STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against KENNETH M. HOLKER, Attorney at Law of the State of Minnesota.	File No. C5-99-1061 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDAITON FOR DISCIPLINE**

The above-entitled matter came before the undersigned on October 7 and 8, 1999, at the Minnesota Judicial Center, St. Paul, Minnesota. Respondent appeared personally, together with his attorney, Michael J. Hoover. The Director of the Office of Lawyers Professional Responsibility appeared by Candice M. Hojan, Senior Assistant Director.

Based upon the evidence adduced at the hearing, the briefs and arguments of counsel, and all the documents and records on file herein the Court makes the following:

FINDINGS OF FACT

1. Respondent was admitted to the practice of law in Minnesota on October 21, 1977. He currently practices as a sole practitioner in Monticello, Minnesota, concentrating on the areas of probate, trusts, and estate planning.
2. Between 1982 and 1998, Respondent received five admonitions pursuant to Rule 8(d)(2) of the Rules on Lawyers Professional Responsibility. Pursuant to this Rule, the Director may issue an admonition upon his conclusion "that a lawyer's conduct was unprofessional but of an isolated and non-serious nature."
    a. On October 15, 1982, Respondent was issued an admonition for failing to return client files in violation of DR7-102(A)(2), Minnesota Code of Professional Responsibility (MCPR).

b. On January 31, 1990, Respondent was issued an admonition for failing to timely pay interest accruing on his trust account to the Lawyers' Trust Account Board in violation of DR9-103, MCPR, and Rule 1.15(d), Minnesota Rules of Professional Conduct (MRPC).

c. On May 31, 1991, Respondent was issued an admonition for charging interest on legal fees without making adequate disclosures in violation of Rule 1.5(a) MRPC.

d. On April 3, 1995, Respondent was issued an admonition for failing to pay for advertisements that he had published in several newspapers in violation of Rule 8.4(d) MRPC.

e. On January 6, 1998, Respondent was issued an admonition for failing to adequately explain the basis of his fees and for using an inappropriate fee agreement in violation of Rule 1.4(b), MRPC, and Lawyers Professional Responsibility Board Opinion No. 15.

3. For each tax year from 1990 through 1995, Respondent had adjusted gross income in excess of the minimum filing requirements. He knew that he was required to file his state and federal income tax returns for each calendar year on or before April 15 of the next calendar year or before any expiration of extensions granted by the tax authorities.

4. Respondent filed his 1992 and 1993 Minnesota income tax returns 9 months late and his 1994 Minnesota income tax return 18 months late. His 1995 Minnesota income tax return was timely filed.

5. Respondent filed his federal income tax returns late for five of the six tax years from 1990 through 1995. His 1990 return was 2 months late, 1991 was timely, 1992 and 1993 were 2 months late, 1994 was 1 year late, and 1995 was 2 months late.
6. The Director stipulated that late payment of the federal or state income tax returns was not a basis for discipline. The Petition against Respondent relative to the income tax returns is based solely on late filing of the income tax returns.
7. Federal and state employer's quarterly withholding tax returns are due on the last day of the month immediately following the completion of a calendar quarter. For the six consecutive quarters, from the quarter ending September 30, 1990, through the quarter ending December 31, 1991, Respondent did not timely file his federal or Minnesota employer's quarterly withholding tax returns. The returns for all six quarters were filed on August 31, 1992. This filing was 7 months late for the December 1991 quarter, and 22 months late for the September 1990 quarter.
8. When he filed his employer's quarterly withholding tax returns for these six quarters, Respondent owed federal withholding taxes of $15,418, plus interest and penalties, and Minnesota withholding taxes of $1,802, plus interest and penalties.
9. Respondent filed his federal employer's withholding tax return for the quarter ending June 30, 1992, on September 11, 1992. This was approximately 42 days late. With this one exception, Respondent timely filed all his state and federal quarterly withholding tax returns for each of the quarters from the quarter ending March 31, 1992 through the quarter ending December 31, 1995. He did not, however, pay the withholding taxes due. The unpaid federal withholding taxes for this period totaled $42,740 and the unpaid state withholding taxes totaled approximately $4,500.

