3(d) pleading error in *Mulligan* if the OLPR/LPRB knowledge management systems included synopses of important board panel cases. OLPR publishes summaries of some important private disciplines, but rarely makes note of discipline dismissals, even when they decide an important issue.<sup>5</sup>

Comprehensive, up-to-date information on important rulings is needed to avoid repeating yesteryear’s errors.<sup>6</sup> Whether OLPR’s errors resulted from lack of information, failures to spot issues and consult authority, or failures of reasoning is unknown.

The second charging error in *Mulligan* was an alleged violation of 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 ... .” The exceptions to Rule 3.7(a) are not relevant here.

Mulligan acted imprudently and in violation of ethics rules other than Rule 3.7 when he interviewed Ms. T.N. without a note-taker. In many situations, a lawyer should communicate with a potential witness only through an investigator, or with a note-taker present, or by making a recording. The lawyer who does not take precautions risks becoming disqualified as an advocate because the lawyer has become a necessary witness.

However, lawyers often interview witnesses without a note-taker and often they have a good reason. They may expect the witnesses to be friendly and consistent. They may expect the case to settle. The client may not be able to pay a note-taker. The witness may unexpectedly contact the lawyer and the lawyer may have no second opportunity for interview. If the lawyer becomes a witness, another lawyer in the firm may act as advocate, unless the testimony will be adverse to the firm’s client.

The petition alleged 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).” However, Rule 3.7(a) applies only “at a trial,” not in a pre-trial interview. The petition failed to allege facts that made it “likely” that Mulligan would be a “necessary witness” at T.N.’s trial. Mulligan

would have been a necessary witness only if Ms. T.N. admitted to Mulligan that she possessed the gun or drugs but then recanted.

Even without the erroneous charges of Rule 3.7(a) and 4.3(d) violations, Mulligan's misconduct warranted the discipline ordered. This article does not summarize the full range of Mulligan's conduct.

It appears that, as a summary disposition, *Mulligan* is not precedential in its original or corrected form. "[S]ummary dispositions 'have no precedential value because they do not commit the court to any particular point of view,' doing no more than establishing the law of the case."<sup>7</sup> To the best of my memory, the court does not customarily cite as precedent discipline orders that it enters pursuant to stipulation and without opinion.<sup>8</sup>

The court carefully reviews the disciplines recommended in all cases, including stipulations between the director and respondent attorneys. Not infrequently, the court orders briefing from the parties to ensure consistency of the recommended discipline, precedent, and non-precedential discipline orders.

In cases involving stipulated recommendations for discipline, the court, OLPR, and respondent attorneys may not always give exacting scrutiny to all allegations of rule violations. The main concern is normally the recommended discipline. Another concern is whether the alleged conduct violated *some* ethics rule. Many respondent attorneys are unrepresented and are not knowledgeable regarding the rules.

However, *every* alleged rule violation is important. The allegations state OLPR's positions. If the allegation is adopted in a discipline order, it has the court's approval, even if the approval is not precedential.

OLPR might have regarded the mistakes in the *Mulligan* petition as inconsequential. Instead, OLPR did the right thing by seeking the court's correction. OLPR thereby provided a good example. If OLPR has considered whether its errors resulted from inadequacies in systems or resources, its good example will be complete.

OLPR's good example is timely. At its January 31 meeting, the Lawyers Board will vote on amendments to Board Opinion 21, dealing with client notification and conflict issues when a lawyer commits a material error.



#### Footnotes

1. Motion for Amended Order, *In re Mulligan*, File No. A19-1932 (Minn. Jan. 24, 2020).
2. *U.S. v. Gutierrez*, 351 F.3d 897 (8<sup>th</sup> Cir. 2003).
3. Martin A. Cole, *Direct Adversity Conflicts*, Bench & B. of Minn., Oct. 2010 (citing Rule 1.7 cmt. 7).
4. Minnesota Lawyers Board Panel File No. 97-2. I represented the respondent attorney.
5. If it is thought that the rule requiring expungement of dismissals prohibits such record-keeping, amendment of the rule should be sought. Rule 20(e), R. Law. Prof. Resp.
6. A synopsis of Board Panel File No. 97-2 can be found in *Minnesota Legal Ethics* (9<sup>th</sup> ed. 2019) at 1053. The ABA/BNA Lawyers' Manual on Professional Conduct Practice Guide on Rule 4.3 likewise cites authority holding that Rule 4.3 does not require a lawyer to advise an unrepresented person to secure counsel.
7. *Rogers v. COMPASS AIRLINES, Inc.*, 920 N.W.2d 835 (Minn. 2018), citing *Hoff v. Kempton*, 317 N.W.2d 361, 366 (Minn. 1982).

8. To the best of my memory, OLPR also generally refrains from citing orders pursuant to stipulation as authorities. However, in a 2016 case, OLPR cited *In re Fink*, File A08-1534 (Minn., Sept. 25, 2008) as its leading authority. *In re Olson*, File No. A16-0280, (Minn., Sept. 9, 2016).

*William Wernz is the author of the online treatise, "Minnesota Legal Ethics." He has been a member of the Board on Judicial Standards, and he has served as Dorsey & Whitney's ethics partner and as Director of the Office of Lawyers Professional Responsibility.*

**OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY**

1500 LANDMARK TOWERS  
345 ST. PETER STREET  
ST. PAUL, MINNESOTA 55102-1218

TELEPHONE (651) 296-3952  
TOLL-FREE 1-800-657-3601

FAX (651) 297-5801

MEMORANDUM

TO: See Distribution Below

FROM: Susan M. Humiston *SMH*  
Director

DATE: December 31, 2019

RE: News Release - In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN, a Minnesota Attorney,  
Registration No. 0203592.

