SHOULD I REPORT MY CLIENT’S SPILL?

There are numerous spill reporting requirements in the environmental laws. This outline will discuss them, and then address the more difficult issue of whether an attorney has an obligation to report a spill the attorney learns about, but the client chooses not to report.

I. SPILL REPORTING REQUIREMENTS

Federal and state environmental laws and regulations are filled with requirements to report unpermitted spills or releases. Some of the more important requirements under federal and New York law will be discussed, along with the applicable criminal penalties. Generally, the reporting requirements are cumulative, so each requirement that applies must be satisfied.

A. CERCLA Release Reporting

Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §9603(a), requires the immediate reporting of releases of hazardous substances, pursuant to regulations set forth at 40 C.F.R. Part 302. Reporting is required by “any person in charge of a vessel or an offshore or onshore facility... as soon as he or she has knowledge,” to the National Response Center at (800) 424-8802, of any release, of a “reportable quantity” within a 24-hour period of a CERCLA hazardous substance, 40 C.F.R. §302.6(a), except for certain continuous releases. 40 C.F.R. §302.8.

The reportable quantities of hazardous substances are listed at 40 C.F.R. §302.4. Generally, the reportable quantity for an unlisted hazardous substance is 100 pounds in a 24-hour period. 40 C.F.R. §302.5(b).
CERCLA §103(b), 42 U.S.C. §9603(b), provides stiff criminal penalties for any person required to report a release:

who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

Also, under CERCLA §103(c), 42 U.S.C. §9603(c), a report to the U.S. Environmental Protection Agency (“EPA”) was required, by June 9, 1981, by “any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances... are or have been stored, treated, or disposed of,” and which did not have a Resource Conversation and Recovery Act (“RCRA”) permit. The deadline for this report has long since passed, and in spite of EPA interpretations to the contrary, has been held by district courts to be a one-time reporting requirement not applying to releases that were subsequently identified. City of Toledo v. Beazer Materials and Services, Inc., 833 F.Supp. 646 (N.D. Ohio 1993); Lutz v. Chromatex, Inc., 718 F.Supp. 413 (M.D. Pa.1989). Failure to give this notice not only was a crime, but resulted in loss of CERCLA liability defenses:

Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title.

B. SARA Title III Reporting

Pursuant to SARA (Superfund Amendments and Reauthorization Act of 1986) Title III, at 42 U.S.C. §11004, the “owner or operator of a facility” must “immediately” report a release or spill of a reportable quantity of a CERCLA hazardous substance or an “extremely hazardous substance” designated by 40 C.F.R. §355.40(a) to “the community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release and the State emergency response commission of any State likely to be affected by the release.” 40 C.F.R. §355.40(b)(1). In New York State, this is accomplished by calling the New York State Department of Environmental Conservation (“DEC”) spill hotline at (800) 457-7362. For transportation-related releases, the report may be made by calling 911. 40 C.F.R. §355.40(b)(4)(ii).
Exemptions are provided for any release that “results in exposure to persons solely within the boundaries of the facility,” federally-permitted releases, and continuous releases meeting the requirements of 40 C.F.R. §302.8(b). 40 C.F.R. §355.40(a)(2). The extremely hazardous substances, along with their reportable quantities, are set forth at Appendix A to Part 355. The report must include the following information:

(i) The chemical name or identity of any substance involved in the release.

(ii) An indication of whether the substance is an extremely hazardous substance.

(iii) An estimate of the quantity of any such substance that was released into the environment.

(iv) The time and duration of the release.

(v) The medium or media into which the release occurred.

(vi) Any known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals.

(vii) Proper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordination pursuant to the emergency plan).

(viii) The names and telephone number of the person or persons to be contacted for further information.

40 C.F.R. §355.40(b)(2). A written follow-up report is also required “as soon as practicable,” setting forth the above information, as well as:

(i) Actions taken to respond to and contain the release.

(ii) Any known or anticipated acute or chronic health risks associated with the release, and

(iii) Where appropriate, advice regarding medical attention necessary for exposed individuals.

