

## Taxes and Lawyer Discipline

Depending on the exact date you are reading this column, your individual income tax returns were due recently or will be soon. Did you file on time, or will you? If not, have you properly requested an extension of the date on which to file? If you're also an employer, have you kept up with your quarterly employer withholding filing and payment obligations, both federal and state? The Minnesota Supreme Court and the lawyer disciplinary system surely hope so.

April is obviously an appropriate time to remind lawyers of the disciplinary consequences associated with tax misconduct. Since 1972 in Minnesota, failure to file individual income tax returns has been considered to be professional misconduct warranting substantial discipline, most often public discipline.<sup>1</sup> Even without finding a specific disciplinary rule that required tax filing,<sup>2</sup> the court stated:

[W]e hold that the failure to file income tax returns represents a violation of a lawyer's oath of office and further represents a violation of the [Rules of Professional Conduct], and that it will be the subject of disciplinary proceedings ... . Lawyers in this state should henceforth understand clearly that the type of violation

under consideration here is the proper subject of consideration by the Board of Professional Responsibility and this court, and that disciplinary proceedings are mandatory in all cases of failure to file income tax returns.<sup>3</sup>

Since 1972, the history of discipline for tax nonfiling

has not been completely linear, but it remains true that failure to file an income tax return is presumptively a public discipline offense, even without a criminal conviction or a specific finding of willful nonfiling. For example, Rule 10(d), Rules on Lawyers Professional Responsibility (RLPR), authorizes a Lawyers Board panel to find probable cause for public discipline on a motion (i.e., without any input from the respondent attorney) for certain serious misconduct, including "repeated nonfiling of personal income tax returns." So it remains incumbent on all licensed attorneys to timely file their federal and state individual income tax returns or face disciplinary consequences.

### Failure to Pay

Somewhat curiously, the court has never taken the same degree of interest in whether lawyers pay their individual income taxes when due:

We note again it is for failure to file tax returns that lawyers are subjected to disciplinary sanctions, not for failure to pay taxes owed. ... [T]he lawyer disciplinary system is not, nor should it be, a tax collection auxiliary for the government.<sup>4</sup>

That is not to say that failure to pay may never be relevant to determining a motive for willful failure to file, or considered as an aggravating factor for one refusing to enter into any payment plan with the taxing authorities. Generally, however, paying is between the lawyer and the IRS or MDOR.

Many lawyers (or the managing attorney of a law firm) have employees and are legally obligated to withhold taxes from their employees' wages and then pay over that amount to the taxing authorities. For purposes of lawyer discipline, failure to file quarterly employer withholding returns has been treated identically to nonfiling of income tax returns. In 1987, the court extended its holding concerning failure to file tax returns to include employer withholding returns.<sup>5</sup> By contrast with individual income taxes, however, failure to pay withholding taxes has incurred disci-

pline from the court. The court subsequently clarified that distinction by noting that by failing to pay employer's withholding taxes, an attorney "essentially converts to his own use temporarily money belonging to his employees which he withheld from paychecks and placed in his business checking account."<sup>6</sup> Thus, while the court seems to regard failure to pay withholding taxes as not quite as serious as misappropriating client funds, it has equated failure to pay withholding taxes to misappropriating law firm funds, conduct for which it usually has imposed a short period of suspension.<sup>7</sup>

### Criminal Convictions

Criminal convictions involving tax misconduct have also resulted in suspensions in almost all cases. Willful nonfiling may result in a criminal prosecution but, as noted, all nonfiling is treated seriously whether or not willful and whether or not a criminal conviction is obtained. Convictions for tax fraud or willful underreporting of income will result in a period of suspension, especially if the conviction is at a felony level. Unlike felony convictions committed within the practice of law, however, felony-level criminal convictions for tax misconduct have not resulted in disbarment.

To date, the court has treated criminal convictions for tax misconduct as conduct occurring outside the practice of law. Even if the taxable funds at issue were derived from the practice of law (income, employer withholding), which is usually the situation, the misconduct has been treated as personal rather than professional. In one recent case, the court specifically requested briefing and appeared to question that reasoning, but in the end imposed a short suspension, a result that seemingly reaffirmed its prior view.<sup>8</sup>

Few people enjoy preparing tax returns. Many lawyers admit to being poor "numbers" people. Using an accountant, professional tax preparer, or bookkeeper to prepare taxes may be wise for many such individuals. The ultimate responsibility for timely tax filing, however, always remains the taxpayer's: Tax preparers may vouch for the



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accuracy and timeliness of their work, but that is vis-à-vis the taxpayer, not the tax authority. One attorney chose to go it alone, but claimed that his fear of tax preparation should extenuate his tax nonfiling misconduct.<sup>9</sup> At trial, the attorney offered testimony from his psychologist, who testified that the attorney suffered from a “phobic reaction,” an anxiety-related disorder which prevented him from preparing his taxes and completing other financial tasks. As explained by the psychologist, a “phobic reaction” occurs when a person experiences anxiety in association with a particular stimulus even though that stimulus is not frightening and would not normally produce the anxiety it does. The court was willing to accept that, if such a disorder existed, it may have caused the attorney to neglect many of his financial affairs. Nevertheless, finding that this phobia is not classified as a severe psychological disorder by recognized diagnostic methods, the court declined to credit “tax phobia” as an extenuating circumstance.