10. In 1994, Respondent filed Chapter 13 bankruptcy, which was dismissed in 1996. He filed a second Chapter 13 bankruptcy proceeding in October 1996. Respondent has made substantial payments to the Internal Revenue Service and the Minnesota Department of Revenue through these bankruptcy proceedings, and the current bankruptcy plan contemplates complete payment of all tax obligations by October 2001.

11. Through April 15, 1997, Respondent paid $52,150 towards his federal withholding tax obligations. From April 15, 1997 through the time of trial, it appears Respondent has paid another $3,744, for total payments of $55,894. Because of the assessment of interest and penalties by the Internal Revenue Service and challenges by Respondent as to the amounts actually paid to the IRS, it is not possible to determine in this proceeding the actual amounts due the Internal Revenue Service. It is clear, however, that Respondent has remitted at least 95 percent of the taxes due under his federal withholding obligations for the quarters ending September 30, 1990, through December 31, 1995.

12. Respondent's total state withholding tax obligation, exclusive of penalty and interest, for the quarters ending September 30, 1990, through December 31, 1995, was $4,437.58. Respondent has paid at least $3,365.69 to the Minnesota Department of Revenue since 1996, but it appears these sums were credited by the Department of Revenue to his income tax responsibilities rather than his withholding tax responsibilities.

13. Respondent is objecting to the amount of both the Internal Revenue Service and Minnesota Department of Revenue claims in his bankruptcy proceedings. A tax

attorney and a certified public accountant have advised Respondent that he has a good faith basis in law and fact to challenge the sums claimed due by the taxing authorities. If these objections are successful, the amounts claimed by the taxing authorities may be substantially reduced or even eliminated. Even if these objections are unsuccessful, Respondent's Chapter 13 plan provides for payment of all tax claims by October 2001.

14. The witnesses from the Internal Revenue Service and the Minnesota Department of Revenue each testified that the employer's failure to make withholding tax payments has no effect on the tax liabilities of the employees. The employees' accounts are credited as if the withholding taxes were deposited by the employer. If the employee tax return shows a refund is due, the employee will receive the refund even if the employer did not deposit the employer withholding taxes. Neither the Internal Revenue Service nor the Minnesota Department of Revenue seeks to separately collect any unpaid employer withholding taxes from the covered employees, and the failure to remit the withholding taxes does not have any effect on the employee's Social Security account.

15. Respondent is married and has six children, now ages 17 to 27. In 1990, the year Respondent's tax problems first arose, Respondent's eldest daughter was 17 years of age. She had significant chemical dependency problems and ran away from home in the summer of 1990. Although she started school in September 1990, she dropped out by October. In November 1990, Respondent and his wife placed their daughter in a residential facility in Utah. She remained in this facility until her 18th birthday in April 1991. Although Respondent initially believed that this placement would be

covered by his health insurance, his insurer denied payment, and Respondent was responsible for $20,000 to $25,000 incurred to treat his daughter. Additionally, the parents were required to meet with their daughter and her counselors two to three times a month in Utah. Respondent not only incurred substantial additional expenses for travel, but the travel time and emotional toll arising out of his daughter's problems significantly interfered with his ability to generate income from his law practice.

16. In 1992, Respondent had serious stomach and digestive problems. He was hospitalized at the Mayo Clinic for one week in the summer of 1992 and generally did not have his health issues resolved until October or November of 1992.

17. In January 1994, Respondent suffered a major heart attack. He had a second heart attack in March 1994, just as he was beginning to get back to work from the first heart attack. He was not able to return to his normal level of activity until June 1994. Respondent suffered additional heart attacks in June 1996 and August 1998.

18. Respondent's wife started a 24-hour photo developing business in 1989. This business closed at a substantial loss in 1993. It appears that a major cause of the business loss was employee theft.

19. In 1995, Respondent's father had serious heart problems. Respondent and his siblings tried to care for their father in their homes because neither they, their mother, nor their father wanted him to stay in a nursing home. In September 1995, Respondent's wife's father, who was close to Respondent, died suddenly. Respondent's father died 6 weeks later.

