REPORTING RELEASES FROM CLIENTS' UNDERGROUND STORAGE TANK SYSTEMS: SHOULD ATTORNEYS HAVE THE HOT LINE ON SPEED DIAL?

*Harriett Jane Olson**
*Kathleen T. Kneis***

I. INTRODUCTION

Reporting requirements under environmental statutes are not a new phenomenon.[1] Such self-policing methods are an integral part of the efforts of state and federal environmental agencies to control the degradation of the environment caused by the discharge of hazardous wastes.[2] The regulations promulgated under New Jersey's Underground Storage Tank (UST) Law,[3] however, take bold new steps toward expanding the range of persons who are required to report.[4] Unlike most reporting requirements which impose the obligation to report on the owner/operator of a facility,[5] on a permittee,[6] or on a person who is in

* B.A., Houghton College, 1980; J.D., Harvard University, 1983. Partner, Pitney, Hardin, Kipp and Szuch, Morristown, N.J.

** B.A., Pennsylvania State University, 1986; J.D., Georgetown University, 1989. Associate, Pitney, Hardin, Kipp and Szuch, Morristown, N.J.

1 *See, e.g.*, 42 U.S.C. § 9603 (1988) (discharge reporting requirement under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)); N.J. STAT. ANN. § 58:10-23.11e (West 1990) (discharge reporting requirement under New Jersey's Spill Compensation and Control Act (The Spill Act)); N.J. STAT. ANN. § 13:1K-16(a) (West 1990) (discharge reporting requirement under New Jersey's Discharge Act (The Suspicion Statute)); N.J. ADMIN. CODE § 7:14A-2.5(a)(14)(vi)(1) (1990) (regulatory discharge reporting requirement under New Jersey's Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1990) (WPCA)).

2 Note, *Attorney-Client Confidentiality: The Ethics of Toxic Dumping Disclosure*, 35 WAYNE L. REV. 1157, 1170 (1989). The author notes that because federal and state agencies can only effectively monitor the discharge of hazardous substances into the environment if industries adhere to these reporting requirements, violations of the reporting requirements should be strictly prosecuted. *See id.*

3 N.J. STAT. ANN. §§ 58:10A-21 to -37 (West 1990). The UST statute and regulations, N.J. ADMIN. CODE §§ 7:14B-1.1 to 15.10 (1990), present a comprehensive scheme for the registration, design, construction, installation, operation, maintenance, systematic testing and monitoring, permitting and closure of underground storage tanks. *See id.*

4 *See* N.J. ADMIN. CODE § 7:14B-7.3(a) (1990).

5 *See, e.g.*, Suspicion Statute, N.J. STAT. ANN. § 13:1K-16(a) (West 1990) ("An owner or operator of an industrial establishment . . . who knows or suspects the occurrence of any hazardous discharge on site . . . shall . . . file a written report

some way liable for a discharge,[7] the UST regulations impose the obligation of reporting on *any person* with knowledge of a confirmed discharge.[8]

Current environmental legislation imposes liability for discharges on owners/operators[9] and permittees,[10] imposing a reporting requirement on these parties would seem to be in accord with current public policy. Further, imposing such an obligation on anyone aware of a discharge would seem to be a way to ensure that otherwise unreported discharges would be brought to the attention of the New Jersey Department of Environmental Protection (NJDEP or Department).[11] Assuming, however, that the goals of this broadly applicable requirement are legitimate, the question of whether or not to impose a discharge reporting requirement on persons who are not responsible for either the dis-

---

concerning this hazardous discharge with the governing body of the municipality . . . and the local board of health.").

[6] *See, e.g.*, Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1990). The regulations promulgated under this act require all New Jersey Pollutant Discharge Elimination Systems (NJPDES) permit holders to report the discovery of any discharge which "may endanger health or the environment." N.J. ADMIN. CODE § 7:14A-2.5(a)(14)(vi)(1) (1990). Note that the 1990 amendments to the WPCA, P.L. 1990, ch. 28, also authorize the DEP to *request* information relating to a discharge or potential discharge from "*any person* who the department has reason to believe has, or may have" such information. N.J. STAT. ANN. § 58:10A-15(a) (emphasis added). Unlike the UST regulatory disclosure requirement, however, this new WPCA provision does not require "any person" to *volunteer* the applicable information. *See id. See also infra* note 8 for text of reporting requirement.

[7] *See, e.g.*, N.J. STAT. ANN. § 58:10-23.11e (West 1990) ("Any person who may be subject to liability for a discharge . . . shall immediately notify the department.").

[8] N.J. ADMIN. CODE § 7:14B-7.3(a) provides in pertinent part that:

> *[a]ny person*, including, *but not limited to*, the owner or operator of an underground storage tank system or contractor hired to install, remove or test an underground storage tank system shall, upon confirming a release, immediately report the release to the appropriate local health agency in accordance with local requirements, and the Department's Environmental Action Hotline. . . .

Id. (emphasis added). The regulations distinguish between suspected and confirmed releases. *See* N.J. ADMIN. CODE §§ 7:14B-7.1 to -7.3 (1990). Suspected releases must be confirmed or disproved, N.J. ADMIN. CODE § 7:14B-7.2(a), but only confirmed discharges must be reported. N.J. ADMIN. CODE § 7:14B-7.3.

[9] *See, e.g.*, N.J. STAT. ANN. § 58:10-23.11g(b) (Spill Act provision discussing the amount of damages recoverable against the owner or operator of a major facility).

[10] *See, e.g.*, N.J. STAT. ANN. § 58:10A-10 (West 1990); N.J. ADMIN. CODE § 7:14A-2.5(a)1 (1990). These statutory and regulatory provisions under the WPCA provide for civil and criminal sanctions for violations of, *inter alia*, permits issued pursuant to the Act.

[11] As the NJDEP points out in the comments accompanying the publication of the new UST regulations, adding to the list of those responsible to report "adds another layer of protection to human health and the environment." 22 N.J. REG. 2781 (Sept. 4, 1990).

charge or the UST system.[12] The requirement creates a particular burden for attorneys who are faced with an apparent conflict between their duty under the New Jersey Rules of Professional Conduct (NJRPC) to keep confidential all information relating to the representation of their clients[13] and to comply with a provision of law which might be construed to require them to report.

In analyzing this conflict, Part II of this article will discuss the background of the UST discharge reporting requirement and the UST regulations to determine if the broad "any person" language was intended to create a reporting requirement for attorneys. Part III of this article will assume that the reporting requirement was intended to extend to attorneys and will discuss the conflict which would result between the attorney's duty to report (as may be required by regulation and by certain NJRPC provisions) and not to report (as generally required by NJRPC Rule 1.6).

