

FILE NO. A08-2097

STATE OF MINNESOTA

IN SUPREME COURT

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OFFICE OF LAWYERS  
PROF. RESP.

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In Re Petition for Disciplinary Action  
Against JILL M. WAITE,  
a Minnesota Attorney,  
Registration No. 191152

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION  
FOR DISCIPLINE**

The above-captioned matter was heard on March 19, 2009, March 31, 2009, April 1, 2009, April 10, 2009, and April 17, 2009, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Julie E. Bennett appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Michael C. Mahoney and Jill E. Clark appeared on behalf of Respondent Jill M. Waite, who was personally present throughout the proceedings.

After some testimony had been received, while Kenneth Thompson was testifying, the referee advised him regarding his constitutional rights not to incriminate himself during his testimony. Thereafter Attorney Eric Cooperstein appeared as personal attorney for Kenneth Thompson, Cassandra Meyer, and Sarah Schilling, employees of Kenneth Thompson.

The hearing was conducted on the Director's August 29, 2008, petition for disciplinary action and February 6, 2009, supplementary petition for disciplinary action. The undersigned heard the testimony of twelve (12) witnesses. The Director presented the evidence of witnesses Jill M. Waite, Kenneth James Thompson, Catherine Dunham, Edwin Holmes, Julie Seymour, and Lori Abbott. Respondent also presented the evidence of witnesses Jill M. Waite, Jill E. Clark, Sarah Schilling, Cassie Meyer, Dr. Ferris Fletcher, Cheryl Lamone, and Dakota County Court Administrator Caroline

Renn. The Director submitted exhibits 11, 13, and 26-48 which were received; Respondent submitted exhibits 102-120, 202, 204-206, 208-210, 212, and 214-223 which were received. Of these received exhibits, Exhibits 26, 112, 208, 209, and 210 were ordered sealed from public inspection by stipulation. Exhibits A, B, and C were not received but were preserved in the record as being offers of proof to which objections were sustained by the referee, for illustrative purposes, or other purposes stated in the record. The exhibit books submitted also contain other exhibits that were not offered or for other reasons not received into evidence.

In her answers to the petition for disciplinary action and the supplementary petition for disciplinary action, Respondent admitted certain factual allegations made by the Director, denied others, and denied any rule violations. The findings and conclusions made below are based upon Respondent's admissions, the documentary evidence submitted by the parties, the testimony presented, the demeanor and credibility of witnesses as determined by the undersigned, and the reasonable inferences to be drawn from the documents and testimony. If a particular factual finding is admitted in Respondent's answer to the petition for disciplinary action, and even though the Director may have provided additional evidence to establish the finding, no other citation will necessarily be made.

Based on the evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

#### **FINDINGS OF FACT**

1. Respondent was admitted to practice law in Minnesota on July 15, 1988. Respondent currently practices law as a sole practitioner in Minneapolis, Minnesota. (R. test.)

2. Respondent was initially admitted to the practice of law in Texas in 1977. Respondent was also admitted and practiced in Wisconsin prior to seeking admission to Minnesota. (R. test.)

Counts One and Two  
Failure to file State Individual Income Tax Returns

3. Respondent had sufficient gross income in 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004 to require her to file state individual income tax returns. (Respondent admits; Respondent's answer ¶ 1.)

4. Respondent failed to timely file her 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004 state individual income tax returns. (R. admits; R. ans. ¶¶ 2-13.)

5. Between 1993 and 2004, Respondent's primary sources of income were self-employment income from her law practice and rental income from her real estate. (R. test.)

6. Due to Respondent's failure to timely file and pay her taxes for the years 1994 through 2001, the Minnesota Department of Revenue (DOR) conducted an audit of Respondent. (R. admits; R. ans. ¶ 14.)

7. On August 16, 2004, the DOR sent Respondent a tax order and summary explaining the results of their audit for tax years 1994 through 2001 and including tax returns generated by the DOR. The summary concluded that Respondent had a tax liability of \$84,797.74, and requested Respondent to pay that amount in full by October 15, 2004. Also included with the order and summary was an appeal form with instructions on how to appeal the audit. Respondent did not complete the appeal form and did not pay the tax liability by October 15, 2004. (R. admits; R. ans. ¶ 15.)

8. Respondent does not recall whether she requested extensions to file her state individual income tax returns. If Respondent did request an extension,

Respondent did not file her state individual income tax returns prior to the end of the extension period. (R. test.)

9. Respondent filed her 2004 state income tax return late on or about August 22, 2005. (R. admits; R. ans. ¶ 15.)

10. Respondent filed her 2000 state income tax return late on or about August 30, 2005. (R. admits; R. ans. ¶¶ 9.)

11. Respondent filed her 2001 and 2003 state income tax returns late on or about September 8, 2005. (R. admits; R. ans. ¶¶ 10, 12.)

12. Respondent filed her 2002 state income tax return late on or about September 27, 2005. (R. admits; R. ans. ¶ 11.)

13. Respondent filed her 1998 and 1999 state income tax returns late on or about October 18, 2005. (R. admits; R. ans. ¶¶ 7, 8.)

14. Respondent filed her 1993, 1994, and 1995 state income tax returns late on or about May 4, 2006. (R. admits; R. ans. ¶¶ 2, 3, 4.)

