

FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition to Amend Rule 20 of the  
Minnesota Rules on Lawyers Professional  
Responsibility  
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**PETITION OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY  
BOARD TO AMEND RULE 20,  
RULES ON LAWYERS  
PROFESSIONAL RESPONSIBILITY**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

Petitioners, Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director), respectfully request this Court to adopt the amendment to Rule 20, Rules on Lawyers Professional Responsibility (RLPR), as set forth below. In support of this petition, petitioners would show the Court the following:

#### INTRODUCTION

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system. Petitioner Director is appointed by this Court to oversee the lawyer discipline system and seek enforcement of the Minnesota Rules of Professional Conduct (MRPC).

2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

3. This Court has adopted the RLPR to establish the rules governing how investigations and proceedings in lawyer discipline matters should be conducted. *See* Rule 2, RLPR.

4. Rule 20, RLPR, governs the public and private nature of the documents and information maintained by the Office of Lawyers Professional Responsibility (OLPR). From time to time, this Court has amended Rule 20, RLPR, to address necessary changes in handling investigative information. For example, in 1999, Rule 20, RLPR, was modified to allow an exchange of information otherwise confidential between two disciplinary boards involving conduct of judges that occurred prior to the judge assuming judicial office. Records maintained by the OLPR are specifically exempt from the Minnesota Data Practices Act (*see* Minn. Stat. § 13.90) and from the Minnesota Rules of Public Access to Judicial Records (*see* Minn. Stat. Access to Rec., Rule 1, Subdiv. 2). Rule 20, RLPR, is therefore the only guidance on the confidential or public nature of the records maintained by the Director.

5. Petitioners recognize the importance of Rule 20, RLPR. As a government entity, the OLPR is expected to provide transparency to the public. Public access to information is central to that transparency. Petitioners also recognize the heavy burden associated with maintaining records that contain sensitive, personal, and identifiable information that should not be open to public inspection. The proposed amendments to Rule 20, RLPR, aim to balance those two compelling interests, while providing clear guidance on how information maintained by the Director should be handled.

6. For the reasons set forth below, petitioners request this Court adopt the proposed amendment to Rule 20, RLPR, as set forth in Attachment A.

#### **BACKGROUND AND NEED FOR AMENDMENTS**

7. Beginning in 2016, the Director started to review the RLPR to address areas of improvement to provide clarity and better guidance to the Director and the public. Many of the areas of concern relate to the practical day-to-day application of the RLPR. The Director identified Rule 20, RLPR, the rule that governs the confidentiality and public access of records maintained by the Director, as a rule in need of immediate changes.

8. The current Rule 20, RLPR, could be improved in a number of regards. For example, the current Rule 20, RLPR, provides that prior to probable cause, records maintained by the Director during the course of investigation shall be confidential. Rule 20, RLPR, provides no exception, however, for the Director or the District Ethics Committee (DEC) to share information as necessary with fact or expert witnesses who are interviewed as part of the Director's or the DEC's investigation. Moreover, Rule 20, RLPR, provides no exception that would allow the Director to share information as necessary with Lawyers Concerned for Lawyers when an attorney's mental or physical well-being becomes a concern, or with law enforcement as necessary to protect the safety of the OLPR.

9. Conversely, under the current Rule 20, RLPR, once matters become public, the file is open to public inspection without sufficient protections in place for private, personal, or sensitive information of the parties involved. For example, the current Rule 20, RLPR, does not specify that social security, bank account, or medical information should remain confidential. The Director oftentimes obtains information from other government agencies during the course of an investigation. Under the current Rule 20, RLPR, information classified as confidential by other agencies would not remain confidential once a matter becomes public. Non-complainant client information may also become public even though those clients had nothing to do with the complaint.

10. The lack of clarity under Rule 20, RLPR, relating to these scenarios left the Director with little guidance on how to handle records when faced with these pressing issues. The Director determined that amendments to Rule 20, RLPR, were needed to provide clear and specific guidance on the confidential or public nature of such information.

11. In June 2018, LPRB's Rules Committee (LPRB Rules Committee) began work on specific amendments to Rule 20, RLPR. It became clear after attempts at

amending Rule 20, RLPR, that an organizational overhaul of the rule was needed. For example, the LPRB Rules Committee struggled with adding additional exceptions to sections of the rule because as organized, in some cases, those sections were already exceptions to the rule. At times, a necessary proposed change became an exception to an exception to an exception. This made for drafting difficulties and made any changes to Rule 20, RLPR, more difficult to understand, thus defeating the purpose of any amendments.