Enclosed is a copy of a news release concerning the above matter. Attached to the news release is a copy of a lawyer disciplinary decision issued by the Minnesota Supreme Court.

ljj

Enclosures

cc: D. Gregory Mulligan

*Distribution:*

Assignment Editor, KSTP Newsroom (newsreply@kstp.com)  
Rochelle Olson, Minneapolis Star Tribune (Rochelle.Olson@startribune.com)  
Abby Simons, Minneapolis Star Tribune (asimons@startribune.com)  
Assignment Editor, Minnesota Public Radio (newsroom@mpr.org)  
Associated Press, Attention: News Desk (apminneapolis@ap.org)  
MNN/UPI (newsroom@mnnradio.com)  
Assignment Desk, KARE 11 (news@kare11.com)  
Hannah Sayle, Managing Editor, City Pages (hsayle@citypages.com)  
Laura McCallum, Minnesota Public Radio (lmccallum@mpr.org)  
Tom Lyden, KMSP Fox 9 (tom.lyden@foxtv.com)  
Seth Leventhal (seth@leventhalpllc.com)

Distribution List  
December 31, 2019  
Page 2

Valley News Live (news@valleynewslive.com)  
Leah Beno, Fox 9 News (Leah.Beno@foxtv.com)  
William J. Wernz (wernz.william@dorseyalumni.com)  
Petra Mandigo Hulm, North Dakota Supreme Court (phulm@ndcourts.gov)  
Barbara Jones, Managing Editor, Minnesota Lawyer (barbara.jones@minnlawyer.com)  
Randy Furst, Minneapolis Star Tribune (rfurst@startribune.com)  
David Chanen, Minneapolis Star Tribune (david.chanen@startribune.com)  
Nick Woltman, St. Paul Pioneer Press (nwoltman@pioneerpress.com)  
Dan Browning, Minneapolis Star Tribune (dbrowning@startribune.com)  
Paul Walsh, Minneapolis Star Tribune (pwalsh@startribune.com)  
WCCO (tips@wcco.com)  
Jennifer Mayerle, WCCO-TV (jlmayerle@wcco.com)  
Sarah Horner (shorner@pioneerpress.com)  
Richard D. Sletten, Clerk of Federal District Court (michael\_vicklund@mnd.uscourts.gov)  
Kevin Featherly, Minnesota Lawyer (kfeatherly@minnlawyer.com)  
Chao Xiong, Minneapolis Star Tribune (cxiong@startribune.com)  
Internal Revenue Service (opr.notices@irs.gov)

**OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY**

1500 LANDMARK TOWERS  
345 ST. PETER STREET  
ST. PAUL, MINNESOTA 55102-1218

TELEPHONE (651) 296-3952  
TOLL-FREE 1-800-657-3601

FAX (651) 297-5801

**NEWS RELEASE**

For immediate release  
December 31, 2019

Contact: Susan M. Humiston, Director  
(651) 296-3952

**ATTORNEY DISCIPLINED**

ST. PAUL -- The Minnesota Supreme Court recently suspended attorney D. Gregory Mulligan of Edina. The discipline was imposed after the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against Mulligan. A copy of the Court's decision is attached.

-END-

**RECEIVED**

DEC 30 2019

OFFICE OF LAWYERS  
PROF. RESP.

STATE OF MINNESOTA

IN SUPREME COURT

A19-1932

**FILED**

December 30, 2019

**OFFICE OF  
APPELLATE COURTS**

In re Petition for Disciplinary Action against  
D. Gregory Mulligan, a Minnesota Attorney,  
Registration No. 0203592.

**ORDER**

The Director of the Office of Lawyers Professional Responsibility has filed a petition for disciplinary action alleging that respondent D. Gregory Mulligan has committed professional misconduct warranting public discipline—namely, representing clients when a potential, non-waivable conflict of interest existed, failing to deposit advance fees into trust, failing to timely refund unearned advance fees, ineffectively representing a client in a criminal manner, interviewing a potential trial witness without a third person present, failing to make proper disclosures to an unrepresented person, failing to comply with discovery obligations, failing to provide the client with a copy of the file, and entering into a business transaction with a client without making the proper disclosures. *See* Minn. R. Prof. Conduct 1.1, 1.3, 1.4(a)(4), 1.4(b), 1.7(a)(2), 1.8(a)(2), 1.15(c)(4), 1.15(c)(5), 1.16(d), 3.4(c), 3.7(a), 4.3(b), 4.3(d), 8.4(d).

Respondent and the Director have entered into a stipulation for discipline. In it, respondent waives his right to answer and his rights under Rule 14, Rules on Lawyers Professional Responsibility (RLPR) and unconditionally admits the allegations in the

petition. The parties jointly recommend that the appropriate discipline is a 30-day suspension and 2 years of supervised probation.

The court has independently reviewed the file and approves the recommended disposition.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Respondent D. Gregory Mulligan is suspended from the practice of law for a minimum of 30 days, effective 14 days from the date of this order.
2. Respondent shall pay \$900 in costs pursuant to Rule 24, RLPR.
3. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).
4. Respondent shall be eligible for reinstatement to the practice of law following the expiration of the suspension period provided that, not less than 15 days before the end of the suspension period, respondent files with the Clerk of the Appellate Courts and serves upon the Director an affidavit establishing that he is current in continuing legal education requirements, has complied with Rules 24 and 26, RLPR, and has complied with any other conditions for reinstatement imposed by the court.
5. Within 1 year of the date of this order, respondent shall file with the Clerk of the Appellate Courts and serve upon the Director proof of successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Failure to timely file the



required documentation shall result in automatic suspension, as provided in Rule 18(e)(3),  
RLPR.

6. Following reinstatement, respondent shall be placed on probation for 2 years,  
upon the following terms and conditions:

- a. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall promptly respond to the Director's correspondence by its due date. Respondent shall provide to the Director a current mailing address and shall immediately notify the Director of any change of address. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct that may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.
- b. Respondent shall abide by the Minnesota Rules of Professional Conduct.
- c. Respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director to monitor compliance with the terms of this probation. Within 2 weeks of the date of this order, respondent shall provide to the Director the names of four attorneys who have agreed to be nominated as respondent's supervisor. If, after diligent effort, respondent is unable to locate a supervisor acceptable to the Director, the Director will seek to appoint a supervisor. Until a supervisor has signed a consent to supervise, the respondent shall on the first day of each month provide the Director with an inventory of active client files described in paragraph d. below. Respondent shall make active client files available to the Director on request.
- d. Respondent shall cooperate fully with the supervisor in his/her efforts to monitor compliance with this probation. Respondent shall contact the supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall submit to the supervisor an inventory of all active client files by the first day of each month during the probation. With respect to each active file, the inventory shall disclose the client name, type of representation, date opened, type of fee charged, most recent activity, next anticipated action, and anticipated closing date. Respondent's supervisor shall file written reports with the Director at least quarterly, or at such more frequent intervals as may reasonably be requested by the Director.