15. Respondent filed her 1996 and 1997 state income tax returns late on or about May 6, 2006. (R. admits; R. ans. ¶¶ 5, 6.)

16. On January 28, 2005, February 3, 2005, and February 4, 2005, the DOR wrote Respondent stating their intent to refer her unpaid tax liability to the U.S. Treasury Offset Program. (R. admits; R. ans. ¶ 16.)

17. On February 9, 2005, the DOR sent Respondent a demand for payment and an intent to levy wages regarding her unpaid tax liability.

18. On March 30, 2005, the DOR filed a tax lien against Respondent in Hennepin County.

19. On April 5, 2005, the DOR wrote Respondent informing her that they had sent a notice of levy to Twin City Co-ops Federal Credit Union (Twin City Co-ops), where Respondent maintains a bank account.

20. On April 5, 2005, the DOR sent Stephen Schweckendieck a notice of third party levy, instructing him to pay to the DOR any money he owed Respondent.

Schweckendieck is Respondent's tenant who rents an apartment owned by Respondent.

21. On June 13, 2005, the DOR wrote Respondent informing her that they had sent a notice of levy to Twin City Co-ops.

22. On July 12, 2005, the DOR sent Respondent a demand to file tax returns for the years 2002, 2003 and 2004.

23. On July 12, 2005, the DOR sent Respondent notice of their intent to file a complaint with the Director's Office.

24. On September 21, 2005, the DOR filed a complaint with the Director's Office against Respondent.

25. On December 2, 2005, the DOR sent Respondent a notice of intent to offset her federal tax refunds based on Respondent's delinquent tax liability for the years 2002 and 2003.

26. On December 14, 2005, the DOR sent Respondent notice of correspondence to Matthew Guyer. Respondent had recently retained Guyer, a certified public accountant (CPA), to assist her in filing her taxes and resolving her tax liability.

27. On February 22, 2006, the DOR wrote Respondent informing her that they had sent a new levy notice to Schweckendieck.

28. On September 29, 2006, the DOR filed a tax lien against Respondent in Hennepin County for \$2,503.12.

Failure to Timely File Federal Individual Income Tax Returns

29. Respondent had sufficient gross income in 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004 to require her to file federal individual income tax returns. (R. admits; R. ans. ¶ 30.)

30. Respondent failed to timely file her federal individual income tax return for 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004. (R. admits; R. ans. ¶¶ 31-42.)

31. Respondent does not recall whether she requested extensions to file her federal individual income tax returns. If Respondent did request an extension, Respondent did not file her federal individual income tax returns prior to the end of the extension period. (R. test.)

32. Respondent did not file her 2002 federal individual tax return prior to September 23, 2005. (R. admits; R. ans. ¶ 40.)

33. Respondent filed her 2003 federal individual tax return late on or about October 10, 2005. (R. admits; R. ans. ¶ 41.)

34. Respondent filed her 1998, 1999, 2000, 2001 and 2004 federal individual income tax returns late on or about October 18, 2005. (R. admits; R. ans. ¶¶ 36- 39, and 42.)

35. Respondent filed her 1993, 1994, 1995, 1996 and 1997 federal individual income tax returns late on or about April 27, 2006. (R. admits; R. ans. ¶¶ 31- 35.)

36. On November 1, 2005, the Internal Revenue Service (IRS) filed a tax lien against Respondent for tax year 2002. (R. admits; R. ans. ¶ 43.)

37. On December 22, 2005, the IRS wrote the Director indicating that Respondent had not yet filed tax returns for the years 1993, 1994, 1995, 1996 and 1997. (R. admits; R. ans. ¶ 44.)

38. On January 12, 2006, the IRS sent Respondent a final notice of intent to levy due to her unpaid tax liability totaling \$18,018.11 for the years 1998 through 2001, as well as 2003 and 2004. (R. admits; R. ans. ¶ 45.)

39. On January 13, 2006, the IRS filed a tax lien against Respondent in the amount of \$17,730.70 for the tax years 1998, 1999, 2000, 2001, 2003 and 2004. (R. admits; R. ans. ¶ 46.)

40. On February 27, 2006, the IRS sent Twin City Co-ops a notice of levy against Respondent in the amount of \$18,392.85. (R. admits; R. ans. ¶ 47.)

41. By the time of the hearing Respondent had fully paid her state and federal income tax obligations. The total amounts paid were not summarized.

42. Respondent's counsel during the hearing moved to amend Respondent's answer to deny portions of Counts One and Two. The referee denied the motion on April 1, 2009 as untimely and unfairly prejudicial. This was in part because allowing the amendment would have required the Director to likely produce substantial expert testimony not available without a lengthy continuance, and because considerable preparation had been completed and evidence had already been received, which could likely have been prejudiced by the amendment.

43. Respondent explained much of her failures to file as being her reliance upon third part advice from various persons in the early to mid 1990's. As the referee understood her testimony, she claimed that she was told that since she purchased a four-plex building devoted in part to her office use, her real estate deductions would exceed her law practice and other income, and that this meant she need not file income tax returns, but could file to receive a refund. Even after she received no further advice from the person who allegedly told this to Respondent, she claimed that she continued for several years not to file returns, assuming the initial advice was still valid, year after year.