20. Respondent's law office was struck by a tornado in July 1997. His office was substantially closed because of the damage for the month of July 1997.

21. The parties stipulated to the following schedule of adjusted gross income and self-employment taxable income for the years 1990 through 1995:

Tax Year	Adjusted Gross Income	Self-Employed Taxable Income
1990	$35,957	$44,545
1991	$41,285	$53,400
1992	$43,637	None
1993	$63,414	$47,562
1994	$73,401	$22,980
1995	$56,088	$32,237

The elevated adjusted gross income for 1994 resulted from the Respondent's liquidation of his Individual Retirement Account.

22. This disciplinary proceeding was initiated by a report to the Director in December 1996. This report did not originate with the Internal Revenue Service or the Minnesota Department of Revenue. The Respondent has cooperated with the Director in investigating and resolving this disciplinary proceeding.

Based upon the foregoing the Referee makes the following:

CONCLUSIONS OF LAW

1. Respondent's failure to timely file his state and federal individual income tax returns violated Rule 8.4(b), Minnesota Rules of Professional Conduct, and the Minnesota Supreme Court's holding in In re Bunker, 199 N.W.2d 628 (Minn. 1972). His failure to timely file and pay his state and federal employer withholding taxes also violates Rule 8.4(b), MRPC. See In re Johnson, 414 N.W.2d 199 (Minn. 1987).

2. The prior private admonitions do not constitute aggregating circumstances supporting greater sanctions in this case. By rule, these admonitions are for "isolated and non-serious" conduct. Rule 8(d)(2), RLPR. The 1982 admonition is much too dated to be

relevant, and none of the admonitions arise out of conduct similar to that involved here.

Based upon the foregoing the Referee makes the following:

RECOMMENDATION

1. Respondent be publicly reprimanded.
2. Respondent be placed on probation for a minimum of 2 years or until his obligations to the Department of Revenue and Internal Revenue Service are completed under his Chapter 13 bankruptcy plan, whichever is longer, said probation to be on the following terms and conditions:
    a. Respondent shall timely complete the payments to the Chapter 13 Trustee according to the confirmed plan.
    b. Respondent shall file all required income tax and employer withholding returns to the Internal Revenue Service and the Department of Revenue on a timely basis and pay the tax obligations due thereunder. Respondent shall affirmatively report to the Director on or before the due date of any required returns, his compliance with the filing and payment requirements, Such reports shall include copies of the required returns. In the event Respondent seeks an extension for filing or payment, he shall provide the Director with copies of all applications for said extensions and proof of approval of such applications. Respondent shall provide all of the required documents and information without specific requests from the Director.
    c. Respondent shall abide by the Minnesota Rules of Professional Conduct.

d. Respondent shall cooperate fully with the Director's efforts to monitor compliance with this probation and shall properly respond to the Director's correspondence. Respondent shall cooperate with the Director's investigation of any additional allegations of unprofessional conduct which may come to the Director's attention. Upon the Director's request, Respondent shall provide authorization for release of information and documentation to verify compliance with the terms of probation.

3. Respondent shall pay $900 in costs, plus the Director's disbursements, pursuant to Rule 24(a) and (b), RLPR.

The attached Memorandum is incorporated herein.

Dated this 24 day of November, 1999.

BY THE REFEREE

WILLIAM A. JOHNSON
JUDGE OF DISTRICT COURT

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against KENNETH M. HOLKER, Attorney at Law of the State of Minnesota.	File No. C5-99-1061 **MEMORANDUM**

This is an attorney discipline proceeding in which there is virtually no dispute as to the attorney's professional misconduct or that the misconduct constitutes a violation of the disciplinary rules, but there is great dispute as to the appropriate discipline.

Attorney Kenneth Holker did not timely file his state or federal income taxes for most of the years between 1990 and 1995. Basically, he was 2 to 12 months late filing his federal income taxes for 1990 and 1992-95 and 9 to 18 months late filing his state income taxes in 1992 through 1994. More significantly, Respondent did not timely file any of his quarterly employer withholding taxes for six consecutive quarters from September 30, 1990 to December 31, 1991. He failed to timely pay his state or federal quarterly employer withholding taxes for the quarters from September 30, 1990 until December 31, 1995, and he accrued substantial arrearages.

