

**Lawyers Only Hurt Themselves By Failing To  
Cooperate With Disciplinary Investigations**

by  
**Martin A. Cole, Senior Assistant Director  
Minnesota Office of Lawyers Professional Responsibility**

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By now, most attorneys should be aware that failure to cooperate with a disciplinary investigation, conducted either by the Office of Lawyers Professional Responsibility or by a district ethics committee on the Director's behalf, can be an independent basis for professional discipline.

This rule originally was created by Supreme Court decision in *In re Cartwright*, 282 N.W.2d 548 (Minn. 1979) (6-month suspension for failure to cooperate even though underlying complaint found to be without merit), then codified in Rule 25, Rules on Lawyers Professional Responsibility, and later reinforced by Rule 8.1(a)(3), Minnesota Rules of Professional Conduct (MRPC).

On average, half a dozen attorneys are privately disciplined for non-cooperation annually. In addition, each year several public petitions include a charge of non-cooperation in conjunction with other serious misconduct.

Cooperation is mandated, but it is wise tactically, too. Respondents in public disciplinary cases frequently proclaim their cooperation with the disciplinary investigation in mitigation. The Court has occasionally acknowledged this claim as valid. See, for example, *In re Dvorak*, 554 N.W.2d 399 (Minn. 1996). Thus, cooperation can only help a disciplinary respondent.

Lack of cooperation, however, can still result in serious discipline in the right situation.

### **The ghost of Cartwright**

One pending case and a recent decision by the Director's Office reveal some variations on this theme and are worth reporting more widely. In one matter, the "ghost" of Cartwright appeared and provides the perfect "blue print" for anyone wishing to be publicly disciplined, or hopefully how not to be. A trust account overdraft notice was received about a local attorney (see Rule 1.15(j)-(n), MRPC). After needless delay, the attorney provided a brief explanation of the overdraft.

When asked to provide the required documentation to substantiate his explanation, however, the attorney failed to respond on several occasions. A formal disciplinary file was opened -- again no response. Charges were issued. The attorney finally met with the Director's representative and promised cooperation, only to promptly resume his silence. A motion to by-pass the Lawyers Board panel process for flagrant non-cooperation (see Rule 10(d), RLPR) was granted after the attorney did not respond to the motion.

A public petition was filed, and the attorney did not file an answer. Only after the Director moved for a default on the petition did the lawyer obtain counsel who immediately sought to have the matter remanded for hearing, and provided the long-requested trust account records. The Director did not oppose the respondent's motion, as a full hearing on the merits was preferred to a default. But only then could the underlying allegations finally be investigated. This attorney turned what might have been a private disposition, had he fully cooperated from the start, into public discipline.

A particularly troubling non-cooperation situation has arisen on a few occasions recently where a respondent is represented by counsel. Certainly respondents are entitled to counsel; indeed the Director's Office routinely encourages respondents to get counsel in serious matters. But what if counsel is dilatory in responding or less than cooperative in providing requested information or documents? Volunteer district ethics committees have deadlines to meet in conducting their investigations, and a busy respondent's counsel may be seen as much as an impediment to the process than as a help.

On two recent occasions, frustrated district ethics committees have recommended discipline against the respondent for non-cooperation, or investigation of the respondent's counsel, based upon counsel's delay. To date, the Director has not imputed a counsel's delay to the client, but there may be limits to such a policy. At a minimum, requests for reasonable continuances should be sought promptly and politely, and not "self granted" without any contact with the Director's Office or the local investigator.