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Ethical Considerations in the Conduct of Investigations

ENVIRONMENTAL PRACTICE ISSUES

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This outline will discuss selected issues that environmental lawyers may be presented with in the course of the conduct of environmental investigations.

1. Spill Reporting

Federal and state environmental laws and regulations are filled with requirements to report unpermitted spills or releases, making violators subject to criminal penalties. Some of the more important requirements under federal and New York law will be discussed. The reporting requirements are cumulative, so each requirement that applies must be satisfied. While most petroleum spills must be reported, there is no general requirement to report spills of less than a "reportable quantity" of hazardous substances that are not stored in a tank of at least 1,100 gallons.

a. CERCLA Release Reporting.

i. **Reportable Quantities.** 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 that are reported. 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).

ii. **Hazardous Substance TSD Sites**. CERCLA §103(c), 42 U.S.C. §9603(c) required a report to the U.S. Environmental Protection Agency ("EPA"), 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") hazardous waste facility 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.

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. §355.42. 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. §355.42. 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. §§355.31, 355.32. The extremely hazardous substances, along with their reportable quantities, are set forth at Appendix A to Part 355. The report must include the information set forth at 40 C.F.R. §355.40(b), and a written follow-up report is also required "as soon as practicable." 40 C.F.R. §355.40(b).

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 information specified at 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).

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).

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.

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(b). 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). By policy, DEC has created the following exception for *de minimis* spills:

> 3. What petroleum spills need to be reported?
>
> All petroleum spills that occur within New York State (NYS) must be reported to the NYS Spill Hotline (1-800-457-7362) within 2 hours of discovery, except spills which meet all of the following criteria:
>
> 1. The quantity is known to be less than 5 gallons; and
>
> 2. The spill is contained and under the control of the spiller; and
>
> 3. The spill has not and will not reach the State's water or any land; and
>
> 4. The spill is cleaned up within 2 hours of discovery.

> A spill is considered to have not impacted land if it occurs on a paved surface such as asphalt or concrete. A spill in a dirt or gravel parking lot is considered to have impacted land and is reportable.

http://www.dec.ny.gov/chemical/8692.html

g. **New York Oil Spill Law**. Navigation Law §175 provides 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 section 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).

h. **Bulk Storage Spills in New York.** ECL §17-1743 sets forth the following reporting requirement to make 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:

> 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.

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 reportable quantities may be similar to those specified under CERCLA, they are not identical, and the measurement of reportable quantities is not limited to 24 hours. 6 N.Y.C.R.R. §595.1(c)(13). "[R]eleases of petroleum or hazardous wastes" are exempt. 6 N.Y.C.R.R. §595.1(b). The reporting requirement applies to (1) "an owner or operator" of a "storage facility," (2) "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," (3) "any person in actual or constructive control or possession of a hazardous substance prior to its release," and (4) "any employee, agent or representative" of such persons. 6 N.Y.C.R.R. §595.3(a)(1). Further, releases of lesser quantities which cause or "may

reasonably be expected to cause" an 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). All such releases must be reported to the DEC spill hotline within two hours. 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).

j. **Requirements for Attorneys.** Most of the spill reporting requirements apply to the "owner or operator," and not their lawyer. 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? Rule 1.6 of the Rules of Professional Conduct (formerly DR 4-101) generally prohibits attorneys from revealing "confidential information" of a client, which is defined as "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," Rule 1.6(a) (generally encompassing "confidences" and "secrets" under the old rule). However, Rule 1.6(b) contains a number of exceptions, pursuant to which a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary," including "(2) to prevent the client from committing a crime," and "(6) when permitted or required under these Rules or to comply with other law or court order." Arguably, the spill reporting requirements falls under each. Since the Rule uses the word "may," it is not mandatory, there is no affirmative burden... to disclose." Nassau Co. 2001-07. Nonetheless, this 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 *Middleton*, the spill reporting by a lawyer may be "required by law," so he or she may fall under the exception of Rule 1.6(b)(6). 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."

Social Services Law §413 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). "[A] client's intent to commit a crime is not a protected confidence or secret." *People v. Andrades*, 4 N.Y.3d 355, 361-2, 795 N.Y.S.2d 497 (2005). Under this exception, an attorney acted properly in revealing the intent of his client to commit perjury after counseling his client not to perjure himself. *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001). Similarly, a lawyer may take appropriate action to prevent suicide, including disclosure of his client's intentions. N.Y. State 486; N.Y. City 1997-2. However, 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, but might have reached "a different balance, and outcome... for emergencies which involve the prevention of imminent serious bodily injury or death."

