

Judicial Ethics: The Obligation to Report Tax Evasion in Support Cases

by
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It can be a nettlesome occurrence for matrimonial and support judges. During the course of discovery or a trial, a judge learns that a witness or a party has unreported “under the table” income. Instinctively, a trial judge may recoil: the federal¹ and state² taxing authorities should be informed.

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¹ The Internal Revenue Code makes tax evasion a felony if a party “willfully attempts to evade or defeat any tax.” A conviction can lead to imprisonment for five years and a \$100,000 fine. 26 U.S.C. § 7201 (2014). Willfully failing to file a return is a misdemeanor with a penalty of imprisonment up to a year. 26 U.S.C. § 7203 (2014).

² For example, the California Tax Code § 19706 makes explicit that a felony occurs if any person willfully fails to file any return with intent to evade any tax imposed by the state income tax laws. *People v. Mojica*, 18 Cal. App. 4th 1383, 42 Cal. Rptr. 3d 318 (2006). New York punishes “tax fraud acts,” including a failure to file an annual return, which is a Class A misdemeanor. N.Y. TAX LAW § 1801 (2014). If the taxpayer evades more than \$3,000 in taxes, the crime is a Class E felony, with penalties of imprisonment up to four years. N.Y. PENAL LAW § 70(2) (2014); N.Y. TAX LAW § 1803 (2014). Ohio has a similar provision. OHIO REV. CODE ANN. §§ 5747.19, 5747.99 (2014) (failure to file is a felony). *See State v. Heer*, 1998 Ohio App. LEXIS 4453 (Ohio Ct. App. 1998). Many states require a finding of willfulness. *See Arizona*, ARIZ. REV. STAT. § 43-842 (2014) (willfulness required under failure to file statute); Illinois, 35 ILL. COMP. STAT. § 5/1301 (willful failure to file a state return is a felony); New York, N.Y. TAX LAW § 1801(c) (2014) (the statute requires a finding of “willfulness,” which is defined as acting with either intent to defraud, intent to evade the payment of taxes or intent to avoid a requirement of this chapter, a lawful requirement of the commissioner or a known legal duty); Pennsylvania, 72 PA. CONS. STAT. § 7353 (2014) (willful attempt to evade state income tax is a misdemeanor).

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But, the judicial decision to report tax evasion or other illegal conduct to “appropriate authorities” is more complicated, with an overlay of federal law, state-by-state ethical rules, and practical complications that caution judicial restraint and serious contemplation before reaching any decision.

In every state, judicial conduct codes require judges to maintain the integrity and independence of the judiciary and avoid impropriety or its appearance.³ But, perhaps surprisingly, the “integrity” referenced in these rules applies only to the legal participants – lawyers and judges – and not to lay people, who have committed crimes and who seek the legal process to obtain the benefit – or shelter – of law. Most of these state codes find their reference in the ABA Model Code of Judicial Conduct, Canon 2.⁴ Rule 2.15 under that Canon creates a two-part analysis for judges who learn of misconduct by other judges or lawyers. If the judge has “knowledge” that a judge has violated the Code of Judicial Conduct – or the lawyer has violated the Code of Professional Conduct – and the conduct “raises a substantial question” regarding the judge’s or lawyer’s “honesty, trustworthiness or fitness,” the judge “shall inform the appropriate authority.”⁵ In contrast, if the judge “receives information” indicating that there is a “substantial likelihood” that the judge or lawyer has violated their respective Code, the judge “shall take appropriate action.”⁶ The rules provide little guidance on the difference between “knowledge” of a “substantial question” of misconduct and “information” about the same topic. Some states suggest that

³ See, e.g., *In re* the Arkansas Code of Judicial Conduct, 748 S.W.2d 141 (Ark. 1988); CONN. CODE OF JUD. CONDUCT Canon 3 (b) (3); IOWA CODE OF JUD. CONDUCT Canon 1, cited in *In re* Meldrum, 834 N.W.2d 650, 653 (Iowa 2013); MD. CODE JUD. CONDUCT Canon 3B(3); N.J. CODE OF JUD. CONDUCT Canon 1, cited in *In re* Curcio, 80 A.3d 373 (N.J. 2013); 22 N.Y. CODES R. & REGS. § 100.2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). *Massey v. Anand*, 2012 N.Y. Slip Op. 31634(U) (N.Y. Sup. Ct. 2012) (if a judge received information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct [see 22 N.Y. CODES R. & REGS. § 1200], he or she must take appropriate action).

⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 2 (A judge shall perform the duties of judicial office impartially, competently, and diligently).

⁵ *Id.* Rule 2.15: Responding to Judicial and Lawyer Misconduct.

⁶ *Id.*

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judges need “reasonable cause” to justify reporting.⁷ Other states suggest that the ethical misconduct must be “clearly established.”⁸ The rules give little guidance for trial judges to determine the difference between “informing authorities” and taking “appropriate action.” In a Florida disciplinary action, the Florida Supreme Court described “appropriate action” as including “addressing minor misconduct directly with the lawyer” or reporting the misconduct to the Bar, but added that it did not extend to “a personal investigation by the judge.”⁹ Regardless of the significance of that distinction, the Canon of Judicial Conduct’s use of the word “shall” means that the judge’s obligation is mandatory and a judge, aware of such violations, may themselves engage in unethical conduct if they fail to make such a report.¹⁰ The principle extracted from this rule and its underlying Canon is that the ABA and state judicial conduct authorities place substantial emphasis on the need for judges and lawyers to take every step to ensure that the public has confidence in the legal process.

Against the backdrop of this rigid ethical standard to protect the public’s confidence in the legal system by mandating reporting of a broad range of judicial and attorney misconduct, a trial judge may assume that the same judicial response – mandatory

⁷ In a Colorado opinion, the court described the Colorado rules as requiring a trial judge to report any conduct if there is “reasonable cause for the commencement of disciplinary proceedings. *People v. Kolenc*, 887 P.2d 1024 (Colo. 1994).

⁸ *In re J.B.K.*, 931 S.W.2d 581, 584 (Tex. App. 1996).

⁹ *See, e.g., In re Cohen*, 99 So. 3d 926 (Fla. 2012). The court offered no guidance on how the trial judge should have addressed “minor misconduct” – on the record, off the record, in court, in chambers, with clients and opposing counsel present or without. If no “personal investigation” is authorized, then the trial judge would be left to his own devices to decide how to separate fact from simple allegation. In New York, the rules require the trial judge to conduct such a personal investigation to determine whether “a substantial violation” has occurred. 22 N.Y. CODES R. & REGS. § 100.3(D)(2) (2006); N.Y. Advisory Comm. on Jud. Ethics, Op. 10-85 (2012) (the trial judge must personally determine whether an attorney’s conduct “constitutes a substantial violation”). But, there is no guidance on the extent of the potential investigation; i.e., whether some form of hearing or inquiry is required.

¹⁰ *In re Lorona*, 875 P. 2d 795, 796 (Ariz. 1994) (judge who failed to report ethical violations by another judge would himself have violated his own ethical obligations).

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reporting – extends to witnesses and parties that appear before them in civil cases¹¹ and admit a severe offense which constitutes a felony. For trial judges in support and domestic relations cases, the usual offense is tax evasion, the seemingly ubiquitous “under-the-table” income. A trial judge may assume that the public’s respect for the integrity of the judicial system would be best served if the public, which commits crimes, faced the same consequences as lawyers or judges who engaged in unethical but not necessarily criminal behavior. However, in almost every state¹² – save two – a trial judge’s duty to report illegal conduct or tax evasion, or any other criminal activity, is not mandatory and rests instead within the judge’s discretion.¹³ In a 1988 opinion, the New York Advisory Committee on Judicial Ethics, in a stance reiterated before and since in most other states, held that reporting a witness who had admitted to committing tax evasion or a doctor who had admitted to falsifying medical records to “appropriate authorities” was solely within the discretion of the presiding judges. The Committee noted: “in the absence of any statutory requirement, the trial judges are not obligated to report the apparent misconduct; they may exercise their discretion in

¹¹ The analysis in this article only pertains to civil cases. In criminal cases, the “appropriate authorities” are present in the courtroom and they can take whatever steps they deem appropriate when a litigant – or witness – confesses to tax evasion.