The discussion under Part III will first present a brief overview of the duty of confidentiality, the theory underlying it, and why there are necessary exceptions to the duty. Part III will then evaluate whether, irrespective of the wisdom of imposing a reporting obligation on an attorney, the UST reporting obligation legally can be imposed in light of the exceptions to the duty of confidentiality. Two exceptions are particularly relevant in connection with the UST reporting requirement: the exception stating that an attorney must disclose information necessary to prevent a client from committing an illegal act likely to result in substantial harm,[14] and the exception which permits, but does not require, an attorney to disclose information when disclosure

---

12 For example, as stated by one person who provided comments on the regulations during the regulatory review process, imposing a duty to report on a contractor or consultant inappropriately imposes a burden on the client relationship and creates a situation where consultants may be forced to choose between reporting, and thereby alienating a client who has forbidden disclosure, and not reporting and thereby risking the consequences of the failure to report. *See* 22 N.J. Reg. 2781 (Sept. 4, 1990). *But see infra* text accompanying notes 33-36, wherein the applicability of the UST penalty provisions to anyone other than owner or operator is questioned.

13 NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1990) [hereinafter NJRPC] states the general rule that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)." *Id.*

14 NJRPC 1.6(b)(1) (1990).

is required by other law.[15] The analysis under Part III concludes that the latter exception provides little direction for the attorney in connection with the UST reporting requirement.

Finally, Part IV of this article will present a practical approach for the attorney who is uncertain where his or her obligations lie when the UST reporting requirement clashes with a duty to the client.

II. The Applicability of the UST Reporting Requirement To Attorneys

Read literally, the UST reporting requirement applies to attorneys.[16] Despite the sweeping language of this provision, however, examination of the reporting requirement in conjunction with the NJDEP's response to comments on the draft regulations[17] and in conjunction with the UST regulation's penalty provision,[18] could lead one to conclude that the NJDEP did not intend to extend the reporting obligations to attorneys.

The first question regarding applicability of the UST reporting requirement to attorneys is raised by the fact that the language of the reporting requirement introduces an active discovery element in imposing the obligation to report. Focusing on the language of the provision, the reporting obligation is imposed on "[a]ny person . . . *upon confirming a release*."[19] The regulations list five methods which may be used to confirm a release, including visual inspection and ground water monitoring.[20] As it

---

15 NJRPC 1.6(c)(3) (1990).

16 Although not specifically mentioning attorneys, the UST reporting requirement imposed on "any person" is broad enough to include attorneys. *See* N.J. Admin. Code § 7:14B-7.3(a) (1990). The UST regulations define "person" to include "any individual, partnership, company, corporation, consortium, joint venture, commercial or any other legal entity, the State of New Jersey, or the United States Government." N.J. Admin. Code § 7:14B-1.6 (1990).

17 *See* 22 N.J. Reg. 2781 (Sept. 4, 1990). In compliance with the Administrative Procedure Act, N.J. Stat. Ann. §§ 52:14B-1 to -15 (West 1990), an agency must publish a summary of a proposed rule and an explanation of its purpose. *See* N.J. Stat. Ann. § 52:14B-4(a)(2) (West 1990). An agency must then accept and consider public comments on the proposed rule prior to adoption. *See id.* at § 14B-4(a)(3). A summary of the comments and the agency's response are published along with the final regulations in the New Jersey Register. *See id.* at § 14B-4(a)(4).

18 N.J. Admin. Code § 7:14B-12.1(a) (1990).

19 N.J. Admin. Code § 7:14B-7.3(a) (1990) (emphasis added).

20 *See id.* The complete list of confirmation methods listed is as follows:

1. Test, sampling or monitoring results from a leak or discharge detection method specified in N.J. Admin. Code § 7:14B-6.2, 3, and 4 that indicate that a release has occurred;
2. Analyses by a laboratory, certified pursuant to N.J. Admin. Code

is not likely that an attorney would visually inspect a tank,[21] let alone conduct ground water monitoring or any of the other "scientific" methods suggested by the regulations,[22] one could argue that an attorney would not be implicated by the reporting requirement because he or she would not actually be the person confirming a release.

Such a narrow analysis, however, may rely on too literal a reading of the regulations. The regulations include latitude for a variety of scientific and practical discharge confirmation methods.[23] Further, although a court might not uphold the NJDEP's conclusion, the Department has indicated that mere receipt of a report of a confirmed release gives rise to an obligation to report.[24] Thus, the NJDEP can be expected to take the position that an attorney who has learned of a confirmed discharge from a client or a client's consultant would be required to report.[25]

Other aspects of the UST reporting requirement, however, may still be read to indicate that the NJDEP did not intend to include attorneys as parties obligated to report. First, although the reporting requirement is not specifically limited to owners/operators and contractors are not listed in the reporting provision by way of limitation,[26] one could conclude that the NJDEP *primarily* intended to reach the owner/operator and contractor with the provision since they are the only parties specifically men-

---

§ 7:18, of ground water samples which indicate the presence of contamination in the ground water immediately beneath and/or in the immediate vicinity of the underground storage tank system;

3. Results from a closure plan conducted in accordance with the requirements of N.J. ADMIN. CODE § 7:14B-9.2(b) or 9.3(b) which indicate the presence of contamination in the ground water immediately beneath and/or in the immediate vicinity of the underground storage tank system;

4. Any other method, including visual inspection, that confirms that a release has occurred; or

5. A release is confirmed based upon the investigation conducted under N.J. ADMIN. CODE § 7:14B-7.2.

N.J. ADMIN. CODE § 7:14B-7.3(a) (1990).

21 Although such a situation is not impossible to imagine.

22 *See supra* note 20 for the full list of permitted methods.

23 *See* N.J. ADMIN. CODE § 7:14B-7.3(a)4 (1990). In addition to the specific discharge confirmation methods provided by the regulations, "[a]ny other method" which confirms a release is acceptable. *Id.*

24 The DEP has commented that "anyone *having knowledge of a confirmed release* has a responsibility to report . . . ." 22 N.J. Reg. 2781 (Sept. 4, 1990) (emphasis added).

25 This requirement is, of course, in addition to the client or the consultant's independent obligation to report. The regulations do not state that one report of a release satisfies the reporting obligations of all of the persons who must report.

26 *See supra* note 8 for text of the reporting requirement.

tioned.[27] Such a conclusion is supported by the practical consideration that the owner/operator, or the contractor hired to conduct tank testing, or both, will be the only persons on site when a discharge is confirmed and so would be the only persons able to report "immediately" as required.[28] They may also be the *only* parties presented with an opportunity to report.[29]

NJDEP's intent to include attorneys is further questioned by the Department's response to the concerns expressed over the reporting requirements.[30] Although persons providing comments on the regulations during the regulatory review process mentioned concerns over applying the requirement to both contractors and attorneys,[31] the NJDEP only *specifically* responded to the concern about contractors in its response.[32] The Department may have been trying to avoid the attorney obligation issue in light of potential conflicts with the duty of confidentiality; however, if the Department were committed to requiring reporting

---

27 *Id.*

28 *See* N.J. ADMIN. CODE § 7:14B-7.3(a) ("Any person . . . shall, upon confirming a release, *immediately* report the release . . . .") (emphasis added).

29 The owner/operator and consultant may be the only parties to learn of the discharge, *especially* if the attorney's duty of confidentiality is not found to preclude his or her reporting obligation under the regulations. Although a noncompliant owner/operator would be hard-pressed to keep knowledge of a confirmed discharge from the consultant who performed the testing, the owner/operator who knows of the attorney's duty to report would likely choose not to advise (and would likely prevent the consultant from advising) the attorney of a confirmed discharge. Thus, the attorney is, practically speaking, only a secondary source of information with regard to reporting. Consequently, the attorney's "obligation" to report may never arise.

