

FILE NO. C3-87-1683

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
Against HAROLD R. WINGERD,  
an Attorney at Law of the State of Minnesota.  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION  
FOR DISCIPLINE**

The above entitled matter was tried on June 13, 2001, before the Honorable Warren E. Litynski acting as referee by appointment of the Minnesota Supreme Court. Appearing at the trial were:

Betty Shaw, Senior Assistant Director for the Office of Lawyers Professional Responsibility;  
Jerry Strauss, Attorney for Respondent;  
Harold Wingerd, Respondent.

Subsequent to trial each counsel submitted proposed Findings of Fact, Conclusions of Law and Recommendation for Discipline together with a written memorandum, the last of which was received on June 19, 2001, and the record closed at that time.

Based on the evidence presented to the referee and the entire file, the referee makes the following Findings of Fact, Conclusions of Law and Recommendation for Discipline:

**FINDINGS OF FACT**

1. Respondent was admitted to practice law in Minnesota on October 5, 1973. He currently practices law in St. Paul, Minnesota.
2. Respondent practices exclusively in family law.
3. Respondent's disciplinary history includes:
  - a. An October 28, 1986, admonition for neglecting a client matter in violation of DR 6-101(A)(3), Minnesota Code of Professional Responsibility (MCPR)(Exhibit 1).
  - b. A March 10, 1988, stayed sixty-day suspension and three years public probation for failing to timely file income tax returns in violation of DR 1-102(A)(5) and (6), MCPR, and Rules 8.4(b) and (d), Minnesota Rules of Professional Conduct (MRPC)(Exhibit 2).
  - c. An April 24, 1990, admonition for neglecting a marriage dissolution matter, failing to communicate with his client and failing to deposit his client retainer into his trust account in violation of Rules 1.3, 1.4(a) and 1.15(a), MRPC (Exhibit 3).
  - d. A two year private probation for incompetence, neglect and charging an unreasonable fee in a probate matter in violation of Rules 1.1, 1.3, and 1.5(a), MRPC, beginning February 22, 1993 (Exhibit 4).

4. On February 1, 1999, Susie Sullivan, hereafter Sullivan, obtained an order for protection. Among other things, the order for protection temporarily granted Sullivan custody of her three minor children, child support and possession of the parties' homestead. Respondent did not represent her in these proceedings.
5. On April 26, 1999, Sullivan was served with a summons and petition for dissolution of marriage. On May 13, 1999, Sullivan retained Respondent to represent her in the marriage dissolution proceeding. Sullivan paid Respondent \$2,500.00 retainer (Exhibit 5).
6. At all times relevant, Respondent has maintained Firststar Bank trust account no. 173443280 ("trust account") and Liberty State Bank business account no. 02-073-5 ("business account") (Exhibits 15 and 16).
7. On May 14, 1999, Respondent forwarded a retainer agreement to Sullivan for signature (Exhibit 6). Sullivan signed and returned the retainer agreement on May 18, 1999 (Exhibit 7). The retainer agreement acknowledged receipt of Sullivan's \$2,500.00 retainer and provided that the retainer would be "credited against all time expended by us and against all costs incurred on your behalf." The retainer agreement did not state that the funds would not be held in trust, that the retainer was non-refundable or that Respondent had earned the funds upon receipt (Exhibit 7).
8. On May 13 or 14, 1999, prior to performing substantial work on the file, Respondent deposited Sullivan's entire retainer to his business account, thereby misappropriating substantially all of Sullivan's retainer (Exhibits 8, 16 and 17).
9. At that time Respondent had in his employ one Terri Hunt, an experienced paralegal. It was Ms. Hunt's duty to prepare an answer and submit to Respondent for approval. Ms. Hunt failed to prepare an answer.
10. Respondent failed to prepare and serve an answer or to otherwise perform any work on Sullivan's case.
11. On May 31, 1999, Respondent prepared and mailed to Sullivan a billing statement falsely stating that Respondent had performed the following services on May 13, 1999:

[D]raft Certificate of Representation, Interrogatories and Request for Production of Documents.

In fact, Respondent had not performed these services (Exhibit 8).