40 C.F.R. §355.40(b)(3).
SARA Title III provides the following criminal penalty:

Any person who knowingly and willfully fails to provide notice in accordance with section 11004 of this title shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two years, or both (or in the case of a second or subsequent conviction, shall be fined not more than $50,000 or imprisoned for not more than five years, or both).


C. RCRA Facility Reporting

If a hazardous waste treatment, storage or disposal facility has “a release, fire or explosion” by which a hazardous waste “could threaten human health or the environment outside the facility,” federal and state RCRA regulations require that its “emergency coordinator” must immediately notify local authorities, and call the National Response Center at (800) 424-8802 or the federal “on-scene coordinator” designated under the National Contingency Plan, and in New York the state spill hotline, (800) 457-7362, to report:

(a) Name and telephone number of reporter;
(b) Name and address of facility;
(c) Time and type of incident (e.g. release, fire);
(d) Name and quantity of material(s) involved, to the extent known;
(e) The extent of injuries, if any; and
(f) The possible hazards of human health, or the environment, outside the facility.

6 N.Y.C.R.R. §373-2.4(g)(4)(ii); see also 40 C.F.R. §264.56(d). Further, the hazardous waste must be cleaned up as soon as practicable. 6 N.Y.C.R.R. §373-2.4(g)(6); see also 40 C.F.R. §264.56(e). Similar requirements also apply to “accumulators” of hazardous wastes. 6 N.Y.C.R.R. §372.2(a)(8)(ii), 373-1.1(d)(iii)(c)(5), 373-3.4(g)(4)(iii). 40 C.F.R. §262.34(d)(5)(iv)(C).

Criminal penalties under RCRA include fines of up to $50,000 per day of violation and jail terms of up to five years. RCRA §3008(d), 42 U.S.C. §6928(d). Similar criminal penalties apply under New York State law. See ECL §§71-2705; 71-2721.

D. Federal UST Regulations

Federal regulations at 40 C.F.R. Part 280, promulgated under RCRA, generally cover underground storage tanks (“USTs”) of at least 110 gallons that store petroleum or any substance defined as hazardous under CERCLA. See 40 C.F.R. §§280.10, 280.12. Hazardous waste tanks are excluded, since they are regulated as hazardous waste storage facilities under RCRA. 40 C.F.R. §280.10(b)(1). See, e.g., 6 N.Y.C.R.R. Part 373.
Under these regulations, if there is a spill or overfill of petroleum of either more than 25 gallons or that causes a sheen on nearby surface waters, or a CERCLA reportable quantity of a hazardous substance, “owners and operators of the UST system” must report the spill within 24 hours to EPA, or the state if designated by EPA. 40 C.F.R. §280.53(a)(1). In New York, EPA has designated DEC to receive these reports, and the report is made to the DEC spill hotline. The spill must be immediately cleaned up or contained. 40 C.F.R. §280.53(a). If spills of less than 25 gallons or less than a reportable quantity cannot be cleaned up within 24 hours, they must also be reported. 40 C.F.R. §280.53(b). Failure to report is a violation of RCRA punishable as discussed above.

E. Surface Water Spills

Clean Water Act §311(b)(5), 33 U.S.C. §1321(b)(5) requires that “[a]ny person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility” of a “harmful quantity” must “immediately notify the appropriate agency of the United States Government of such discharge.” “Hazardous substances” and their reportable quantities are designated by 40 C.F.R. Part 116. 40 C.F.R. §117.21. For oil, a quantity which violates an applicable water quality standard, or which causes a sheen on the water, 40 C.F.R. §110.3, must be reported to the National Response Center at (800) 424-8802. 40 C.F.R. §110.6.

Under Clean Water Act §309(c), 33 U.S.C. §1319(c), criminal actions can be brought against responsible persons for willful or negligent violations of the Act, or any permit or order. Negligent violations are punishable by fines of between $2,500 and $25,000 per day and/or one year in prison, while knowing violations are punishable by fines of $5,000 to $50,000 and up to three years in jail.

F. New York Petroleum Bulk Storage Regulations

The New York State petroleum bulk storage regulations contain an important spill reporting requirement, which is contained in regulations applicable “to all aboveground and underground petroleum storage facilities with a combined storage capacity of over eleven-hundred (1,100) gallons, including all facilities registered under Part 612 of this Title.” 6 N.Y.C.R.R. §613.1(d).