30 *See* 22 N.J. Reg. 2781 (Sept. 4, 1990).

31 *Id.*

32 *Id.* ("Adding contractors to the list of responsible people adds another layer of protection to human health and the environment."). The remainder of the NJDEP response is couched in terms of the general obligation of any person to report. Specifically, the NJDEP's response indicates that:

> [i]t is the Department's position that anyone having knowledge of a confirmed release has a responsibility to report that release to the Department for investigation and cleanup. Adding contractors to the list of responsible people adds another layer of protection to human health and the environment. The rules place the burden for reporting on any person with knowledge of a confirmed release and that person or persons will be subject to penalties for noncompliance as well as any person who interferes with anyone complying with the rules.

Id. Despite reiteration of the obligation of any person to report, it seems that the more telling portion of the Department's response is that which adds only contractors to "the list of responsible people" (presumably the more standard "list" of obligated parties i.e., owner or operators and others responsible for a discharge under other environmental laws). *See supra* text accompanying notes 5-7.

from attorneys, one would expect to find this sentiment included in the Department's response to this specific question.

The scope of the penalty provision in the UST regulations[33] also supports the theory that the Department did not intend to include lawyers in the reporting requirement. The penalty provision applies only to an *owner or operator* who fails to comply with the regulations.[34] Because penalty provisions are narrowly construed,[35] the Department will be constrained from expanding the scope of this provision. Consequently, while an attorney might be found to have a duty to report, he or she cannot be subjected to a penalty for failure to do so.[36]

Obviously, the only *certain* conclusion which may be drawn from the preceeding discussion is that the NJDEP *might* not have

---

[33] *See* N.J. ADMIN. CODE § 7:14B-12.1 (1990).

[34] N.J. ADMIN. CODE § 7:14B-12.1(a) provides that:

> [f]ailure by *an owner or operator* of an underground storage tank system to comply with any requirement of the State Act or this chapter may result in denial or revocation of the owner's or operator's registration or permit for the tank system and/or the imposition of civil administrative penalties, issuance of administrative compliance orders, imposition of civil penalties, initiation of civil action for injunctive relief, or petitioning the Attorney General to bring a criminal action in accordance with N.J.S.A. 58:10A-10 and N.J.A.C. 7:14-8.

Id. (emphasis added).

[35] *See, e.g.*, State v. Valentin, 105 N.J. 14, 17, 519 A.2d 322, 323 (1987) ("[P]enal statutes must be strictly construed."); State v. Provenzano, 34 N.J. 318, 322, 169 A.2d 135, 137-38 (1961) ("The rule that a penal statute should be strictly construed . . . means that a statute shall not be extended by tenuous interpretation beyond the fair meaning of its terms lest it be applied to persons or conduct beyond the contemplation of the Legislature."); State v. Fair Lawn Service Center, Inc., 20 N.J. 468, 472, 120 A.2d 233, 235 (1956) ("Penal statutes are to be strictly construed and while it may be said that it is to be presumed that the Legislature would not denounce certain acts without providing a penalty, yet penal consequences cannot rest upon a mere presumption. Such legislative purpose must be expressed, and in clear and direct language."); 3A SUTHERLAND, STATUTORY CONSTRUCTION § 75.06 (4th ed. 1986) ("A penalty provision in [an environmental statute] should be strictly construed in favor of the person being penalized.").

[36] This conclusion may be questionable since the penalty provision of the statute under which the UST regulations were promulgated extends to *any person* who violates the act. *See* N.J. STAT. ANN. § 58:10A-32 (West 1990) ("A person violating the provisions of this act is liable to the penalties prescribed in section 10 of . . . [N.J. STAT. ANN. § 10A-10]."). The penalties imposed by N.J. STAT. ANN. § 58:10A-10, which include all those sanctions specifically enumerated in N.J. ADMIN. CODE § 7:14B-12.1(a) (*see supra* note 34 for the text of the regulatory penalty provision), similarly extend to "any person . . . in violation of any provision of this act . . . ." N.J. STAT. ANN. § 58:10A-10 (West 1990). It may be useful to note, however, that the statute merely delegates to NJDEP the authority to require reporting, and does not include the broad language of the regulation's reporting requirement. *See* N.J. STAT. ANN. § 58:10A-25a(5) (West 1990). Consequently, it is not clear that an attorney's failure to report would violate the statute itself.

specifically intended to include attorneys within the purview of the UST reporting requirement. Attorneys, therefore, would be taking a risk in not reporting a client's confirmed discharge because the literal terms of the reporting requirement do extend to attorneys, even if the obligation *is* considered by the NJDEP to be secondary to that of an owner/operator or consultant. The safer conclusion would be to assume that the reporting requirement does apply to attorneys. Such a conclusion, however, does not necessarily mean that an attorney must comply with the reporting requirement. As explained in Part III of this article, determining whether the obligation to report extends to attorneys is only an initial consideration. Concluding that it does extend to attorneys raises the larger issue of whether an attorney must, in any event, comply.

III. THE CONFLICT BETWEEN THE UST REGULATIONS' DUTY TO DISCLOSE AND THE RULES OF PROFESSIONAL CONDUCT'S DUTY NOT TO

As a general rule, subject to few exceptions, an attorney has a duty not to reveal information relating to the representation of a client.[37] Although the rule protecting confidential communications originated from a consideration "for the oath and honor of the attorney,"[38] the more current view is that it "rest[s] upon the policy in favor of affording to the client freedom from apprehension in consulting his legal adviser."[39] Courts and commentators

---

[37] *See* NJRPC 1.6(a) (1990). This ethical rule of confidentiality is far broader than the evidentiary attorney-client privilege. "In marked contrast to the privilege, confidentiality applies to *all* information *about* a client, not simply to *communications from* a client." G.C. HAZARD, JR. & W. W. HODES, THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 140 (emphasis in original) [hereinafter HAZARD & HODES]. *See also* AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1981), *portions reprinted in* A.B.A.J. 1, 10 (Supp. Oct. 1981) [hereinafter ABA FINAL DRAFT] ("The confidentiality rule applies. . .to all information relating to the representation [of a client], whatever its source."). The ethical rule also governs at all times and prohibits voluntary disclosures (except those made in the furtherance of representation) as opposed to the evidentiary privilege which "spring[s] into being merely in cases where a lawyer faces inquiry from others." HAZARD & HODES, *supra* at 140-41. The duty of confidentiality discussed in Part III of this article concerns the broader ethical rule.

[38] *In re* Richardson, 31 N.J. 391, 396, 157 A.2d 695, 698 (1960) (citing 8 WIGMORE, EVIDENCE § 2290, at 547-48 (3d. ed. 1940)).