12. The Director and the LPRB Rules Committee began to reconsider how best to amend Rule 20, RLPR, to avoid making the rule more confusing and difficult to understand. The Director reviewed other jurisdictions to compare how others handled confidential and public information. The Director studied the equivalent rules from other jurisdictions to determine what could be learned and adopted to improve Minnesota's own rule. Based on this information, the Director, in collaboration with the LPRB Rules Committee, worked on drafting a re-organized Rule 20, RLPR, to streamline the rule, making it easier to understand, while addressing the various deficiencies identified in the current rule.

13. On June 5, 2020, the Director presented to the LPRB Rules Committee a revised and reorganized Rule 20, RLPR. The LPRB Rules Committee approved the changes, with additional language to clarify that information related to non-complainant clients should remain confidential except under certain conditions.

14. At a regular Board meeting on June 19, 2020, the LPRB Rules Committee presented to the LPRB the proposed amendments to Rule 20, RLPR. At the meeting, the Board approved petitioners' filing of this petition to amend Rule 20, RLPR, with the Court.

15. On August 25, 2020, at an MSBA Professional Regulation Committee meeting, the OLPR presented the MSBA Professional Regulation Committee with a

draft of the proposed amendments to Rule 20, RLPR. Other than typographical changes, no objections or substantive comments or suggestions were made.

16. At a regular Board meeting on September 25, 2020, the LPRB was informed that the MSBA Professional Regulation Committee offered no substantive recommendations or comments. The LPRB was offered a copy of the proposed amendments to Rule 20, RLPR, inclusive of edits made based on the MSBA Professional Regulation Committee recommended edits for review. The LPRB made no objections or other changes to the LPRB's original approval of filing this petition to amend Rule 20, RLPR.

#### **SUMMARY OF THE PROPOSED AMENDMENTS AND DISCUSSION**

17. The following are the principal changes to Rule 20, RLPR, and the reasons for the changes, which petitioners recommend this Court adopt:

##### **Changes in the Organization of the Rule.**

18. Changes to Rule 20, RLPR, include a change in the rule's organization. The proposed changes would divide the rule into categories of information: (a) before probable cause or commencement of referee or court proceedings; (b) after probable cause or commencement of referee or court proceedings; (c) information maintained as part of the Director's more administrative rather than investigative or prosecutorial function; and (d) expungement.

19. As previously mentioned, this change is necessary to streamline the rule, making it easier to understand and follow and allowing for the amendments without creating a situation where the rule contains confusing multiple exceptions to exceptions to the rule.

##### **Section 20(a), RLPR: Records Before Determination of Probable Cause or Commencement of Referee or Court Proceedings.**

20. To reflect the reorganization of Rule 20, RLPR, Rule 20(a), RLPR, has been modified to make clear that section (a) covers information maintained by the Director

prior to a determination of probable cause or commencement of public referee or Court proceedings. The amended section (a) makes clear that it would include records related to pending investigations, or matters that resulted in dismissals or private discipline. All such information, except specified under Rule 20(a), RLPR, is deemed confidential nonpublic information.

21. This section is mostly unchanged, except for deletions of sections that were made unnecessary due to the change in the rule's organization, additions to include instances where information otherwise confidential may be shared with others, and changes that would clarify the rule. The changes and reason for changes are as follows:

- a. Deletion of 20(a)(2) – under new rule organization, there is no longer a need to specify that confidential information becomes public after a probable cause determination.
- b. Amending current section 20(a)(3) to allow sharing of information with other lawyer admission or disciplinary authority that have matters under investigation relating to the affected attorney.
  - Under the current rule, such information sharing is only allowed if the attorney is admitted to practice or seeks to practice in the other jurisdiction. On occasion, other jurisdictions will seek information about an attorney who is under investigation, even though the attorney is not seeking admission or admitted in the other jurisdiction. The current rule would not permit sharing of information.
  - The amendment broadens the rule to allow sharing of information if the affected lawyer is under investigation in the other jurisdiction.
- c. Deletion of 20(a)(8) which keeps confidential mental impressions and communication between Committee and Board members.
  - This provision is unnecessary under the new rule organization because everything under section 20(a) is confidential unless excepted by the rule.

- This provision has been moved to section 20(b), which addresses information that is public.
- d. Addition to allow the Director to share information otherwise deemed confidential under this section with the DEC and any fact or expert witness as necessary to investigate the complaint.
- This change is important because such necessary information sharing is essential for the Director and the DEC to conduct investigations.
  - Currently, the Director views such information sharing as impliedly authorized in order to carry out the essential function of enforcement of the Rules of Professional Conduct.
  - This change offers clear guidance that such necessary information sharing is permitted.
- e. Addition to allow the Director to share information otherwise deemed confidential under this section with the Supreme Court approved lawyer assistance program (in this case, Lawyers Concerned for Lawyers (LCL)) in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being.
- Oftentimes, during the course of an investigation, the attorney's mental, emotional, or physical well-being becomes an issue.
  - The current Rule 20 does not permit sharing of information with LCL in such cases, which may interfere with necessary assistance offered to the affected lawyer in a timely manner.
  - The amended rule would permit the Director to reach out to LCL for assistance. The amended rule makes clear that any communication would be one-sided, so that it is understood that all interactions between the affected attorney and LCL would remain confidential.
- f. Addition to allow the Director to share information otherwise deemed confidential under this section with law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or district court is at risk.