The referee does not find this evidence to be true or persuasive. It was vague in description and implausible. The filing requirements of the federal and state governments are well known and clear, as would be known to any person offering income tax advice, and to attorneys. Even though a taxpayer may not owe tax due to deductions, the government is unable to evaluate income and deductions without a return being filed. Respondent has admitted that she had adequate gross income requiring her to file returns in all applicable years (and in fact she has now paid taxes,

interest and penalties for those years). Further it is unreasonable to extrapolate such advice, even if given for an isolated year, to all future years. Finally, if a refund were available merely by filing a return, it is inexplicable why no such return was filed by Respondent.

44. Respondent further alleges being misled by DOR regarding misinformation or by its renegeing upon its oral agreements with her.

The Respondent has failed to provide credible evidence in this regard, the referee does not credit her testimony, and finds this claim to be unproven.

Count Four  
Judge Davis Matter

45. H.S. retained Respondent to represent him in a civil claim against the City of Minneapolis and individual police officers. H.S. alleges he was beaten by Minneapolis police officers. (Ex. 34.)

46. Beginning in May 2004, the Federal District Court for the District of Minnesota implemented the case management/electronic filing (CM/ECF) system which required case documents, with a few exceptions, to be filed electronically. As part of the CM/ECF system attorneys are required to maintain a current e-mail address and if the e-mail address changes, attorneys are required to update the information on ECF. Pursuant to these rules, Respondent provided the court with an e-mail address which the court used to provide notice. (Respondent's supplementary answer ¶ 65; Jill Clark test.; D. Minn. L.R. 5.1 and the Electronic Case Filing Procedures for the District of Minnesota.)

47. On April 12, 2006, Respondent filed a complaint in the matter in federal court, demanding a jury trial. (R. admits; R. supp. ans. ¶ 67; Ex. 34.)

48. On May 4, 2006, the court issued a notice of pre-trial conference scheduled for June 29, 2006. Pursuant to Rule 26(f), Rules of Federal Civil Procedure, at least 21

days before the pre-trial conference the parties must confer to consider the basis of their claims and defenses and the possibilities for a resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan. Rule 26(f) further requires that parties submit a written report outlining their plan. (Ex. 35; Fed. R. Civ. Pro. Rule 26.)

49. The court's May 4, 2006, order provided the parties with the e-mail address for Chief Judge Michael Davis' chambers. (Ex. 35.)

50. Respondent received the court's May 4, 2006, order through the ECF system. (R. test.)

51. On June 27, 2006, counsel for defendants filed a document entitled "Defendant's Rule 26 (f) Report." In this document defendants state the parties did not participate in the meeting required by Rule 26(f), and that they made numerous attempts to contact Respondent to schedule the meeting without success. Defendants forwarded draft copies of the Rule 26(f) report to Respondent and received no response. Defendants note their last contact with Respondent was an e-mail from Respondent on June 23, 2006, requesting a copy of the report be forwarded. (Ex. 36.)

52. Prior to the June 29, 2006, pre-trial conference, Respondent received "Defendant's Rule 26(f) Report." (R. test.)

53. On June 30, 2006, the court issued a pre-trial scheduling order. Pursuant to the court's order, pre-discovery disclosures were to be made by July 20, 2006, the identity of expert witnesses disclosed by July 1, 2007, motions to amend the pleadings were to be served by October 15, 2007, and all motions were to be filed and heard by November 1, 2007. The order also provided that the case should be ready for a jury trial by November 1, 2007. (Ex. 37.)

54. On November 13, 2007, the court filed a notice to the parties that they were on a trial block for February 1, 2008. The notice also required the parties to submit several documents by January 18, 2008, including a statement of the case, exhibit list,

witness list, list of deposition testimony being offered into evidence, and proposed *voir dire* questions. The court sent notice of the November 13, 2007, pre-trial order to Respondent by e-mail in accordance with the ECF procedures. (Ex. 38.)

55. Respondent failed to submit any documents to the court as directed in the court's November 13, 2007, order. (R. test.; Ex. 39.)

56. On November 14, 2007, the court filed a notice of settlement conference to be held on December 19, 2007. (Ex. 220.)

57. The parties, including Respondent, attended the settlement conference which had been rescheduled to December 20, 2008. At this conference, the Magistrate informed the parties that the trial in the matter was scheduled for February 4, 2008. (R. test.)

58. On January 14, 2008 Respondent received an e-mail from opposing counsel Timothy Skarda attaching his proposed jury instructions and indicating he looked forward to hearing from Respondent about the submissions. (Ex. 223.)

59. On January 17, 2008, the court's calendar clerk (clerk) called Respondent and spoke with Respondent's adult daughter, who, at the time, served as Respondent's legal assistant. The clerk informed Respondent's daughter that February 4, 2008, was the date certain for trial, and told her to refer to the November 13, 2007, order, for the due dates for trial submissions. (Ex. 40.)

60. Respondent admitted she received a message from her daughter regarding the February 4, 2008, trial date. (R. test.; Ex. 202.) Respondent testified regarding the limited role her daughter played in her law practice. She does however have the duty to employ and train adequately the employees of her law practice.

61. On January 22, 2008, at 8:59 a.m., the clerk called Respondent again, but was unable to leave a message as Respondent's answering machine was full. (Ex. 40.) Respondent has the duty to take reasonable steps to receive telephone message relating to her law practice.