12. In addition, Respondent's billing statement falsely implied that Sullivan's unearned retainer balance was being held in trust on her behalf. In fact, Respondent had misappropriated the retainer by depositing it to his business account and using the funds (Exhibit 16).
13. On June 14, 1999, the Court entered a default judgment against Sullivan. The default judgment reduced Sullivan's husband's child support obligation, provided for no spousal maintenance and required Sullivan to move from the parties' homestead by June 15, 2000. The

Court also ordered that the Order for Protection be modified to comport with the terms in the Decree of Dissolution. When Sullivan received notice of the default judgment she immediately advised Respondent's office.

14. Sullivan hired new counsel, Jonathan Fogel, to attempt to vacate the judgment. At the request of Mr. Fogel, on June 25, 1999, Respondent issued Sullivan a \$2,500.00 check on his business account as a refund of her entire retainer (Exhibit 10 and 17).
15. Fogel was unsuccessful in an attempt to have the trial court vacate the judgment.
16. Sullivan then appealed to the Minnesota Court of Appeals, which, on February 15, 2000, ordered the default judgment vacated and remanded the matter for a full evidentiary hearing.
17. Respondent testified that he did not know how to go about vacating a default judgment and confessed that it was due to professional incompetence.
18. Following remand, the dissolution was granted, presumably with new terms. Total fees and costs incurred by Sullivan were \$10,045.00. This was eventually paid by Respondent. Presumably, then, it cost Sullivan nothing for representation in the dissolution proceedings.
19. Sullivan filed a complaint with the Board of Professional Responsibility.
20. In explaining his neglect of the Sullivan matter in an October 1, 1999, response to the Sullivan complaint, Respondent stated:

As best I can ascertain, my Paralegal apparently and inadvertently marked "done" on a sheet that we maintain for client file activity, on Suzie Sullivan's file. That in fact was supposed to be entered on the client file located directly below Ms. Sullivan's file on the client listing.

(Exhibit 11).

21. Respondent repeated this explanation during an October 18, 1999, telephone conference with the district ethics committee (DEC) investigator.
22. In February 1 and May 9, 2000, meetings with the Director's Office, Respondent again repeated this explanation.
23. Respondent's statement that his paralegal had inadvertently recorded on the client list that work on the Sullivan matter was "done" was false.
24. Respondent encouraged his paralegal to help him create an acceptable explanation for the neglect in the Sullivan matter. Respondent knew that the explanation given to the DEC investigator and to the Director's Office was not a true and accurate description of what occurred.
25. Until approximately March 2000, Respondent did not routinely deposit client advance fee payments into his trust account.

26. For the period until at least March 2000, Respondent has failed to maintain accurate and contemporaneous client subsidiary ledgers and failed to perform the monthly trial balances and reconciliations (Exhibit 13).
27. Respondent failed to timely file his 1995, 1996 and 1997 federal income tax returns, although required by law to do so. Respondent filed those returns on the following dates:

<u>Tax Year</u>	<u>Date of Filing</u>
1995	08/27/98
1996	09/09/98
1997	09/08/98

28. As shown above, Respondent failed to timely file federal employer withholding returns for the quarters ending March 31, 1995; June 30, 1995; September 30, 1995; December 31, 1995; March 31, 1996; December 31, 1996; March 31, 1997; June 30, 1997; September 30, 1997; December 31, 1997; March 31, 1998; March 31, 1999; June 30, 1999; December 31, 1999; March 31, 2000; and June 30, 2000:

<u>Tax Period Ending</u>	<u>Due Date of Return</u>	<u>Date of Filing</u>
03/31/95	04/30/95	04/09/97
06/30/95	07/31/95	04/09/97
09/30/95	10/31/95	04/09/97
12/31/95	01/31/96	04/10/97
03/31/96	04/30/96	04/10/97
12/31/96	01/31/97	06/05/98
03/31/97	04/30/97	06/05/98
06/30/97	07/31/97	06/05/98
09/30/97	10/31/97	06/02/98
12/31/97	01/31/97	06/05/98
03/31/98	04/30/98	06/06/98
03/31/99	04/30/99	05/21/99
06/30/99	07/31/99	08/12/99
12/31/99	01/31/99	02/13/00
03/31/00	04/30/00	08/14/00
06/30/00	07/31/00	09/18/00

29. Respondent failed to timely pay the taxes due on his federal employer withholding returns for the quarters ending December 31, 1996; March 31, 1997; June 30, 1997; December 31, 1997; March 31, 1998; and June 30, 2000, although required by law to do so. Respondent's total unpaid withholding tax obligation exceeded \$5,000.00.
30. Respondent failed to timely file his 1995 and 1996 state income tax returns, although required by law to do so. Respondent filed those returns on the following dates:

<u>Tax Year</u>	<u>Date of Filing</u>
1995	09/08/98
1996	09/08/98

31. As shown below, Respondent failed to timely file state employer withholding returns for the quarters ending March 31, 1995; June 30, 1995; September 30, 1995; December 31, 1995; March 31, 1996; December 31, 1996; March 31, 1997; June 30, 1997; September 30, 1997; December 31, 1997; March 31, 1998; June 30, 1998; September 30, 1998; December 31, 1998; March 31, 1999; June 30, 1999; December 31, 1999; March 31, 2000; and June 30, 2000:

<u>Tax Period Ending</u>	<u>Due Date of Return</u>	<u>Date of Filing</u>
03/31/95	04/30/95	05/23/95
06/30/95	07/31/95	06/14/96
09/30/95	10/31/95	06/14/96
12/31/95	01/31/96	06/12/96
03/31/96	04/30/96	05/07/96
12/31/96	01/31/97	01/20/99
03/31/97	04/30/97	01/21/99
06/30/97	07/31/97	01/21/99
09/30/97	10/31/97	01/28/99
12/31/97	01/31/97	03/30/99
03/31/98	04/30/98	03/30/99
06/30/98	07/31/98	03/30/99
09/30/98	10/31/98	03/30/99
12/31/98	01/31/99	03/30/99
03/31/99	04/30/99	05/20/99
06/30/99	07/31/99	09/16/99
12/31/99	01/31/99	Not yet filed
03/31/00	04/30/00	09/14/00
06/30/00	07/31/00	09/18/00

32. Between 1995 and 1998 Respondent failed to timely file federal unemployment compensation returns or to timely pay the unemployment taxes when due. In 1997 the IRS prepared the unemployment return for Respondent. In 1996, 1997 and 1998 Respondent filed only after receiving demand notices from the IRS.

<u>Tax Year</u>	<u>Date Due</u>	<u>Date Filed</u>	<u>Date Paid</u>
1995	01/31/96	07/17/97	10/23/97
1996	01/31/97	10/23/99	11/29/99
1997	01/31/98	10/23/99	08/16/00
1998	01/31/99	10/23/99	11/29/99

33. Respondent's lengthy discipline history is an aggravating factor, especially since two of the prior incidents involve conduct found in this case; i.e., a trust account violation and failing to timely file state income tax returns.
34. This referee finds the following mitigating factors in the Sullivan matter:
- a) Respondent reimbursed her for all of her fees and expenses, and
  - b) Respondent's paralegal failed to do her job.

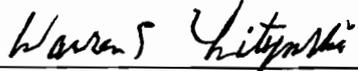
**CONCLUSIONS OF LAW**

1. Respondent's conduct in misappropriating Sullivan's retainer, routinely failing to deposit unearned retainers to his trust account and failing to maintain required trust account books and records violates Rules 1.15(a)(2), and (e), and 8.4(c), MRPC.
2. Respondent's conduct in making false statements to the DEC investigator and the Director's Office violated Rule 8.4(c), MRPC.
3. Respondent's conduct in failing to timely file federal and state income tax returns, and to timely file or pay employer withholding tax returns and unemployment returns violated Rule 8.4(b) and (d), MRPC, and the Minnesota Supreme Court's holding in *In re Bunker*, 294 N.W.2d 199 (Minn. 1972).
4. Respondent's conduct in his representation of Susie Sullivan violated Rule 1.3, MRPC.

**RECOMMENDATION FOR DISCIPLINE**

The undersigned referee recommends that Respondent be suspended from the practice of law for six months and that reinstatement pursuant to Rule 18(a)-(e), Rules on Lawyers Professional Responsibility (RLPR), be conditioned upon payment of Rule 24, RLPR, costs and disbursements and compliance with Rule 26, RLPR.

Dated this 29 day of June, 2001.

  
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Honorable Warren E. Litynski

cc: Attorney Betty Shaw, 25 Constitution Ave., Suite 105, St. Paul, MN 55155-1500.  
Attorney Jerry Strauss, 250 2<sup>nd</sup> Ave. So., Suite 240, Minneapolis, MN 55401