- Lawyer discipline cases oftentimes involve unhappy respondents and complainants that could lead to potentially threatening situations. The current rule does not provide an exception to reveal information with law enforcement as necessary to protect the Office or the Board.
  - For example, if the Director’s staff meets with a respondent or complainant who becomes threatening, law enforcement may need to be aware of the identity of the lawyer or complainant, the reason for the threat, or any relevant background information relating to the threat.
  - This addition to Rule 20 would make clear that under such circumstances, the Director is permitted to reveal information otherwise deemed confidential under Rule 20(a) if necessary to address public safety or the safety of OLPR staff and others.
- g. The section formerly listed under the heading “Special Matters” is amended to be incorporated within Rule 20(a) as section 20(a)(13), RLPR, with minor edits for clarity.
- The current Rule 20 has a section titled “Special Matters” that lists specific circumstances otherwise confidential information may be revealed. In an effort to streamline the rule, this section remains the same, but incorporated section Rule 20(a)’s exceptions.

**Section 20(b): Records After Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.**

22. As part of the rule’s reorganization, Section 20(b), RLPR, would address records maintained by the Director after probable cause has been determined or after commencement of public referee or court proceedings. Under this provision, records maintained by the Director after a determination of probable cause or the commencement of public court proceedings would be deemed public information except as provided under this section. The changes and reason for changes under this section are as follows:



- a. Minor edits generally made to this section of the rule to clarify the rule and reflect the organizational change.
- b. Addition to the rule to exclude from public access sensitive personal information contained in the file such as social security numbers, birthdates, driver's license numbers, bank account numbers and medical information.
  - During the course of the Director's investigation, the Director necessarily obtains sensitive personal information relating to the affected lawyer, the complainant or others.
  - The current Rule 20, RLPR, does not exclude such information from public access once a file becomes public. The Director currently makes an attempt to protect such information, but it is not specifically provided for under Rule 20, RLPR.
  - This amendment would make clear that such information is not public and will remain confidential even after the file becomes public, but would still allow the Director to file such information under seal pursuant to Minnesota Rules of Civil Appellate Procedure 112.01.
- c. Addition to the rule to exclude from public access information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information. Such information may remain confidential and nonpublic under this amendment.
  - During the course of an investigation, the Director sometimes obtains information from other governmental agencies. While inter-agency sharing of information is permitted, such information is often confidential and should remain non-public when provided to the Director.
  - The current rules do not specify that confidential information obtained from other agencies should remain confidential. This causes a chilling effect in inter-agency information sharing as the Director cannot guarantee that confidential information from another government agency will remain so under our rules.

- This amendment makes clear that when a file becomes public, confidential information obtained from other government agencies that are classified by such agencies as confidential, will remain confidential.
- d. Addition to the rule to exclude from public access, the identity of non-complaining clients unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.
- During the course of an investigation, the Director may obtain information from other clients who were non-complainants. For example, a trust account case may reveal trust account violations for a number of clients who never complained to the Director.
  - Under the current Rule 20, once a matter becomes public, information relating to these non-complainant clients may become public as part of the public file. Such information may include client name, legal issues handled, or other personal information.
  - Petitioners believe these non-complainant clients should not have their otherwise private information revealed just because they had the misfortune to hire an attorney who committed misconduct.
  - The amended rule would keep confidential such information from non-complainant clients, unless such person waives confidentiality, or was involved in the matter as a witness or someone who provided evidence.
- e. Addition to section 20(b) to protect the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties. This provision was previously contained under section 20(a) of Rule 20, and with the reorganization of Rule 20, is more appropriately under Rule 20(b).

**Section 20(c): Administrative Files: Advisory Opinions, Overdraft Notification Program Files, Rule 26, RLPR, Compliance, Rule 24, RLPR, Collections, Rule 5.8, MRPC, Disclosures, Trusteeship Files, and Probation Files.**

23. As part of the rule's reorganization, Section 20(c), RLPR, would address records maintained by the Director in the Director's administrative capacity unrelated to the investigation or prosecution of attorney misconduct. The amended rule makes clear such information is deemed confidential unless otherwise permitted or required under the rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director. The changes and reason for changes in this section are as follows:

- a. In general, section 20(c) keeps the provisions of the current section 20(f), which only addresses advisory opinion, overdraft notification and probation files.
- b. Section 20(c) expands current section 20(f) to address the handling of records maintained in other administrative capacities not currently covered by Rule 20(f), such as Rule 26, RLPR, compliance; Rule 24, RLPR, collection efforts, trusteeship files; and Rule 5.8, MRPC, disclosures.
- c. As Section 20(c) is expanded to include handling of Rule 24, RLPR, collection efforts and Rule 5.8, MRPC, disclosures, Section 20(c) adds specific provisions to address the special nature of those two rules as follow:
  - Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these rules are not deemed confidential. This is because Rule 24 collection efforts would necessarily involve litigation and court filings, which are public in nature.
  - Correspondence received by the Director pursuant to Rule 5.8, MRPC, are not deemed confidential. This is because Rule 5.8, MRPC, involves the hiring of attorneys whose licenses are

suspended. As a matter of public protection, such disclosures should be public.