¹² See Wash. Ethics Advisory Comm., Op. 93-11 (1993) (list of states making disclosure discretionary as of 1993).

¹³ The federal judiciary is governed by the Code of Conduct for United States Judges. While the contents, in many respects, reflect the same high standards as the ABA Model Code, the federal code has no specific rule regarding judicial reporting of litigant misconduct. The federal Judicial Conference has a Code of Conduct Committee which issues a compendium of opinions which are not available to the public. *Pac. Cycle, Inc. v. Powergroup Int’l, LLC*, 2013 U.S. Dist. LEXIS 141378 p. 4, n.2 (W.D. Wis. 2013) (the compendium is available to federal judges and their staffs but not the public). A search of federal authority on a judge’s obligation to report illegal activity by litigants that surfaces in the courtroom was unproductive. However, in its 2006 opinion, the South Carolina Advisory Committee on Standards for Judicial Conduct noted that “the federal advisory committee for federal judges has reasoned that a ‘judge should not assume a prosecutorial role, nor chill public access to the courts by assuming the role of a policeman.’” S.C. Jud. Dep’t Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2006 (2006), *citing* U.S. Compendium of Selected Opinions, § 1.1(c) (1966).

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determining whether to report the actions.”¹⁴ The Committee in New York described “mandatory reporting” as “undesirable” because it would dissuade witness from truth-telling and encourage the use of a threat of criminal prosecution in settlement discussion.¹⁵

In a similar rendition, the Maryland Judicial Ethics Committee considered a case in which a trial judge heard a witness testify to more than \$200,000 in income but he reported income of only \$15,000. The Committee concluded there was no obligation to report the alleged tax evasion because such a “blanket duty” would be unduly burdensome to the judge “with no assurance of a corresponding public benefit.”¹⁶ The Committee noted that the court would face “the equally compelling question of what quantum of evidence should trigger” the duty to report.¹⁷ But, the Committee did note that in some cases, the upholding of judicial integrity – and the public’s confidence in the judiciary – would justify – although not mandate — reporting. In those instances, the Committee suggested that failing to report “would be so contrary to the moral obligation of a law-abiding citizen as to undermine the public confidence in the integrity of the judiciary.”

In a South Carolina judicial ethics opinion, the same concerns surface.¹⁸ The litigant admitted that he had under-reported his income. When the judge made further inquiry during the proceeding, the attorney for the litigant told the judge that he explained the litigant’s Fifth Amendment right against self-incrimination to him. The South Carolina Advisory Committee on

¹⁴ N.Y. Advisory Comm. on Jud. Ethics, Op. 03-110 (2004); N.Y. Advisory Comm. on Jud. Ethics, Op. 88-85 (1988).

¹⁵ N.Y. Advisory Comm. on Jud. Ethics, Op. 88-85 (1988).

¹⁶ Md. Jud. Ethics Comm., Op. 2004-07 (2004). The Maryland Committee readily handled the easy questions: reporting adultery or traffic violations would produce no public benefit but few would dispute a report over “a serious felony.” The Committee suggested the complexity of questions that arise during a trial “preclude the development of any standard that could be fairly used to measure compliance with a general rule or mandate that a judge report criminal activity.” *Id.* at 2. But, in a somewhat significant omission, the Maryland Committee never advised whether under-reporting income by \$185,000 in a single year – a clear federal felony – should be reported.

¹⁷ *Id.* See also *supra* note 9.

¹⁸ S.C. Jud. Dep’t., Advisory Comm. on Standards of Jud. Conduct, Op. 17-2006 (2006).

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Standards of Judicial Conduct joined other states in not making the judge's duty to report the tax evasion mandatory but the Committee noted that any reporting should only occur "at the conclusion of any proceedings" and, in exercising discretion, the court should consider "the severity and recentness of the activity."¹⁹ For judges facing admitted proof of tax evasion, the cautions offered by the South Carolina committee may be of little consequence. Tax evasion, at least to the extent of under-reported income, will seldom meet a "severity" test and "recentness" in tax filings is also a nebulous standard. In addition, the direction that the court wait until the conclusion of proceedings is equally challenging: the judge's lack of comment during the hearing or her failure to make any reference to the admitted criminal conduct during the hearing puts the judge in the position, at least to the admitted lawbreaker and his spouse or other party and participants in the courtroom, of condoning through silence the witnesses' criminal conduct. If the court never comments on the witnesses' criminal conduct during the proceeding – especially if (as it often is), the under-reporting is extensively explored on cross-examination – the public perception of the entire process is that under-reporting income and tax evasion, while damaging the credibility of the witness, have no other collateral criminal consequences.

Florida reached the same conclusion as South Carolina, albeit in a split decision. In a trial, a party testified that they had under-reported income.²⁰ When asked whether the trial judge had to report such an offense, the Florida Committee on Standards of Conduct Governing Judges added another dimension to the inquiry, noting that the federal "misprision of felony statute" required, by its text, that any individual, aware of a felony under federal law, was required to make it "known" to a judge or other civil authority or face a fine or imprisonment."²¹ The Florida

¹⁹ *Id.*

²⁰ Fla. Sup. Ct. Jud. Ethics Advisory Comm. ("Fla. JEAC"), Op. 78-4 (1978).

²¹ The federal misprision statute is codified at 18 U.S.C. § 4. Enacted in 1909, statute was originally described as "misprision of treason." 60 P.L. 350; 35 Stat. 1088; 60 Cong. Ch. 321 (1909). As the Florida Committee noted, the statute has been interpreted to require "an affirmative act of concealment." Fla. JEAC, Op. 78-4; *see infra* discussion in text at notes 70-74.

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Committee’s invocation of the federal misprision of felony statute would seem to justify a conclusion that federal public policy, as dictated by the federal statute, would require a state or federal trial judge, who hears a sworn admission of tax fraud, to “notify” civil authorities of the crime even if the judge could only be culpable under the statute through “an affirmative act of concealment.”²² Surprisingly, among the states that have considered this ethical question, only Florida seems to have even considered the federal misprision statute in evaluating a trial judge’s discretion on whether to disclose the federal offense of under-reporting income.²³ Despite the discussion of the federal policy of requiring reports of criminal activity, the Florida Committee was divided on its recommendation: three members concluded that the trial judge had “a definite obligation to report” and the six-majority members concluded that the decision to report was discretionary.²⁴ The Florida opinion highlights the clash between a state policy – leaving the disclosure of under-reported income to the discretion of a trial judge – and the federal policy, enshrined in the misprision of felony statute, requiring individuals, aware of criminal activity, to disclose felonies by others. In addition, the Florida decision highlights that tax evasion may not be the only crime that is implicated when a party testifies to under-reported income.²⁵ The filing or uttering of a false instrument through fil-

²² See, e.g., *Patel v. Mukasey*, 526 F.3d 800, 803 (5th Cir. 2008) (to be convicted of a misprision of a felony offense, the defendant must commit some affirmative act to prevent discovery of the earlier felony and such conduct necessarily entails the act of intentionally giving a false impression, i.e., the false impression that the earlier felony never occurred). But, whether “active concealment” is required for a conviction under the misprision of felony statute is an unsettled question. See *infra* discussion in text at note 72.

²³ In Florida, uttering a forged instrument is a felony. FLA. STAT. § 831.02 (2014). Perjury in official proceedings is also a felony. FLA. STAT. § 837.02 (2014).