62. On January 22, 2008, at 9:01 a.m., the clerk e-mailed Respondent stating that trial submissions were due Friday, January 18, and that the court had heard from opposing counsel that joint jury instructions had not been completed. The e-mail further requested Respondent to inform the court when Respondent would have the documents to the court, and reminded Respondent of the February 4, 2008, trial date. (Ex. 40.)

63. On January 22, 2008, the court issued an order requiring Respondent to “submit a statement of the case, exhibit list, witness list, list of deposition testimony, all motions *in limine*, proposed *voir dire*, joint proposed jury instructions, and a proposed special verdict form, all submitted in the manner set forth in the court’s November 13, 2007, order, by noon Friday, January 25, 2008. If Plaintiff fails to submit the required material by noon on January 25, 2008, this case will be **dismissed with prejudice.**” The court sent notice of the order to Respondent by e-mail. (Ex. 39.)

64. Respondent failed to submit any additional documents to the court by January 25, 2008, pursuant to the court’s November 13, 2007, and January 25, 2008, orders. After the noon deadline had passed, the clerk called Respondent and left a message requesting Respondent to call back immediately. Respondent failed to contact the court in response to the message. (Ex. 40.)

65. On January 25, 2008, the court signed an order dismissing the case with prejudice stating Respondent had “frequently disobeyed Court orders without any explanation or excuse.” (Ex. 40.)

66. Respondent arranged for an attorney to represent H.S. in an appeal to the 8<sup>th</sup> Circuit Court of Appeals. The 8<sup>th</sup> Circuit Court of Appeals upheld Chief Judge Davis’ decision. (Ex. 48.)

67. Respondent introduced testimony that the federal ECF system is *unreliable and prone to errors*. However the testimony indicated that if such problems

existed, they existed primarily in early 2004 when the system was implemented, and were not prevalent as late as 2006, 2007, and 2008.

68. Respondent testified that she did not receive several of the e-mails sent by the federal court. However she offered no evidence that the messages were returned undelivered to the federal court, nor any evidence persuasive to the referee that they were not received on her computer. Respondent stated her desire to offer technical testimony from a Jeffrey Roth on the last day of the hearing regarding email functioning and non-functioning. However Respondent had not disclosed the witness to the Director although the issue was known to Respondent for several months. The referee denied the offer of such testimony, in part because receiving the testimony would have required the Director to retain and interview an expert retained by the Director, to provide an opportunity for cross examination and rebuttal testimony, and for yet another continuance in the hearing. The referee finds that the email messages from the federal court were received by Respondent.

69. Irrespective of the disputed electronic messaging, Respondent failed to respond to electronic and other messages and orders that she does not dispute receiving or were clearly received by her.

As stated above, Respondent also failed to respond to many of these communications, in addition to the emails she disputes receiving.

70. Respondent has introduced lay testimony and expert testimony concerning her alleged disability regarding computers and technology. The evidence refers to this condition as "post-traumatic stress disorder," or "computer phobia."

It is alleged that this condition somehow resulted in Respondent's inability to adequately operate her computer during the relevant period.

The Court's subsequent findings shall treat the claim as to this condition as it relates to all counts of the petition. However even if the Respondent had such a

condition, it did not prevent her from recognizing that she was unable to effectively deal with her office computer, and assign a competent person to do so.

Count Three (Kenneth Thompson Matter)

And

Count Five (Catherine Dunham Matter)

70. The referee treats these matters together because they are inter-related and have several common facts.

71. Kenneth Thompson (Thompson, or K.T.); Catherine Dunham (Dunham, or C.D.); and Cheryl Lamone (Lamone), a witness who testified, are all siblings.

72. Thompson owned and operated at the relevant times more than one business. He employed several persons, and is an experienced businessman.

73. Respondent represented Catherine Dunham's ex-husband, D.L., in post-decree family matters (R. test).

74. Respondent represented D.L. in a petition for an order for protection against C.D. on behalf of D.L. and C.D.'s minor children. (R. admits; R. ans. ¶ 49).

75. At the time Respondent's client, D.L., was seeking an order for protection against C.D. on behalf of D.L.'s and C.D.'s teenage children, D.L. had supervised visits with the children. (Exhs. 26 and 104).

76. Kenneth Thompson was not a party to the order for protection action. (Thompson test.; Holmes test.; Dunham test.; R. test.)

77. D.L. had known Thompson for years and knew the name of Thompson's former wife. In fact, when both couples were still married, Thompson and his wife stayed with D.L. and C.D. at their home. (Thompson test.)

78. On January 31, 2007, Respondent and D.L. went first to the Dakota County Courthouse and then to the Scott County Courthouse to obtain information concerning Thompson. Respondent received various printouts at the Scott County Court

Administrator's Office which were attached to her affidavit. (See ¶ 45 below).

Respondent was in possession of this information overnight and prior to executing her affidavit. (R. test.)