- e. Respondent shall initiate and maintain office procedures which ensure that there are prompt responses to correspondence, telephone calls, and other important communications from clients, courts, and other persons interested in matters which respondent is handling, and which will ensure that respondent regularly reviews each and every file and completes legal matters on a timely basis.
- f. Within 30 days of the date of this order, respondent shall provide to the Director and to the probation supervisor, if any, a written plan outlining office procedures designed to ensure that respondent is in compliance with probation requirements. Respondent shall provide progress reports as requested.
- g. Respondent shall complete a minimum of 2 hours of continuing legal education credits or other training/shadowing per month related to criminal law or criminal procedure.
- h. If, after giving respondent an opportunity to be heard by the Director, the Director concludes that respondent has violated the conditions of probation or engaged in further misconduct, the Director may file a petition for disciplinary action against respondent without the necessity of submitting the matter to a panel or panel chair.

Dated: December 30, 2019

BY THE COURT:



David L. Lillehaug  
Associate Justice

**FILE NO. A19-1932**

STATE OF MINNESOTA

IN SUPREME COURT

-----  
 In Re Petition for Disciplinary Action  
 against D. GREGORY MULLIGAN,  
 a Minnesota Attorney,  
 Registration No. 0203592.  
 -----

**MOTION FOR  
AMENDED ORDER**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Pursuant to Rule 127, Minnesota Rules of Civil Appellate Procedure, the Director of the Office of Lawyers Professional Responsibility, with the agreement of respondent, seeks an amended order due to mistake. The basis for the requested relief is as follows:

1. On December 3, 2019, the Director filed a petition for disciplinary action, stipulation for dispensing with panel proceedings, for filing petition for disciplinary action, and for discipline, and a proposed order with the Court.
2. On December 30, 2019, the Court issued an order for discipline, suspending respondent from the practice of law for 30 days. The order included a reference to violations of, among other rules, Rules 3.7 and 4.3(d), Minnesota Rules of Professional Conduct (MRPC).
3. Following the issuance of the Court's December 30, 2019, order, the Director became aware of mistakes that were made in the December 3, 2019, petition for disciplinary action regarding Rules 3.7 and 4.3(d), MRPC. Respondent's actions did not violate Rules 3.7 and 4.3(d), MRPC. While respondent's conduct in interviewing a witness without the presence of a third party had the potential to result in a violation of the rule, he did not violate Rule 3.7, MRPC, in that he did not testify at trial nor did he identify himself as a witness or otherwise offer to testify. Similarly, while respondent's failure to disclose to the witness that his client's interests were adverse to hers violated

Rule 4.3(b), MRPC, there is no evidence in the petition that respondent gave the witness legal advice in violation of Rule 4.3(d), MRPC. The Director has included a redline of the petition to show changes made.

4. The Director has discussed the mistake with respondent, who has received a copy of an amended petition, striking reference to Rules 3.7 and 4.3(d), MRPC.

5. The parties also agree that deleting the rule violations does not change the recommended discipline.

WHEREFORE, the Director respectfully prays for the following relief:

1. That the Court issue an amended order based on the Director's amended petition for disciplinary action and updated stipulation for discipline, filed with this motion; and

2. That the effective date of respondent's 30-day suspension remain January 13, 2020.

Dated: January 24, 2020.

Susan M. Humiston  
SUSAN M. HUMISTON  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 0254289  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952  
Susan.Humiston@courts.state.mn.us

Dated: January 23, 2020.

Keshini M. Ratnayake  
KESHINI M. RATNAYAKE  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 0386518  
Keshini.Ratnayake@courts.state.mn.us

**FILE NO. A19-1932**

STATE OF MINNESOTA

IN SUPREME COURT

-----  
In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN,  
a Minnesota Attorney,  
Registration No. 0203592.  
-----

**AMENDED PETITION FOR  
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility (Director) files this amended petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney (respondent) was admitted to practice law in Minnesota on October 27, 1989. Respondent currently practices law in Edina, Minnesota. Respondent has committed the following unprofessional conduct warranting public discipline:

**DISCIPLINARY HISTORY**

- A. On October 21, 2015, respondent was issued an admonition for utilizing a website that implied several attorneys worked for his law firm when, in fact, respondent was a solo practitioner, in violation of Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).
- B. On October 13, 2010, respondent was issued an admonition for communicating with a prospective client without including the words "Advertising Material" clearly and conspicuously on the envelope or on the communication therein, in violation of Rule 7.3(c), MRPC.

CONFLICT OF INTEREST MATTER

1. On October 4, 2017, C.J. and Y.V. were charged as co-defendants with felony drug offenses in Hennepin County, Minnesota. Both offenses arise from the same facts and circumstances. Specifically, C.J. and Y.V. were each charged with two counts of possession of a controlled substance after large amounts of marijuana and cash were found within the home they shared and the storage locker they allegedly rented together. C.J. and Y.V. are father and son. Both C.J. and Y.V. speak Hmong as their first language and require the services of an interpreter when appearing in court.

2. Shortly after being charged, C.J. and Y.V. contacted respondent to seek representation in their respective criminal cases. Respondent met with C.J. and Y.V. to discuss representation, but did not utilize the services of a professional interpreter. Instead, respondent used Y.V. as a translator for C.J. At the conclusion of the meeting, respondent agreed to represent both C.J. and Y.V. in their criminal matters.

3. C.J. and Y.V. each agreed to pay a \$3,000 flat fee for respondent's services. Both fees were paid in full by C.J. in advance of respondent providing legal services. Respondent cannot produce copies of flat fee agreements signed by either C.J. or Y.V. Respondent admits he failed to deposit the \$6,000 advanced fees into a trust account.

4. On December 19, 2017, respondent appeared before the court with C.J. and Y.V. for their omnibus hearings in Hennepin County District Court.

5. During a sidebar, the court expressed concern regarding the potential conflict of interest respondent could face if one or both defendants chose to have a trial in the matter.

6. Respondent told the court and the prosecutor that the Mayo Clinic was "coming after [him]" and he could not "afford" to give up any of his cases.

