

## MUSINGS ON NONCOOPERATION

by  
Marcia A. Johnson, Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (October 1996)

Receipt of a cream-colored envelope from the Office of Lawyers Professional Responsibility, stamped *Personal and Confidential*, is enough to instill trepidation and anxiety in any member of the bar. It is an entirely natural psychological reaction to a communication that likely is not anticipated and certainly not welcome. It is akin to an audit letter from the IRS. There may be nothing amiss about a taxpayer's records or returns, but the process itself can still be discomfiting. Opening such an envelope from the Director's Office can lead to relief -- that an ethical complaint has been summarily dismissed (without investigation), or serve to confirm the discomfort -- that a response to a notice of investigation must be made.

Attorneys are *required* to cooperate with the disciplinary process. It is a responsibility that comes with the privilege of practicing law. It is part and parcel of participating in a self-regulating profession. Indeed, most lawyers respond to a disciplinary complaint courteously and promptly, as should be expected. A surprising number of others, however, do not cooperate promptly, but slowly, tortuously, or not at all, and at significant cost to the system and themselves.

Some attorneys have a fundamental misunderstanding that responding to a disciplinary complaint is not, and should not be considered the equivalent of responding to discovery or motion practice in civil litigation. There, extensions of time and continuances can make a mockery of the time limits imposed in the Rules of Civil Procedure and contribute to the crushing backlog in the court system. Noncooperation with a disciplinary investigation can affect an attorney's very ability to practice law. Importantly, lawyers need to understand that *failure* to cooperate with the discipline system is considered serious misconduct and constitutes grounds for a separate and independent disciplinary offense.

The seminal Minnesota disciplinary case on noncooperation is *In re Cartwright*, 282 N.W.2d 548 (Minn. 1979). Cartwright was suspended for six months for noncooperation with the disciplinary investigation, *despite the fact that the underlying complaints ultimately were terminated without discipline*. Cartwright repeatedly failed to respond to inquiries from the Director's Office. He told the referee that he had no intention of responding because he did not feel the board had "conducted an investigation which he deemed sufficient to require a reply from him as an attorney." *Id.* at 549. The Court did not agree. Since at least the 1930s, the Supreme Court has articulated the duties of lawyers under investigation as being a "courteous response and prompt cooperation."

Following *Cartwright*, Rule 25, Rules on Lawyers Professional Responsibility was promulgated. Rule 25 clearly delineates the scope of the duties of a lawyer under investigation for alleged misconduct. A lawyer must 1) furnish designated papers, documents or tangible objects; 2) furnish in writing a full and complete explanation covering the matter under investigation; and 3) appear for conferences and hearings at the times and places designated. It goes without saying that an attorney's cooperation in these matters is essential to conducting a timely and thorough investigation.

Despite the clarity of Rule 25, and the expectations of the Court, many attorneys do not fully cooperate with the discipline system. The majority of these simply trudge through the process, responding

incompletely and slowly, until the investigation is eventually completed. The slow responders hinder both the disciplinary process and themselves. Obviously, when the investigator (whether it be a DEC volunteer or an attorney from the Director's Office) must send out three or more letters to get a partial response and then several follow-up letters, the process is delayed and resources are wasted. When meetings or depositions are scheduled and rescheduled due to the attorney's failure to appear, the process is delayed and resources are wasted. Contrary to what the slow cooperators apparently believe, however, the disciplinary investigation will not disappear for lack of interest on the part of the attorney. Approximately seven attorneys every year are admonished for noncooperation alone, or coupled with other substantive violations of the MRPC.

It is not uncommon for attorneys who have cooperated at the commencement of an investigation to stop cooperating as further complaints are filed or it becomes clear that public discipline will be sought. The Court recently suspended a Minnesota attorney for six months for failure to keep a client informed, to respond to clients' requests for information, to establish the basis for his fee, to promptly return clients' property, and to cooperate with the disciplinary system. *In re Gryzbek*, No. C4-96-128, 1996 WL 414146 (Minn. July 1996). The Court indicated that while the public was not served by permitting the lawyer's nonresponsiveness to clients, its "particular concern was his complete lack of cooperation with the disciplinary system." *Id.* The lawyer had responded partially to the first two complaints against him, but subsequently dropped out of the proceedings save to appear at oral argument to the Court with respect to discipline.

Similarly, the Court indefinitely suspended an attorney (with a twoyear minimum) for neglect, misrepresentations, trust account problems, and noncooperation. *In re Lindley*, 538 N.W.2d 697 (Minn. 1995). The respondent had partially responded to a client complaint and a trust account overdraft notice, but thereafter failed to respond to two additional client complaints. Like Gryzbek, the respondent failed to participate further in the public proceedings save to appear at oral argument. *See also, In re Sigler*, 512 N.W.2d 899 (Minn. 1994) (indefinite suspension with twoyear minimum). In other cases, matters that likely would have been resolved with private discipline became public by virtue of the lawyer's noncooperation.

When a lawyer completely ignores disciplinary proceedings, several procedural allowances are provided in the Rules on Lawyers Professional Responsibility to expedite the process. If a lawyer does not attend the prehearing conference before the charges are heard, a Lawyers Board Panel chair, on motion of the Director's Office, can authorize a public petition for disciplinary action to be filed. Rule 10(d), RLPR. If no answer is filed to the petition, upon motion of the director, the Court can hold the allegations of the petition deemed admitted. Rule 13(b), RLPR. If an attorney's whereabouts are unknown, Rule 12(c), provides the procedural mechanism for taking final disciplinary action. *In re Strom*, No. C4-94-1551, 1996 WL 400295 (Minn. 1996).

The Court recently suspended for two years an attorney who utterly disregarded the disciplinary proceedings. *In re Olson*, 545 N.W.2d 35 (Minn. 1996). Two vulnerable clients filed complaints against Olson, alleging neglect and misrepresentations, which caused them significant hardship. Olson failed to respond to written or phone inquiries, failed to attend scheduled meetings, and failed to file an answer to the petition or attend any hearings.

As the Court has often proclaimed, the purpose of attorney discipline is not to punish the attorney, but to protect the public. When an attorney repeatedly fails to cooperate, or totally defaults in the disciplinary process, the Director's Office, and, ultimately the Court, are left to conclude that the attorney is a significant

risk to the public. An attorney who ignores his or her own best interests likely will not do better for a client. Unfortunately, lawyers do not lose their human frailties when they receive their degrees.