



# PROFESSIONAL RESPONSIBILITY

## NONCOOPERATION — MAKING A BAD SITUATION WORSE

BY EDWARD J. CLEARY

I'm often asked what one piece of advice I would give a lawyer who has had a complaint filed against her. The advice is simple: get past the fear and/or anger that is often a natural reaction to being made the subject of a complaint and cooperate as soon as possible.

If the complaint involves neglect or procrastination, consider how it appears to an investigator or this office if the subject of such a complaint dithers and moans but doesn't respond to the merits. In that instance, the lawyer is her own worst enemy. The first step to navigating the disciplinary system is to avoid further problems due to the failure to comply with the Rules. If the complaint is unfounded, a prompt and responsive answer will often end the matter. If the complaint is valid, cooperation may not end the matter, but it will ensure that the responding lawyer does not aggravate an already stressful and uncomfortable episode in a professional career.

### THE RULES INVOLVED

Almost 70 years ago, four decades before this office was created, the Minnesota Supreme Court cited an attorney for failing to respond to authorities who "were entitled to expect at least a courteous response and a prompt cooperation."<sup>1</sup> Other cases followed<sup>2</sup> and in 1981, Rule 25 of Rules on Lawyers Professional Responsibility (RLPR) was created to clarify once and for all what "cooperation" entails in the context of a professional disciplinary investigation. Rule 25, RLPR, specifies that it is the lawyer's duty "to cooperate with the District Committee, the Director, the Director's staff, the Board, or a Panel." Rule 25(b), RLPR, provides that violation of the rule is unprofessional conduct and constitutes a ground for discipline. Pursuant to Rule 8.1 of the Minnesota Rules of Professional Conduct (MRPC), a lawyer in connection with a disciplinary matter must "not knowingly fail to respond" to a disciplinary authority's lawfully authorized demand for information. Both of these provisions provide constitutional breathing room by allowing an exception for a challenge that is made promptly, in good faith, and is asserted for a substantial purpose other than delay.

*"Noncooperation continues to be one of the common grounds for both public and private discipline."*

It is also important to note that a lawyer's duty under Rule 25, RLPR, extends to requests made by a local district ethics committee volunteer. Often the first contact or awareness a lawyer has that he is the subject of a complaint comes from the local district ethics committee. Some lawyers treat this initial contact in a cavalier manner, particularly when the initial contact comes from a nonlawyer member of the committee. Treating the complaint in this manner is a mistake. The investigators are instructed to fully document the noncooperation of an attorney and to keep complete written records regarding compliance with requests for documents under Rule 25, RLPR. Any delay on the part of the respondent serves to lengthen the process, while needlessly burdening the investigator and upsetting the complainant. A written response to the complaint must be obtained from the lawyer. Rule 6, RLPR, gives the lawyer and the complainant certain rights. Under Rule 6(d), RLPR, the complainant has an opportunity to reply to the lawyer's response, while under Rule 6(c), RLPR, the lawyer has the right to obtain a copy of the investigator's report.

### PUBLIC FILES

The good news for an attorney who has had a groundless complaint filed against her, is that under Rule 20(e)(1), RLPR, all the "records or other evidence of a dismissed complaint" are destroyed three years after dismissal. The potentially bad news for a respondent who is the subject of charges is that after probable cause has been determined or a proceeding before a

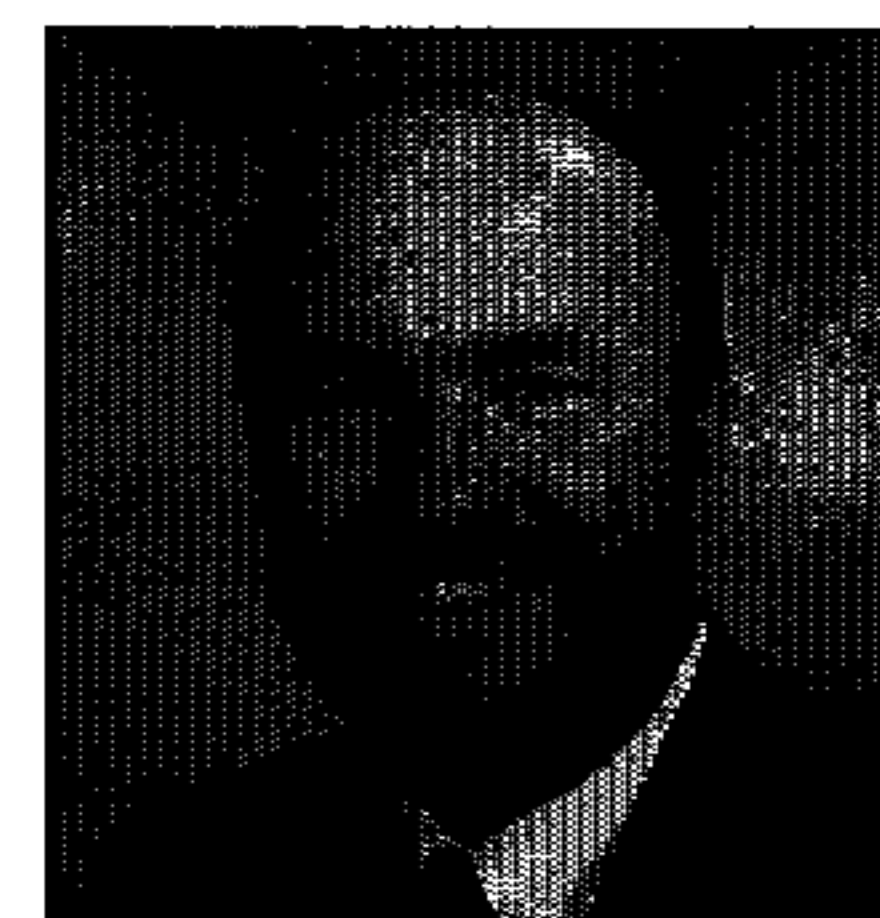
referee of the Supreme Court has been commenced, all "files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential" under Rule 20(c), RLPR. In other words, once an attorney has reached the point, either by waiver or by a Board Panel determination, that the matter warrants public discipline, the file is public, open to other lawyers, the media, and prosecutors.