7. While on the record for the omnibus hearings, the court noted its concern regarding the potential conflict of interest and questioned C.J. and Y.V. through a court-interpreter about the discussions respondent had with each of them regarding the potential conflict. C.J. and Y.V. both responded that respondent had not discussed the

potential conflict of interest with them. Respondent then orally withdrew as counsel for both matters.

8. Respondent provided a refund of \$3,000 to C.J. on April 20, 2018.

Respondent refunded the balance of the legal fees, \$3,000, to C.J. on September 18, 2018.

9. Respondent's conduct in accepting representation of two co-defendants in the same criminal matter, in circumstances where a potential non-waivable conflict of interest existed, violated Rules 1.1, 1.7(a)(2), and 8.4(d), MRPC.

10. Respondent's conduct in failing to deposit advance fees into his trust account, in the absence of written fee agreements signed by his clients, violated Rule 1.15(c)(5), MRPC.

11. Respondent's conduct in failing to promptly refund the unearned portion of C.J. and Y.V.'s flat fees violated Rules 1.15(c)(4), and 1.16(d), MRPC.

#### FELONY TRIAL MATTER

12. On October 19, 2018, T.N. was charged with felony prohibited person in possession of a firearm and possession of a controlled substance in Hennepin County District Court. The matter was assigned to a district court judge (the court).

13. On October 22 and 23, 2018, respondent filed certificates of representation on behalf of T.N. The matter was scheduled for an omnibus hearing on November 19, 2018.

14. T.N. agreed to pay \$2,000 for respondent's legal services, but did not have cash available to pay respondent. Respondent and T.N. agreed that T.N.'s wife would give respondent her vehicle and the vehicle's title as collateral until T.N. and his family could pay the \$2,000 cash. The parties agreed upon a deadline of April 1, 2019. Respondent stated he would keep the vehicle if the \$2,000 cash payment was not made by that date. In the fall of 2018, T.N.'s wife's vehicle was delivered to respondent, who kept the vehicle parked in his office lot. Respondent failed to comply with the requirements of Rule 1.8(a), MRPC, prior to entering into a business transaction with T.N. Eight weeks after the vehicle was delivered to respondent, it was towed from

respondent's office parking lot to Anoka. Respondent claimed the vehicle, and had it towed back to T.N.'s home and returned the title to T.N.'s wife.

15. On November 14, 2018, the state filed a notice of intent to seek an upward sentencing departure, also known as a *Blakely* notice. Respondent did not file a written response to the state's *Blakely* notice. Respondent admits he was unfamiliar with *Blakely* notices and the related case law and procedures. Respondent admits he made no attempt to research and familiarize himself with *Blakely* issues during his representation of T.N.

16. On December 27, 2018, the state filed a notice of evidence of additional offenses to be offered at trial. Respondent did not file a written response to the state's notice.

17. On March 15, 2019, the state filed its motions *in limine*. Respondent did not file a written response to the state's motions *in limine*, nor did he file written motions *in limine* on behalf of T.N.

18. A jury trial commenced with jury selection on March 18, 2019. On March 19, 2019, respondent, on behalf of T.N., made an oral motion *in limine* to exclude the state from discussing certain evidence at trial. Respondent's motion was denied.

19. During the trial, respondent revealed to the court and the prosecutor that he had interviewed T.N.'s wife as a possible alternate perpetrator to present during T.N.'s trial. Respondent failed to advise T.N.'s wife that T.N.'s interests would be adverse to hers if she was identified as an alternate perpetrator. Respondent failed to disclose a summary of T.N.'s wife's statement to the prosecutor in the matter.

20. T.N. was found guilty of both offenses on March 21, 2019, and taken into custody by the court. On this same date, the court made a finding that the state had presented sufficient evidence of prior convictions to support an aggravated sentence. T.N. then waived his right to an aggravated sentencing trial. The court went through the requisite waiver with T.N. due to respondent's apparent lack of understanding of the issues. T.N. then admitted facts in support of an aggravated sentence.



21. Respondent provided T.N. with a full refund following the trial by returning the keys and title for the vehicle to T.N.'s wife.

22. The court spoke with respondent on the phone following the trial to express its concern for respondent and respondent's practice. Respondent admitted he was struggling financially and accepting any client that sought his services without regard for the complexity of the case or his ability to competently represent the client.

23. On June 5, 2019, the court filed a complaint with the Director. The court expressed concern regarding respondent's competence in the areas of criminal law and procedure, as well as his memory and his ability to appropriately communicate with and represent clients. The court also expressed concern that respondent was creating a conflict of interest with his clients in putting his own financial interests above his clients' right to competent representation.

24. T.N. filed a complaint with the Director on April 9, 2019. T.N.'s chief complaint was that respondent failed to provide him with a copy of his file, including the discovery and witness list filed by the state. Respondent admits he failed to provide T.N. with a copy of the discovery and state's witness list until after the conclusion of the trial. T.N. also alleged respondent was unprepared for his trial. The court also stated in its complaint against respondent that respondent appeared for trial each day without a laptop or paper file for T.N.

25. Respondent's conduct in failing to research *Blakely* issues in order to respond to the state's notice, to discuss the issues relating to the *Blakely* notice with his client, and to generally effectively represent T.N., violated Rules 1.1, 1.3, and 1.4(b), MRPC.

26. Respondent's conduct in failing to disclose to T.N.'s wife that T.N.'s interests would be adverse to T.N.'s wife's if she testified during the trial as an alternate perpetrator violated Rules 1.1, 4.3(b), and 8.4(d), MRPC.

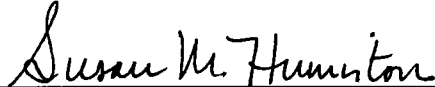
27. Respondent's failure to disclose to the prosecutor a summary of T.N.'s wife's statement violated Rules 1.1, 3.4(c), and 8.4(d), MRPC.

28. Respondent's failure to provide T.N. with a copy of the discovery and state's witness list in the matter, until after the conclusion of the trial, violated Rules 1.4(a)(4), 1.15(c)(4), and 8.4(d), MRPC.

29. Respondent's conduct in entering into a business transaction with T.N. without advising T.N. of the desirability of seeking independent legal advice violated Rule 1.8(a)(2), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: January 23, 2020.