Under these regulations:

Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two (2) hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two (2) hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

6 N.Y.C.R.R. §613.8. Note that the DEC hotline can also be reached with an “800” prefix (800-457-7362).
Violations of this regulation are punishable under ECL §71-1933(1) as a misdemeanor, and upon conviction subjects a violator to a fine of up to $37,500 and/or imprisonment for up to one year.

G. New York Oil Spill Law

The New York Oil Spill Law provides, at Navigation Law §175, that “[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge.” Regulations at 17 N.Y.C.R.R. §§32.3 and 32.4 implement that statute. Under §32.3, the notification requirement under Navigation Law §175 extends to “[a]ny person responsible for causing a discharge,” “the owner or operator of any facility from which petroleum has been discharged,” and “any person who has actual or constructive control of such petroleum immediately prior to such discharge.” Notification is required by a telephone call to the DEC spill hotline, and a list of detailed information that must be provided with the notification is set forth at 17 N.Y.C.R.R. §32.4(b).

While the reporting requirement under 6 N.Y.C.R.R. §613.8 appears limited to regulated bulk tanks (although it may be interpreted more broadly by DEC), the reporting requirement under Navigation Law §175 is not limited to bulk tanks, and covers any unpermitted “discharges,” as defined by the New York Oil Spill Law. See Navigation Law §172(8). Violations are an offense punishable by a $25,000 fine. Navigation Law §192. DEC has successfully prosecuted failures to report in administrative proceedings on numerous occasions. See, e.g., Avis Rent A Car System, LLC (March 24, 2009) ($10,000 and $15,000 fines); Gasco-Merrick Road Gas Corp. and Juan M. Romero (June 2, 2008) ($125,000 in fines for spill reporting and other violations); cf. Brother’s Gas Stop, Inc. (April 6, 2007) (no violation proved).

H. Bulk Storage Spills in New York

ECL §17-1743 sets forth the following reporting requirement:

Any person who is the owner of or in actual or constructive possession or control of more than 1,100 gallons, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

Thus, this provision requires an immediate call to the DEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters. Violations of this statute are punishable under ECL §71-1933(1) as a misdemeanor with fines of up to $37,500 and/or imprisonment for up to one year.
I. Releases of Hazardous Substances in New York

DEC regulations also require reporting of releases of designated quantities of hazardous substances listed at 6 N.Y.C.R.R. Part 597. While the designated substances and quantities may be similar to those specified under CERCLA, they are not identical. “[R]eleases of petroleum or hazardous wastes” are exempt. 6 N.Y.C.R.R. §595.1(b). The reporting requirement applies to:

(i) an owner or operator;

(ii) any person in a contractual relationship with an owner or operator who inspects, tests or repairs any portion of a storage facility which is or was used for the storage of hazardous substances;

(iii) any person in actual or constructive control or possession of a hazardous substance prior to its release; and

(iv) any employee, agent or representative of (I) through (iii) above who has knowledge of a release.

6 N.Y.C.R.R. §595.3(a)(1).

Those persons “must report the release of a reportable quantity of a hazardous substance,” which is defined by 6 N.Y.C.R.R. §597.2, to the DEC spill hotline at 800-457-7362 within two hours. 6 N.Y.C.R.R. §595.3(a)(2). Further, releases of lesser quantities which cause or “may reasonably be expected to cause” a “fire with potential off-site impacts,” explosion, “vapors, dust and/or gases,” which may cause illnesses (not including illnesses to persons in the same building), or contravention of air or water quality standards, must also be reported. 6 N.Y.C.R.R. §595.3(a)(2). Nonetheless, a spill to a secondary containment system that is completely contained and accounted for within 24 hours need not be reported. 6 N.Y.C.R.R §595.3(a)(4).

Furthermore, within 24 hours of discovery, “[t]he owner or operator of a storage facility shall notify [DEC] of a suspected or probable release of a hazardous substance unless an investigation shows that a release has not occurred or does not need to be reported” 6 N.Y.C.R.R §595.3(b)(1). Reporting is not required for a continuous release satisfying the requirements of 40 C.F.R. §302.8. 6 N.Y.C.R.R §595.3(a)(5).