²⁴ While the committee was split on its conclusion regarding the obligation to report, it appears that the entire committee concluded that the federal misprision of felony statute did not apply to Florida state judges, although the committee did not point to any authority to justify that conclusion. Fla. JEAC, Op. 78-4.

²⁵ In a later opinion, the Florida Supreme Court Judicial Ethics Advisory Committee revisited the judge’s obligation to report illegal conduct in a context of a potential sex crime by one of the parties. See Fla. JEAC, Op. 2012-11 (2012). The Committee held there was no obligation to report, citing the earlier

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ing a false or understated return, in many cases constitutes a form of perjury and may give further gravity to the witnesses' offense under both state and federal law and call for a more prudent exercise of discretion by the trial judge.

Illinois, in reaching the same conclusion that reporting of confessed crimes in the courtroom is not mandated, added a series of factors relevant to a judge's exercise of discretion to report criminal conduct including: (1) the nature and seriousness of the offense; (2) conclusiveness of the information before the judge that a crime has been committed; (3) the recent, remote, or ongoing nature of the crime; (4) whether the crime has a victim and if so whether the victim is operating under a disability that would interfere the victim's ability to report the crime; (5) whether a danger to the community exists or the public trust is involved; and (6) whether the state's attorney or an assistant state's attorney was present when the information concerning the criminal activity was disclosed.²⁶ Curiously, the Illinois opinion seems to stray far from the question posed by the inquiring judge: the request for an opinion centered solely on a trial over a mechanic's lien in which the witness admitted that he had filed understated W-2 forms to reduce child support payments. Given these facts and the suggested criteria, it seems unlikely that judge, applying all of these criteria, would ever file a report in a similar support matter. While the admission at trial should be deemed "conclusive" proof of tax evasion, the nature of the offense only impacts two parties – the recipient of the support and the child – and there is no direct victim of the crime, only the recipient parent who is denied mandated support payments. The last criterion – danger to the community or whether a state's attorney is present – seem to be irrelevant to the pending inquiry. But, the more intriguing question, unresolved in the Illinois opinion, is the court's weighing of the "nature and seriousness" of the offense.²⁷ In one respect, tax evasion or under-reporting income may fail a "seriousness" test because, as several judges have

opinion Fla. JEAC, Op. 78-4 but, added that if a judge reported such conduct there may be "further ethical considerations, such as disqualification, depending on the facts involved." *Id.*

²⁶ Ill. Judges Ass'n Ethics, Op. 2002-01, p. 2 (Oct. 2002).

²⁷ *Id.*

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noted in other contexts, seeking to minimize tax payments is an American tradition.²⁸

Another intriguing issue surfaces in a review of this question by the Georgia Judicial Qualifications Commission. The Commission relied on sister-state opinions and concluded that the trial judge has no obligation to report tax fraud to the Internal Revenue Service.²⁹ In its final paragraph, the Commission raised an ominous issue: it expressly declined to opine on the impact of a discretionary report on “the judge’s judicial immunity.”³⁰ In Georgia – and elsewhere³¹ – judges are not immune from liability for non-judicial actions, or “actions not taken in the judge’s judicial capacity.”³² The reference by the Commission to whether discretionary reporting by a trial would waive judicial immunity raises a question whether discretionary reporting of tax evasion is within the ambit of a judge’s “judicial capacity.” However, it seems unlikely that any court would so narrowly confine judicial immunity, when a trial judge, acting within the scope of his discretion, reports criminal activity to “appropriate authorities.”³³ The Supreme Court has declared that “discretionary decision-making by judges” is what “the doctrine of judicial immunity is designed to protect.”³⁴ Given its broad reach, the caution of the Georgia Commission may reflect an overabundance of caution that should not trouble trial judges.

In perhaps the earliest iteration of the “discretionary reporting” theory, the Arizona Supreme Court held that reporting the “probable felony” of tax evasion rested solely in the discretion of the trial judge because the issue was not addressed in the state’s

²⁸ As Judge Learned Hand remarked: “Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934).

²⁹ Ga. Jud. Qualifications Comm’n, Op. 166 (1992).

³⁰ *Id.*

³¹ *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991).

³² *Heiskell v. Roberts*, ___ S.E.2d ___, 2014 Ga. LEXIS 746, p. 12 (Ga. 2014).

³³ *See, e.g., Leach v. Powell*, 2008 U.S. Dist. LEXIS 108158 (E.D. Va. 2008), *aff’d*, 293 Fed. Appx. 230 (4th Cir. 2008) (judge who reported unethical conduct by attorney was immune from civil lawsuit over the action).

³⁴ *Antoine v. Byers & Anderson*, 508 U.S. 429, 435 (1993).

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Code of Judicial Conduct.³⁵ The Arizona opinion is carefully couched: the court opinion deals only with “suspected violations” even though the request for an opinion involved a trial judge who heard a witness under oath admit that they had “failed to pay income taxes.”³⁶ In this instance, the judge, who requested the advisory opinion, did not ask the Committee to evaluate a “suspected violation”: instead, the judge had heard an “admitted violation.” There is no indication that the Arizona Committee considered the actual question posed: do the same ethical considerations apply to both an “admission of a crime” and a “suspected violation”? This failure of the Arizona Committee to consider these different factual scenarios highlights the dilemma for a trial judge: if the proof of the criminal conduct is unimpeachable, then perhaps the ethical precepts that mandate disclosure would appear to be more prominent and, conversely, if the evidence leads only to a suspicion of a crime, then the ethical compulsion to report diminishes. The Arizona Committee raised a series of consequences to be weighed by the trial judge in exercising that discretion including whether the disclosure was designed by a litigant to “embarrass the other side” or gain a tactical advantage “extraneous from the merits.”³⁷ This last suggestion for consideration by trial judges seems oddly out of place. In a trial when a litigant’s income is disputed – as often occurs in divorce and support matters – a litigant will probe “under-the-

³⁵ Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Ad. Op. 92-15, Discussion, p. 1 (1992). The description of failing to pay income taxes as a “probable felony” may be an unfortunate description of a litigant’s conduct. Evading taxes is a felony. The Supreme Court has held that the evasion of federal taxes involves deceit or fraud upon the government, achieved by concealing a tax liability or misleading the government as to the extent of the liability. *Spies v. United States*, 317 U.S. 492, 499 (1943) (an act of tax evasion may be “any conduct, the likely effect of which would be to mislead or to conceal”). Tax evasion is a crime of moral turpitude, because it necessarily involves fraud. *Carty v. Ashcroft*, 395 F.3d 1081, 1085, n.7 (9th Cir. 2005) (fraud is “implicit in the nature of the crime” of tax evasion). Failing to file an accurate state tax return is a felony in Arizona, punishable by up to five years in prison. ARIZ. REV. STAT. § 42-1127 (2014) (falsely concealing a material fact on a tax return is a Class 5 felony); *State v. Averyt*, 876 P.2d 1158 (Ariz. Ct. App. 1994); *State v. Fendler*, 622 P.2d 23 (Ariz. Ct. App. 1980).

³⁶ Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Ad. Op. 92-15, Discussion, p. 1.

³⁷ *Id.*

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table” income of an adverse party for obvious reasons: to increase the support paid by the recalcitrant parent and discredit the veracity of the payor. If the payor is lying to the federal government about his income, any “embarrassment” seems to be self-inflicted. In addition, the fact that the payor has lied to the federal or state government – and committed a state and federal felony – by understating income on his tax returns is an admission that any lawyer, representing the recipient, wants in his trial arsenal and it is difficult to conceive that the payor’s lack of credibility and admission of a crime would ever be deemed “extraneous” to the merits. These suggestions to guide a trial judge’s exercise of discretion seem to add little to the ethical dilemma of whether to report tax evasion confessed in a courtroom. Although the Arizona Committee leaves the reporting decision to a judge’s discretion, the Committee notes that a courtroom is not a “duty free zone” where a crime may be admitted with impunity, and comments that a blanket judicial attitude of “hear no evil, see no evil, report no evil” does not inspire public confidence in the judicial system.³⁸ In the example offered after this invocation of the “public confidence in the judiciary” as tilting judges to lean toward reporting, the Committee seems to narrow its focus only to violent crime and away from the more common admission of tax evasion.