SUSAN M. HUMISTON  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY

Attorney No. 0254289  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952  
Susan.Humiston@courts.state.mn.us

and



KESHINI M. RATNAYAKE  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 0386518  
Keshini.Ratnayake@courts.state.mn.us

**FILE NO. A19-1932**

STATE OF MINNESOTA

IN SUPREME COURT

-----  
In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN,  
a Minnesota Attorney,  
Registration No. 0203592.  
-----

**AMENDED PETITION FOR  
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility (Director) files this amended petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney (respondent) was admitted to practice law in Minnesota on October 27, 1989. Respondent currently practices law in Edina, Minnesota. Respondent has committed the following unprofessional conduct warranting public discipline:

**DISCIPLINARY HISTORY**

- A. On October 21, 2015, respondent was issued an admonition for utilizing a website that implied several attorneys worked for his law firm when, in fact, respondent was a solo practitioner, in violation of Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).
- B. On October 13, 2010, respondent was issued an admonition for communicating with a prospective client without including the words "Advertising Material" clearly and conspicuously on the envelope or on the communication therein, in violation of Rule 7.3(c), MRPC.

**Redline version for  
reference only**

- C. "Advertising Material" clearly and conspicuously on the envelope or on the communication therein, in violation of Rule 7.3(c), MRPC.

CONFLICT OF INTEREST MATTER

1. On October 4, 2017, C.J. and Y.V. were charged as co-defendants with felony drug offenses in Hennepin County, Minnesota. Both offenses arise from the same facts and circumstances. Specifically, C.J. and Y.V. were each charged with two counts of possession of a controlled substance after large amounts of marijuana and cash were found within the home they shared and the storage locker they allegedly rented together. C.J. and Y.V. are father and son. Both C.J. and Y.V. speak Hmong as their first language and require the services of an interpreter when appearing in court.
2. Shortly after being charged, C.J. and Y.V. contacted respondent to seek representation in their respective criminal cases. Respondent met with C.J. and Y.V. to discuss representation, but did not utilize the services of a professional interpreter. Instead, respondent used Y.V. as a translator for C.J. At the conclusion of the meeting, respondent agreed to represent both C.J. and Y.V. in their criminal matters.
3. C.J. and Y.V. each agreed to pay a \$3,000 flat fee for respondent's services. Both fees were paid in full by C.J. in advance of respondent providing legal services. Respondent cannot produce copies of flat fee agreements signed by either C.J. or Y.V. Respondent admits he failed to deposit the \$6,000 advanced fees into a trust account.
4. On December 19, 2017, respondent appeared before the court with C.J. and Y.V. for their omnibus hearings in Hennepin County District Court.
5. During a sidebar, the court expressed concern regarding the potential conflict of interest respondent could face if one or both defendants chose to have a trial in the matter.
6. Respondent told the court and the prosecutor that the Mayo Clinic was "coming after [him]" and he could not "afford" to give up any of his cases.

7. While on the record for the omnibus hearings, the court noted its concern regarding the potential conflict of interest and questioned C.J. and Y.V. through a court-interpreter about the discussions respondent had with each of them regarding the potential conflict. C.J. and Y.V. both responded that respondent had not discussed the potential conflict of interest with them. Respondent then orally withdrew as counsel for both matters.

8. Respondent provided a refund of \$3,000 to C.J. on April 20, 2018. Respondent refunded the balance of the legal fees, \$3,000, to C.J. on September 18, 2018.

9. Respondent's conduct in accepting representation of two co-defendants in the same criminal matter, in circumstances where a potential non-waivable conflict of interest existed, violated Rules 1.1, 1.7(a)(2), and 8.4(d), MRPC.

10. Respondent's conduct in failing to deposit advance fees into his trust account, in the absence of written fee agreements signed by his clients, violated Rule 1.15(c)(5), MRPC.

11. Respondent's conduct in failing to promptly refund the unearned portion of C.J. and Y.V.'s flat fees violated Rules 1.15(c)(4), and 1.16(d), MRPC.

#### FELONY TRIAL MATTER

12. On October 19, 2018, T.N. was charged with felony prohibited person in possession of a firearm and possession of a controlled substance in Hennepin County District Court. The matter was assigned to a district court judge (the court).

13. On October 22 and 23, 2018, respondent filed certificates of representation on behalf of T.N. The matter was scheduled for an omnibus hearing on November 19, 2018.

14. T.N. agreed to pay \$2,000 for respondent's legal services, but did not have cash available to pay respondent. Respondent and T.N. agreed that T.N.'s wife would give respondent her vehicle and the vehicle's title as collateral until T.N. and his family could pay the \$2,000 cash. The parties agreed upon a deadline of April 1, 2019. Respondent stated he would keep the vehicle if the \$2,000 cash payment was not made

by that date. In the fall of 2018, T.N.'s wife's vehicle was delivered to respondent, who kept the vehicle parked in his office lot. Respondent failed to comply with the requirements of Rule 1.8(a), MRPC, prior to entering into a business transaction with T.N. Eight weeks after the vehicle was delivered to respondent, it was towed from respondent's office parking lot to Anoka. Respondent claimed the vehicle, and had it towed back to T.N.'s home and returned the title to T.N.'s wife.

15. On November 14, 2018, the state filed a notice of intent to seek an upward sentencing departure, also known as a *Blakely* notice. Respondent did not file a written response to the state's *Blakely* notice. Respondent admits he was unfamiliar with *Blakely* notices and the related case law and procedures. Respondent admits he made no attempt to research and familiarize himself with *Blakely* issues during his representation of T.N.

16. On December 27, 2018, the state filed a notice of evidence of additional offenses to be offered at trial. Respondent did not file a written response to the state's notice.

17. On March 15, 2019, the state filed its motions *in limine*. Respondent did not file a written response to the state's motions *in limine*, nor did he file written motions *in limine* on behalf of T.N.

18. A jury trial commenced with jury selection on March 18, 2019. On March 19, 2019, respondent, on behalf of T.N., made an oral motion *in limine* to exclude the state from discussing certain evidence at trial. Respondent's motion was denied.