79. On February 1, 2007, Respondent filed with the court a document entitled "Petitioner's Attorney's Affidavit in Support of Petition for Order of Protection." In the body of Respondent's affidavit, Respondent states the following regarding Kenneth Thompson, "Kenneth Thompson has been charged with at least 14 criminal charges just since 2001." Respondent's affidavit went on to list some of the 14 criminal charges against Kenneth Thompson, which included interference with a 911 call, criminal damage to property, possession of narcotics, and fleeing a police officer. (R. admits; R. ans. ¶ 50)

80. Respondent attached to the above-mentioned affidavit a document entitled "Criminal Case Record Search Results" that she had printed from a computer terminal at the Scott County Courthouse. This document identified seven separate criminal matter involving a defendant named Kenneth Thompson. (R. admits; R. ans. ¶ 51.)

Most of her experience with Court Administration had been in Hennepin County, which presents such search information differently from Dakota County. (R. test.)

81. The seven criminal matters, as itemized on the search results, listed three different Kenneth Thompsons with different birthdates and different middle initials. (R. admits; R. ans. ¶ 52.) Only one criminal conviction involved the Kenneth Thompson referred to in Count Three, Kenneth James Thompson.

82. Also attached to Respondent's February 1<sup>st</sup> affidavit were documents entitled "Register of Actions." These documents contained the case histories for two of the seven criminal matters. The defendant listed on these registers is identified as Kenneth Steven Thompson of Bloomington, Minnesota. (R. admits; R. ans. ¶ 53.)

83. Also attached to Respondent's February 1, 2007 affidavit were records retrieved from Scott County concerning Thompson's divorce. These documents clearly list Thompson's full name and that of his wife. (Exs. 26, 112.)

84. Despite the discrepancies in the birthdates and middle names of the individuals listed as Kenneth Thompson and without any further effort to determine whether the defendant in any of these matters was in fact C.D.'s brother, Respondent attached the results as they were and attributed the charges of all three Kenneth Thompsons to C.D.'s brother in the body of her affidavit. (R. admits; R. ans. ¶ 54.) She explained at the hearing that in her experience the same person will sometimes erroneously be identified in records with different names, addresses and dates of birth. The referee finds that Respondent's actions in referring to information in her affidavit concerning the other Kenneth Thompsons not C.D.'s brother involved in Count Three were made by Respondent negligently, but not intentionally, knowingly, or maliciously. Moreover, the discrepancies were readily observable in the attachments to Respondent's affidavit and not concealed or altered in any way.

85. Judge Metzen of Dakota County declined to sign an OFP order January 31, 2007 and again February 1, 2007. (Memo at end of Exh. 104.)

86. On February 12, 2007, Respondent filed a petition for a writ of mandamus with the Court of Appeals. It sought an order that the district judge order a hearing on the OFP.

The pleadings were served upon Dunham. However she testified, and the referee finds, that she did not send them to anyone or take any action about them. (Dunham test.)

87. As shown by testimony from the Dakota County Court Administrator, under local court practice the OFP file containing Respondent's erroneous affidavit was a confidential file and not a public file.

88. On March 6, 2007, the Court of Appeals ordered that a Dakota County District Judge set a hearing on the OFP petition or explain why no hearing would be held. (Exh. 103)

On March 26, 2007, Respondent served Dunham with the OFP petition and notice of an April 2, 2007 hearing date. (Exhs. 205, 206.)

Dunham received the documents and soon faxed them to the office of Budget Exteriors, one of Thompson's businesses. Office manager Cassie Meyer (Meyer) gave them to Thompson. (Dunham, Meyer test.)

The referee finds that this was the first knowledge Thompson had of Respondent's affidavit containing the erroneous criminal allegations concerning Thompson.

89. On April 2, 2007 Thompson called attorney Ed Holmes (Holmes) for the first time regarding the Dunham matter. Holmes had done some prior legal work for businesses of Thompson. (Holmes test.)

90. At the April 3, 2007 hearing Holmes, who had filed no motion, appeared with Thompson. (Holmes test.)

He pointed out the inaccuracies in Respondent's prior affidavit regarding Thompson, and asked that they be corrected. (Exh. 214, p. 3).

Judge Metzen requested that a motion be made, and scheduled such motion to be heard on a later date when the Dunham OFP petition would be heard. (Exh. 214, p. 11).

Judge Metzen suggested that Holmes call Respondent and agree what information should be stricken, and he agreed. (Exh. 214, p. 13-14).

Holmes was to file a brief by April 9, 2007, and Respondent was to respond by April 12, 2007. (Exh. 214, p. 14-15).

91. On April 3, 2007 Holmes faxed a motion to Respondent, and then mailed a letter to Respondent. The motion attempted to invoke the "safe harbor" provision

under Rule 11 of the Rules of Civil Procedure. It recited some information about the inaccuracies in Respondent's affidavit, but was not fully accurate or complete. (Exh. 29).

92. Respondent responded to Holmes immediately by letter, explaining that she had not received Exh. 27, and requesting more information. (Exh. 30).

93. Holmes was out of the country until April 10, 2007. He then responded to Respondent's letter, enclosing the erroneous information he wished to be corrected. (Exh. 31)

94. On April 12, 2008 Respondent filed a corrected affidavit correcting her affidavit as Holmes had requested. (Resp. test.).

95. Nonetheless, without yet knowing of Respondent's correcting affidavit, Holmes drafted a motion for Rule 11 sanctions and filed it April 12, 2007. (Exh. 106, Holmes test.)