[39] *Id.* Although the *Richardson* Court was discussing the duty of confidentiality arising under the evidentiary privilege, *see id.*, the same values and purposes underlying the evidentiary rule would likewise appear to apply to the ethical rule, given the New Jersey Supreme Court's reliance on authorities discussing the evidentiary

believe that such freedom from apprehension will result in free and full disclosure by the client to the attorney,[40] thus facilitating more competent service to the client.[41] Other benefits cited as being derived from full client disclosure are the ability of an attorney to prevent social harms by counseling a client to comply with the law,[42] and the enhancement of "the autonomy and individual liberty of citizens" by creation of a zone of privacy that the government cannot invade.[43]

The duty of confidentiality, however, is not absolute.[44] Because an attorney has duties to the legal system and general public in addition to the client,[45] situations do occur in which the duty to keep confidential information relating to the representation is overcome by an attorney's "duty to see that justice is done."[46] In fact, the New Jersey Supreme Court has, in the past,

---

privilege in opinions discussing the ethical rules. *See In re* Advisory Opinion No. 544 of N.J. Supreme Ct., 103 N.J. 399, 511 A.2d 609 (1986); *see also* HAZARD & HODES, *supra* note 37, at 140 ("[I]t is not uncommon for courts and other authorities to mingle the two concepts [the evidentiary and the ethical privilege] uncritically.").

40 *Advisory Opinion No. 544*, 103 N.J. at 405, 511 A.2d at 612.

41 HAZARD & HODES, *supra* note 37, at 128.

42 *Id.* at 129. *But see* Note, *supra* note 2, at 1174 n.99 wherein the author summarizes the opinion of one critic of this position:

> Subin argues that it is unwarranted to assume a client will not reveal relevant facts without a pledge of confidentiality. He suggests that most people use attorneys to help them through the complex legal system. A client will tell his [sic] attorney whatever he [sic] feels the attorney needs to know to help the client achieve his goals. Therefore, a client's revelation of facts is governed by the client's self-interest, not by any assurances of confidentiality.

Id. (citing Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1116-72 (1985)). Subin's view presupposes that the client knows what facts are important to the legal analysis. This is often untrue. In the view of the authors of this article, adding incentive for clients to filter the information disclosed to their attorneys is likely to impair the quality of the representation.

43 HAZARD & HODES, *supra* note 37, at 129.

44 *See infra* note 48 for the list of exceptions to the duty of confidentiality under the NJRPC.

45 "A lawyer is an officer of the legal system, a representative of clients and a public citizen having special responsibility for the quality of justice." ABA FINAL DRAFT, *supra* note 37, at 5.

46 *See* Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 335 (1976) [hereinafter Callan & David]. The duty of confidentiality rests on a presumption of the lawfulness of the client's current activities. HAZARD & HODES, *supra* note 37, at 141. "Lawyers cannot be permitted to be the instruments of their clients' criminal and/or fraudulent activities." REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON THE MODEL RULES OF PROFESSIONAL CONDUCT, 112 N.J.L.J. Supp. 1, 10 (Jul. 28, 1983) [hereinafter REPORT OF DEBEVOISE COMMITTEE]. Thus, in one case, the New Jersey Supreme Court held that Disciplinary Rule 4-101(B) (predecessor

expressed a bias toward the principle of full disclosure when it has come into conflict with the principle of confidentiality.[47] In recognition of the fact that the duty of confidentiality is not, and cannot be, absolute, NJRPC 1.6 provides certain enumerated exceptions, both mandatory and permissive, to the general rule of confidentiality.[48] As set forth below, two of the exceptions are

---

to RPC 1.6) did not allow an attorney to withhold information concerning the whereabouts of his client where nondisclosure would have allowed the client to evade compliance with a court judgment which incorporated terms that the client had consented to. Fellerman v. Bradley, 99 N.J. 493, 509 (1985). To hold otherwise, the Court stated, "would permit a party 'to mock justice' . . ., with none of the policies underlying the rationale for protecting a client's secrets advanced in the process." *Id.*

[47] *See* REPORT OF DEBEVOISE COMMITTEE, *supra* note 46, at 10. In this Report, the Debevoise Committee cites to *In re* Kozlov, 79 N.J. 232, 241-42, 398 A.2d 882, 887 (1979) and *In re* Richardson, 31 N.J. 391, 396-97, 157 A.2d 695, 697 (1960), for the proposition that "in the balancing act needed to resolve the conflicting principles of full disclosure versus confidentiality, public policy demands that full disclosure is the more fundamental principle." REPORT OF DEBEVOISE COMMITTEE, *supra*, at 10. Furthermore, in dismissing arguments that various exceptions to the Model Rule concerning confidentiality should be eliminated, the Debevoise Committee stated that such a move would jeopardize the public's esteem for the legal profession. *Id.* The Committee's Report also expressed concern for the protection of attorneys stating that:

> Lawyers cannot be permitted to be the instruments of their clients' criminal and/or fraudulent activities. . . .Even if the disciplinary rules were to permit lawyers to represent clients who were committing criminal and fraudulent acts without the attorney disclosing those acts so as to prevent their consummation, it would be illusory to think that the lawyers would be shielded from civil and perhaps criminal liability as participants in the crimes and frauds.

Id.

[48] NJRPC 1.6(b) and (c) (1990) provide:

> (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client:
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
>
> (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
>
> (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
>
> (3) to comply with other law.

particularly relevant to the question of whether an attorney must report a confirmed discharge at a client's facility. The first is the mandatory rule that an attorney must reveal confidential information where he or she believes it is necessary to prevent a client from committing an illegal act which is likely to result in substantial harm or injury (the "substantial harm" exception).[49] The second and perhaps more troublesome exception is the permissive rule allowing an attorney to reveal confidential information where the attorney believes it is necessary to comply with other law (the "other law" exception).[50]

A. Illegal Act Likely To Result In Substantial Harm

One of the issues which relates to applying the "substantial harm" exception to the question of whether an attorney should report a confirmed discharge arises from the language of the exception itself. NJRPC 1.6(b)(1) requires an attorney to disclose if the disclosure will "*prevent* the client . . . from committing a criminal, illegal or fraudulent act . . . ."[51] The prospective nature of this exception, however, may render it inapplicable to the issue of whether or not an attorney must report a client's failure to report or to take the required corrective action.[52]

The client's failure to report is a *continuing* violation and not one which is clearly in the past (which would not be disclosable) or purely expected to occur in the future (which would be disclosable, to the extent it is likely to cause substantial harm). Consequently, it is not squarely within the NJRPC 1.6(b)(1) category of required disclosure. Although commentators note that disclosure of a continuing violation is improper if it would result in the

---

Id.

49 *See* NJRPC 1.6(b)(1) (1990), as set forth in its entirety at note 48 *supra*. Note that this exception is brought into issue whether or not the UST reporting obligation extends to attorneys. If the "substantial harm" exception applies to a client's failure to report a discharge (*see infra* text accompanying notes 51-65 for a discussion of this issue), an attorney would have the duty under the NJRPC to report the client's failure to report, irrespective of any independent legal duty. Nonetheless, the "substantial harm" exception is examined herein because the question of its applicability is raised by the reporting requirement; the issue is heightened if an attorney also has an independent duty to report.