19. During the trial, respondent revealed to the court and the prosecutor that he had interviewed T.N.'s wife as a possible alternate perpetrator to present during T.N.'s trial. ~~Respondent interviewed T.N.'s wife himself, without the presence of a third person.~~ Respondent failed to advise T.N.'s wife that T.N.'s interests would be adverse to hers if she was identified as an alternate perpetrator ~~and that she should secure counsel.~~ Respondent failed to disclose a summary of T.N.'s wife's statement to the prosecutor in the matter.

20. T.N. was found guilty of both offenses on March 21, 2019, and taken into custody by the court. On this same date, the court made a finding that the state had presented sufficient evidence of prior convictions to support an aggravated sentence. T.N. then waived his right to an aggravated sentencing trial. The court went through the requisite waiver with T.N., due to respondent's apparent lack of understanding of the issues. T.N. then admitted facts in support of an aggravated sentence.

21. Respondent provided T.N. with a full refund following the trial, by returning the keys and title for the vehicle to T.N.'s wife.

22. The court spoke with respondent on the phone following the trial to express its concern for respondent and respondent's practice. Respondent admitted he was struggling financially and accepting any client that sought his services without regard for the complexity of the case or his ability to competently represent the client.

23. On June 5, 2019, the court filed a complaint with the Director. The court expressed concern regarding respondent's competence in the areas of criminal law and procedure, as well as his memory and his ability to appropriately communicate with and represent clients. The court also expressed concern that respondent was creating a conflict of interest with his clients in putting his own financial interests above his clients' right to competent representation.

24. T.N. filed a complaint with the Director on April 9, 2019. T.N.'s chief complaint was that respondent failed to provide him with a copy of his file, including the discovery and witness list filed by the state. Respondent admits he failed to provide T.N. with a copy of the discovery and state's witness list until after the conclusion of the trial. T.N. also alleged respondent was unprepared for his trial. The court also stated in its complaint against respondent that respondent appeared for trial each day without a laptop or paper file for T.N.

25. Respondent's conduct in failing to research *Blakely* issues in order to respond to the state's notice, to discuss the issues relating to the *Blakely* notice with his

client, and to generally effectively represent T.N., violated Rules 1.1, 1.3, and 1.4(b), MRPC.

~~26. Respondent'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), MRPC.~~

~~27.26. Respondent's conduct in failing to advise disclose to T.N.'s wife that T.N.'s wife of his potential conflict of interest and to seek counsel regarding her possible testimony interests would be adverse to T.N.'s wife's if she testified during T.N.'s the trial as an alternate perpetrator violated Rules 1.1, 4.3(b) and (d), and 8.4(d), MRPC.~~

~~28.27. Respondent's failure to disclose to the prosecutor a summary of T.N.'s wife's statement violated Rules 1.1, 3.4(c), and 8.4(d), MRPC.~~

~~29.28. Respondent's failure to provide T.N. with a copy of the discovery and state's witness list in the matter, until after the conclusion of the trial, violated Rules 1.4(a)(4), 1.15(c)(4), and 8.4(d), MRPC.~~

~~30.29. Respondent's conduct in entering into a business transaction with T.N. without advising T.N. of the desirability of seeking independent legal advice violated Rule 1.8(a)(2), MRPC.~~

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the



Rules on Lawyers Professional Responsibility, and for such other, further or  
different relief as may be just and proper.

Dated: \_\_\_\_\_, ~~2019~~2020.

---

SUSAN M. HUMISTON  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 0254289  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952  
Susan.Humiston@courts.state.mn.us

---

and

---

KESHINI M. RATNAYAKE  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 0386518  
Keshini.Ratnayake@courts.state.mn.us

---

**FILE NO. A19-1932**

---

**STATE OF MINNESOTA****IN SUPREME COURT**

---

In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN,  
a Minnesota Attorney,  
Registration No. 0203592.

---

**STIPULATION FOR FILING  
AMENDED PETITION FOR  
DISCIPLINARY ACTION,  
AND FOR DISCIPLINE**

THIS STIPULATION is entered into by and between Susan M. Humiston, Director of the Office of Lawyers Professional Responsibility (Director), and D. Gregory Mulligan, attorney (respondent).

WHEREAS, the parties wish to correct a mistake in a previously filed petition,  
NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and  
between the undersigned as follows:

1. On December 3, 2019, the Director filed a petition for disciplinary action, stipulation for dispensing with panel proceedings, for filing petition for disciplinary action, and for discipline, and a proposed order with the Court.
2. On December 30, 2019, the Court issued an order for discipline, suspending respondent from the practice of law for 30 days.
3. The Director has prepared an amended petition for disciplinary action in this matter to correct mistakes that were made in the original petition for disciplinary action regarding the alleged violations of Rules 3.7 and 4.3(d), Minnesota Rules of Professional Conduct (MRPC).
4. Respondent acknowledges receipt of the amended petition for disciplinary action and this stipulation for filing an amended petition for disciplinary action and waives service thereof. Respondent unconditionally admits the allegations in the amended petition.

5. The parties agree that the original proposed discipline of a 30-day suspension is still appropriate, despite the removal of the Rule 3.7 and 4.3(d), MRPC, violations, and recommend no change in respondent's discipline.

6. The parties recommend and request that respondent's original 30-day suspension, which became effective on January 13, 2020, remain in effect until the conclusion of the 30-day period, and until respondent has met the requirements for reinstatement proscribed in the Court's original December 30, 2019, order.

IN WITNESS WHEREOF, the parties executed this stipulation on the dates indicated below.

Dated: January 24, 2020.

Susan M. Humiston  
SUSAN M. HUMISTON  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 0254289  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952  
Susan.Humiston@courts.state.mn.us

Dated: January 24, 2020.

Keshini M. Ratnayake  
KESHINI M. RATNAYAKE  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 0386518  
Keshini.Ratnayake@courts.state.mn.us

Dated: January 24, 2020.

D. Gregory Mulligan  
D. GREGORY MULLIGAN  
RESPONDENT  
Attorney No. 0203592  
3209 West 76<sup>th</sup> Street, Suite 200  
Edina, MN 55435  
(952) 832-5250

## STATE OF MINNESOTA

## IN SUPREME COURT

A19-1932

In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN,  
a Minnesota Attorney,  
Registration No. 0203592.

