

## TRANSPARENCY IN GOVERNMENT

By

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The Minneapolis *StarTribune* recently published a series of articles and an editorial concerning the state's Board of Medical Practices, and one on possible legislative response. The crux of their articles concerns the amount of information available to the public about the board's investigations and decisions. The editorial called for greater transparency by the board. The public expects a substantial degree of openness and transparency from its governmental agencies. On the whole, this is a reasonable expectation, especially if public funds are involved.

In the lawyer discipline system, how much openness and transparency is appropriate? Balancing the public's desire to have access to accurate information about a lawyer's conduct, her license status and disciplinary history, against the also legitimate confidentiality concerns of innocent lawyers and their clients—especially in matters where the client is not the source of a complaint, is often difficult. Beyond that basic tension, there also exists a tension in determining what information, although available to the public, should be *publicized* by the lawyer disciplinary system and what should simply be available.

### Rule 20

The starting point for analyzing confidentiality in lawyer discipline proceedings is Rule 20, Rules on Lawyers Professional Responsibility (RLPR). The basic statement of the rule is that “the files, records, and proceedings of the District [Ethics] Committees, the [Lawyers] Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed[.]” This appears to side heavily against transparency. There then follow, however, 11 identified exceptions to confidentiality and seven more special matters in which the director has discretion to disclose information. The number of exceptions may seem sufficient to essentially “swallow” the basic rule. In fact, most information in lawyer discipline matters,

including matters in which private discipline is issued, remains confidential unless and until probable cause for public discipline is established and a petition is filed with the Minnesota Supreme Court. Once such a probable cause determination is made, the director's file becomes open to the public. Information relating to advisory opinions issued by the director's staff, overdraft notification files (that do not result in a disciplinary investigation), and probation files are confidential in most instances under Rule 20.

What are the exceptions that allow disclosure of otherwise confidential information about a disciplinary matter? Most involve authorizing disclosure of information between the Director's Office and other similar agencies, such as the Board of Law Examiners, Board on Judicial Standards, the Client Security Board, and other lawyer discipline and admission authorities. Even there, most such disclosures are made pursuant to an attorney's authorization for disclosure, as are all disciplinary history checks requested by the Governor's Office (when considering a judicial appointment) or by malpractice carriers. One requirement of Rule 20 that sometimes catches an attorney off-guard during a disciplinary investigation provides that if the complainant in a matter is or was a client of the attorney at the time of the alleged misconduct, then the attorney is to furnish copies of his written responses directly to the complainant, except any portions of the response not related to the complainant's allegations. Examples of the more discretionary matters that the Director's Office may disclose include, logically, the ability to disclose to other members of a lawyer's firm information necessary to protect the firm's clients or to ensure appropriate supervision.

### **Publicizing**

The director also has discretion under Rule 20 to disclose the ultimate result of almost any disciplinary matter. This has never been interpreted to provide unfettered discretion to tell anything to just anyone about a matter. Rather, it allows the director to deal honestly with members of the press, for example in instances where criminal charges have been brought against an attorney or court sanctions have been imposed that have already generated a degree of publicity. If the Director's Office already has such a matter under investigation, it would be disingenuous to respond "no comment" to a press call about the matter rather than acknowledge that the disciplinary system is aware of the allegations and is investigating and will deal with the matter properly.

Considerable information is available to the public about the lawyer discipline system, especially via our website (<http://lprb.mncourts.gov>). Complaints may be filed online by completing a form; the lawyer search function allows anyone to obtain information about a lawyer's current license status and public discipline history (with links to copies of the relevant documents); the Rules of Professional Conduct, the RLPR,

and other applicable sources are provided; and copies of the office's annual reports are reproduced there for review. Disciplinary history and license information may also be obtained by telephone.

A final aspect of transparency involves publicizing the activities of a governmental agency, as opposed to simply making information available upon inquiry or internet search. What level of affirmative action to notify the public about a particular lawyer is appropriate? The Lawyers Board's approach generally is to issue a press release upon filing a contested petition for public disciplinary action with the Minnesota Supreme Court if the Director's Office will be seeking suspension or disbarment. This provides a level of public notice that the attorney is alleged to have committed serious misconduct and that her license may be revoked in the near future. If the respondent attorney stipulates to an agreed-upon recommendation for discipline that is being filed simultaneously with the petition, then a press release is usually filed only if disbarment is part of the stipulated agreement. The distinction is premised upon the fact that the court will be issuing an order for discipline relatively promptly in most such matters. A press release is also sent upon the issuance of all public discipline decisions by the supreme court. Of late, the press, including online news sources, has been printing articles based upon our office's press releases more often than in the past.

### **Balancing**

The Lawyers Board and the court have reached a balance at present by which substantial general and statistical information about the discipline system is readily available to the public. Information relating to the license status of all attorneys can be obtained. The reputation of an innocent lawyer is maintained by keeping confidential information about dismissed complaints and those in which private discipline was imposed (although such matters may become public if further misconduct is committed).Ftn 1

Once there exists probable cause to warrant public discipline of an attorney, files are open to the public (upon reasonable advance request as to active files) and a lawyer's complete public discipline history may be viewed. Where public notice is deemed necessary, the system's activities are actively publicized. On the whole, it would appear that concerns for the level of transparency in other government agencies are not often echoed in the lawyer discipline system.

### **Notes**

1 Confidentiality requirements on dismissed complaints and private discipline apply only to persons within the disciplinary system. The complainant receives a copy of such dispositions and is not bound by Rule 20. "Gag rules" on complainants also have

been held to be unconstitutional. Although the immunity protection afforded complainants for statements made in a disciplinary investigation (Rule 21(a), RLPR) do not apply to statements made outside the process, a truthful recitation of the result of a disciplinary complaint is unlikely to be actionable absent additional, and defamatory, statements.