96. In the documents provided by Holmes was an affidavit by Thompson alleging that he telephoned Respondent about a week before February 13, 2007, and mailed a letter to her from him and Meyer, his officer manager, on February 13, 2007. The intention of Thompson, as now found by the referee, was a fraudulent attempt to retroactively invoke the 21 day "safe harbor" provision of Rule 11.03 (a)(1). Respondent denied, and the referee finds, that she never received the call or letter because they were not made or sent. (Exh's 27, 31).

97. Holmes later admitted at the hearing that some of the fees claimed by him in his motion had been incurred for Dunham in an unrelated matter. (Holmes test.). Thompson ultimately claimed fees of several thousand dollars. However the referee finds that almost none of these were necessary if Thompson had not falsely claimed the making of the February call and mailing of the letter. (Exh's 106, 114, 116, 117, 118).

98. The hearing with Judge Metzen was held April 16, 2007. She found that Thompson called Respondent about February 6, 2007, and wrote to her February 13,

2007 demanding correction of Respondent's erroneous affidavit. This was based upon Thompson's allegations. She further found that Respondent did not correct the error until her affidavit filed April 12, 2007, and ordered Respondent to pay \$3,500 to Thompson for the legal services of Holmes. (Exh. 215).

99. Respondent retained counsel and filed a motion to vacate Judge Metzen's Rule 11 Sanction. The hearing on the motion was held April 20, 2007. (Exh. 216).

By order of July 9, 2007 Judge Metzen vacated her earlier Rule 11 Sanction order because an adequate "safe harbor" had not been provided to Respondent pursuant to Rule 11. (Exh. 33).

Had Attorney Holmes acted in accordance with Rule 11.03 (a) of the Rules of Civil Procedure by serving the Rule 11 motion upon Respondent an adequate time before filing, Respondent would have had the "safe harbor" opportunity to correct her erroneous affidavit, as she ultimately did, and Judge Metzen would not have been asked to rule upon any Rule 11 motion.

100. Thompson filed an ethics complaint against Respondent with the Director's Office April 9, 2007. He complained of Respondent's error in her affidavit, and later that she had not promptly paid the sanction initially ordered by Judge Metzen. (Exh's. 115, 116, 117, 118).

The referee finds that his primary purpose was to misuse the Director's services to enforce payment of an inflated claim against Respondent for the sanction, and to harass Respondent for representing Dunham's ex-husband. The Director's Office however properly repeatedly advised Thompson that their office could not act to collect money for him.

101. After receiving the Rule 11 motion, Respondent asked Holmes the telephone number from which Thompson had earlier called Respondent. (Exh. 30).

On April 15, 2007 Holmes responded that there were three telephones from which Thompson could have called Respondent – his home, his office, or his cell phone.

102. Respondent obtained from her telephone service providers a list of all telephone numbers that made calls of any type, local or long distance, to her office number or cell phone number during the period Thompson claimed to have called her to complain about her erroneous affidavit. (R. test., Exhs. 208, 209).

Respondent identified the names of nearly all of the originating callers, and later identified a previously unidentified number as being a general number at the Hennepin County Jail from which inmates may telephone their attorney or others. No numbers matched those that Thompson had earlier provided. Respondent then supplied her telephone records to the Director's Office so that Thompson could identify the number from which he called. Thompson refused to examine the list, then claiming that he could have called from "hundreds of phones," rather than the three he had originally listed. (Exh. 115).

103. Respondent then began discovery, at her substantial expense, primarily to discover evidence about Thompson's telephone call and letter that he alleged making and sending to Respondent. She encountered considerable difficulties with Thompson's non-cooperation, some of which required intervention by the referee.

Despite repeated efforts by Respondent's attorney to serve them with deposition subpoenas, Thompson and his employees could not be served until after extraordinary effort by Respondent. The referee's assessment of the evidence is that they intentionally attempted to evade service, at Thompson's instruction. The testimony of Meyer and Sarah Schilling, another employee of Thompson who allegedly notarized the letter Meyer allegedly sent to Respondent with that of Thompson, showed that while Respondent's attorney was attempting to serve them, Thompson had instructed Schilling to take unrequested time off from work. She left town. (Schilling

test.) Meyer testified at her sworn deposition that she had not been available for service during a particular two-day period when Respondent was attempting to serve her because she had been sent by Thompson to a two day seminar. (Exh. 101, Cassandra Meyer deposition, p. 62). However at the March 17, 2009 hearing, Meyer admitted that her deposition testimony was false and she had not attended a seminar. (Meyer test.)

104. Thompson, when ultimately served, requested and obtained from the referee a continuance of his deposition. The subpoena duces tecum instructed him to bring to the deposition 1) computer data regarding generation of the alleged letters from he and Meyer to Respondent; 2) addresses and telephone numbers of Meyer and Schilling; and 3) any proof that the alleged letters to Respondent had in fact been sent. (Exh. 109).

Thompson brought only a single piece of paper, which gave Schilling's hire date. (Exh. 110).

He stated to the referee that he did not have access to the address of Schilling. Based upon his testimony and that of Meyer and Schilling at the evidentiary hearing, the referee finds his statement to be false. He had access to her address and that of Meyer. At the deposition the referee asked Thompson the name of the most knowledgeable person who worked on computers at his businesses. He answered that it was Michael Babcock. At trial however he admitted that Babcock had died, and Schilling admitted that the present appropriate person was Ken Burkhardt. (Thompson, Schilling test.)