## AMENDED ORDER

On December 30, 2019, the Court issued an order for discipline suspending respondent D. Gregory Mulligan from the practice of law for a minimum of 30 days, effective January 13, 2020. On January 24, 2020, the Director moved, with respondent's agreement, for an amended order due to mistakes in the petition. With the motion, the Director submitted an amended petition and stipulation for discipline, striking two rule violations, namely, Rules 3.7 and 4.3(d), Minnesota Rules of Professional Conduct (MRPC), but recommending no change to the discipline imposed.

Based upon the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The Director's Motion for an amended order is GRANTED;
2. The Court's order dated December 30, 2019, is amended to describe the conduct warranting public discipline as alleged in the amended petition as: accepting representation of two co-defendants in circumstances where a potential non-waivable conflict of interest existed and failing to abide by the Rules of Professional Conduct regarding flat fees, refunds, contact with unrepresented parties, ineffectively representing a client in a criminal matter, interviewing a potential trial witness whose interests he reasonably should have known were adverse to his client's interest without disclosing that adversity, failing to comply with discovery obligations to both the state

and the client, and entering into a business transaction with a client without advising the client of the desirability of seeking independent legal advice, in violation of Rules 1.1, 1.3, 1.4(a)(4) and (b), 1.7(a)(2), 1.8(a)(2), 1.15(c)(4) and (5), 1.16(d), 3.4(c), 4.3(b), and 8.4(d), MRPC.

3. All other aspects of the order remain in force and effect including the effective date of respondent's suspension.

Dated: \_\_\_\_\_, 2020.

BY THE COURT:

---

David L. Lillehaug  
Associate Justice

**OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY**

1500 LANDMARK TOWERS  
345 ST. PETER STREET  
ST. PAUL, MINNESOTA 55102-1218

TELEPHONE (651) 296-3952  
TOLL-FREE 1-800-657-3601

FAX (651) 297-5801

MEMORANDUM

TO: See Distribution Below

FROM: Susan M. Humiston *SMH*  
Director *JW*

DATE: February 13, 2020

RE: News Release - In Re Petition for Disciplinary Action  
against D. GREGORY MULLIGAN, a Minnesota Attorney,  
Registration No. 0203592.

Enclosed is a copy of a news release concerning the above matter. Attached to the news release are copies of a lawyer disciplinary decision issued by the Minnesota Supreme Court.

ljj

Enclosures

cc: D. Gregory Mulligan

*Distribution:*

Assignment Editor, KSTP Newsroom (newsreply@kstp.com)  
Rochelle Olson, Minneapolis Star Tribune (Rochelle.Olson@startribune.com)  
Abby Simons, Minneapolis Star Tribune (asimons@startribune.com)  
Assignment Editor, Minnesota Public Radio (newsroom@mpr.org)  
Associated Press, Attention: News Desk (apminneapolis@ap.org)  
MNN/UPI (newsroom@mnnradio.com)  
Assignment Desk, KARE 11 (news@kare11.com)  
Hannah Sayle, Managing Editor, City Pages (hsayle@citypages.com)  
Laura McCallum, Minnesota Public Radio (lmccallum@mpr.org)  
Tom Lyden, KMSP Fox 9 (tom.lyden@foxtv.com)  
Seth Leventhal (seth@leventhalpllc.com)

Distribution List  
February 13, 2020  
Page 2

Seth Leventhal (seth@leventhalpllc.com)  
Valley News Live (news@valleynewslive.com)  
Leah Beno, Fox 9 News (Leah.Beno@foxtv.com)  
William J. Wernz (wernz.william@dorseyalumni.com)  
Petra Mandigo Hulm, North Dakota Supreme Court (phulm@ndcourts.gov)  
Barbara Jones, Managing Editor, Minnesota Lawyer (barbara.jones@minnlawyer.com)  
Randy Furst, Minneapolis Star Tribune (rfurst@startribune.com)  
David Chanen, Minneapolis Star Tribune (david.chanen@startribune.com)  
Nick Woltman, St. Paul Pioneer Press (nwoltman@pioneerpress.com)  
Dan Browning, Minneapolis Star Tribune (dbrowning@startribune.com)  
Paul Walsh, Minneapolis Star Tribune (pwalsh@startribune.com)  
WCCO (tips@wcco.com)  
Jennifer Mayerle, WCCO-TV (jlmayerle@wcco.com)  
Sarah Horner (shorner@pioneerpress.com)  
Richard D. Sletten, Clerk of Federal District Court (michael\_vicklund@mnd.uscourts.gov)  
Kevin Featherly, Minnesota Lawyer (kfeatherly@minnlawyer.com)  
Chao Xiong, Minneapolis Star Tribune (cxiong@startribune.com)  
Internal Revenue Service (opr.notices@irs.gov)  
Robin M. Wolpert, Lawyers Professional Responsibility Board Chair (rwolpert@comcast.net)  
Fox 9 News (fox9news@foxtv.com)

**OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY**

1500 LANDMARK TOWERS  
345 ST. PETER STREET  
ST. PAUL, MINNESOTA 55102-1218

TELEPHONE (651) 296-3952  
TOLL-FREE 1-800-657-3601

FAX (651) 297-5801

**NEWS RELEASE**

For immediate release  
February 13, 2020

Contact: Susan M. Humiston, Director  
(651) 296-3952

**ATTORNEY DISCIPLINED**

ST. PAUL – On February 11, 2020, the Minnesota Supreme Court vacated the December 30, 2019, suspension order for attorney D. Gregory Mulligan of Edina, replacing it with an order dated February 11, 2020. Copies of the Court's decisions are attached, which includes an order explaining the reasons for vacating the December 30, 2019, order and the new order.

-END-



**FILED**

February 11, 2020

**OFFICE OF  
APPELLATE COURTS**STATE OF MINNESOTA  
IN SUPREME COURT

A19-1932

**RECEIVED**

FEB 12 2020

In re Petition for Disciplinary Action against  
D. Gregory Mulligan, a Minnesota Attorney,  
Registration No. 0203592.OFFICE OF LAWYERS  
PROF. RESP.

