

FILED

May 13, 2022

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

**ORDER REGARDING PROPOSED AMENDMENTS
TO THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY**

The Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility have filed a petition to amend Rule 20, Rules on Lawyers Professional Responsibility. We opened a public comment period and held a public hearing on January 26, 2022.

After thorough consideration of the proposed amendments and the public comments, and for the reasons explained below, we deny the petition.

IT IS HEREBY ORDERED that the petition of the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility to amend Rule 20, Rules on Lawyers Professional Responsibility, is denied.

Dated: May 13, 2022

BY THE COURT:

Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

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MEMORANDUM

PER CURIAM.

The Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director) have filed a petition to amend Rule 20 of the Rules on Lawyers Professional Responsibility (RLPR). The petition asks us to reorganize Rule 20, expand petitioners' authority to share information with other agencies, and maintain as confidential certain records that are part of a disciplinary proceeding. We opened a public comment period and held a public hearing on January 26, 2022.

Rule 20, RLPR, addresses the confidentiality of petitioners' files, records, and proceedings. The rule treats these items differently, depending on whether or not a panel of the LPRB has made a probable cause determination that public discipline is warranted or proceedings before this court or a referee under the Rules on Lawyers Professional Responsibility have begun.¹ If there has not been a probable cause determination, such files, records, and proceedings "shall be deemed confidential and shall not be disclosed,"

¹ In this memorandum, we use the phrase "probable cause determination" as a shorthand way to refer to the phrase "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" that is used in Rules 20(a)(2) and 20(c), RLPR.

subject to several exceptions. Rule 20(a), RLPR. If, however, there has been a probable cause determination, these files, records, and proceedings “are not confidential,” “except for work product” or unless we or a referee orders otherwise. Rule 20(c), RLPR.

Petitioners claim that their records are exempt from the Rules of Public Access to Records of the Judicial Branch (Rules of Public Access) and that Rule 20 is the only guidance they have on the confidential or public nature of their records. Petitioners have identified additional areas where they believe they should be allowed to share confidential investigative documents and information before there has been a probable cause determination. In addition, they believe the rule does not adequately address privacy concerns related to sensitive documents they might possess that become public after a probable cause determination.

We agree with some of the underlying rationales for the petition. There may be additional areas in which petitioners should be allowed to share confidential investigative documents and information before there has been a probable cause determination. In addition, we acknowledge that some of petitioners’ documents may contain sensitive information, such as personally identifying information, and that these documents become publicly accessible after a probable cause determination. As a result, sound public policy reasons may support allowing some, or some portions, of petitioners’ documents to remain confidential after a probable cause determination has been made.

Nevertheless, we have substantial concerns with the proposed rule changes in the petition. The petition appears to be based on a fundamental misunderstanding of the law

that applies when determining whether petitioners' records and proceedings are publicly accessible or confidential. Rule 20, RLPR, is not the only guidance applicable here.

The Rules of Public Access govern the public's access to the records of the Minnesota Judicial Branch. Minn. R. Pub. Access to Recs. of Jud. Branch 1, subd. 1 ("These rules govern access to the records of all courts and court administrators of the judicial branch of the state of Minnesota."). The Rules of Public Access apply to some of the petitioners' records. *See id.*, subd. 2 (stating that "these rules do not govern access to the *substantive and procedural records* of the" court's boards, including the petitioners (emphasis added)). Specifically, they apply to petitioners' administrative records that do not relate to a specific disciplinary investigation or proceeding. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 1, subd. 2, 5.

Petitioners propose a new rule that would make the Director's administrative records confidential, while simultaneously giving the Director the authority to decide to disclose these records.² This proposed rule is contrary to the Rules of Public Access in two ways. First, the presumption of confidentiality is the opposite of the presumption in the Rules of Public Access that administrative records are publicly accessible unless an exception in those rules requires confidentiality. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 5 (stating that "[a]ll administrative records are accessible to the public except the following"). Second, the proposed rule would allow the Director to determine that administrative records that are not accessible to the public under the Rules of Public

² This is proposed Rule 20(c)(1).

Access, such as a personnel record, could still be disclosed. *See id.*, subd. 1 (making personnel records not publicly accessible but providing that specific information about judicial branch employees may be disclosed).

In addition, the Rules of Public Access apply to anything filed in a disciplinary case before us, including anything filed with a referee. Minn. R. Pub. Access to Recs. of Jud. Branch 1, subd. 1 (“These rules govern access to the records of all courts and court administrators of the judicial branch of the state of Minnesota.”), 3, subd. 5(a) (defining “case records”). The Rules of Public Access make anything filed in such a case publicly accessible unless it is subject to an exception in those rules. Minn. R. Pub. Access to Recs. of Jud. Branch 2 (stating that “[r]ecords of all courts . . . in the state of Minnesota are presumed to be open to any member of the public” but that there are “exceptions to the general policy” set out in the rules), 4, subd. 1 (stating that “the following case records are not accessible to the public”). Many of petitioners’ records will be filed in disciplinary cases before us, making them presumptively publicly accessible under the Rules of Public Access.

Petitioners, however, have proposed a new rule that would maintain the confidentiality of certain records even after there is a disciplinary case before us.³ According to petitioners, the Director would file these records under seal in a disciplinary case pursuant to Minn. R. Civ. App. P. 112.01. This proposed rule is inconsistent with the Rules of Public Access. For example, the rule proposes that records containing medical

³ This is proposed Rule 20(b)(2)–(4).

information would remain confidential. But the Rules of Public Access only make medical records, not medical information, confidential, Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(f) (designating “medical records” as not publicly accessible, but not medical information), and in most cases, medical records become publicly accessible if admitted into evidence in proceeding that is open to the public, unless a court orders otherwise, Minn. R. Pub. Access to Recs. of Jud. Branch 8, subd. 5.

In addition, some of the proposed categories of confidential records, such as those containing sensitive information, have no comparable exception in the Rules of Public Access making them nonpublic. The phrase “sensitive information” is very broad and could encompass many records. A lawyer accused of committing misconduct in a disciplinary case before us could believe that many more records fall under this exception and are not publicly accessible, leading to disputes about what is confidential under this rule. The proposed rule does not indicate who will decide what is sensitive information or what criteria will be applied in making this determination.

Petitioners also propose deleting Rule 20(d), RLPR, which addresses “the files, records, and proceedings before a referee or this Court.” They “are not confidential” unless we or the referee orders otherwise. *Id.*; *see also* Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(v)(3) (stating that case records are not accessible to the public if they are made so by “court orders”). Petitioners have not explained why they deleted the rule that allows us and a referee to determine, on a case-specific basis, that certain filings in a disciplinary case should be designated confidential.

In light of our concerns, we deny the petition without prejudice, and petitioners may file another petition proposing changes to Rule 20, RLPR.