Failure to report is a misdemeanor punishable under ECL §71-4303 by a year in jail and/or fine of up to $25,000.

II. REQUIREMENTS FOR ATTORNEYS

Most of the spill reporting requirements clearly do not include an attorney. The rules generally apply to the “owner or operator,” which would not include their attorney. The RCRA requirement only applies to the “emergency coordinator.” While persons in “actual or constructive
possession or control” or a contractor “who inspects, tests or repairs” that must report under ECL §17-1743 and 6 N.Y.C.R.R. §595.3(a)(2) may include an environmental consultant or tank tester, it would not normally include an attorney.

However, an attorney may fall within the category of “any person” with knowledge of a spill who is required to report a release of petroleum from a bulk storage facility under 6 N.Y.C.R.R. §613.8. Likewise, an attorney would likely be an “agent or representative” of an “owner or operator” required to report a release of hazardous substances under 6 N.Y.C.R.R. §595.3(a)(1).

What should a lawyer do if his client refuses to report? There is no clear answer.

In a decision of the DEC Commissioner, In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998), Commissioner Cahill found that a consultant who learned about a petroleum spill from a tank, but failed to report, violated 6 N.Y.C.R.R. §613.8, even though he was neither an owner nor an operator. In this case, Donald Middleton, acting on behalf of a bank that held a mortgage on the property, smelled petroleum in dirt from soil borings excavated near a UST. The Commissioner ruled that:

The term “any person” in §613.8 should be given a broad, not limited or restrictive, interpretation. The term “any person” is intended to apply, not only to persons who are “owners” and “operators”, but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring “any person” to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

The Commissioner skirted the issue of whether ethics codes may supercede this reporting requirement, stating:

Middleton is not a professional engineer, and therefore cannot claim that he is under a professional obligation not to disclose under the Code of Ethics for Engineers, assuming that the code was otherwise applicable under the circumstances. Nor is Mr. Middleton an attorney, and therefore the attorney–client privilege could not be asserted as a basis for his non-disclosure.

In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998). How does this ruling apply to lawyers?
Former DR 4-101 of the New York Code of Professional Responsibility (effective until March 31, 2009) generally prohibited attorneys from revealing a “confidence” or “secret” of a client without the permission of the client. These terms were defined as follows:

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Former DR 4-101(a). Since “secret” was defined to be broader than “confidence,” N.Y. State 645, this general prohibition encompassed not only the situation where the client revealed a spill to the client’s attorney, but also when the attorney learned about it from someone else—such as an environmental consultant.

DR 4-101 has been replaced by Rule 1.6 of the New York Rules of Professional Conduct, effective April 1, 2009. This Rule pertains to “confidential information,” rather than “confidences” and “secrets” governed by the former rule, and generally prohibits the disclosure without the client’s consent. “Confidential information” is defined as follows:

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (I) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

This definition encompasses essentially the same information as “confidences” and “secrets,” and thus would include not only the situation where the client revealed a spill to his or her attorney, but also when the attorney learned from an environmental consultant or another third party.

The former rule contained a number of exceptions, pursuant to which a “lawyer may reveal” confidences and secrets, including “when permitted under Disciplinary Rules or required by law or court order,” DR 4-101(c)(2), or “[t]he intention of a client to commit a crime and the information necessary to prevent the crime.” DR 4-101(c)(3). Arguably, the spill reporting requirement fell under each. Since the rule used the word “may,” it was not mandatory, so that under DR 4-101(c), “there [was] no affirmative burden ... to disclose.” Nassau Co. 2001-07. Nonetheless, this did not relieve an attorney from an independent obligation to comply with the law. See N.Y. State 681; Matter of Balter v. Regan, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984), cert. den’d 469 U.S. 934, 105 S. Ct. 332 (1984) (duty to comply with court order).
Under the new Rules of Professional Conduct, Rule 1.6(b) provides that an attorney may not only “reveal,” but may also “use confidential information to the extent that the lawyer reasonably believes necessary”:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime;
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(6) when permitted or required under these Rules or to comply with other law.

