

The Mysterious Case of the Disappearing Lawyer

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After three or more years of law school, after having passed the bar exam, and perhaps after having incurred a substantial debt, most attorneys consider their law licenses hard-earned and well worth keeping. Even if not actively practicing law, many attorneys continue to pay their attorney registration fee and keep current on their continuing legal education requirements. Therefore, the thought of basically walking away from their law licenses, of allowing the Supreme Court to take away their right to practice law, would strike most lawyers as unthinkable. Yet, occasionally, lawyers end up losing their right to practice law by simply refusing to cooperate with the Director's investigation of apparently minor complaints.

How this happens is fairly straightforward. Why it happens is a more difficult question to answer. But what one should do if one finds oneself in this situation is obvious.

To understand how these lawyers run afoul of the system it is helpful to have some background on the system. When the Director's Office receives a complaint of unprofessional conduct, an attorney in the office reviews the complaint to determine if it provides a basis for a reasonable belief that misconduct may have occurred. If the complaint meets that test, it will be investigated. The subject of the complaint has an ethical obligation to cooperate with the investigation. Rule 8.1(a)(3) of the Minnesota Rules of Professional Conduct provides that a lawyer may not knowingly fail to respond to a discipline authority's "lawfully authorized demand for information by either providing the information sought or making a good faith challenge to the demand."

The scenario that plays out in the case of the disappearing lawyer is that the lawyer either never cooperates, or stops cooperating, with the Director's investigation.

A case currently pending in the Director's Office is an archetype of this situation. In the fall of 1999, the client of the respondent lawyer filed a complaint with the Director's Office. The client alleged that the lawyer had neglected his case and had not filed an appeal as he had promised he would. The Director referred the matter for investigation by the District Ethics Committee (DEC). The lawyer was slow in responding to the DEC, but eventually responded. The DEC concluded that the lawyer's handling of his client's case was unprofessional and recommended that the Director issue an admonition. The Director received the DEC's report and provided a copy to the lawyer, along with a request for additional information. The lawyer never replied to the Director's request. The lawyer also did not respond to numerous follow-up requests and eventually the Director issued a petition for public discipline. What was likely a private admonition will now result in public discipline as a result of the lawyer's ongoing failure to cooperate.

In another recent case involving similar background facts, the lawyer was personally served with the petition for discipline and then failed to answer the petition. The Director brought a motion for summary relief and the Minnesota Supreme Court ordered the allegations of the petition deemed admitted. When the

lawyer failed to submit a brief or appear at oral argument, the court ordered the lawyer indefinitely suspended. *In re Flatten*, No. C0-99-2182 (Minn. June 8, 2000). In other cases where the lawyer has simply refused to participate in the process, the court has similarly suspended the lawyer indefinitely. See *In re Merlin*, 572 N.W.2d 737 (Minn. 1998); *In re Engel*, 538 N.W.2d 906 (Minn. 1995).

So what possesses lawyers like these to drop out of the system and "surrender" their licenses? Obviously, their failure to respond to the Director's inquiries makes it impossible to answer this question with any certainty, but certain themes do emerge. In some cases lawyers have indicated that various physical and psychological ailments made them unable to respond. Lawyers describe a situation where an initial failure to respond leads to further difficulty in responding. If the lawyer found there was a psychological hurdle in responding to that first letter from the Director, the hurdle becomes progressively higher with each subsequent letter or pleading. In other cases, the lawyer may have been in the process of leaving the practice and was not willing to go through the effort of cooperating. The lawyer may view the complaint as meritless or the Director's requests for information as excessive and therefore, unworthy of a response.

Obviously, if one is failing to cooperate with an investigation by the Director's Office, the ethical and prudent thing to do is to start cooperating. What may not be quite so obvious is that participation in the investigation, regardless of the earlier non-cooperation, will always put the lawyer in better stead than will continued non-cooperation. If the lawyer's non-cooperation is insignificant, the misconduct may not rise to the level of unprofessional conduct warranting discipline. However, even if the non-cooperation is serious enough to warrant discipline, the resulting discipline will likely be less if the lawyer subsequently cooperates.

Moreover, if the lawyer can provide the Director with some reason for the non-cooperation, the Director may consider this "mitigation" in determining the appropriate discipline.

What the lawyer cannot do when faced with an ethics complaint is to simply ignore the complaint. Ignoring the complaint will not result in the complainant and the Director eventually tiring of the matter and going away.

Continued non-cooperation guarantees the lawyer will lose the right to practice law for which the lawyer has worked so long and hard.