A judge should consider, for example, the severity and recentness of the matter. Surely, a judge has no duty to report each and every witness who has admitted to having once smoked marijuana. On the other hand, a judge is under an obvious imperative to notify the police of a witness who, in court admitted committing recent, unsolved serial murders. Between these two extremes lies the twilight zone of discretion. It is the nature of discretion that it can be abused both by action and inaction.³⁹

These suggestions also provide little guidance to a trial judge when tax evasion surfaces. Tax evasion, while a federal and state felony, can hardly qualify as “severe” and is often not “recent.” Filing a false tax return can involve multiple federal and state

³⁸ *Id.*; see also *In re Lorona*, 875 P.2d at 800 (a judge is expected to act in a manner inspiring confidence that even-handed treatment is afforded to everyone coming into contact with the judicial system). See also *In re Haddad*, 627 P.2d 221, 229 (Ariz. 1981) (judges have a positive obligation “not only to be impartial but to be seen to be impartial”).

³⁹ Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Op. 92-15, Discussion, p. 1.

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offenses. The Arizona Committee, while consigning any reporting of such crimes to a “twilight zone of discretion,” seems to ignore the compounding of violations that is inherent in an admission of tax evasion. Finally the Arizona Committee cautions that judges considering reporting should “not pursue extra-judicial justice to such an extent that judicial justice is tainted.”⁴⁰ The use of this phrase seems to suggest that a trial judge, upon hearing an admission of tax evasion, should do nothing during the trial, since any inquiry by the court to the witness or any admonishment of the witness by the court might constitute “extra-judicial justice.” However, in considering the issue of public confidence, it would seem incongruous that a trial judge, upon hearing an admission of a crime, would simply do or say nothing at the time of the utterance, even if the judge later elects to report the violation. This suggestion of judicial non-intervention at the time of the admission also seems to contrast sharply with the ethical view that suggests judges have some obligation, if intending to report, to discover further facts that would justify the conclusion that illegality has occurred.

A final glimpse of the continuum of ethical complications is seen in New York. In a chorus of ethical opinions, New York leaves it up to trial judges to report a litigant’s alien status,⁴¹ allegations that a lawyer-husband misused his Interest of Lawyer’s Account (IOLA),⁴² a positive drug test by a doctor in a divorce matter,⁴³ the receipt of unreported income to a divorce party

⁴⁰ A search of judicial opinions in Arizona to define “extra-judicial justice” revealed that no Arizona court has ever utilized this phrase in an opinion. A similar search in all state and federal cases through an electronic search engine reveals that no court in the United States has ever included this phrase in any opinion.

⁴¹ N.Y. Advisory Comm. on Jud. Ethics, Op. 05-30 (2005) (no obligation to report divorce litigant’s status as an alien).

⁴² N.Y. Advisory Comm. on Jud. Ethics, Op. 13-127 (2013) (during divorce action, allegations of misuse of the husband attorney’s Interest of Lawyer’s Account (IOLA) fund were “inconclusive,” but the judge not obligated to investigate the alleged misconduct unless “substantial likelihood” that attorney committed “substantial violation” of rules of conduct).

⁴³ N.Y. Advisory Comm. on Jud. Ethics, Op. 06-13 (2006) (no ethical requirement to report positive drug test by a doctor in a divorce matter); *accord* Alaska Comm’n on Jud. Conduct, Op. 017 (no obligation to report confessed illegal drug trafficking).

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who received social security disability benefits,⁴⁴ the filing of a false instrument,⁴⁵ statutory rape,⁴⁶ or even an open bench warrant.⁴⁷ Despite these opinions, New York judges have suggested there is an “obligation” to report potential tax evasion by a divorcing spouse to appropriate authorities. In *Hashimoto v. La Rosa*, the court, during a pretrial motion in a divorce, read an affidavit from the husband in which he admitted that he had failed to report income to the tax authorities. The court held that it was “obligated to report admissions of tax evasion or fraud to the authorities” and forwarded the sworn documents to the IRS.⁴⁸ Similarly, in *Beth M. v. Joseph M.*, the spouse testified at trial that she failed to report rental income on her statement of net worth and failed to pay taxes on the income. The court held it was “obligated to report admissions of possible tax evasions or fraud”, citing *Hashimoto v. LaRosa*, and sent its decision to the IRS.⁴⁹ Finally, in *PP v. KP*, the trial court sent its decision and order to the IRS when a witness testified that she received income and paid no taxes on it. The court did not suggest any obligation to report such tax evasion, instead commenting that in the face of “candid admission,” the court “believes it appropriate to forward the decision and order to the IRS.”⁵⁰ The apparent New York preference to exercise discretion in reporting illegal activity – albeit outside the matrimonial context – is also revealed in *Doe v. Great Expectations*.⁵¹ The court, having concluded that a party had violated consumer fraud laws, advanced a copy of its deci-

⁴⁴ N.Y. Advisory Comm. on Jud. Ethics, Op. 08-155 (2008) (no obligation to report illegal receipt of social security disability benefits, but court could choose to do so).

⁴⁵ N.Y. Advisory Comm. on Jud. Ethics, Op. 09-71 (2009) (no obligation to report filing a false instrument); *see also* N.Y. Advisory Comm. on Jud. Ethics, Op. 12-180 (2012) (no obligation to report admitted perjury by a party).

⁴⁶ N.Y. Advisory Comm. on Jud. Ethics, Op. 05-84 (2005) (no obligation to report when 15-year-old asks for consent to marry a 21-year-old).

⁴⁷ N.Y. Advisory Comm. on Jud. Ethics, Op. 13-35 (2013) (no obligation report to police that party has open bench warrant).

⁴⁸ 4 Misc. 3d 1037(A) (N.Y. Sup. Ct. 2004).

⁴⁹ 12 Misc. 3d 1188(A) (N.Y. Sup. Ct. 2006).

⁵⁰ While the court’s decision to report the evasion was “discretionary,” the court cited the “obligation” language in *Hashimoto v. LaRosa* and *Beth M. v. Joseph M.* for support. 30 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2011).

⁵¹ 10 Misc. 3d 618 (N.Y. Civ. Ct. 2005). In deciding to report, the court noted that the defendant had previously been involved in litigation against the

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sion to “appropriate public officials.” In articulating its rationale, the court considered a number of factors, but most importantly that reporting the wrongful consumer fraud impacted the broader public interest. Illinois, in an analogous context, reached the same conclusion regarding judges encountering evidence of widespread consumer fraud. The Illinois Judges Association opined that a judge who learns that a litigant has violated truth-in-lending laws on a broad scale has no obligation to report the wrongdoing. The Illinois opinion reveals one aspect that merits a closer scrutiny: the judge in that opinion had investigated the litigant’s conduct and concluded “that the same plaintiff has numerous similar collection cases pending” which were a result of the same improper conduct.⁵² This fact suggests that a trial judge, in exercising his discretion, can research whether the litigant has engaged in similar illegal conduct elsewhere, an action that moves the judge away from the role of discretionary decision-maker and closer to that of a prosecutorial investigator, a role that might impact his ability to hear the underlying dispute and, as the Georgia opinion suggests, may impact his judicial immunity.⁵³ However, the consumer fraud rationale advanced in the Illinois opinion and the New York court determination in *Doe v. Great Expectations* implicates broader public concerns than the personal tax evasion issues raised by the numerous states and the New York courts in *PP v. KP* and *Hashimoto v. La Rosa*. The consumer fraud rationale also gives little guidance to judges in matrimonial or support matters, in which the public interest in tax accountability often takes a back seat to the needs of judges and litigants to decide income and support matters.