While a spill rarely creates a risk of "imminent serious bodily injury or death" (unless explosion or fire is imminent), some spills may lead to immediate serious environmental harm, so the exception might apply. If the threat is not so serious, then N.Y. City 2002-1 suggests that the duty to report a future crime does not apply.

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." This rule 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.

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, 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 may not be able to keep confidential information. An excellent discussion of this issue is contained in Randall C. Young, *Attorney-Client Privilege and Spills at Petroleum Bulk Storage Facilities*, 30 N.Y. Environmental Lawyer 1 (Spring 2010), in which Mr. Young also suggests that the client's Fifth Amendment privilege against self-incrimination might prevent an attorney from making a report.

k. **Misprision.** The general rule under New York law is that "criminalizing a citizen's mere failure to report a crime to the police is incongruous with our nation's system of justice." *People v. Williams,* 20 A.D.3d 72, 79, 795 N.Y.S.2d 561, 567 (1st Dep't 2005), *app. dis'd* 5 N.Y.3d 811, 803 N.Y.S.2d 40 (2005). "New York has never

recognized the common-law crime of misprision, the failure to report a crime." *People v Meyers*, 72 Misc. 2d 1003, 1006, 340 N.Y.S.2d 505 (Crim. Ct. Kings Co. 1973). Therefore, there is no general duty to report someone else's failure to report a spill under New York law. However, "misprision of a felony" is a federal crime:

> 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.

18 U.S.C. §4. 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 concealed 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 they are punishable by more than a year in jail. *See* 42 U.S.C. §§6928(d), 9603(b,c), 11045(b)(4). 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 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.

2. Materials Subject to Discovery.

a. **Privileges.** Counsel must be cautious to shield, to the extent possible, communications and other materials developed in the course of investigation by the work product or attorney/client privilege. The attorney/client privilege under CPLR §4503 protects "those communications made in confidence to an attorney for the purpose of seeking professional advice." *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 887 (1979). CPLR §3101(c) exempts the work product of an attorney from disclosure, which "includes memoranda, correspondence, mental impressions and personal beliefs conducted, prepared or held by the attorney." *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 396,

522 N.Y.S.2d 999, 1002 (4th Dep't 1987). But if the material could have been prepared by a lay person, it is not covered by this exception. Connors, *McKinney's Practice Commentary* C3101:28. Further, routing material through a lawyer does not make it privileged. *Id.* C3101:35. While under the Federal Rule of Evidence 501, federal common law governs these privileges (except that where a state claim or defense is involved, the state rule applies), the rules are generally the same in federal court. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

b. **Material Prepared for Litigation.** CPLR §3101(d)(2) protects from disclosure "materials prepared in anticipation of litigation" unless "undue hardship" and "substantial need" are shown. This includes non-party witness statements. *Yasnogordsky v. City of New York*, 281 A.D.2d 541, 722 N.Y.S.2d 248 (2d Dep't 2001). However, CPLR §3101(g) allows discovery of accident reports. While an investigation or accident report prepared in the ordinary course of business is normally discoverable, reports prepared exclusively for purposes of anticipated litigation are presumptively shielded. *Landmark Insurance Co. v. Beau Rivage Restaurant, Inc.*, 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep't 1986); Connors, *McKinney's Practice Commentary* C3101:33. FRCP Rule 26(b)(3) provides similar protection in federal court. Therefore, data and reports that are prepared in the normal course of business or submitted to government agencies are discoverable, such as test results, Phase I and II reports, and remedial investigations. This would include such things as interviews with past owners, operators and occupants conducted for a Phase I study, pursuant to 40 C.F.R. §312.23. The more difficult issue is whether data and reports produced for purposes of litigation are discoverable.

