Taxes: To File Or Not To File . . . That Isn't Even A Question

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The tax season has come and gone. Even the filing deadline for those who received automatic extensions has passed. Did you file that income tax return? Did you file quarterly returns and pay over your employer withholding taxes? If not, now would be a good time to put your tax house in order, so as to avoid a serious run-in with the Office of Lawyers Professional Responsibility.

Since 1972, attorneys in Minnesota have been on notice that failure to file their income tax returns could subject them to public discipline. In the seminal case of *In re Bunker*, 199 N.W.2d 628 (Minn. 1972), the Supreme Court told the bar that nonfiling of income tax returns was professional misconduct that would result in discipline of suspension or disbarment.

In fact, since then, disbarment has only been imposed when the nonfiling has been combined with other significant misconduct, but suspensions have been frequently imposed. The duration of the suspension has depended on the seriousness of the nonfiling, such as the number of years for which returns were not filed and the amount of tax owed in those years. Substantial mitigation has also, on occasion, reduced the discipline to a public reprimand and probation.

A growing area of discipline in the tax area is nonfiling and nonpayment of employer withholding taxes. The court in *In re Johnson*, 414 N.W.2d 199 (Minn. 1987), stated that failure of an attorney/employer to pay withholding taxes is, in effect, conversion, as it allows the attorney use of money that belongs either to the employee or to the government. Disciplinary cases involving employer withholding taxes have resulted in suspensions. What does filing your income tax returns or paying your employer withholding taxes have to do with your professional conduct as a lawyer? In *In re Chrysler,* 434 N.W.2d 668, 669 (Minn. 1986), the Minnesota Supreme Court answered that question as follows:

"It can be argued that failure to file tax returns should be left a matter between the government and the taxpayer; that while filing lapses are not to be condoned, they need not require the imposition of professional disciplinary sanctions, at least no severe sanctions. No clients are harmed. Sufficient punishment is administered by the tax authority. . . . But if the legal profession, with its close nexus to our governmental structure, is to maintain its legitimacy and integrity, we think it is not inappropriate for its members to be subjected to disciplinary sanctions for failing to file tax returns, the essential first step in a voluntary self-assessment system."

Since 1986, the Minnesota Department of Revenue (DOR) has been authorized to notify the Director's Office of tax return nonfiling and tax payment delinquencies by attorneys, under Minn. Stat. 290.61. The Director's Office receives three or four complaints each year from the DOR concerning attorneys who have failed to

file tax returns, usually for multiple years.

Such complaints are investigated by attorneys in the Director's Office. The investigation includes requesting an authorization from the attorney to check on the income tax return filing status with the Internal Revenue Service as well as the DOR. If circumstances warrant, inquiry will also be made about the attorney's filing of employer withholding returns and payment of withholding taxes. In addition, an attorney investigating another type of complaint may have reason to request copies of an attorney's tax returns or authorizations to check on tax filing status.

Attorneys have the professional obligation to comply with the tax laws by filing their tax returns and paying the employer withholding taxes they have collected. Failure to comply with this obligation exacts a heavy penalty, including the attorney's right to practice law. To file or not to file. It's not really even a question, is it?