Occasionally, respondent attorneys or their counsel argue that Rule 25, RLPR, results in compelled testimony in violation of the Fifth Amendment with the result that the government should not be allowed to proceed against the lawyer by using the compelled statements in a criminal prosecution. The issue is whether an attorney faced with discipline is the same as an employee faced with the decision to surrender his job or waive his constitutional privilege against self-incrimination.<sup>3</sup>

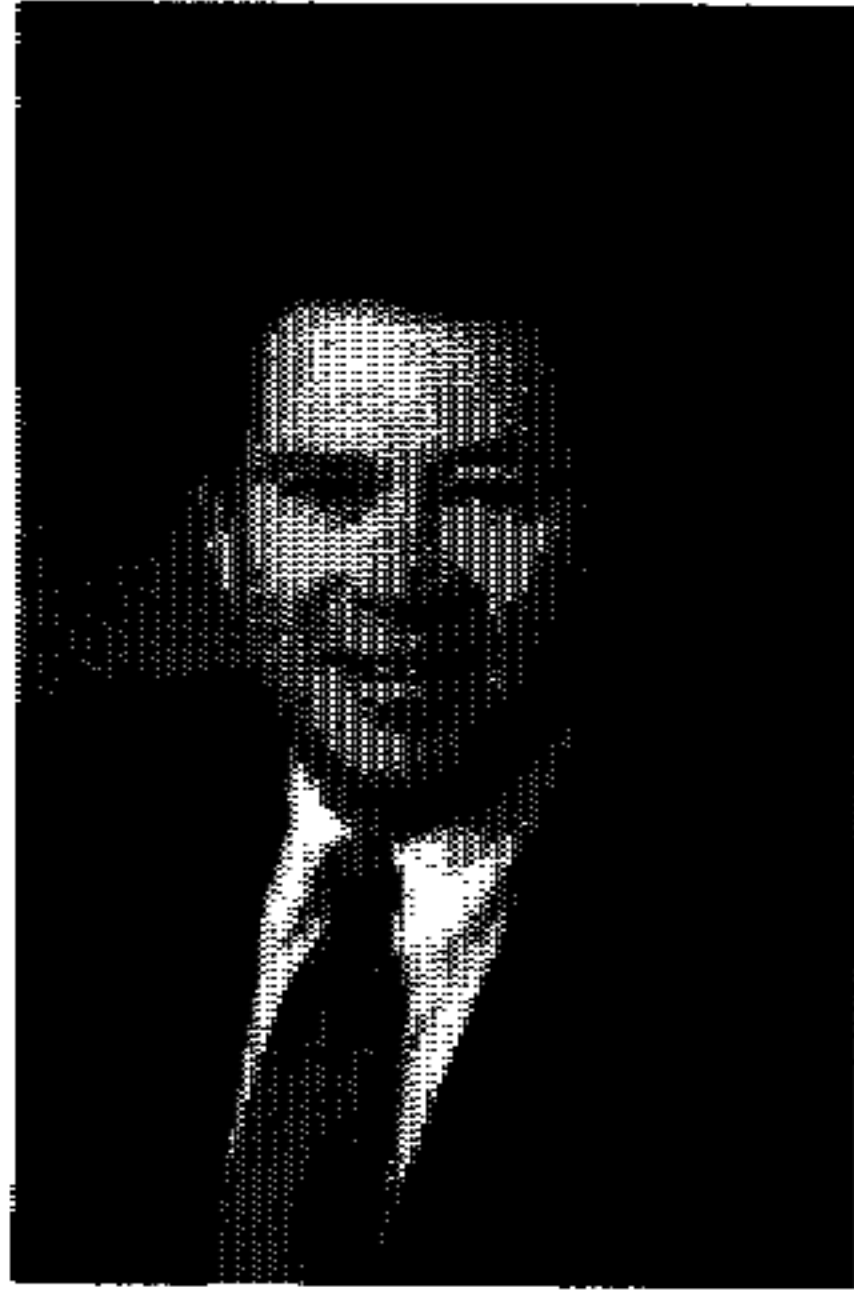
Since few discipline cases result in disbarment, which is the closest analogy to "the loss of a 'job,'" the situation is unusual.<sup>4</sup> However, in disbarment cases, Rule 25, RLPR, leaves open such a challenge as a "substantial purpose other than delay." Consequently, a respondent who has engaged in the type of misconduct that could result in criminal prosecution can invoke the Fifth Amendment without the immediate threat of "loss of employment"; however, in such a situation, this office will pursue the matter fully, even without the respondent's cooperation, and the result will probably be the same.