c. **Expert Disclosure.** While CPLR §3101(d) requires disclosure, for a testifying expert, of "the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion," it does not require production of an expert report. Connors, *McKinney's Practice Commentary* C3101:29A(H). In federal court, non-testifying experts are generally shielded from discovery absent "exceptional circumstances," FRCP Rule 26(b)(4)(B), but testifying experts must produce reports, including "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them." FRCP Rule 26(a)(2)(B). There is a split of authority interpreting FRCP Rule 26(a)(2)(B)(ii), requiring disclosure of "the data or other information considered by the witness in forming them." *Moore's Federal Practice* (3d ed.) §26.80[1][a]. While some courts have held that "core work product" materials, such as the strategies and mental impressions of attorneys conveyed to experts or draft reports reviewed by the lawyer, are privileged, *Haworth, Inc. v. Herman Miller, Inc.,* 162 F.R.D. 289 (W.D. Mich. 1995), the weight of authority indicates that these materials are discoverable. *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006); *Emerson Enterprises LLC v. Kenneth Crosby-New York, Inc.*, 2008 U.S. Dist. LEXIS 2651 (W.D.N.Y. 2008). However, Rule 26(b)(4) has been amended, effective December 1, 2010, to shield draft expert reports from discovery, as well as communications between a lawyer and expert, other than the facts or assumptions the expert relies upon.

d. **Data.** While there is no clear rule on whether data developed for purposes of litigation must be disclosed, the better course is to assume it is discoverable.

i. In *Dunning v. Shell Oil Co.*, 57 A.D.2d 16, 393 N.Y.S.2d 129 (3d Dep't 1977), the plaintiffs' geologist undertook testing, and created a report. While the plaintiffs were required to produce "test borings and related soil data," they did not have to produce the expert's opinions, since they were created for purposes of litigation.

ii. In *Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, 45 ERC 1821 (W.D.N.Y. 1997), the defendant was allowed discovery of documents produced by the plaintiff's consultant Rust, who was originally hired by the plaintiff's former law firm to handle site remediation. The materials were not work product, since there was no proof "that Rust was hired for the project to assist its counsel in providing legal advice, or that any of the documents were generated for that purpose." 45 ERC at 1824. Further, "[e]ven if these documents were prepared with an eye toward litigation, it is indisputable that the documents also contain information which plaintiff would be expected to obtain or compile in the ordinary course of its business of overseeing the performance of environmental remediation work under its contract with defendant." *Id.* In addition, "when a party takes a position in a case that places at issue the very information sought to be protected from disclosure by the work product doctrine, the protection may be waived." *Id.* Finally, "the assistance rendered by Rust was based on factual and scientific evidence obtained through studies and observation of the physical condition of the Durez site, and not through client confidences," and "[s]uch underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations.'" 45 ERC at 1826.

3. Spoliation

Spoliation is the destruction of evidence that "will fatally compromise the defense or leave the defendants without the means to defend the action." *Ifraimov v. Phoenix Industrial Gas, LLC*, 4 A.D.3d 332, 333, 772 N.Y.S.2d 78, 79 (2d Dep't 2004). "'When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation.'" *Standard Fire Insurance Company v. Federal Pacific Electric Co.*, 14 A.D.3d 213, 218, 786 N.Y.S.2d 41, 45 (1st Dep't 2004). A pleading may be struck "even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." *DiDomenico v C & S Aeromatik Supplies*, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452, 459 (2d Dep't 1998). Alternately, the less severe sanction of a negative inference may be imposed. *Ifraimov v. Phoenix Industrial Gas, LLC*, 4 A.D.3d 332, 334, 772 N.Y.S.2d 78, 79 (2d Dep't 2004). The federal courts follow a similar analysis:

> The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Once a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. *See id.* at 127. The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial

> judge, *see West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), and is assessed on a case-by-case basis. *See United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980).

Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).

In *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334 (D. Conn. 2009), PCB-laden soil samples taken from a golf club's property and electronic records of the analyses were not preserved. No "litigation hold" was placed on laboratory data or the samples. Counsel did, however, advise the purported owner of the source site that samples had been taken and remediation was going to begin in two weeks. Defendant Pitney-Bowes, the tenant of the alleged source property, sought to undertake testing and radioisotope dating, but could not do so. The district judge imposed as a sanction precluding admission of the data or other evidence plaintiff gained from the soil samples, holding that the duty to preserve the evidence arose by the time counsel was actively involved in the investigation and preparation for a cost recovery action:

> Unlike other cases involving difficulties of evidence preservation--for example, the scene of a fire in a house, *Howell*, 168 F.R.D. at 506--there is no reason offered why it was not feasible, either logistically or economically, for OBG to store the soil samples in its laboratory. Contrary to Innis Arden's contention, federal regulations permit rather than prohibit such storage. *See* 40 C.F.R. § 261.4(d)(vi) (authorizing temporary storage of a hazardous sample in a laboratory for "a specific purpose," including "until conclusion of a court case or enforcement action where further testing of the sample may be necessary"). Moreover, such retention is consistent with the procedures for sample storage that OBG developed. Innis Arden's culpability is based on OBG's continuous and on-going sample "deactivation," and on its counsel's failure to issue any evidence-preservation directive despite contemporaneously recognizing the potential negative consequences of evidence destruction. Under these circumstances, Innis Arden's failure to preserve evidence warrants sanctions.
>
> Pitney Bowes also claims that it is significantly prejudiced by the loss of the sample evidence because it now cannot analyze the soil samples for dating analysis and cannot assess the precise types of PCBs, as well as other compounds, in the sampling from Innis Arden's property. This prejudice is consistent with Innis Arden's recognition of the relevance of such additional testing--which never performed--in its correspondence with OBG. In his July 2005 e-mail, McCormack [counsel for Innis Arden] suggested doing the same types of further testing as a way of making the link between Pitney Bowes and Innis Arden more conclusive. Because the sediment samples and data no longer exist and cannot be re-tested, date-tested, or subjected to more refined testing, Pitney Bowes cannot conduct the analysis on which it might have developed evidence that the PCBs on Innis Arden's property were not caused by a post-1967 release from Pitney Bowes.

257 F.R.D. 334, 342. In a later decision, 629 F. Supp. 2d 175 (D. Conn. 2009), the plaintiff's expert opinions were struck due to insufficient data, attorneys' fees awarded by the magistrate were approved, and the case was dismissed.

Thus, if plaintiff does not give potentially responsible parties or insurers the opportunity to sample a site or examine tanks or other equipment prior to disposal, a spoliation claim may be raised. All potential parties should be invited to sample and examine the site, and observe tank removals or other major operations. The need to address an imminent threat to the environment, or respond to agency orders, may compromise this ability. A cautious plaintiff may seek a court order or stipulation to govern the defendants' rights in this regard. Where possible, split samples and tanks or piping at issue should be preserved, as well as chain of custody, lab results and other related data.

4. Access for Testing.

It is critical to generate evidence to support future cost recovery and protect subrogation rights prior to remediation. Generally, an expert should observe and test the site as soon as feasible, and forensic testing should be undertaken at an early juncture.

a. **Access Agreements.** Normally an access agreement should be executed prior to entry onto a third party's property. Typical provisions include:

- Advance notice.
- Limited duration/termination.
- Only a temporary license not a tenancy or easement.
- Split samples.
- Sharing of data and reports.
- Immediate notification regarding release reporting.
- Insurance coverage.
- Defense and indemnification for work.
- Reservation of rights and defenses.
- Restoration of site.
- Confidentiality.
- No representations regarding utilities or subsurface conditions.

While "all appropriate inquiry" for a Phase I study only requires "[a] visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography)," 40 C.F.R. §312.27(a)(2), the standard Brownfield Cleanup Agreement requires access:

> IV. Entry upon Site
>
> A. Applicant hereby agrees to provide access to the Site and to all relevant information regarding activities at the Site in accordance with the provisions of ECL 27-1431. Applicant agrees to provide the Department upon request with proof of access if it is not the owner of the site.
>
> B. The Department shall have the right to periodically inspect the Site to ensure that the use of the property complies with the terms and conditions of this Agreement. The Department

will generally conduct such inspections during business hours, but retains the right to inspect at anytime.

C. Failure to provide access as provided for under this Paragraph may result in termination of this Agreement pursuant to Paragraph XII.

b. **Discovery Devices.** Access can be gained for testing by discovery devices.

i. FRCP Rule 34(a)(2) allows a party to serve notice "to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." FRCP Rule 34(c) provides that if a subpoena is served, "a nonparty may be compelled... to permit an inspection."

ii. CPLR §3120(1) provides that "[a]fter commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum...."

(ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

iii. Pre-action discovery may be allowed by court prefer "to aid in bringing an action," or "to preserve information." CPLR §3102(c).

c. **Warrantless Entry.**

i. **Environmental Statutes.** CERCLA §104(e)(4)(A), 42 U.S.C. §9604(e)(4)(A), authorizes the government to enter property "if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant" in order "to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants." However,"before leaving the premises," the owner, operator or tenant must be given "a receipt describing the sample obtained and, if requested, a portion of each such sample." CERCLA §104(e)(4)(B), 42 U.S.C. §9604(e)(4)(B). DEC has similar authority under ECL §27-1309(3) to "enter any inactive hazardous waste disposal site and areas near such site and inspect and take samples of wastes, soils, air, surface water, and groundwater." It should give advance notice, and give receipts and offer split samples. ECL §27-1309(4). Towns engineers are authorized to enter property "for the purpose of making surveys, examinations or investigations, including the making of test pits and test borings." Town Law §32-a.

ii. **Constitutional Protections.** The Fourth Amendment and Article 1, §12 of the New York Constitution prohibit warrantless searches, and require "probable cause" prior to the issuance of a warrant for a search to determine code compliance. Agencies generally cannot enter without a subpoena. *Marshall v Barlow's, Inc.*, 436 U.S. 307 (1978). An "administrative" search warrant may be issued, provided "reasonable legislative or administrative standards for conducting an... inspection are satisfied." *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S. Ct. 1727, 1735 (1967). The authority for such devices under New York law is unclear. *Cf.* Criminal Procedure Law Part 190 (criminal subpoenas); ECL §27-1309(2) (authorizing subpoenas for records and testimony). But in an emergency, a reasonable warrantless entry may be justified. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, (1978). Further, warrantless inspections may be allowed for closely regulated industries where there is a reduced expectation of privacy. *Colonade Corp. v United States*, 397 U.S. 72, 90 S. Ct. 774 (1970); *United States v Biswell*, 406 U.S. 311, 92 S. Ct. 1593 (1972).

d. **Unauthorized Entry.** Unauthorized entry for testing is a trespass. *Benderson v. Ulrich/34 Chestnut Street, LLC,* 57 A.D.3d 1417, 871 N.Y.S.2d 547 (4th Dep't 2008). In *Benderson*, a contractor entered the property to do testing after a purchase and sale contract and access agreement had expired, and contamination was found that required remediation. This was actionable, because discovery of previously unknown contamination on its property can result in liability for the remedial costs:

> Plaintiffs allege in the complaint that, by reason of defendant's conduct, they have "incurred environmental remediation costs in an amount to be determined at trial and the value of the Property has been impaired to the plaintiff[s'] damage in the amount to be determined at trial." We conclude that defendant failed to meet its initial burden of establishing that plaintiffs did not sustain any damages. Indeed, the attorney for plaintiffs who was responsible for negotiations stated in an opposing affidavit that "plaintiffs[s] would not have incurred [the costs of environmental remediation] but for the Defendants['] trespass." [citation omitted]

57 A.D.3d at 1419, 871 N.Y.S.2d at 548-9.

5. Notice to Insurers.

Upon identifying an occurrence that may result in a potential claim, it is prudent to give immediate notice to all carriers that may provide coverage. This includes not only policies held by the injured party, but also, to the extent they can be identified, insurers of third parties who may be liable for environmental contamination.

a. **Late Notice.** In New York, the rule has long been that late notice of an occurrence that may result in a claim precludes coverage, even if there is no prejudice to the insurer. *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.,* 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972); *Olin Corp. v. Insurance Co. of North America*, 743 F. Supp. 1044, 1053 (S.D.N.Y. 1990), *aff'd* 929 F.2d 62 (2d Cir. 1991). In most other states,

prejudice must be shown. *See, e.g., Solvents Recovery Service of New England, Inc. v. Hartford Ins. Co.*, 218 N.J. Super. 49 (N.J. App. Div. 1987); *West American Insurance Company v. Hardin, Exrx.*, 59 Ohio App.3d 71, 571 N.E.2d 449 (Ohio Ct. App. 1989). However, by Laws of 2008, Ch 388, Insurance Law §3420(a)(5) was added, applicable to policies issued on or after January 17, 2009, to eliminate the "no prejudice" rule. This new rule does not apply to older policies, *Briggs Ave. LLC v. Insurance Corp. of Hannover*, 11 N.Y.3d 377, 870 N.Y.S.2d 841 (2008), which often are the source of coverage for environmental liabilities.