## ORDER

The Director of the Office of Lawyers Professional Responsibility has filed an amended petition for disciplinary action alleging that respondent D. Gregory Mulligan has committed professional misconduct warranting public discipline—namely, representing clients when a potential, non-waivable conflict of interest existed, failing to deposit advance fees into trust, failing to timely refund unearned advance fees, ineffectively representing a client in a criminal manner, failing to disclose to an unrepresented person that his client's interests were adverse to those of the unrepresented person, failing to comply with discovery obligations, failing to provide the client with a copy of the file, and entering into a business transaction with a client without making the proper disclosures. *See* Minn. R. Prof. Conduct 1.1, 1.3, 1.4(a)(4), 1.4(b), 1.7(a)(2), 1.8(a)(2), 1.15(c)(4), 1.15(c)(5), 1.16(d), 3.4(c), 4.3(b), 8.4(d).

Respondent and the Director have entered into a stipulation for filing an amended petition for disciplinary action and for discipline. In it, respondent unconditionally admits the allegations in the amended petition. The parties jointly recommend that the appropriate

discipline is a 30-day suspension, retroactive to January 13, 2020, and 2 years of supervised probation.

The court has independently reviewed the file and approves the recommended disposition.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Respondent D. Gregory Mulligan is suspended from the practice of law for a minimum of 30 days, retroactive to January 13, 2020.
2. Respondent shall pay \$900 in costs pursuant to Rule 24, Rules on Lawyers Professional Responsibility (RLPR).
3. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).
4. Respondent shall be eligible for reinstatement to the practice of law following the expiration of the suspension period provided that respondent files with the Clerk of the Appellate Courts and serves upon the Director an affidavit establishing that he is current in continuing legal education requirements, has complied with Rules 24 and 26, RLPR, and has complied with any other conditions for reinstatement imposed by the court.
5. By December 20, 2020, respondent shall file with the Clerk of the Appellate Courts and serve upon the Director proof of successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Failure to timely file the required documentation shall result in automatic suspension, as provided in Rule 18(e)(3), RLPR.

6. Following reinstatement, respondent shall be placed on probation for 2 years, upon the following terms and conditions:

a. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall promptly respond to the Director's correspondence by its due date. Respondent shall provide to the Director a current mailing address and shall immediately notify the Director of any change of address. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct that may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

b. Respondent shall abide by the Minnesota Rules of Professional Conduct.

c. Respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director to monitor compliance with the terms of this probation. Within 2 weeks of the date of this order, respondent shall provide to the Director the names of four attorneys who have agreed to be nominated as respondent's supervisor. If, after diligent effort, respondent is unable to locate a supervisor acceptable to the Director, the Director will seek to appoint a supervisor. Until a supervisor has signed a consent to supervise, the respondent shall on the first day of each month provide the Director with an inventory of active client files described in paragraph d. below. Respondent shall make active client files available to the Director on request.

d. Respondent shall cooperate fully with the supervisor in his/her efforts to monitor compliance with this probation. Respondent shall contact the supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall submit to the supervisor an inventory of all active client files by the first day of each month during the probation. With respect to each active file, the inventory shall disclose the client name, type of representation, date opened, type of fee charged, most recent activity, next anticipated action, and anticipated closing date. Respondent's supervisor shall file written reports with the Director at least quarterly, or at such more frequent intervals as may reasonably be requested by the Director.

e. Respondent shall initiate and maintain office procedures which ensure that there are prompt responses to correspondence, telephone calls, and other important communications from clients, courts, and other persons interested in matters which respondent is handling, and which will ensure that respondent regularly reviews each and every file and completes legal matters on a timely basis.

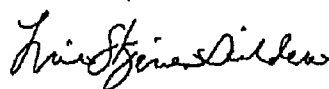
f. Within 30 days of the date of this order, respondent shall provide to the Director and to the probation supervisor, if any, a written plan outlining office procedures designed to ensure that respondent is in compliance with probation requirements. Respondent shall provide progress reports as requested.

g. Respondent shall complete a minimum of 2 hours of continuing legal education credits or other training/shadowing per month related to criminal law or criminal procedure.

h. If, after giving respondent an opportunity to be heard by the Director, the Director concludes that respondent has violated the conditions of probation or engaged in further misconduct, the Director may file a petition for disciplinary action against respondent without the necessity of submitting the matter to a panel or panel chair.

Dated: February 11, 2020

BY THE COURT:



Lorie S. Gildea  
Chief Justice

**FILED**

February 11, 2020

**OFFICE OF  
APPELLATE COURTS**STATE OF MINNESOTA  
IN SUPREME COURT

A19-1932

**RECEIVED**

FEB 11 2020

OFFICE OF LAWYERS  
PROF. RESP.

In re Petition for Disciplinary Action against  
D. Gregory Mulligan, a Minnesota Attorney,  
Registration No. 0203592.

## ORDER

On December 3, 2019, the Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action alleging that respondent D. Gregory Mulligan committed professional misconduct warranting public discipline. That same day, the parties filed a stipulation for discipline in which Mulligan unconditionally admitted the allegations in the petition and the parties recommended that the appropriate discipline was a 30-day suspension followed by 2 years of probation. On December 30, 2019, we suspended Mulligan for 30 days, followed by 2 years of probation. *In re Mulligan*, 936 N.W.2d 884, 884 (Minn. 2019) (order).

The Director has now filed a motion for an amended order suspending Mulligan due to mistakes in the petition for disciplinary action. Along with the motion, the Director has filed an amended petition for disciplinary action that addresses these mistakes by eliminating factual allegations related to two rule violations and the allegations that Mulligan violated these rules. The Director has also filed a stipulation for filing an amended petition for disciplinary action and for discipline. The Director asks us to issue

an amended suspension order based on the amended petition for disciplinary action and the updated stipulation for discipline.

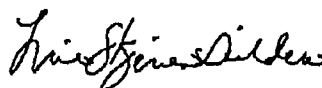
Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The Director's motion for an amended order is granted.
2. The December 30, 2019 order suspending respondent is vacated.
3. The Director is authorized to file an amended petition for disciplinary action and a stipulation for filing an amended petition for disciplinary action and for discipline.
4. The Clerk of the Appellate Courts shall separately docket the amended petition for disciplinary action and the stipulation for filing an amended petition for disciplinary action and for discipline, both of which are attached to the Director's motion for an amended order.

Dated: February 11, 2020

BY THE COURT:



Lorie S. Gildea  
Chief Justice