50 *See* NJRPC 1.6(c)(3) (1990), as set forth *supra* at note 48.

51 NJRPC 1.6(b)(1) (1990).

52 It is possible that this exception would not require disclosure if the client failed to report but did take corrective action, as the risk of harm requiring an attorney to disclose would decrease if the discharge were remedied, even if it were remedied without agency knowledge or supervision.

disclosure of a past crime,[53] at least one case indicates that the result in New Jersey might be different.[54]

Further, the penalty provision of the regulations may reasonably be construed to hold that the continuing intention of the client to fail to report *is* the intent to commit a future illegal act. The penalty provision under the UST regulations[55] incorporates by reference the penalty section under the Water Pollution Control Act (WPCA).[56] The WPCA provision relating to the assessment of civil administrative penalties specifically provides that "each day during which such violation continues shall constitute *an additional, separate, and distinct offense.*"[57] Thus, although an attorney's disclosure of the client's future intention not to report may necessarily implicate the client's past failure to do so (which is a past illegal act), it is arguable that the separate and distinct

---

[53] *See* Callan & David, *supra* note 46, at 362-65 and authorities cited therein.

[54] *See In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954). In *Selser*, the New Jersey Supreme Court applied the (then common law) future crime or fraud exception to the *evidentiary* attorney-client privilege to require an attorney to reveal client confidences relating to the client's *continuing* activities in bribing public officials. *Id.*; *see also* New Jersey Advisory Committee on Professional Ethics, Opinion No. 247 (Dec. 7, 1972), wherein an attorney questioned whether he had the duty to reveal to the proper authorities the fact that his client was in the country illegally. The applicable disciplinary rule, DR 4-101, permitted an attorney to reveal both a client's intention to commit a crime and the information necessary to prevent the crime. Although the Committee found that the violation in issue was not a crime (DR 4-101, the predecessor to RPC 1.6, covered only crimes, not fraudulent or other illegal acts), it did highlight the fact that the violation involved was *continuing* in nature and pointed out that "there is a distinction to be made between confidences concerning a crime already committed and confidences with respect to a continuing crime or one to be committed." *Id.* By placing the continuing crime in the same category with the future crime, the Committee at least suggests that disclosure of a continuing crime should be treated similarly, and thus, would be permissible. *But cf. In re* Nackson, 114 N.J. 527, 555 A.2d 1101 (1989), wherein the New Jersey Supreme Court in a "close call" held that the future crime or fraud exception to the *evidentiary* privilege did not require an attorney to reveal the whereabouts of his client who had jumped bail and continued to evade authorities. *Id.* at 534, 537, 555 A.2d at 1105. In so holding, the Court found that the substantive violation had occurred (and had ended) when the client failed to appear in court when required and that the client revealed his whereabouts to the attorney "for the purpose of ending that criminal violation." *Id.* at 536 (citing to Callan & David, *supra* note 46, at 365).

[55] N.J. ADMIN. CODE § 7:14B-12.1(a) (1990), set forth in full at note 34 *supra*.

[56] N.J. STAT. ANN. § 58:10A-10 (West 1990).

[57] N.J. STAT. ANN. § 58:10A-10d (West 1990) (emphasis added); *see also id.* at § 10e (in connection with the imposition of civil penalties pursuant to this section, "each day's continuance of the violation shall constitute a separate violation."). *But see* N.J. STAT. ANN. § 58:10A-10f (West 1990) which provides only that the criminal penalties which may be assessed for violations may be assessed per day of violation, not that each day of continuing violation constitutes a *separate* violation. *Id.*

violation which results each day the client decides to violate the is not merely a continuation of the initial illegal failure to report.

A more troubling aspect of the "substantial harm" exception is that the exception presumes that an attorney is capable of assessing both the likelihood and the seriousness of the anticipated consequences of the client's failure to comply with the UST regulations.[58] Assuming that the Legislature's statement is correct and leaking underground storage tanks are among the most common causes of ground water pollution in the state,[59] making such an assessment would appear to be "deceptively simple."[60]

While no one would doubt that the release of hazardous wastes into the environment, and especially into the ground water, can have serious repercussions,[61] it is also true that some releases of hazardous substances are essentially harmless in certain circumstances.[62] Thus, determining the likelihood and se-

---

58 "A lawyer shall reveal such information. . .to prevent the client. . .from committing a criminal, illegal or fraudulent act that *the lawyer reasonably believes* is *likely* to result in death or *substantial* bodily harm or *substantial* injury to the financial interest or property of another;" NJRPC 1.6(b)(1) (1990) (emphasis added).

59 *See* N.J. STAT. ANN. § 58:10A-21 (West 1990).

60 Discussion between Geoffrey C. Hazard, Jr. and Leon Silverman, *Will the ABA Draft Model Rules of Professional Conduct Change the Concept of the Lawyer's Role?*, Third Orison S. Marden Memorial Lecture, The Association of the Bar of the City of New York 18 (Dec. 9, 1980). To illustrate the actual complexity of the problem, Silverman first posed a situation involving "a client brandishing a loaded revolver charging out of the lawyer's office intent upon causing the death of a person against whom he has a grievance." *Id.* at 19. Obviously, this is a person who must be stopped. *Id.* Far more difficult to resolve, however, is a situation where an attorney learns that his client's product might cause bodily injury to its users. *Id.* The lawyer learns of a significant body of scientific information on both sides of the issue of whether such harm would "likely" occur. *Id.* Silverman asks, "Is it the lawyer's function to judge between the two scientific views? Is he [sic] now to be the arbiter?" *Id. Cf.* ABA FINAL DRAFT, *supra* note 37, at 10. The ABA Commission advocated a permissive, rather than mandatory, "substantial harm" exception noting (in conjunction with an "intended homicide" example) that "it is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out . . . . To require disclosure [in this instance], at risk of disciplinary liability if the assessment . . . turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma." *Id.*

61 For example, it has been estimated that one gallon of gasoline can contaminate one million gallons of drinking water so as to render the water unsuitable for drinking. NJDEP BASIS AND BACKGROUND DOCUMENT FOR THE UNDERGROUND STORAGE TANK PROGRAM REGULATORY PROPOSAL 5 (Aug. 1989) [hereinafter BASIS AND BACKGROUND].

62 Soil contamination, for example, may prove not to be dangerous unless it "A) comes into direct contact with people, (B) results in ground water contamination, or (C) results in the generation of a vapor phase that impacts the atmosphere, structures or underground utilities or other conduits." BASIS AND BACKGROUND, *supra* note 61, at 20. Similarly, the entire NJPDES regulatory system is premised on

verity of the risk to human health or of property damage requires a detailed, scientific analysis of many factors.[63] This is an analysis that an attorney is unqualified to make.[64] Furthermore, it is not reasonable to expect that a client who has failed to report will have contracted with a qualified consultant for such an evaluation.[65] Thus, although the "substantial harm" exception might be interpreted to require an attorney to report a client's failure to report, it will be rare that an attorney will have sufficient certainty of the degree of harm likely to result, to be mandated to disclose the discharge pursuant NJRPC 1.6(b)(1). A second exception to the rule of confidentiality, however, may present a different result.

