FORMAL OPINION 117

ATTORNEY, WHO FAILS TO COOPERATE WITH A DISCIPLINARY COMMITTEE, MAY BE CHARGED WITH ADDITIONAL GROUNDS OF MISCONDUCT UNDER RULE 4, DR1-102(A) (5) & (6).

QUESTION: May a Missouri attorney, who fails to respond to a request of a disciplinary committee or who fails to appear at a scheduled hearing at the request of said committee or who fails to furnish documents upon request of said committee, be charged with that conduct as an additional grounds for discipline in Formal Notice or Information filed under Rule 5?

ANSWER: It is the opinion of the Advisory Committee that such conduct by the attorney is grounds for additional charge under DR1-102(A) (5 & 6), Rule 4, Supreme Court of Missouri. Such failure to cooperate with the disciplinary committee does constitute conduct that is "prejudicial to the administration of justice" and is "conduct that adversely reflects on the attorney's fitness to practice law."

The aforesaid provisions of Rule 4 have not heretofore been construed by the Missouri Supreme Court. The Court has stated:

"We do not find that respondent violated DR1-102(A)(6). Undoubtedly, as the Special Master found, the conduct of respondent – reflects on respondent's fitness to practice law. However, this subsection of DR1-102(A) refers by its terms to any other conduct which reflects adversely on fitness to practice law. In other words, it seems to contemplate conduct other than that described in the preceding numbered subsections. It is not simply another method proscribing the same conduct." In re Connaghan, 613 S.W.2d 626 (5) (Mo. banc 1981) l.c. 632.

Our research has not found any case in which the Missouri Supreme Court has interpreted the phrase "conduct that is prejudicial to the administration of justice."

In the following cases, the Court has used its contempt powers to punish attorneys who failed to appear and produce records before disciplinary committees after being properly served with a subpoena. See Twenty-first Judicial Circuit Bar Committee v. Brian J. Fahey, 583 S.W.2d 171 (Mo. Sup. en banc 1979); In re West, 152 S.W.2d 69, 70 (Mo. Sup. en banc 1941); In re Fenn, 128 S.W.2d 657 (Mo.App. 1939); In re H____ S____, 69 S.W.2d 325 (Mo. App. 1934).

In West, supra, where the attorney failed to appear before the Advisory Committee after being subpoenaed, the Court expressly held "the disobedience of a lawful order of a court is such an interference with the administration of justice as to constitute a contempt (citing cases)." At that time under Rule 35, Sec. 22, the attorney had a professional obligation of "fairness to the Court."

In the Fenn case, supra, the attorney appeared but did not testify at his disciplinary hearing.

In re H___ S___, supra, the Court said at p. 327, (4):

"Now while a lawyer is not a public officer in the constitutional or statutory sense of the term he is an officer of the court, and as such, owes a definite obligation to the public as a whole in the matter of the proper administration of justice. His license to engage in the practice of the law is his, not of right, but as a privilege granted him by the state which comes to him burdened with conditions of subsequent good behavior and professional integrity."

Research of out state authorities reveals many cases in which the courts have considered the problem of attorneys who fail to cooperate with disciplinary authorities and the courts.

It appears that in 26 states, the Court will entertain, as additional charge of misconduct, the failure to cooperate with disciplinary authorities.

One of the leading cases on the point is Disciplinary Proceedings against Kennedy, 309 N.W.2d 83 (Wis. Sup. Ct. 1981).

In Kennedy, the attorney had previously been given a public reprimand for his failure to respond to complaints against him and his failure to appear before a district grievance committee during an investigation conducted by the State Bar of Wisconsin. State vs. Kennedy, 123 N.W.2d 449 (Wis. Sup. Ct. 1963).

Thereafter in the 1981 proceeding, the same attorney was being investigated on additional charges of neglect and for failure to appear before a Judge. The attorney failed to answer the written complaint filed by the Board of Attorneys professional Responsibility and failed to answer written inquiries of the Board.

On appeal, after referee recommended a reprimand for failure to cooperate, the Board charged that respondent with repeated violations of the rules requiring an attorney to cooperate with the inquiries of the Board . . . The Board also argued "that failure to impose discipline more severe than a public reprimand . . . will have a detrimental effect on the legal profession . . . by leading other attorneys to conclude they may ignore requests for cooperation from the Board with the assurance that, if disciplined, they will receive merely a public reprimand."

The Court suspended respondent's license for 60 days and assessed costs "because the respondent had a history of failing to respond to the Board and because he failed to cooperate in the disposition of an action pending in circuit court by failing to respond to correspondence from both opposing counsel and the presiding judge."