b. **Evidence of Coverage.** An insured must prove, by a preponderance of the evidence, the existence and terms of a lost insurance policy. *Gold Fields American Corporation v. Aetna Casualty and Surety Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup. Ct. N.Y. Co. 1997), *Employers Insurance of Wausau v. The Duplan Corp.*, 1999 U.S. Dist. LEXIS 15368 (S.D.N.Y. 1999). "Of necessity, policyholders tender secondary evidence to establish the existence and terms of missing policies." West, *General Practice in New York*, Insurance §31.20. *See also Gold Fields American Corporation v. Aetna Casualty and Surety Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup. Ct. N.Y. Co. 1997). Such secondary evidence often comes in the form of witnesses, "including individuals involved in the placement of the missing or incomplete policy or claims personnel who adjusted claim thereunder," who "may be able to testify as to the content of the original document." *Id.* Further, specimen policies can be used to establish the terms of the policies at issue. *Id.*; *Maryland Cas. Co. v. W.R. Grace & Co.*, 1995 WL 562179 (S.D.N.Y. 1995). Historic records, including minutes and prior litigation records, should be searched, previous insurance brokers, outside counsel and former employees should be consulted, and it may even be prudent to hire insurance archeologists to try to locate evidence of coverage or provide standard policy terms.

c. **Claims Against the Responsible Party's Insurer.** Two New York statutes give a right to make a direct claim against a responsible party's insurance company. Consequently, reasonable diligence must be used to be sure these insurers are put on notice as soon as contamination is discovered. If their identity is not known, requests should be made to the responsible party to identify the insurers and put them on notice.

i. **Navigation Law §190.** The New York Oil Spill Law provides as follows:

> Claims against insurers. Any claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

Navigation Law §190. In *Snyder v. Newcomb*, 194 A.D.2d 53, 60, 603 N.Y.S.2d 1010, 1015 (4th Dep't 1993), the Fourth Department held that "section 190 is explicit in providing that 'any claim for damages by any injured person... may be brought directly against... the insurer,'" and ruled that "the statute creates a direct cause of action."

ii. **Insurance Law §3420(a)(2).** This statute provides that if a judgment "shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

iii. **Notice.** While an insurer must be placed on notice of a claim by an injured party, Insurance Law §3420(a)(3) allows the notice to be given by the injured party. This provision is applicable to the claims by a third party under Navigation Law §190. *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep't 1993). Thus, "[w]here the insured fails to give proper notice, the injured party can give notice herself, thereby preserving her right to proceed directly against the insurer," and "is not to be charged vicariously with the insured's delay." *Appel v. Allstate Insurance Co.*, 20 A.D.3d 367, 799 N.Y.S.2d 467 (1st Dep't 2005); *Lauritano v. American Fidelity Fire Insurance Co.*, 3 A.D.2d 564, 568-9, 162 N.Y.S.2d 553, 557 (1st Dep't 1957), *aff'd* N.Y.2d 1028, 177 N.Y.S.2d 530 (1958). The "reasonable notice required of an injured party is of necessity measured by standards different than those applied to the insured." *Price v. Allstate Insurance Co.*, 12 A.D.2d 911, 210 N.Y.S.2d 945, 946 (1st Dep't 1961); *Lauritano v. American Fidelity Fire Insurance Co.*, 3 A.D.2d 564, 568-9, 162 N.Y.S.2d 553, 557 (1st Dep't 1957), *aff'd* N.Y.2d 1028, 177 N.Y.S.2d 530 (1958). "[T]he sufficiency of notice by an injured party is governed not by mere passage of time but by the means available for such notice." *National Grange Mut. Ins. Co. v. Diaz*, 111 A.D.2d 700, 701, 490 N.Y.S.2d 516, 518 (1st Dep't 1985). It is acceptable to give notice to an insurer within a reasonable time of discovering that the existence of a policy and the identity of the insurer after using reasonable diligence to discover them. *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep't 1993); *State of New York v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep't 1995). In *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep't 1993), the court held that notice given approximately five years after discovery of a spill was timely, but in *State of New York v. Taugco, Inc.,* 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep't 1995), a two-year delay after learning of the identity of the insurer was too long.

iv. **Disclaimer.** Where an insurer's disclaimer merely states that the insured did not give timely notice, but does not mention late notice by the injured third party, the disclaimer is not effective as to the injured party, and the late notice defense is waived or barred by estoppel. *General Accident Insurance Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979). Thus, in *Henner v. Everdry*, 74 A.D.3d 1776, 902 N.Y.S.2d 765 (4th Dep't 2010), plaintiffs who sued under Navigation Law §190 could proceed against the discharger's insurer in spite of a four-year delay between the discharge and the notice, since the insurers only disclaimed on the basis of the discharger's late notice, and a reservation of rights letter was not a disclaimer.