While most state judicial ethics codes follow the “discretion to report” maxim,⁵⁴ the rule, while pervasive, is not universal.

New York State Attorney General’s office and the case involved a consumer issue which had been the subject of the earlier litigation. *Id.* at 625.

⁵² *Id.*

⁵³ See *supra* discussion in text at notes 29-33.

⁵⁴ See, e.g., Ala. Jud. Inquiry Comm’n, Op. 86-281 (1986) (no duty to report criminal offenses disclosed during trial); Ill. Jud. Ethics Comm., Op. 96-13 (1996) (no duty to report violation of truth in lending laws); Ariz. Jud. Ethics Advisory Comm., Op. 92-15 (1992) (no duty to report “illegal activity”); Fla. Ethics Advisory Comm., Op. 78-4 (1978) (same); La. Sup. Ct. Comm. on Jud. Ethics, Op. 73 (1987) (no ethical duty to report civil and criminal tax fraud or matters relating to tax fraud); Minn. Bd. of Jud. Standards, Summary of Advi-

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Michigan, through a state bar ethics opinion, reaches a different conclusion and New Jersey, by judicial decision, joins Michigan in concluding that trial judges have an ethical duty to report crime or fraud. In Michigan, the matrimonial judge learned that a witness had under-reported “a substantial amount of business income” and when the trial judge inquired further during the proceeding, the witness invoked the Fifth Amendment.⁵⁵ The trial judge asked whether that evidence “may” be reported to “proper authorities,” a suggestion that the trial judge assumed he had the discretion to report the conduct but no obligation to do so.⁵⁶ The State Bar of Michigan opined otherwise: the judge has a duty to report crime or fraud “to uphold the integrity of the judicial system.”⁵⁷

sory Ops. (2009) (no duty to report criminal activity in court proceedings as decision is left to the “judgment and conscience” of the trial judge); Or. Jud. Conduct Comm., Op. 86-1 (1986) (no duty to report violation of the Internal Revenue Code to the IRS); N.Y. Advisory Comm. on Jud. Ethics, Joint Ops. 88-85, 88-103 (1988) (no duty to report “illegal activity”); Utah Ethics Advisory Comm., Op. 00-3 (2000) (same); Wash. Ethics Advisory Comm., Ops. 93-11 (1993) (same), 02-9 (2002) (to require the reporting of every incident of past or present marijuana use, building code violations, tax violations, bad checks, consumer fraud, or any of the other myriad of criminal violations a judge may become aware of would immerse the judge in side issues, take time away from the judicial function and likely compromise the judge’s appearance of impartiality). *See also* Ariz. Jud. Ethics Advisory Comm., Op. 92-15 (1992) (“Judges are not ombudsman at large or roving fighters of injustice.”); Me. Ethics Advisory Comm., Op. 01-1 (2001) (reporting requirement could affect a judge’s appearance of impartiality); N.Y. Advisory Comm. on Jud. Ethics, Joint Ops. 88-85, 88-103 (mandatory reporting requirement might dissuade witnesses from telling the truth or encourage threats of criminal prosecution as a settlement technique); Ethics Comm. of the Pa. Conf. of State Trial Judges, Op. 99-2 (1999) (no obligation to report suspected tax evasion because the court is not an agent of the taxing authorities).

⁵⁵ State Bar of Mich., Ethics Op. CI-1177 (1988). The judge, in this inquiry, took steps to investigate the alleged wrongdoing by asking questions about the witness’s tax avoidance conduct. The questioning by the court demonstrates the conundrum: the judge may not be sure that wrongdoing has occurred and be tempted to inquire. But, the inquiry can threaten to divert the hearing and give the appearance of bias by the court.

⁵⁶ *Id.*

⁵⁷ *Id.* The Michigan opinion appears to split hairs on one aspect of the duty. It holds that a judge has a duty to report “suspected crime or fraud” but adds that a judge is not required to “report mere suspicions” but may exercise his discretion to do so. The opinion makes no attempt to differentiate between

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New Jersey, in the most contrarian stance in the nation, takes a similar tack through common law. In *Sheridan v. Sheridan*, the court concluded that the failure to file an income tax return or report income on a filed return – while “not uncommon in matrimonial litigation and occur[ing] occasionally in civil litigation” – should be reported to appropriate authorities.⁵⁸ In that case, the couple had more than \$110,000 in unreported income stashed in shoe boxes and a dog biscuit box. The court noted that attorneys are ethically required to report wrongdoing and judges should not sit mute in the face of acknowledged, demonstrated or potential wrongdoing, and hence, a judge’s obligation to report is even more expansive [than an attorney’s obligation] and the judge should report “all evil heard and seen.”⁵⁹ The rule in *Sheridan v. Sheridan* has a somewhat skimpy legal premise. The judge, in his opinion, claimed that his source for the obligation was an internal court memorandum which related a conversation between a judge and an official of New Jersey Central Ethics Unit who gave a broad interpretation to the state Judicial Canons, even though the memorandum makes no specific reference to judicial obligations to report litigant misconduct.⁶⁰

While aged almost a quarter century, the rule in *Sheridan v. Sheridan* still guides New Jersey’s judges and it surfaces most often in matrimonial matters, when a couple’s finances are under adversarial scrutiny. In *Fitzgerald v. Duff*, an appeals court in 2013 instructed a lower court to report materially false income tax filings to appropriate authorities.⁶¹ In 2012 in *Challow v. Challow*, the trial judge reported a taxpayer who took excessive deductions which constituted, in the judge’s view, “intentional

“suspected crime or fraud” (which require reporting) and mere “suspicion of crime or fraud” (to which reporting is not required but discretionary), apparently leaving that task to discerning trial judges. *Id.*

⁵⁸ 247 N.J. Super. 552 (N.J. Super. Ct. Ch. Div. 1990).

⁵⁹ The court in *Sheridan v. Sheridan*, after concluding that it must file a report, imposed a constructive trust on the couple’s marital property and stayed distribution of the remaining marital assets for one year to allow the taxing authorities to seek to intervene to recover unpaid taxes. *Id.* at 567.

⁶⁰ *Id.* at 563. The New Jersey Canons at the time contained the universal requirement that judges report misconduct by other judges and attorneys. *Id.*

⁶¹ *Fitzgerald v. Duff*, 2013 N.J. Super. Unpub. LEXIS 1376 (N.J. Super. Ct. App. Div. June 7, 2013).

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under reporting of income.”⁶² In *Onyiuke v. Onyiuke*, the trial judge reported erroneous child care deductions by a parent.⁶³ In *MacFarland v. MacFarland*, the court suggested in 2008 that it may be required to report tax evasion even if a litigant filed an amended return.⁶⁴ New Jersey’s experience demonstrates that if a judge decides to report “wrong doing” – either under a mandate to do so or at his or her discretion – the courts can end up engulfed in deciding, at least on a threshold basis, countless taxing questions, such as reporting bartering transactions and erroneous use of child care deductions, even though these may be complex federal taxing questions outside the usual ken of state trial judges. As these New Jersey cases further demonstrate, when obligated to report, judges may tend to report even *possible* violations of law to authorities.