B. The Duty to Comply With "Other Law"

A lawyer, like any individual, has an obligation to obey the law.[66] Yet, when faced with a conflict between his or her own obligation to comply with the law and the duty of confidentiality

---

the understanding that certain discharges to the environment are not deleterious and therefore may be permitted. *See supra* note 6.

63 *See* DEPT. OF GOVERNMENT RELATIONS AND SCIENCE POLICY, AMERICAN CHEMICAL SOCIETY, CHEMICAL RISK: A PRIMER (1984). This pamphlet provides a guide to understanding the "complex issue of health risks associated with the use of chemicals . . . ." *Id.* at 1. Basically, a risk assessment involves an estimation of two factors: the probability of harm and the severity of the expected consequences from a given exposure. *See id.* at 2. "These two factors . . . are simple to state but frequently difficult to determine." *Id.* When examining risk from chemical exposure, the severity of the consequence is the "measure of an adverse health effect caused by a certain level of exposure to a chemical for a certain length of time." *Id.* "The chance of a certain severity of harm for a given exposure" is a measure of a substance's toxicity. *Id.* Common methods of estimating toxicity are clinical studies, epidemiological studies, animal studies, test tube studies and structure-activity relationships. *Id.* at 4-5. All of these methods have inherent uncertainties. *Id.* at 5. The factors involved in assessing human exposure include the magnitude, duration, frequency and route of exposure in addition to an estimate of the size and nature of the exposed population. *Id.* at 7. Like toxicity measurements, measurements of exposure "are permeated with uncertainties." *Id.*

64 Absent any significant education or other experience in the field of science. *Cf.* State, *ex rel.* Corbin v. Ybarra, 777 P.2d 686, 690 (Ariz. 1989) ("Gas chromatography by Dubowski's technique to analyze soil samples for chemicals that may fall within the statutory hazardous waste definition is a skill not usually learned in law school. Few lawyers can ever learn, much less litigate, such matters without expert advice.").

65 Such a consultant is also obligated to report. *See* N.J. ADMIN. CODE § 7:14B-7.3(a) (1990).

66 *See* ABA FINAL DRAFT, *supra* note 37, at 5 ("A lawyer's conduct should conform to the requirements of the law . . . ."). *See also* HAZARD & HODES, *supra* note 37, at 46, wherein the authors observe that, although lawyers sometimes believe that codes of professional conduct exempt them from "other law", such a position is simply incorrect. *Id.*

owed to a client, an attorney must first evaluate these competing claims.[67] This evaluation is addressed, but not answered, by NJRPC 1.6(c)(3) which *permits* an attorney to disclose client confidences where necessary to comply with the other law,[68] but provides no guidance about when disclosure under this provision is warranted.[69] As discussed in the following section, however, the potential breadth of the "other law" exception, and the absence of interpretive comment, does not mean that all disclosure is *per se* permitted. As indicated below, the "other law" exception should only be invoked to permit disclosure where the other law in question may validly be imposed on attorneys in the first place.

1. The "Other Law" Exception To The Duty of Confidentiality

The "other law" exception to the duty of confidentiality states that a lawyer "may reveal such [confidential] information to the extent the lawyer reasonably believes necessary . . . to comply with other law."[70] Two of the noteworthy aspects of the exception are its permissive nature[71] and that, like the "substantial harm" exception discussed above, NJRPC 1.6(c)(3) requires the attorney to exercise his or her judgment in determining whether or not to disclose the information.[72] In exercising his or her judgment, the attorney must assess the need for disclosure of the information and the amount of information necessary to be released to comply with the other law.

The permissive nature of the exception puts the onus of decision making squarely on the individual attorney. Since this exception is not mandatory, an attorney will not face disciplinary

---

67 Actually, the first evaluation an attorney must make is whether the competing law even applies to attorneys. The reporting requirement which is the subject of this article illustrates the difficulty of such an evaluation. As discussed in Part II of this article, the combination of questions raised by the phrasing of the reporting requirement, the phrasing of NJDEP responses to comments pertaining to the requirement, and the absence of an applicable penalty provision, leave the obligation of an attorney to report very much in question. *See supra* text accompanying notes 16-36. For purposes of the discussion to follow, however, the intent to extend the UST reporting obligation to attorneys will be assumed.

68 *See* NJRPC 1.6(c)(3) (1990).

69 *See id.*

70 *Id.*

71 *Id.* The exception states that "a lawyer *may* reveal . . . ." *Id.* (emphasis added).

72 *Id.* The exception allows an attorney to decide whether the information to be disclosed is "*reasonably necessary* . . . to comply with other law." *Id.* (emphasis added).

action for making a wrong decision to report,[73] absent circumstances indicating that such disclosure was patently unreasonable.[74] Immunity from disciplinary action, however, does not similarly make an attorney exempt from civil or criminal liability for failing to comply with the law.[75] Thus, in the context of the UST reporting requirement, if an attorney were found to have incorrectly determined that compliance with the reporting requirement was not permitted, he or she would not likely be disciplined by the applicable ethics committee. The attorney would be subject to penalties and other sanctions, however, including possible criminal sanctions for violating the independent reporting obligation under the regulations.[76]

One might ask then, why an attorney would ever *not* report a confirmed discharge under the UST regulations. Not reporting might expose the attorney to the risk of very serious civil and criminal sanctions. On the other hand, deciding to report removes the risk of even disciplinary action, as long as the determination that reporting was required, is not unreasonable.[77] As has already been discussed, it is not unreasonable to conclude that the UST reporting requirement does apply to attorneys.[78] This is so despite the fact that the opposite conclusion would likewise be reasonable.[79] The risk of alienating the reported client, and possibly other clients,[80] as well as a desire to promote free flow of information from clients, however, will probably

---

[73] Since there is no NJRPC which *requires* compliance with law, the failure to disclose under a statute that might require attorney disclosure would not expose an attorney to disciplinary action anymore than would a moving violation in an automobile, despite the fact that the attorney might be liable for the statute's own penalties. *See* REPORT OF DEBEVOISE COMMITTEE, *supra* note 46, at 10. Although NJRPC 8.4(b) does state that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" it is doubtful that an attorney's "violation" of the UST reporting requirement, given the competing interest of client confidentiality, would reflect adversely on a lawyer's "honesty, trustworthiness or fitness as a lawyer." *Id.*

[74] *See* NJRPC 1.6(c)(3) (1990). The exception permits disclosure only where the attorney *reasonably* believes it is necessary to comply with the "other law." *Id.*

[75] *See* REPORT OF DEBEVOISE COMMITTEE, *supra* note 46, at 10.

[76] *See supra* text accompanying notes 33-36.

[77] *See supra* text accompanying notes 73-74.

[78] *See supra* text accompanying notes 16-36.