The dispute between the parties is what discipline would be appropriate in this situation. Respondent argues for a public reprimand and probation; the Director argues for a 6-month suspension followed by probation as may be determined at the time of reinstatement. Based on the unique facts of this case, most particularly the length of time that has passed since Respondent's misconduct, the personal and family crises that were occurring contemporaneously with Respondent's misconduct, and Respondent's efforts

to address his tax liabilities, the undersigned recommends a public reprimand followed by probation.

Since In re Bunker, 294 Minn. 47, 199 N.W.2d 628 (1972), the Court has consistently held that an attorney's failure to file income taxes is a violation of the attorney's oath of office and the appropriate subject of professional discipline. In applying Bunker, the Court has developed two refinements that are particularly relevant to the instant case.

First, the Court has distinguished between failure to file and late filing. While the complete failure to file income taxes would lead to the "harsh sanctions" of suspension or disbarment, the Court has been "far more lenient" where the attorney is guilty of "the mere failure to timely file." In re Thedens, 557 N.W.2d 344, 348 (Minn. 1997). In Thedens, the Court held that the late filing of income tax returns, standing alone, did not merit suspension. See also, In re Donahoo, 441 N.W.2d 450 (Minn. 1989); In re Anastas, 368 N.W.2d 271 (Minn. 1985) (both upholding stipulations for public reprimands and probation for late filing of income taxes); but see, In re Orme, 418 N.W.2d 161 (Minn. 1988); In re Bolen, 416 N.W.2d 449 (Minn. 1987) (both upholding stipulations for 30 day suspensions for late filing of income taxes).

Second, the failure to file or pay employer's withholding taxes has been treated as a significantly more serious violation than the failure to file or pay income taxes.[1] The failure to remit withholding taxes permits the attorney "to use money belonging either to the employee or the state for his own use – in short converting money." In re Johnson,

[1] The failure to *pay* income taxes, as opposed to the failure to *file* income taxes, is not even a basis for attorney discipline. In re Chrysler, 434 N.W.2d 668, 669 (Minn. 1989); In re Tyler, 495 N.W.2d 184, 186 n.1 (Minn. 1992). The Director has recognized this distinction by stipulating that Respondent's failure to pay his income taxes is not a basis for discipline.

414 N.W.2d 199, 202 (Minn. 1987). Even though the withholding tax violation does not generally arise out of an attorney-client relationship, it is "directly related to the operation of [the attorney's] law practice and may well reflect the seriousness with which he regards his professional obligation in handling other people's money." Id.

Applying these principles to the facts of the instant case, Respondent's income tax violations would, standing alone, suggest probation rather than suspension. Respondent's income tax violations constitute late filing rather than failure to file. He was repeatedly late filing his state and federal income tax returns, but all his returns were filed by October 1996, almost three years before the Petition in this case and several months before any complaint to the Board of Professional Responsibility.

Respondent's failure to timely file and pay employer withholding taxes, on the other hand, would ordinarily call for suspension. In 1995, the Court reviewed its prior discipline cases involving attorneys who failed to timely file and pay employer's withholding taxes and noted the cases evinced "a tendency, although by no means a bright-line rule, to impose a 30-day to 60-day suspension." In re Gurstel, 540 N.W.2d 838, 842 (Minn. 1995). The Court specifically noted, however, that attorneys in future cases should anticipate that the sanction may be more severe. Id. at 842-43.

Consistency is, of course, a goal in professional discipline cases, and prior decisions can offer guidance in determining appropriate sanctions, but each case must be examined individually, with discipline imposed that is appropriate to its unique circumstances. In re Bernard, 534 N.W.2d 272, 274-75 (Minn. 1995); In re Ruffenbach, 486 N.W.2d 387, 390 (Minn. 1992). "The determination of the appropriate measure of discipline for an attorney is necessarily subjective. Because each case involves a

different factual setting, different violations, and mitigating or aggravating circumstances, prior disciplinary law is helpful only through analogy . . . ." In re Zotaley, 546 N.W.2d 16, 20 (Minn. 1996). The applicability of these principles to tax misconduct cases is confirmed by In re Wylde, 454 N.W.2d 423, 425-27 (Minn. 1990), where the Court exhaustively reviewed the different discipline it imposed in various cases where an attorney had failed to file income taxes.