However, when the judicial reporting of illegal conduct shifts from mandatory to discretionary, a variety of compelling public policy considerations, articulated by the courts in New Jersey under a mandatory requirement and by the numerous state ethical committees, still confront a trial judge sitting in support and matrimonial cases in most of the states. As the Arizona Supreme Court intoned, a courtroom is not a “duty free zone” where a crime may be admitted with impunity and a blanket judicial attitude of “hear no evil, see no evil, report no evil” does not inspire public confidence in the judicial system.⁶⁵ The critical concern for a trial judge, weighing an exercise of discretion, is what constitutes “public confidence” in the legal system and the judiciary. The danger of harm to others – evidenced in *Doe v. Great Expectations* – is not a realistic touchstone for judges hearing evidence of tax evasion in divorce matters.⁶⁶ Tax evasion has little public dimension but, conversely, cheating on tax returns and lying about income clearly undercuts any litigant’s confidence in the judiciary and the notions of personal accountability

⁶² 2011 N.J. Super. Unpub. LEXIS 1068 (N.J. Super. Ct. App. Div. 2011).

⁶³ 2011 N.J. Super. Unpub. LEXIS 1541 (N.J. Super. Ct. App. Div. 2011).

⁶⁴ 2008 N.J. Super. Unpub. LEXIS 2654 (N.J. Super. Ct. App. Div. 2008)(husband paid income “under the table” and only later filed an amended income return, but the court declined to comment on the state or federal tax implications outside of this matrimonial context).

⁶⁵ Ariz. Sup. Ct., Jud. Ethics Advisory Comm., Ad. Op. 92-15, Discussion, p. 1.

⁶⁶ See *supra* discussion in text at note 51.

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and citizenship which are annually renewed when tax returns are filed.

In a small world view, if a litigant's under-reporting of income is confessed in a courtroom but never reported by the presiding official, the litigant could hardly be blamed for concluding that future violations will similarly be ignored. The litigant could easily conclude that the secret of his crimes – under-reporting his income and lying on his tax returns – will be shielded by the courts, a fact that would no doubt, undermine any respect of the litigants for the court's invocation of justice. The broader public's confidence in justice and the rule of law may remain untainted if the judge decides not to report a litigant's tax evasion but, the individual litigant's – and all the participating family members' – confidence in the system of justice and its impartial forum would be justifiably undercut.

Overarching these discretionary concerns over the public's confidence in the judiciary but ignored by almost every state committee that has considered this question, is the federal law enforcement policy underlying the federal misprision of felony statute which was invoked but deemed inapplicable by the Florida ethics committee.⁶⁷ Practically, trial judges may scoff at any reference to the misprision statute in this context. The federal criminal statute, enacted a century ago, has never been utilized against judges or others in the judicial system, based on information of illegal activity uncovered in the courtroom.⁶⁸ But, as one

⁶⁷ See *supra* discussion in text at notes 20-21.

⁶⁸ The federal misprision of felony statute is still alive and well. *United States v. White Eagle*, 721 F.3d 1108 (9th Cir. 2013) (Bureau of Indian Affairs superintendent convicted of misprision for failing to report criminal fraud); *United States v. Brizan*, 709 F.3d 864 (9th Cir. 2013) (wife's failure to disclose her husband's drug trafficking activities). States have misprision-related statutes as well. Under Ohio law, for example, a party with knowledge of a felony, particularly a bank, is required to report such offense to law enforcement, regardless of motive. OHIO REV. CODE § 2921.22(A) (no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities); OHIO REV. CODE § 2921.22(I) defines a violation of this section as a crime, constituting a misdemeanor of the fourth degree. See *Dovell v. Guernsey Bank*, 373 B.R. 533 (Bankr. Ct. E.D. Ohio 2007) (bank required to report check fraud under federal and state misprision statutes). *But see* *People v. Williams*, 20 A.D.3d 72, 795 N.Y.S.2d 561 (N.Y. Sup. Ct. App. Div. 2005) (at common law, a person was guilty of "misprision of felony" when, knowing of the commission of a felony, he failed to report it to

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court noted: “what the misprision statute does not do is preclude, exempt or otherwise immunize any public official including the defendant [a state court judge] simply because they are public officials or state judges.”⁶⁹

Misprision of felony may seem to be an outdated and disfavored notion for state judges.⁷⁰ Most states have declined to adopt this aging common law rule, state legislatures have repealed state misprision laws and state courts, in considering the common law rule, have been widely critical of the very concept.⁷¹ Most federal courts, in interpreting the statute, have required

the authorities and although the offense constitutes a crime under federal law (18 U.S.C. § 4), it has been given a less than warm reception by many jurisdictions within this country and New York has never recognized it).

⁶⁹ United States v. Baumgartner, 2012 US Dist. LEXIS 147896, p.35 (E.D. Tenn. 2012), *aff'd*, 2014 US App. LEXIS 18411 (6th Cir. 2014). The court, in a footnote, noted that state politicians, police officers, and sheriffs’ deputies have been convicted of misprision for concealing – taking steps designed to avoid disclosure of — crimes. *Id.* n.9. The court added:

the misprision statute embodies a prohibition for any person, whether a state official, judge or otherwise, who knows about the commission of a federal felony and who fails to notify the authorities, to affirmatively act to conceal the crime. The misprision statute compels nothing (inasmuch as mere knowledge or mere failure to report does not constitute a violation of the statute) but prohibits the affirmative act of concealment after knowledge.

Id.

⁷⁰ For an extensive discussion of the misprision concept and its treatment by the states, see *Percival v. People*, 2014 VI Supreme LEXIS 39 (Sup. Ct. V.I. 2014) (conviction of witness to shooting overturned under local law because there was no active concealment).

⁷¹ See, e.g., Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697 (2003) (misprision of felony was wholly unsuited to American criminal law). See also *Holland v. State*, 302 So. 2d 806 (Fla. Dist. Ct. App. 1974). The Maryland Court of Appeals described misprision as follows:

We are satisfied, considering its origin, the impractical and indiscriminate width of its scope, its other obvious deficiencies, and its long non-use, that it is not now compatible with our local circumstances and situation and our general code of laws and jurisprudence. Maintenance of law and order does not demand its application, and, overall, the welfare of the inhabitants of Maryland and society as enjoyed by us today, would not be served by it.

Pope v. State, 396 A.2d 1054, 1078 (Md. 1979).

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“active concealment” to justify any conviction.⁷² While a judge’s declining to report admitted tax evasion would hardly rise to the level of “an active concealment” of a felony to justify a prosecution under the misprision statute, the fact that such a prosecution is unlikely does not diminish the federal public policy underlying the statute; i.e., that public officials, who learn of admitted felony violations of federal laws, have a duty to report such activity to appropriate officials. The law, read broadly, reflects a longstanding federal policy that public officials, and perhaps especially judges, who hear or read sworn admissions of tax violation by litigants, would seem to be easily swept into the ambit of those who, as a matter of federal public policy, have reporting obligations under the misprision statute.⁷³ No less authority than the Supreme Court has noted:

Concealment of crime has been condemned throughout our history. . . . Although the term “misprision of felony” now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship. This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination . . . the criminal defendant no less than any other citizen is obliged to assist the authorities.⁷⁴

The misprision statute has some history as a tool used against lawyers when they had knowledge of schemes to bribe judges⁷⁵ and has been used to prosecute judges.⁷⁶ These examples – which involve lawyers and judges engaged in criminal schemes – are not directly pertinent to trial judges who learn of tax evasion and consider disclosure. But, these continued prosecutions indi-

⁷² However, anyone seeking to avoid prosecution because they have not engaged in an “affirmative act of concealment” should consult *United States v. Carabello-Rodriguez*, 480 F.3d 62 (1st Cir. 2007), which held that a strict construction of the statute does not require an “an affirmative act” of concealment; mere knowledge without disclosure can constitute concealment.

⁷³ In an opinion from the Utah Ethics Advisory Committee, the opinion notes that “judges would be ethically required to report illegal activity only if a statute imposed this obligation.” The committee never considered whether the federal misprision of felony statute applied in these instances. Utah Ethics Advisory Comm., Op. 00-03 (2000).

⁷⁴ *Roberts v. United States*, 445 U.S. 552, 557-58 (1980), cited in *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002).

