

By MARTIN COLE

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.¹ Even without finding a specific disciplinary rule that required tax filing,² 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.³

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.⁴

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.⁵ 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."⁶ 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.⁷

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.⁸

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.⁹ 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

- ¹ *In re Bunker*, 294 Minn. 47, 199 N.W.2d 629 (1972).
- ² 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).
- ³ *In re Bunker*, 199 N.W.2d at 631-32.
- ⁴ *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).
- ⁵ *In re Johnson*, 414 N.W.2d 199 (Minn. 1987).
- ⁶ *In re Gurstel*, 540 N.W.2d 838, 841 (Minn. 1995).
- ⁷ See, *In re Moulton*, 721 N.W.2d 900 (Minn. 2006).
- ⁸ *In re Hatling*, 793 N.W.2d 139 (Minn. 2011).
- ⁹ *In re Serstock*, 432 N.W.2d 179 (Minn. 1988).

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