**Section 20(d): Expunction of Records.**

24. Current Section 20(e) of RLPR addresses records retention. This section would remain the same, but consistent with the reorganization of Rule 20, RLPR, would be changed to become section 20(d) of RLPR.

**CONCLUSION**

For the foregoing reasons, petitioners Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility respectfully request this Court to adopt the amended changes to Rule 20, RLPR, as set forth in Attachment A, and amend the Rules of Lawyers Professional Responsibility accordingly.

Respectfully submitted,

/s/ Robin Wolpert

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## ATTACHMENT A

### Rule 20. CONFIDENTIALITY; EXPUNCTION

#### (a) Records Before Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.

The investigative files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint against or investigation of a lawyer prior to a determination of probable cause or commencement of referee or Court proceedings, including files resulting in private discipline, summary dismissal, or a determination that discipline is not warranted, shall be deemed confidential and shall not be disclosed, except:

- (1) As between the Committees, Board and Director in furtherance of their duties;
- (2) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice, or has a matter under investigation;
- (3) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall a member of the District Ethics Committee or the Board, the Director, or the Director's staff be subject to deposition or compelled testimony, except upon a showing to the Court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;
- (4) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege, portions may be deleted;
- (5) Where permitted by the Court;
- (6) Where required or permitted by these Rules;

(7) As between the Director or District Ethics Committee and any witnesses, whether fact or expert, as is necessary for the investigation of the complaint;

(8) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer;

(9) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office;

(10) As between the Director and the Board of Law Examiners in furtherance of their duties under these Rules;

(11) From the Director to the Supreme Court approved lawyer assistance program in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being;

(12) As between the Director and law enforcement or court personnel in situations where public safety or the safety of the Director and staff, Board, or District Court is at risk;

(13) Notwithstanding the provisions of this Rule, the following may be disclosed by the Director relating to records before a determination of probable cause or commencement of referee or Court proceedings:

(i) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(ii) With the affected lawyer's consent, the fact that the Director has determined that discipline is not warranted;

(iii) The fact that the Director has issued an admonition;

(iv) The Panel's disposition under these Rules;

(v) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e);

(vi) The fact that the terms of a conditional admission have been modified or extended under Rule 8(d)(5);

(vii) Information to other members of the lawyer's firm or employer necessary for protection of the firm's or organization's clients or for the appropriate exercise of responsibilities under Rules 5.1 and 5.2, Minnesota Rules of Professional Conduct.

**(b) Records After Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.**

After probable cause has been determined under Rule 9(j)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director are public and not confidential except:

(1) As ordered by the referee or this Court;

(2) Medical records and other documents containing sensitive or personal identifying information, including but not limited to social security numbers, birthdates, driver's license numbers, bank account numbers and medical information shall remain confidential and should, as administratively practicable, be redacted or removed from the file;

(3) Information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information shall remain confidential and nonpublic.

(4) The identity of non-complaining clients shall remain confidential and not subject to public disclosure unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a declaration or sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.

(5) Nothing in this Rule shall be construed to require the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties.

**(c) Administrative Files: Advisory Opinions, Overdraft Notification Program Files, Rule 26, RLPR, Compliance; Rule 24, RLPR, Collections; Rule 5.8, MRPC, Disclosures, Trusteeship Files, and Probation Files.**

(1) All other files, notes, and records maintained by the Director and not specifically mentioned in Rule 20, RLPR, shall not be disclosed unless otherwise permitted or required under the Rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director.

(2) The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, Rule 26, RLPR, compliance, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

(i) in the course of disciplinary proceedings arising out of the enforcement of Rule 26, RLPR, or arising out of the facts or circumstances of the advisory opinion, overdraft notification or probation; or

(ii) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification, probation or Rule 26, RLPR, requirements;

(3) Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these Rules are not deemed confidential.

(4) Correspondence received by the Director pursuant to Rule 5.8, Minnesota Rules of Professional Conduct, are not deemed confidential.

**(d) Expunction of Records.**

The Director shall expunge records relating to dismissed complaints as follows:

(1) *Destruction schedule.* All records or other evidence of the existence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) *Retention of records.* Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.