Exceptions (2) and (6) are basically the same as the exceptions (3) and (2), respectively, under DR 4-101(c), and thus ethics opinions under the old rules are still relevant. So, while like DR 4-101(c), Rule 1.6(b) does not create an affirmative duty to disclose, Nassau Co. 2001-07, it does not relieve an attorney from an independent obligation to comply with the law. See N.Y. State 681; Matter of Balter v. Regan, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984), cert. den’d 469 U.S. 934, 105 S. Ct. 332 (1984) (duty to comply with court order).

Under the Middleton decision, the spill reporting by a lawyer may be viewed as “required... to comply with other law,” so he or she may fall under the exception of Rule 1.6(b)(6) that allows disclosure. While no ethics opinion could be found on spill reporting, N.Y. State 649 considered the obligation of a lawyer to reveal a breach of fiduciary duty by an executor to the beneficiaries of an estate, and concluded that “the attorney's obligation or ability to disclose the information to the beneficiaries depends, with respect to information that qualifies as a client secret, upon whether the applicable law requires disclosure.”

An analogous reporting requirement is Social Services Law §413, which requires social service professionals to report suspected child abuse. In N.Y. City 1997-2, the City Bar Committee on Professional and Judicial Ethics considered whether a lawyer employed by a social services organization, who provided legal services to minor clients, had a duty to report abuse without authorization by the client. It concluded:

If the lawyer concludes that the law requires the lawyer to report suspected child abuse or mistreatment in certain classes of cases, the lawyer may make such a report when the law so requires. DR 4-101(C)(2). If the lawyer is not certain that he has a legal obligation to disclose otherwise confidential information, however, the lawyer should take available legal steps to seek clarification of the law before making disclosure.

Similar logic may apply to spill reporting.
In addition, if the client refuses to report a spill, he commits a continuing violation of the law, and therefore the attorney knows his or her client intends to continue to commit a crime. This could fall under the exception of Rule 1.6(b)(2). Under the similar exception under the old rules, an attorney acted properly in revealing the intent of his client to commit perjury after counseling his client not to perjure himself. *People v. DeParlo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001).

More recently, in *People v. Andrades*, 4 N.Y.3d 355, 361-2, 795 N.Y.S.2d 497 (2005), the Court of Appeals endorsed the actions of an attorney, who after failing to convince his client not to perjure himself, called to the judge’s attention that the lawyer had an ethical dilemma about his client’s upcoming testimony, without explicitly revealing that the client planned to lie:

we note that at no time did counsel ever disclose to the court that defendant intended to commit perjury or otherwise disclose any client secrets. Rather the court inferred defendant’s perjurious intent based upon the nature of counsel's application. However, counsel could have properly made such a disclosure since in the case a client’s intent to commit a crime is not a protected confidence or secret.

Likewise, in Nassau Co. 2001-07, a lawyer could, but was not required, to reveal an executor’s illegal intent to conceal the existence of a distributee.

In N.Y. City 2002-1, the City Bar Committee on Professional and Judicial Ethics ruled that the exception does not permit disclosure of client confidences and secrets based on client's “continuing crime” of continued knowing possession of stolen property:

an attorney may not disclose client confidences and secrets relating to a client’s completed criminal act even though the effects may be continuing where that criminal act is the very subject on which the client is consulting the attorney and the client's completed conduct has satisfied all elements of the crime, i.e. where the continuing offense is “factually indistinguishable from a past offense” aside from temporal continuation.

The decision was reached by striking “a balance between the competing interests of clients to confidentiality and of society to be protected from future crimes.” The Committee noted that:

We conclude a different balance, and outcome, exists for emergencies which involve the prevention of imminent serious bodily injury or death. In these situations, which the Committee anticipates will be rarely encountered, client confidentiality must yield to the lawyer's decision to protect human life.

N.Y. City 2002-1. Similarly, under the old code, a lawyer could take appropriate action to prevent suicide, including disclosure of his client's intentions. N.Y. State 486; N.Y. City 1997-2.
The new rules added an exception to allow disclosure “to prevent reasonably certain death or substantial bodily harm.” Rule 1.6(b)(1). This addition to the rules is consistent with the ethics opinions under the old rule that allowed such disclosure in certain instances. While a spill rarely creates a risk of “reasonably certain death or substantial bodily harm,” some spills could if an explosion or fire is imminent. In that case, this exception probably applies, and a lawyer should probably report. If the threat is not so serious, then disclosure is probably not allowed on this basis.