It is important to note as well that the Fifth Amendment does not apply to the production of records that attorneys are required by law to maintain. Failure to

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produce those records is a violation of the duty to cooperate without reference to the Fifth Amendment.<sup>5</sup> The result is that lawyers who are in serious trouble facing the likelihood of criminal prosecution consult counsel who may well advise them to stipulate to disbarment with our office, since at that point we are often the least of their problems.

### **RECENT CASE**

Noncooperation continues to be one of the common grounds for both public and private discipline. In 1999, one in ten private disciplines resulted from violations of either Rule 8.1(a)(3), MRPC, or Rule 25, RLPR, while over a quarter of public disciplines last year involved infractions of those same provisions.

In July of this year, the Minnesota Supreme Court once again addressed the issue of the failure of an attorney to cooperate with the investigatory process. In *In re Stanbury*, (CX-96-859, decided July 20, 2000), the attorney in question successfully convinced a panel from the Lawyers Professional Responsibility Board that his alleged misconduct did not rise to the level of public discipline. However, the panel found probable cause to believe that the attorney was deserving of public discipline for his noncooperation during the investigation of the complaint. Subsequently, the referee who heard the case agreed with the panel, as did the Court. The respondent had a lengthy disciplinary history, which undoubtedly contributed to the Court's impatience with his failure to meet his obligations under the Rules. The attorney was given a public reprimand and two years' probation for his failure to cooperate with the investigation.

Noncooperation often involves an intentional decision to thumb one's nose at the system. On other occasions, fear or procrastination takes over. In still other situations, the attorney is physically or mentally disabled, and his failure to cooperate is an extension of his inability to meet his professional obligations. The physical and/or mental health of an attorney is always considered; however, a disabled attorney who continues to neglect files often does so to the detriment of his clients. To that extent, all noncooperation must be viewed as a threat to the public interest.

### **CONCLUSION**

Navigating the disciplinary system is more complex than many practitioners realize. The worst mistake for an attorney to make is to ignore the phone call or let-

***"a lawyer's duty [to respond] under Rule 25, RLPR, extends to requests made by a local district ethics committee"***

ter from this office or from a district ethics committee investigator. Any conclusion to be drawn from such failure to cooperate is bad for the attorney and often foreshadows a situation where a lawyer is in deeper trouble than originally thought.

Practicing law is a privilege and the legal profession is fortunate to be self-regulated. The Court and this office have little patience with those respondents who ignore the complaints of the public they serve. Answering in a timely manner and being forthright when a complaint is received is not only the right thing to do, it is the response that is most likely to result to the benefit of the responding attorney. □

### **NOTES**

1. *In re Breeding*, 247 N.W. 694 (1933).
2. See *Matter of Cartwright*, 282 N.W.2d 548 (1979); see also *Marcia A. Johnson*, "Musings On Noncooperation," *Bench & Bar*, October 1996, p. 20.
3. See *Garrity v. New Jersey*, 385 U.S. 493 (1967). *The so-called Garrity rule holds that statements obtained under threat of removal from employment are not allowed to be used in subsequent criminal proceedings.*
4. See *State v. Dovolis* (Henn. Cty. Ct. File No. 97071782). *In that case, Judge Allen Oleisky found that Rule 25, unlike the statute in Garrity, does not force the defendant to waive self-incrimination or face the loss of her job. Other states have also rejected the Garrity analogy. See "States May Use Disciplinary Probe Data Over Defendant's Fifth Amendment Protest," ABA/BNA Lawyers' Manual on Professional Conduct, 6/21/00, p. 301.*
5. See "Fifth Amendment Privilege Doesn't Apply To Lawyer's Records On Representing Client," ABA/BNA Lawyers' Manual on Professional Conduct, 5/13/98, p. 202.