### Conclusion

Failure to file tax returns has been subject to professional discipline for over 40 years. It therefore should come as no surprise to at least one entire generation of lawyers in Minnesota that compliance with IRS and MDOR filing obligations is required. Midnight on April 15 each year remains an important date to remember. ▲

### Notes

<sup>1</sup> *In re Bunker*, 294 Minn. 47, 199 N.W.2d 629 (1972).

<sup>2</sup> Most often, failure to file a tax return may constitute criminal conduct under Rule 8.4(b), MRPC (and see discussion below), or as conduct prejudicial to the proper administration of justice under Rule 8.4(d).

<sup>3</sup> *In re Bunker*, 199 N.W.2d at 631-32.

<sup>4</sup> *In re Tyler*, 495 N.W.2d 184, 187 n.1 (Minn. 1992), citing *In re Chrysler*, 434 N.W.2d 668, 669 (Minn. 1989).

<sup>5</sup> *In re Johnson*, 414 N.W.2d 199 (Minn. 1987).

<sup>6</sup> *In re Gurstel*, 540 N.W.2d 838, 841 (Minn. 1995).

<sup>7</sup> See, *In re Moulton*, 721 N.W.2d 900 (Minn. 2006).

<sup>8</sup> *In re Hatling*, 793 N.W.2d 139 (Minn. 2011).

<sup>9</sup> *In re Serstock*, 432 N.W.2d 179 (Minn. 1988).

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## ABA Report Reveals Pro Bono Trends

A national survey of lawyers shows that 63 percent of respondents who provided pro bono service in 2011 reported having worked on matters that address the everyday legal problems of people in poverty.

The survey report, "Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers," also found that respondents provided an average of 56.5 hours of pro bono work, with a median of 30 hours.

"The report showcases the depth of the American legal profession's longstanding and ongoing commitment to providing legal services to those unable to afford them, and it highlights valuable opportunities for us to encourage even more lawyers to volunteer their services to those in need," said ABA President Laurel G. Bellows.

The report, released by the ABA Standing Committee on Pro Bono and Public Service, quantifies the amount of pro bono work done by U.S. lawyers in 2011, identifies factors that encourage or discourage pro bono service and describes characteristics of recent pro bono service that can help guide new pro bono initiatives.

The report breaks down, by firm size, the average amount of pro bono hours in 2011, noting that:

- Lawyers from firms of 101 and more attorneys provided an average of 77.7 hours;
- Lawyers from firms of 51-100 attorneys provided an average of 39.9 hours;
- Lawyers from firms of 11-50 attorneys provided an average of 45.1 hours;
- Lawyers from firms of 2-10 attorneys provided an average of 58.5 hours; and
- Solo practitioners provided an average of 62.7 hours.

Top providers of pro bono credited several factors for their success. The 36 percent of respondents who performed 50 or more hours of pro bono in 2011 reported that they:

- Are most likely to have received their referrals from an organized pro bono program;
- Are more inclined to do pro bono during economic downturns;
- Are more likely to do pro bono in the future;
- Work for an employer that supports pro bono; and
- Are more likely to seek out pro bono cases rather than wait to be called.

Seventy percent of lawyers who were contacted directly by a pro bono program to assist with a matter reported taking advantage of the opportunity.

"Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers" is available online at <http://tinyurl.com/c7swv27>.

## Pro Bono Opportunity of the Month



### Senior Needs Proof of Home Ownership

The client purchased a home on a Contract for Deed approximately 20 years ago but proper legal recording was never initiated or completed. The client is now almost 80 years old, needs legal proof of home ownership to qualify for Energy Assistance program(s), and wants the title to reflect her ownership of the property. Contact Sean Burke at [sburke@mylegalaaid.org](mailto:sburke@mylegalaaid.org) or by telephone at (612) 746-3759. Further information about this and other pro bono opportunities can be found online at [www.projusticemn.org/volunteer](http://www.projusticemn.org/volunteer)

## ABA Grants Promote Access to Justice Commissions

The American Bar Association's Access to Justice Commission Expansion Project has announced the award of five grants to promote the creation of new Access to Justice commissions in states where they do not exist. The grants were made possible by funding from the Public Welfare Foundation and the Kresge Foundation.

The grants were awarded to: the Arizona Foundation for Legal Services and Education; the Supreme Court of Ohio; the Supreme Court of Oklahoma; the Philadelphia Bar Association; and the Rhode Island Judiciary.

Access to Justice commissions are formal entities that bring together the highest level of the state's courts, organized bar and other stakeholders to support the expansion of access to civil justice for low-income and disadvantaged people. As of March 15, there were Access to Justice commissions in 27 states and the District of Columbia. Most of the commissions were created by the state's supreme court.

Minnesota has no Access to Justice Commission *per se* but until recently the Legal Service Planning Committee of the Minnesota Supreme Court handled some of the functions of such a commission. In 2012 the court eliminated the Planning Committee and transferred the planning function to the Legal Services Advisory Committee (LSAC).

The goal of the grants is to expand access to civil justice for low-income people by increasing the number of state-level Access to Justice Commissions, and more broadly, by increasing and strengthening partnerships among the courts, the bar, civil legal aid providers and funders, law schools, legislators, executive officials and other stakeholders.



Turn the page on write-downs and write-offs.

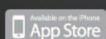


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