Another concern is Rule 1.2(d), which states that:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

This rule is similar to former DR 7-102(A)(7), which prohibited a lawyer from “[c]ounsel[ing] or assist[ing] the client in conduct the lawyer knows to be illegal or fraudulent,” which has been found to require a lawyer to call upon a client to correct a misrepresentation, but not to report the misrepresentation. Nassau Co. 2003-1. That is because the requirement only requires disclosure of fraud where it is not confidential.

However, where a lawyer certified a submission in a litigated matter, and later learned it was fraudulent, they were required to seek to withdraw it, and could reveal the basis to the court to the extent necessary to accomplish the withdrawal. N.Y. State 781.

Ethics opinions advise a lawyer posed with uncertainty about disclosure to “commence a declaratory judgment action or some other appropriate procedure designed to obtain a court determination on the disclosure law.” N.Y. State 645. This advice is of little benefit to an environmental lawyer faced with a two-hour reporting requirement.

Certainly, the lawyer is bound to try to convince the client to report within the time limit for reporting. N.Y. State 649 (duty to try to convince executor not to breach fiduciary duty). If the client refuses, the lawyer is left with a Hobson’s choice.

One option might be to call the DEC, and indicate there was an issue at a property, without explicitly revealing the spill (much like the lawyer did due to the planned perjury in People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005)), and also withdraw as attorney. However, in the author’s view, if the lawyer learns about either a petroleum spill covered by 6 N.Y.C.R.R. §613.8, or a release of hazardous substances at their client’s facility covered by 6 N.Y.C.R.R. §595.3(a)(1), the lawyer falls under the class of persons (“any person” or an “agent,” respectively) required to report, and cannot merely keep “confidential information” secret.
III. OTHER LEGAL REQUIREMENTS

What about general requirements for all citizens? A client’s continuing failure to report a spill may be a crime. If any citizen learns about such a crime, are they required to bring this to the attention of the authorities?

A. General Duty to Disclose under State Law


Therefore, there is no general duty to report someone else’s failure to report a spill under New York law.

B. Misprision of a Felony under Federal Law

Under federal law, 18 U.S.C. §4, makes “misprision of a felony” illegal. According to the statute:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.


According to the Second Circuit, “Misprision of Felony has its roots in the common law which recognized a duty to raise a ‘hue and cry’ and report a felony to the authorities.” U.S. v. Cefalu, 85 F.3d 964 (2d Cir. 1996). According to the Second Circuit:

> The elements of Misprision of Felony are 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime.

U.S. v. Cefalu, 85 F.3d 964 (2d Cir. 1996).

The courts universally agree that a necessary element of misprision of felony is that the defendant affirmatively conceal the felony committed by another. “Mere silence, without some affirmative act, is insufficient evidence” of the crime. Lancey v. United States, 356 F.2d 407, 410 (9th Cir. 1966), cert. den’d, 385 U.S. 922, 87 S.Ct. 234 (1966). “Concealment – indeed an
affirmative step to conceal – is a required element; mere failure to make known does not suffice.” *U.S. v. Warters*, 885 F.2d 1266, 1275 (5th Cir. 1999). “Thus, a person who witnesses a crime does not violate 18 U.S.C. §4 if he simply remains silent.” *U.S. v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984).

A felony is a crime punishable by more than one year in jail. U.S.S.G. §2L1.2, n.2. The failure to comply with federal spill reporting requirements may be a felony, since it is punishable by more than a year in jail. While “mere silence” would not make a lawyer liable for this crime, any affirmative act of concealment of the spill would.

If a lawyer offered any type of advice to help his or her client conceal a spill, this might be considered concealment. Such conduct may put a lawyer at risk of committing misprision of a felony.

IV. CONCLUSION

Clearly, a lawyer should strive to convince their client to report a spill. If they refuse, in the author’s opinion, the lawyer probably must make a report.