⁷⁵ *United States v. Scruggs*, 691 F.3d 660 (5th Cir. 2012).

⁷⁶ *United States v. Baumgartner*, 581 Fed. Appx. 522 (6th Cir. 2014).

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cate the federal policy of requiring disclosure when officials have knowledge of crimes – and prosecuting them criminally when they fail to make such disclosure – is not out of date. While the federal misprision statute may not dictate that state judicial ethics committees, which have opined that reporting tax evasion is discretionary, change their opinions, it should be a pre-eminent consideration for any judge in weighing a discretionary disclosure. For a cautious trial judge, the federal misprision statute, as a longstanding reflection of what the Supreme Court has labeled as a penalty for “irresponsible citizenship,”⁷⁷ should enhance the likelihood of discretionary reporting of admitted tax evasion by litigants.

A second pre-eminent consideration for trial judges who hear evidence of tax evasion and consider reporting these violations should be a recognition that reporting misconduct is at the heart of the legal process. In states that have recently adopted or amended versions of the ABA Model Code, the state high courts have reminded judge and lawyers that Rule 2.15, as it applies to reporting mere misconduct by judges or lawyers is a sacrosanct part of the legal system:

Taking action to address known misconduct is a judge’s obligation. Paragraphs (A) and (B) [of Rule 2.15] impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.⁷⁸

⁷⁷ *Roberts*, 445 U.S. at 558.

⁷⁸ *In Re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct*, 2009 Ark. 238, p.45 (2009); *see also In re Amendments to the Rules Regulating the Fla. Bar*, 101 So. 3d 807, 831 (2012) (comment on Rule 4-8.3, reporting Professional Misconduct); *In re Okla. Code of Judicial Conduct*, 285 P. 2d 1080, 1095 (Okla. 2010) (comment on imposing Rule 2.15 -Responding to Judicial and Lawyer Misconduct); *In Re: Adoption of New Rules Governing Standards of Conduct of Magisterial District Judges*, 2014 Pa. LEXIS 2408 (2014) (comment on imposing Rule 2.15 -Responding to Judicial and Lawyer Misconduct).

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If a trial judge has a strict ethical obligation to report “known misconduct” by an attorney or judge – which may not be illegal – to a disciplinary authority to preserve the integrity of the legal system, then failing to report a confessed felony by a litigant would seem to run an even more substantial risk of impugning the integrity of the legal system, at least in the eyes of the participating litigants. While a double-standard for judges – an absolute obligation to report misconduct by lawyers and other judges and no obligation to report felonies by litigants – may have a legal justification, the impact of the later on the public’s faith in the legal system may be even more pronounced. In cases of judicial or attorney misconduct, the litigant may not be aware of the misconduct or may even benefit from it. In contrast, the self-confessed tax evader is aware of the criminal nature of his or her conduct and, if the judge casts on a blind eye on that admitted conduct, the perpetrator’s respect for the process – the importance of truth-telling and compliance with the law – will be diminished. Parties victimized by the tax evasion – a mother who gets reduced child support, for example – may have their confidence in the system of justice shattered. If the high courts in the states, while adopting rules for judicial conduct, continue to preach that “taking action to address known misconduct by lawyers and judges is a judge’s obligation,” then reporting tax evasion by litigants, while still discretionary as a matter of judicial ethics, would seem to be encouraged and consistent with this vital public policy.

A final generic factor that should lead judges to report tax evasion in support matters is that failing to take any action may undercut both parties faith in the child support system. Child support and alimony or maintenance remain cornerstones of matrimonial litigation. State legislatures and state courts, through requiring extensive “under oath” disclosure of income, uniformly affirm its importance for supporting children and families.⁷⁹ If a litigant can, with impunity, cheat his dependents of

⁷⁹ See, e.g., *Moss v. Superior Court (Ortiz)*, 17 Cal. 4th 396, 424, 71 Cal. Rptr. 2d 215, 950 P.2d 59 (1998) (the California legislature and its courts have long recognized the importance of child support and that “payment of appropriate support is a parent’s primary obligation”); *State ex rel. Taylor v. Thomas*, 639 So. 2d 837, 842 (La. Ct. App. 1994) (the importance of child support guidelines as an appropriate solution to the problems of inconsistency and inade-

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mandated support, the well-calibrated system of child support is endangered. Admitted tax evasion, in non-matrimonial contexts, may not be a “severe” infraction but, when a parent seeks to shield income from his requirement to support his children – or spouse – it cuts against vital public policies in all states and would seem to tilt the scale in favor of disclosure of this crime to appropriate authorities.

A discretionary decision to report instances of “under the table” employment or “under-reported income” during matrimonial or support matters also raises substantial practical concerns. First, because a judge is not obligated to investigate such claims to determine whether they are true, the court would still seemingly need to be satisfied that the claims, as a threshold matter, are worthy of belief and sufficiently proven – even at a preliminary stage. There is little case law or ethical guidance on what proof would support such an evaluation at the preliminary stages of a divorce or support action.

Second, unreported income or tax evasion may surface in pre-trial conferences, well before any witness testifies. Judges may then face a difficult choice: whether to disclose an intention to report tax evasion or other financial illegality during the pendency of the action or before completion of the trial. Most state ethical committee direct that judges wait until the conclusion and file a report after the case is concluded.⁸⁰ This author can find no authority of whether a trial judge, who concludes that discretion requires a report to authorities, must inform the parties that it is contemplating reporting the violation to authorities and whether the party to be reported has a right to a hearing before the report

quacy of child support awards was reiterated when Congress made such guidelines mandatory in all states through the enactment of the Family Support Act of 1988); *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (the Legislature has long recognized the importance of child support for all children as it has expressed, in unmistakable terms, that “dependent children shall be maintained, as completely as possible, from the resources of their parents” and not by the taxpayers, and that support determinations should be made in “the best interests of the child.”); *In re Adoption of K.L.J.K.*, 730 P.2d 1135, 1138 (Mont. 1986) (highlighting the “importance of child support” as the “financial support a parent owes a child”); *Kesterson v. Delara*, 38 P.3d 198, 201 (N.M. 2001) (the importance of child support, both to the child and to the state, cannot be questioned).

⁸⁰ See *supra* discussion in text at note 19.

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occurs.⁸¹ But, other statutes and cases provide some insight. In New York, for example, the Penal Law prohibits the threat of criminal prosecution as a means of extracting money in a civil suit.⁸² Lawyers are barred from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter.⁸³ These rules would suggest that a judge should carefully consider whether to warn any party in the midst of a civil matter that they will report tax-related crimes because it may skewer settlement discussions.

The dangers posed by advising litigants about judicial reporting illegal activity that surfaces in the courtroom is manifest in the “obligated to report” landscape in New Jersey. In *All Modes Transport Inc. v. Hecksteden*,⁸⁴ the trial judge interrupted cross-examination of a litigant regarding potential tax evasion, recessed the trial and advised the attorneys at an in-chambers conference that while the current testimony was not sufficient to justify reporting the witness to a prosecuting authority, if the examination continued and showed additional instances of unwarranted deductions, the court would report the witness. In the alternative, the judge suggested that the witness settle. After the litigant settled, he challenged the settlement as coerced, claiming that his right to proceed was compromised by the judge’s statement that further testimony would trigger his obligation to report.

The appellate court vacated the settlement, holding that the trial judge has no obligation to warn the testifying party about the possible reporting of his conduct to the IRS and the judge’s suggestion that no report would be filed if settlement occurred gave the witness’s opponent an “improper advantage” because such “a threat may be even more coercive when the court is the

⁸¹ In *Onyiuke v. Onyiuke*, 2011 N.J. Super. Unpub. LEXIS 1541 (Super. Ct. App. Div. 2011), the trial judge told the litigant *during the hearing* that he would report the false income tax filings to the IRS. The appeals court, reviewing the trial court’s actions, made no comment about the judicial announcement of an intention to report the illegal conduct made during the hearing. *But see* S.C. Advisory Comm. on Standards for Jud. Conduct, Op. 17-2006 (2006) (any reports should be made only at the conclusion of proceedings).