The record in the instant case discloses extreme mitigating circumstances justifying a lesser sanction than suspension. These circumstances fall into two categories: Respondent's family and health problem which may have lead to his tax misconduct in 1990 through 1992, and Respondent's later medical and financial problems which have made it more difficult for him to repay his tax obligations. The more significant extenuating factors are those which occurred in 1990 through 1992, essentially coinciding with Respondent's failure to file his employer's quarterly withholding tax returns. The returns, which were not filed until August 1992, were due October 31, 1990, through January 31, 1992. Respondent's eldest daughter's problems hit a crisis stage in the summer of 1990. Although she started the school year in September 1990, she dropped out in October of that year. In November, Respondent and his wife placed their daughter in a facility in Utah. Respondent and his wife each testified to the emotional strain this placed on them individually and as a family. This strain was exacerbated by significant financial pressures when Respondent's insurer refused to cover the costs of the placement. Respondent was thus liable for $20,000 to $25,000 of expenses for his daughter. He also was required to travel to Utah regularly to visit with his daughter and meet with her counselors.

While this does not justify his failure to file his employer's withholding tax returns, it appears to the undersigned that this is the sort of "extreme mitigating circumstances, such as illness, chemical dependency, or depression" that can justify probation even in cases which would otherwise require suspension or disbarment. In re Gurstel, 540 N.W.2d 838, 842 (Minn. 1995); In re Ylitalo, 420 N.W.2d 615, 616 (Minn. 1988); In re Johnson, 414 N.W.2d 199, 202 (Minn. 1987). These pressures were magnified in 1992 when Respondent suffered serious stomach and digestive problems. He was hospitalized for a week in the summer of that year and generally was not back to normal until October or November 1992. By August 1992, nevertheless, he filed his delinquent employer's withholding taxes, and thereafter stayed current on the filing of those taxes with one exception.

The next set of mitigating factors does not excuse Respondent's failure to timely file his employer withholding taxes or his income taxes, but does shed light on his failure to pay his employer's withholding taxes. His wife's business failed in 1993 with a substantial loss. He suffered a major heart attack in January 1994 and had a second attack in March of that year. His father became seriously ill in 1995, and his wife's father died suddenly in September 1995. Finally, in July 1997, his office was hit by a tornado. The cumulative effect of these health problems and personal tragedies was a marked reduction in his earning ability. In 1990, Respondent was generating $44,500 from his law practice, this increased to $53,400 in 1991, but declined to about $23,000 in 1994 and $32,000 in 1995. He simply was not generating the income that would allow him to pay all the tax obligations he had incurred.

The last issue for discussion is whether the cumulative misconduct requires greater sanctions than either of the tax violations standing alone. The undersigned has not considered Respondent's failure to timely file income taxes as separate misconduct requiring sanctions that would not be imposed for the more serious violation of failing to timely file and pay employer's withholding taxes. Although Respondent certainly committed both offenses, they were contemporaneous and caused by the same combination of personal crises and financial pressures. I believe the two violations are best considered as one course of professional misconduct.

Similarly, the undersigned does not find that Respondent's record of prior admonitions constitute an aggravating factor justifying greater discipline. First of all, some of the admonitions are dated; the oldest one is 17 years old, the next two are 8 to 10 years old, one is 4 years old, and one is about a year old. More importantly, the very definition of a private admonition is that it is issued for "isolated and non-serious" professional violations. RLPR 8(d)(2). Finally, none of the admonitions address either the subject matter of the current misconduct or the underlying violation of an attorney's oath that is the gravamen of the tax misconduct before the Court. The admonitions may be relevant in evaluating whether Respondent can persuasively raise his past professionalism as a mitigating factor, but they do not rise to the level of an aggravating factor.

The undersigned recommends that Respondent be publicly reprimanded and placed on probation for at least two years.

WAJ