[79] *Id.*

[80] *See* Note, *supra* note 2, at 1158 n.3 ("For an attorney . . . the decision to disclose 'is painstakingly difficult because it involves the lawyer's personal and professional relationship with the client, the lawyer's vested interest in the client, and the lawyer's reputation as an honorable man [sic].' ") (quoting Comment, *Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions with Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561, 575 (1983)).

cause most attorneys to seek a more considered response which would be less fraught with obvious ramifications for the attorney and more focused on whether the reporting is truly required by "other law."

a. *Validity Of The Reporting Requirement Vis-a-Vis The Attorney*

Despite including an exception to the duty of confidentiality for disclosures required by "other law" in the Final Draft of the ABA Model Rules of Professional Conduct (ABA Final Draft),[81] the Comment of the ABA Commission accompanying the exception indicates that the exception is not absolute, but rather that there should, in fact, be a presumption *against* supersession of Draft Rule 1.6 by other laws.[82] Even though no similar comment accompanied the adoption of the "other law" exception in New Jersey,[83] and the New Jersey Supreme Court has expressed a bias toward full disclosure,[84] it is clear that there is *some* presumption against supersession[85] so as to prevent legislative and regulatory

---

81 *See* ABA FINAL DRAFT, *supra* note 37, at 9.

82 *See id.* at 10. "[A] lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession." *Id. But see* Arizona State Bar Committee on Rules of Professional Conduct, Op. 87-3 (1987) where, in examining a conflict between an IRS reporting provision (requiring the reporting to the IRS of all transactions in which greater than $10,000 cash is received in the course of a trade or business) and the duty of confidentiality, the Committee undertook no analysis whatsoever concerning the "validity" of the tax law in holding that the "other law" exception applied and that there was, thus, no ethical bar to reporting. *Id.*

83 *See* REPORT OF DEBEVOISE COMMITTEE, *supra* note 46; NJRPC 1.6 comment.

84 *See supra* text accompanying note 47.

85 *See* text accompanying notes 104-06. *Cf. In re* Advisory Opinion No. 544 of N.J. Supreme Ct., 103 N.J. 399, 511 A.2d 609 (1986) wherein the New Jersey Supreme Court held the "other law" exception inapplicable to a request for specific, individual client information, made by private organizations funding a legal services group to the group's attorney, where the Court found the regulation in issue did not specifically extend to the requested information. In so holding, the Court set out some guidance as to when "other law" could require attorney disclosure:

> We acknowledge that if by statute or *valid* rule or regulation information concerning [the client] were *clearly* required to be reported for *legitimate governmental purposes*, the analysis and result could well be different. A different conclusion as to the propriety of disclosure might also obtain in the event private funding sources sought client information under *enforceable* rules or regulations.

Id. at 411 (emphasis added). Thus, it would appear that not every statute or regulation would qualify.

bodies from abrogating the attorney's duty of confidentiality at a whim.

The only direct guidance available with regard to evaluating whether "other law" supersedes the duty of confidentiality comes from the New Jersey Supreme Court in *In re Advisory Opinion No. 544*.[86] This case indicates that only *valid* enactments serving *legitimate governmental purposes* may overcome the duty of confidentiality, and only to the extent that the language of the enactment *specifically* requires it.[87] The discussion to follow examines the UST reporting requirement in this context.

An examination of the validity[88] of the UST reporting requirement in terms of whether or not it abrogates the duty of confidentiality, has two components. These components are whether, vis-a-vis the attorney, the reporting requirement is within the fair contemplation of its enabling legislation,[89] and if so, whether it nonetheless impermissibly impinges on the New Jersey Supreme Court's power to govern the conduct of attorneys.[90] Each of these issues will be discussed in turn.

It is axiomatic that an administrative regulation " 'must be within the fair contemplation of the delegation of the enabling statute' "[91] and that, in examining the enabling statute, "the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statu-

---

86 103 N.J. 399, 511 A.2d 609 (1986).

87 *Id.* at 410-11. Although the *Advisory Opinion No. 544* Court cites its earlier opinion in Fellerman v. Bradley, 99 N.J. 493, 493 A.2d 1239 (1985), for the proposition that the "compliance-with-law" exception "was deemed to prohibit disclosure of attorney-client information *except* in a situation in which the client was attempting through non-disclosure to evade an order of a court," *Advisory Opinion No. 544*, 103 N.J. at 411, 511 A.2d at 615 (emphasis added), the Court proceeded to list the above criteria, which do not involve evasion of court order, for the "compliance-with-law" exception to apply.

88 As will be explained, this section is not concerned with the *procedural* validity of the regulations, which is a topic beyond the scope of this article. For purposes of the following discussion, we assume that the promulgation of the UST regulations was procedurally proper.

89 *See* New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 384 A.2d 795 (1978).

90 N. J. CONST. (1947), Art. VI § II, par. 3 provides that:

> [t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

Id.

91 *New Jersey Guild*, 75 N.J. at 561-62, 384 A.2d at 803 (quoting South Jersey Airways v. Nat'l. Bank of Secaucus, 108 N.J. Super. 369, 383 (App. Div. 1970)).

tory responsibilities. . . ."[92] Case law confirms that liberal construction is appropriate where "the agency is concerned with the protection of the health and welfare of the public."[93] Because administrative regulations are accorded a rebuttable presumption of validity, "an *ultra vires* finding is disfavored."[94] Thus, in determining whether the New Jersey Legislature delegated to the NJDEP the authority to require an attorney to report a client's confirmed discharge, one must view the issue most favorably toward finding the authority so delegated. From such a posture, the regulation may be supportable.

New Jersey's UST Law[95] requires NJDEP to adopt rules and regulations which "[r]equire the reporting of any discharges and the corrective action taken in response to a discharge from an underground storage tank."[96] The following two sub-sections of the statute, however, describe responsibilities which are specifically and exclusively assigned to owners and operators.[97] The Legislature did not limit the reporting requirement to any particular person or group of persons.[98] Construing the statute liberally, as required, the absence of any limitation regarding persons who may be required to report may support the NJDEP's authority to designate persons obligated to report.[99]

Further, as was discussed in the introduction to this article, extending a reporting obligation to "any person" may serve, no matter how nominally, to more effectively control the discharge of hazardous wastes into the environment.[100] The overall purpose of the statute[101] and regulations[102] to protect the environ-

---

92 *Id.* at 562, 384 A.2d at 795, 804.

93 New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79, 415 A.2d 1147, 1153 (1980). In *Finley*, the Supreme Court upheld regulations requiring nursing homes to make available a reasonable number of beds for indigents although there was no specific provision in the enabling legislation which authorized this requirement. *Id.* The Court found that such power was *implied* under the provision of the enabling legislation which required that the agency find that the standard of health care services provided by a home be "fit and adequate" before issuing a license to such facility. *Id.*

94 New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561, 384 A.2d 795, 803 (1978).

95 N.J. STAT. ANN. §§ 58:10A-21 to -37 (West 1990).

96 N.J. STAT. ANN. § 58:10A-25a(5) (West 1990).

97 *See* N.J. STAT. ANN. §§ 58:10A-25a(6), (7) (West 1990) (requiring the adoption of regulations requiring owners and operators to take corrective actions in the event of a discharge to prepare closure plans).

98 *See* N.J. STAT. ANN. § 58:10A-25a(5) (West 1990).