105. The letter Thompson alleged he sent to Respondent February 13, 2007 was undated. The date on Meyer's alleged accompanying letter was February 13, 2007. That letter was purportedly notarized by Schilling. However the notary block she used contained no place to insert the date of notarization. Schilling could not be certain at the evidentiary hearing that she had notarized the letter on February 13, 2007, or that someone had not transferred her signature to the letter. Prior to her deposition,

Thompson had coached her about her testimony regarding her notarization of Meyer's letter. (Exh. 27, Schilling test.)

106. From all of the testimony, exhibits, and witness demeanor, the referee finds that:

- a) Thompson did not telephone Respondent prior to February 13, 2007.
- b) Thompson did not mail the letters from he and Meyer on February 13, 2007.
- c) Thompson has presented false testimony and affidavits and encouraged Meyer and Schilling to do likewise.

107. On February 19, 2008, Respondent wrote Dunham, enclosing a check in the amount of \$7,207.13 in payment of a judgment entered against Dunham's ex-husband in favor of Dunham on June 2, 2006. Respondent also enclosed a satisfaction of judgment and a stipulation and order for vacation of order for disclosure against Dunham' ex-husband that Dunham had obtained regarding non-payment of the judgment. Respondent's letter requested that Dunham sign and return the satisfaction and the stipulation. (R. admits; supp. ans. ¶ 82)

108. Dunham alleges that she executed the satisfaction and promptly returned it to Respondent. Respondent denied receiving the satisfaction. (Dunham, Resp. test.)

109. On April 7, 2008, Respondent sent the court and Dunham a motion and affidavit requesting satisfaction of the judgment, an order vacating the order for disclosure, and an award of attorney fees. Respondent's notice of motion indicated April 30, 2008, was the hearing date regarding the motion. (Ex. 42)

110. Dunham wrote to Respondent on April 9, 2008, claiming that she sent the satisfaction earlier, enclosing a copy of the purported earlier satisfaction she had sent, said that Respondent could have requested another copy, and sent copies of her reply to Dakota County District Court. (Exh. 43).

111. Respondent did not reply to Dunham. Among Respondent's reasons stated at the hearing were:

- a) Dunham had previously filed complaints against her with the Director's Office, she wished to avoid opportunities for further complaints, and was uncertain if Dunham was represented by an attorney.
- b) The satisfaction copy sent by Dunham could not be filed or recorded in court because it 1) was a copy only; and 2) showed no year of notarization in the notary block. (Resp. test.)

112. Respondent in past dealings with Dunham had disputed that she received documents that Dunham said she had mailed. Nonetheless, even though she sent her letter of April 9, 2008 by certified mail, Dunham did not use certified mail for the original satisfaction she alleged she mailed earlier. (Resp., Dunham test.)

113. On April 21, 2008, Respondent and Dunham's attorney Julie Seymour appeared at a separate hearing regarding child support. Seymour there stated that she represented Dunham only on the child support motion, and not regarding the satisfaction of judgment.

Although the satisfaction was briefly discussed at that hearing, no person brought a substitute satisfaction to be signed by Dunham. (Seymour test.)

114. A hearing was held April 30, 2008 on Respondent's motion to require Dunham to sign the satisfaction. Judge Metzen denied Respondent's motions, but only after requiring Dunham to at that time sign a satisfaction of judgment and stipulation to vacate the order for disclosure. (Exh. 45, Dunham test., R. test).

Judge Metzen believed the hearing to be unnecessary. However with the benefit of all the evidence, the referee finds the hearing was necessary.

115. Respondent introduced testimony from Cheryl LeMone, sister of Dunham and Thompson, and Exh. 108.

The evidence was suggestive that Dunham may have transferred a likeness of LeMone's notary signature, without her consent, to other prior court documents filed by Dunham. This was in part because LeMone said she and Dunham were estranged, and had not spoken for months or years before the notary dates on the documents, and although the name resembled her signature, the notary date was not her handwriting.

The referee has made no positive finding as to such a claim since it does not appear probative in value to the issues in this proceeding, and the evidence was not adequate to establish that Dunham had committed such forgery.

116. After considering all of the evidence in the Dunham matter and the demeanor of the witnesses, the referee finds that Dunham did not mail the original satisfaction to Respondent as she alleged.

The evidence is not clear and convincing that Respondent conducted her dealings with Dunham in a manner to burden the courts unnecessarily or harass Dunham in any manner, including but not limited to allegedly not re-contacting her to re-sign the satisfaction and stipulation, in view of their bitter relationship and her past experiences with Dunham.

#### Aggravating Factors Found by Referee

117. Respondent has a disciplinary history as follows:

a) On January 27, 1995, Respondent was issued an admonition for failing to ensure her client's documents were delivered to the bankruptcy trustee, failing to adequately respond to the trustee's inquiries on the status of the documents, failing to inform her client she would be charged the trustee fees, and failing to promptly search for the requested

documents in violation of Rule 1.3, Minnesota Rules of Professional Conduct (MRPC).

b) On June 20, 2000, Respondent was issued an admonition for failing to submit a summary requested by an arbitrator, failing to timely request a trial, failing to communicate with her client and take action after judgment was entered in violation of Rules 1.3 and 1.4(a), MRPC

118. Respondent has substantial experience in the practice of law. (R. test.)

#### Mitigating Factors Found by Referee

119. Regarding Counts One and Two, while not technically mitigating, the Respondent has satisfied her federal and state income tax liabilities. (Resp. test.)

