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Tax probe continues

By [Elizabeth Stull](#), Daily Record Reporter
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Seven Rochester-area professionals were arrested this week on felony charges for failing to file state income tax returns.

They were caught as part of the Department of Taxation and Finance's ongoing crackdown on white collar tax evaders. Some are being charged under a new, tougher tax fraud law that became effective earlier this year.

It is estimated the seven charged failed to report a combined \$5 million in earnings and owe about \$270,000 in state taxes.

The defendants are scheduled to be arraigned next week before municipal court judges in Rochester, Naples, Walworth and Syracuse.

An arraignment is scheduled for Dec. 16 in Rochester City Court for four Monroe County defendants

Mary Ann Lester, 48, of 4 San Rafael Drive, Rochester, a partner and dentist with Periodontal Health Specialists of Rochester PLLC, is charged with three felony counts for failing to file personal income tax returns for tax years 2003 through 2007. She filed the delinquent returns after being notified of the department's investigation. She had earned \$929,533 over those four years and owed the state \$53,410 in taxes, according to the tax department. She has paid \$32,000 toward her income tax liability. If convicted, she faces up to four years in state prison.

Attorney Carole C. Livsey, of 1191 Lee Road, Rochester, is a solo practitioner with offices at the same address. She was charged with two felony counts for failing to file personal income tax returns for tax years 2004 through 2007, and also was charged with a misdemeanor count of fifth-degree tax fraud under new Tax Law Section 1802, for failing to file her 2008 return.

During those years, Livsey was employed as an attorney for the Victim Resource Center of the Finger Lakes Inc., in Newark, Wayne County. If convicted, she faces up to four years in state prison.

Peter T. Montagliano, of 48 Red Leaf Drive, Rochester, is charged with two felony counts for failing to file personal income tax returns from 2002 through 2005. During those years Montagliano operated an electrical contracting business and earned income primarily from sub-contracting on residential real estate construction projects. A department investigator determined his income totaled \$664,097 for the delinquent years, and he owes an estimated \$40,953 in state income taxes.

Virginia A. Wohltmann, of 1108 Roosevelt Road, East Rochester, faces five felony charges for failing to file income tax returns for tax years 2002 to 2008. In addition to four counts of repeated failure to file income tax returns for tax years 2002-2007, Wohltmann faces one charge under a new law that became effective April 7.

Under new Tax Law Section 1803 she faces fourth-degree tax fraud charge for failing to file a tax return for 2008 and pay more than \$3,000 in income tax due.

Until December 2008 Wohltmann, a doctor specializing in youth and geriatric psychiatry, treated patients at

offices located at 490 Cross Keys Office Park, Fairport, and at Nicholas H. Noyes Memorial Hospital Mental Health Service Department in Dansville.

'Lives are being destroyed'

Some Rochester tax attorneys said they believe the state's decision to prosecute cases for failure to file income tax returns is unfair and inconsistent with a voluntary state program to file delinquent returns without penalty.

"People's lives are being destroyed by a change in policy," said Gerald Dibble, a partner at Dibble & Miller PC who has a master's degree in tax law from New York University.

Dibble represented a Rochester attorney on similar charges earlier this year. He also was retained to represent two of the defendants charged this week — James Walker of Naples and Billie Jo Timmerman of Walworth.

"They've been blindsided," Dibble said.

He maintains the tax department did not prosecute income tax evasion for decades, and has not adequately advertised its new enforcement policies. "All of a sudden they become felons. ... I find that unfair to do to a taxpayer in New York State."

Dibble acknowledged that, as a taxpayer, he personally is glad the department is investigating these cases — he just thinks its new policy should be published more broadly.

"There's a lot, lot more than these seven out there that are being investigated," Dibble said.

Edward Daniel, a tax partner at McConville Considine, Cooman & Morin PC, expressed surprise that the department is pursuing the matters criminally.

"What I would expect the tax department to do is ... estimate the tax owed and provide a bill," Daniel said. He noted that the state will have to prove the defendants intended to commit the crime of tax evasion in order for them to be found guilty.

"There are as many defenses a creative lawyer can come up with. But the [federal] Internal Revenue Code and the state tax law do impose a requirement [that taxes be paid]," Daniel said. "Both at the federal and the state level there is an affirmative legal duty to file a return and report all your income, and pay your tax."

Bill Comiskey, deputy commissioner for enforcement at the state tax department, said it performed 1.2 million audits last year, compared to 700,000 just a few years ago.

He said he was "fairly astonished" by the suggestion people might not be aware the department has ramped up its enforcement efforts.

"Our focus on enforcement, which has unquestionably increased in the past couple of years, has been very well advertised — and failing to enforce is unfair to those who pay their taxes," Comiskey said.

Last year the tax department's audit division collected more than \$2 billion, and the collections division brought in more than \$1 billion.

"Our budget's only a tiny fraction of those recoveries," Comiskey said.

He emphasized that the enforcement efforts deter other taxpayers from failing to file.

"The big dollars that we're getting are from those taxpayers who are deterred from noncompliance, and are now paying their taxes because they recognize there's an increased risk of getting caught," Comiskey told The Daily Record.

New, tougher code

Some of the defendants are being charged under a new Tax Fraud Act that became effective April 7.

The Act replaced Tax Law §1801 and authorizes courts to impose fines that double the amount of the underpaid tax liability resulting from a felony.

In addition, new language under Tax Law §§1802 through 1806 creates multiple felony grades of tax evasion. Under the previous law, failure to file personal income tax was a misdemeanor and became a felony only if the individual failed to file for three years.

Under the new law, failure to file is a felony if an individual evades paying \$3,000 or more. Failure to pay more than \$10,000 is a more serious, D-level felony; evading \$50,000 is a C-level felony and failure to pay \$1 million in taxes is a B-level felony.

"As the crime gets worse, the penalty gets worse," Comiskey said.

Defendants charged outside of Monroe County this week included Marcel R. Pouliot, of 5185 Kasson Road, Onondaga (failure to pay \$20,549 in back income taxes). Pouliot operated a carpentry business and provided services as subcontractor for Paul M. Fowler Development Corp., GSA Development Corp. and Chedell Properties.

Billie Jo Timmerman, a licensed practical nurse who lives at 3621 Main St., Walworth, was charged with failing to pay an estimated \$13,516 in back income taxes. Timmerman was employed as a private duty nurse.

James M. Walker, of 8317 Hatch Hill Road, Naples, faces two felony counts: third-degree tax fraud for failing to file a tax return for 2008 and pay more than \$10,000 in income tax due, a violation of new Tax Law Section 1804, and one felony count for failing to file returns for tax years 2005-2007. An investigator determined Walker's income totaled \$1,421,859 for the delinquent years, with an estimated combined tax liability of \$95,077. During those years Walker was a partner in a wood salvage business, Bigwood LLC, in Naples, New York. If convicted, he faces up to seven years in state prison.

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