⁸² N.Y. PENAL LAW § 155.05 [2] [e] [iv]; *People v. Harper*, 75 N.Y.2d 313, 317 (1990).

⁸³ 22 N.Y. CODES R. & REGS. § 1200.0(3)(4).

⁸⁴ 913 A.2d 814 (N.J. Super. Ct. App. Div. 2006).

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source.”⁸⁵ If a trial judge warns any party about exercising discretion to report and a settlement – advantageous to the non-threatened party – emerges, it may be difficult later to filter out the coercive impact of the judge’s warning if the settlement is later attacked.⁸⁶

Third, the court should also consider whether to place its exercise of discretion on the record in the case. There is no ethical determination, based on this author’s research, that suggests a trial judge is obligated to disclose on the record that he or she intends to report a litigant’s conduct to authorities or any requirement that a litigant be heard before the report is filed. There is also no guidance in the manner of how and to whom to make such a report – in *Doe v. Great Expectations*, the court sent a copy of its decision to “appropriate public officials” without naming them.⁸⁷

⁸⁵ *Id.* at 820. In reaching this conclusion, the New Jersey appeals court cited New York’s ethical opinions that a court’s authority to report evidence of criminal conduct to the prosecutor should not be exercised in a manner that would “encourage the threat of possible criminal proceedings as a means of pressure, for settlement purposes or otherwise, by one litigant against another.” N.Y. Advisory Comm. on Jud. Ethics, Joint Op. 85103 (1988). In other New Jersey cases, a trial judge’s warning about illegal use of a social security number caused a further appellate review of a suggested “coerced settlement.” *Pinto v. McGovern, Provost & Colrick*, 2008 N.J. Super. Unpub. LEXIS 2430 (N.J. Super. Ct. App. Div. 2008).

⁸⁶ For another unusual twist in the New Jersey rule, an appeals court held that requiring a litigant to report their illegal immigration status was improper and the rules only required the court to make the report directly. *State v. V.D.*, 951 A.2d 1088, 1094 (N.J. Sup. Ct. App. Div. 2008).

⁸⁷ *Doe v. Great Expectations*, 10 Misc. 3d 618, 625, 809 N.Y.S.2d 819 (N.Y. Civ. Ct. 2005). The court only sent “its decision” and apparently did not send any of the documents or other evidence which it relied in making its decision. In another context, the New Jersey appeals courts, took a more expansive view and in a case of misuse of social security payments, directed that a copy of the court opinion, “along with sufficient information to enable the SSA [Social Security Administration] to identify the persons involved and take further action.” *New Jersey Div. Youth & Fam. Servs. v. T.D.B.*, 2013 N.J. Super. Unpub. LEXIS 654, p. 12 (N.J. Sup. Ct. App. Div. 2013). *See also Richards v. Quality Automotive of Bloomington, Inc.*, 2012 N.J. Super. Unpub. LEXIS 1484 (N.J. Sup. Ct. App. Div. 2012) (while affirming verdict for plaintiffs, appeals court directs lower court to “inform appropriate taxing authorities and the SSA of this apparent violation of law after plaintiffs admitted having income that was unreported).

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Fourth, the court may confront another quandary: if the couple filed a joint tax return, signed by both spouses, there may be civil and criminal liability to both the husband and wife. The potential tax debt would be a marital debt, subject to distribution. An impending tax investigation will, no doubt, also pinch family finances and, if proven by taxing authorities and assessed against either parent, a resulting tax warrant or other financial penalty could impair a parent's ability to support a child. In contemplating a decision to report, the court should consider whether a subsequent tax investigation – and its impact on family finances – would be in the best interests of the children, assuming that the children are dependent on the tax cheating parent for support.

Fifth, any court considering reporting may also need to fashion an equitable basis for reporting and apply the same reporting rules to lower income litigants – who may be desperate to generate “under the table cash” – as will be applied to higher income litigants, like the parties in *Sheridan v. Sheridan*, who stashed away hundreds of thousands of dollars. Often, in divorce cases, the amount of “under-reported income,” is relatively small, especially in modest income families. While a court may be less likely to report small cases of tax evasion, the federal penalties for failing to file or misreporting income do not differentiate between higher and lower income payors. As another consideration, if a court reports a scofflaw in one case, the court would certainly need, as a part of its discretion, to be consistent and report all similar scofflaws in future cases to assure that its exercise of discretion is even-handed, even though such consistency may lead to an inequitable result in a future case. Overzealous reporting could easily compromise a court's discretion as much as ignoring illegality.

Sixth, any court considering reporting must also avoid a potential sideshow at trial, in which the court may seek to make a finding of under-reported income over the objection of a litigant. In considering its discretion, the court could face another difficult choice if a litigant seeks to condition any settlement on the court withholding any report to the state or federal taxing authorities. The court would not be bound by such an agreement, but as a practical matter, the court's decision may adversely impact any possible settlements or a restoration of post-divorce relationships

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between the litigants. The court must also consider that a litigant, reported to authorities for tax evasion, could easily move to disqualify the judge on any future litigation involving the couple. While courts have disregarded these complaints, nonetheless, trial judges, considering disclosure, should be prepared for such objections.⁸⁸ A court should consider the impact of reporting on the scofflaw's counsel. If matrimonial attorneys are required by state law or rules to certify their client's financial representations and, if under-reported income surfaces, the court may be required to investigate whether and when counsel knew of "under-the-table" income and the falsehood of the sworn financial representations in the statement of net worth. In this case, the question is not whether to report: instead, a lawyer who allows his client to falsely swear before the court, may be the subject of a mandatory report to "appropriate authorities" by a trial judge.⁸⁹

Finally, a court should consider whether other sanctions – available to the court for transgressions by litigants in most courts – should be imposed as an alternative to reporting. Misrepresenting one's income would seemingly justify an award of counsel fees or a fine against an admitted tax-evading litigant. But, before imposing such sanctions, the court would need findings and presumably a hearing and the court could easily become entrapped in an extended proceeding that mirrors a tax evasion prosecution by other authorities.

In short, the nation's matrimonial trial judges face a complicated balance of federal law and policy, state rules and practical

⁸⁸ See *Challow v. Challow*, 2011 N.J. Super. Unpub. LEXIS 1068 (N.J. Super. Ct. App. Div. 2011)(when litigant, reported to authorities for tax evasion, sought to disqualify the presiding judge on remand, the court described the claim as lacking "sufficient merit to warrant discussion in a written opinion").

⁸⁹ *Hunt v. Hunt*, 273 A.D.2d 875, 876, 709 N.Y.S.2d 744 (N.Y. App. Div. 2000) (discussing the certification requirements in matrimonial actions and 22 N.Y. CODES. R. & REGS. §§ 202.16 (e) and 130-1.1a); *Rosen v. Rosen*, 161 Misc. 2d 795,799, 614 N.Y.S.2d 1018 (N.Y. Sup. Ct. 1994) (the certification rule simply takes the assurance already implicit in an attorney's presentation of evidence, and requires the matrimonial attorney to make it explicit. The attorney is required to do no more than certify that he has complied with minimal standards of candor and honesty. The reason for the imposition of the certification requirement clearly is to impress upon the matrimonial bar the necessity for such compliance).

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consequences in exercising discretion to report litigants' tax evasion to authorities. Spouses who have lived together, benefitting from under-reported income, may never mention their family's tax evasion until a divorce intervenes. Trial judges, often greeted at pre-trial conferences with allegations of under-reported income, will face difficult choices while seeking to equitably resolve disputed matrimonial and support matters and uphold the integrity of the legal system.