120. Regarding Count Four, the Judge Davis matter, Respondent retained an attorney to represent her client in an unsuccessful attempt to appeal the dismissal of his case.

121. Regarding Count Four, Respondent has taken measures to improve her computer accountability relative to Federal Court requirements.

#### Matters Not Found to be Mitigating Factors by Referee

122. Respondent introduced testimony from her psychologist Ferris Fletcher. In her practice she emphasizes matters involving anxiety and post-traumatic stress disorder, especially affecting women.

She defined post-traumatic stress disorder as a condition created by a past threatening and horrifying event, that may result in avoidance of related matters.

Respondent first met with Ms. Fletcher in March 2009 and had seen her five times. The petition in this proceeding was filed in 2008. The Davis matter Count Four occurred between 2006 and January 2008.

Ms. Fletcher opined that Respondent suffered from moderate level post-traumatic stress disorder created by: a) her sister kicking, scratching and bullying her in her childhood; and b) her ex-husband verbally abusing her. Her marriage ended over 15 years ago.

Ms. Fletcher further opined that Respondent's post-traumatic stress disorder "triggered" when she was referred to as being stupid and technologically incompetent, reminiscent of her past abuse. This results in Respondent "shutting down" regarding technological subjects, and in her avoidance of such things as computers. She believed that Respondent now realizes her technological limitations and can manage them with the use of a tech assistant.

The referee finds that:

1. Respondent has not proven a severe psychological problem, or that such alleged problem was the cause of her misconduct. Presumably this claim would apply to Count Four, the Judge Davis matter.
2. The sessions with Ms. Fletcher were surprisingly tardy and lacked depth and commitment. Ms. Fletcher merely interviewed Respondent without detailed psychological testing.

3. The referee is not persuaded that Respondent suffers from post-traumatic stress disorder; or finds that if she does that it is not severe and did not have a significant effect upon the misconduct found. The claimed causes of the PTSD are extremely remote in point of time. Further, the evidence does not disclose that Respondent suffered prior serious effects from the alleged "computer phobia" other than the indifference to computers exhibited by many persons in the general population
4. Respondent only recently began consulting Ms. Fletcher, has begun no formal treatment program, and has not demonstrated that the misconduct found has been arrested, nor would be arrested by such psychological consultations.
5. Respondent's alleged psychological disability has not been established pursuant to *In re Weyhrich*, 339 N.W. 2d 274 (Minn. 1983); *In Re Hanvik*, 609 N.W. 2d 235 (Minn. 2000), which restated the requirement that the claimed disability be severe in degree; and *In Re Porter*, 449 N.W. 2d 713 (Minn. 1990), that supported the principle requiring persuasive evidence that the alleged psychological condition caused the misconduct.

123. Respondent has done certain pro bono work. (Clark test.) However the work in some respects was related to her field of emphasis of law, and to some extent client development. The evidence did not demonstrate that the amount of pro bono work was exceptional in the profession.

## CONCLUSIONS OF LAW

### Counts One and Two

1. Respondent's failure to timely file state and federal tax returns violated Rule 8.4(b) and (d), Minnesota Rules of Professional Conduct (MRPC).<sup>1</sup>

### Count Three

2. Respondent's conduct in the Thompson matter did not violate Rules 3.3(a)(1), 4.4, and 8.4(d), MRPC. That Count should be dismissed. The Director however acted in good faith in prosecuting that count.

### Count Four

3. Respondent's conduct in the Davis matter violated Rules 1.1, 1.3, 3.4(c), 5.3 and 8.4(d), MRPC.

### Count Five

4. Respondent's conduct in the Dunham matter did not violate Rules 8.4(d), MRPC. That Count should be dismissed. The Director however acted in good faith in prosecuting that count.

5. The findings numbered 117 through 123 are all incorporated herein regarding aggravation and mitigation.

6. An investigation by the appropriate prosecutorial authorities regarding the actions and statements of Kenneth James Thompson and Cassandra Meyer regarding Count Three is justified by the evidence.

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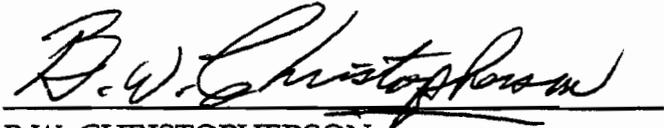
<sup>1</sup> With respect to the state and federal tax filings, all of Respondent's misconduct as set forth herein occurred before the changes to the MRPC which took effect on October 1, 2005. Therefore, all citations to the MRPC are to those Rules as they existed through September 30, 2005.

## RECOMMENDATION FOR DISCIPLINE

The undersigned recommends:

1. That Respondent be indefinitely suspended from the practice of law in the State of Minnesota, and be ineligible to apply for reinstatement for a minimum of five (5) months.
2. That Respondent comply with the requirements of Rule 26, RLPR.
3. That Respondent pay to the Director \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR.

DATED: May 19, 2009.



B.W. CHRISTOPHERSON  
SUPREME COURT REFEREE