See also in Matter of Norlin, 310 N.W.2d 789, 795 (Sup. Ct. of Wis. 1981). The Court affirmed the referee's finding of an additional ground of misconduct at page 795;

"We are also in agreement with the conclusions that the appellant's numerous failures to respond to inquiries and correspondence from the district grievance committee and the Board constitutes professional misconduct. Our rule requiring an attorney being investigated for professional misconduct to fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct states, in pertinent part, `Failure to provide information or misrepresentation

in a disclosure is misconduct.' SCR 22.07(2). Cooperation with disciplinary investigations conducted by district grievance committees and the Board is essential to the effectiveness of such investigations, and a lawyer's failure to cooperate constitutes serious misconduct. Cite Kennedy case, supra."

In Minnesota, the Supreme Court has adopted a similar rule to that adopted in Wisconsin and Washington. In a very clearly worded per curiam opinion in Matter of Cartwright, 2X2 N.W.2d 548 (Minn. Sup. Ct. 1979), the respondent did not respond to several separate complaints sent to him by the Board of Lawyers Professional Responsibility.

In fact, that Board had on several prior occasions notified respondent that the Board considered such uncooperation to be violations of DR1-102(A) (5) & (6). A formal complaint was filed with the Board and formal hearing was held before a Referee.

The only issue presented on appeal "was whether respondent's repeated refusals to cooperate with the appropriate disciplinary authorities concerning ethical complaints deserved discipline."

The Court at page 551 stated:

"This question is not new to the court. We have long recognized that it is incumbent upon an attorney to cooperate with disciplinary authorities in their investigation and resolution of complaints against him. In re Discipline of Douglas Larson, 210 Minn. 414, 298 N.W. 707 (1941); In re Disbarment of I. A. Chmelik, 203 Minn. 156, 280 N.W. 283 (1938); In re Disbarment of A. M. Breding, 188 Minn. 367, 247 N.W. 694 (1933); In re Disbarment of George P. Gurley, 184 Minn. 450, 239 N.W. 149 (1931). As was summarized by the Court in the case of In re Breding:

`Relative to the complaint of said client and the complaint of another aggrieved client, which is also involved in her proceedings, but concerning which the referee has substantially exonerated counsel, the chairman of the ethics committee of the state bar association, the secretary of the state board of law examiners, and the secretary of the ethics committee of the Hennepin county bar association wrote counsel many letters which were ignored by him. They asked him to come before certain committees and make explanation, but this he failed to do. They were giving their time and services to maintain a high standard in the legal profession and were entitled to expect at least a courteous response and a prompt cooperation. Counsel failed in his duty toward these officials. 188 Minn. 368, 247 N.W. 694 (emphasis added).

Here respondent's conduct throughout the various investigations . . . shows a complete disdain for the disciplinary process. Not only did he choose to ignore the bulk of the correspondence coming to him from the various authorities, hut on those occasions when he did promise cooperation, his promises were never fulfilled. Accordingly, the referee was correct in concluding that respondent's complete failure to cooperate with the disciplinary authorities constituted a separate act of professional misconduct.

We note that Minnesota is not alone in imposing a duty upon attorneys to cooperate in investigations of their alleged professional misconduct. See e.g. In re Draper, 317 A.2d 106 (Del. 1974); In re Talbot, 78 Wash.2d 295, 474 P.2d 88 (1970); In the Matter of Disciplinary Proceedings against Elliott, 83 Wis.2d 904, 266 N.W.2d 430 (1970). In fact, other courts have expressly adopted rules requiring cooperation by an attorney under investigation and providing that failure to do so is a separate act of misconduct. For example, Rule 2.6 Discipline Rules for Attorney, 10 Washington Court Rules (1978), provides that:

`. . . It shall be the duty and the obligation of an attorney who is the subject of a disciplinary investigation to cooperate with the Local Administrative Committee, State Bar Counsel or bar staff as requested, subject only to proper exercise of his privilege against self-incrimination where applicable by:

(a) Furnishing any papers or documents;

(b) Furnishing in writing a full and complete explanation covering the matter contained in such complaint; and

(c) Appearing before the Committee at the time and place designated.'

Such a rule is desirable in that it clearly delineates the scope of the attorney's duty and we suggest that the Lawyers Professional Responsibility Board draft such a rule for submission to this court."

See also Matter of Ojala, 2X9 N.W.2d 108 (Sup. Ct. of Minn. 1979). In that case, the Court affirmed the opinion of referee finding failure to cooperate with Disciplinary Authorities as a separate ground for discipline. For similar holding see Matter of Larson, 324 N.W.2d 656 (Sup. Ct. of Minn. 1982).

In order to keep this opinion within the bounds of brevity, please see appendix for citation to cases having similar holdings.

Based on the above cases, it is the opinion of the Advisory Committee, that failure of respondent to cooperate with the disciplinary committee constitutes a separate act of misconduct under DR1-102(A) (5) & (6).

Adopted October 21, 1983.
[Rule 4 – 8.1]
[appendix omitted.]