99 *See* N.J. ADMIN. CODE § 7:14B-7.3(a) (1990).

100 *See supra* text accompanying note 2.

101 *See* N.J. STAT. ANN. § 58:10A-21 (West 1990) ("The Legislature finds and de-

ment may thus be furthered by the reporting requirement. Therefore, requiring "any person" to report a confirmed discharge appears to meet the requirement that a regulation "be within the fair contemplation of the delegation of the enabling statute."[103]

Reaching such a conclusion, however, does not end the inquiry. Regardless of the fact that the Legislature may have empowered the DEP to impose the reporting requirement on attorneys, a follow up inquiry must necessarily be made as to whether the Legislature had the power to impinge on the duty of confidentiality in the first place. Such an inquiry must begin with an examination of the nature of the New Jersey Supreme Court's authority over the practice of law.

In discussing its authority to govern the practice of law, the New Jersey Supreme Court has emphatically and unequivocally determined that:

> so precisely and unmistakably . . . did Article VI, § II, par. 3 of the Constitution . . . make "the Supreme Court the exclusive repository of the State's power to regulate the practice of the law, investing it 'with exclusive responsibility in this area' *State v. Rush*, 46 N.J. 399, 411 (1966)," *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, *supra*, 126 N.J. Super. at 585, that the existence and exclusivity of the power would seem quite beyond question.[104]

This is not to say, however, that the court's authority precludes all action by an administrative or legislative body.[105] In areas where

---

clares that. . .leakage of hazardous substances from underground storage tanks is among the most common causes of groundwater pollution in the State; and that it is thus necessary to provide for the registration and the systematic testing and monitoring of underground storage tanks to detect leaks and discharges as early as possible and thus minimize further degradation of potable water supplies.").

[102] *See* N.J. ADMIN. CODE § 7:14B-1.3(a)8 (1990) ("This chapter is promulgated. . .[t]o protect human health and the environment of the State by ensuring sound underground storage tank management, thereby preventing, controlling, remediating and/or abating actual or potential groundwater contamination.").

[103] New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561-62, 384 A.2d 795, 803 (1978).

[104] American Trial Lawyers v. N.J. Supreme Ct., 66 N.J. 258, 262-63, 330 A.2d 350, 352 (1966).

[105] *See* Knight v. Margate, 86 N.J. 374, 389, 431 A.2d 833, 841 (1981). In *Knight*, the New Jersey Supreme Court held that a law prohibiting certain public officials, including members of the judiciary, from dealing with casinos did not impermissibly impinge on the Supreme Court's exclusive authority to govern the judicial branch of the State, where there was "no fundamental schism" between the challenged law and the interests of the judiciary. *Id.* at 392, 431 A.2d at 842; *see also* Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451, 566 A.2d 215 (App. Div. 1989) (wherein the court ruled that a wrongful discharge action brought by an in-

judicial power has not been exercised or has been only partially exercised, and where legitimate governmental purposes would be served without interfering with judicial prerogatives or where the effect on these prerogatives is only incidental, other governmental branches may act.[106]

The New Jersey Supreme Court has not ruled on the specific issue of a conflict between the duty to report under the UST regulations and the duty of confidentiality. Thus, judicial power has not been exercised in this specific area. Furthermore, although the New Jersey Supreme Court has acted in the area of disclosures required by other law, it was to *permit* such disclosures by adopting the permissive "other law" exception to RPC 1.6, thereby indicating that certain disclosure requirements can be imposed on attorneys without interfering with judicial prerogatives.[107] It is therefore clear that the Legislature did not *per se* impermissibly impinge on the judicial realm by delegating broad authority to the NJDEP to require any person, presumably including attorneys, to report.[108] Whether the delegation was *ultra vires* vis-a-vis an attorney depends, then, on the legitimacy of the legislative purpose in requiring attorneys to report and, more critically, on whether the resulting encroachment on the New Jersey Supreme Court's definition of the duty of confidentiality is too great to withstand challenge.[109]

The laudable goals of the UST regulations, including the reporting requirement, have already been mentioned.[110] It would be difficult to dispute the legitimate purpose of the legislature in enacting the UST legislation.[111] The more difficult challenge for the reporting requirement vis-a-vis the attorney derives from the fact that reporting conflicts with an attorney's duty of confidentiality, interfering with judicial prerogatives. Interestingly enough, the resolu-

---

house attorney pursuant to the "Whistle Blower's Act," N.J. STAT. ANN. § 34:19-1, to the extent the attorney sought monetary damages and not reinstatement, was not inconsistent with NJRPC 1.16(a)(3) which requires an attorney to withdraw from representation when discharged, because, as thus applied, the challenged act actually encouraged and insured the ethical practice of law).

106 *Knight*, 86 N.J. at 389-90, 431 A.2d at 841.

107 *See id.*

108 *See id.*

109 *See id.*

110 *See supra* text accompanying note 2.

111 *See* Lom-Ran v. Dept. of Envtl. Protection, 163 N.J. Super. 376, 384, 394 A.2d 1233, 1236 (App. Div. 1978) ("It is axiomatic that 'the safeguarding of the public health has long been considered an essential governmental function within the police power of the State.' ") (quoting State v. Owens Corning Fiberglass Corp., 100 N.J. Super. 366, 381, 242 A.2d 21, 31 (App. Div. 1968)).

tion of this conflict further hinges on an internal conflict within the duty of confidentiality itself.

In *Taylor v. Hoboken Board of Education*,[112] the appellate division squarely faced a direct conflict between a legislative enactment and a Disciplinary Rule.[113] In conflict were a statute granting tenure status to veterans employed by the state,[114] in this case a school board attorney, and an attorney's duty, under the then-applicable Disciplinary Rules, to withdraw from representation when discharged by the client.[115] The court held that the Disciplinary Rule controlled, citing the fact that the statute was general in nature and *directly* conflicted with a rule in an area for which the Supreme Court "is the exclusive constitutional repository" of authority.[116]

Analyzing the conflict between the UST reporting requirement and the duty of confidentiality in light of *Taylor* does not necessarily invalidate the reporting requirement. On the one hand, the UST reporting requirement is general in nature[117] as was the statute in question in *Taylor*.[118] Although the *Taylor* court did not seem to heavily rely on this factor,[119] it is important to recall that the Supreme Court in *In re Advisory Opinion No. 544* did place some emphasis on the fact that the law in question did not *specifically* require the disclosure at issue.[120] Therefore, it should be noted that the UST reporting requirement, although general in its application to "any person," does *specifically* require the reporting of a confirmed discharge.[121] It is unclear whether the general applicability of the regulation would invalidate it vis a vis an attorney in the eyes of the Supreme Court, despite the fact that it specifically requires the disclosure of confirmed discharges.[122]

---

112 187 N.J. Super. 546, 455 A.2d 552 (App. Div.), *cert. denied*, 95 N.J. 228, 470 A.2d 441 (1983).

113 *See id.* at 546, 559, 455 A.2d at 557. The predecessor to the current Rules of Professional Conduct, the Disciplinary Rules (Code of Professional Responsibility), were in effect at the time of this decision.

114 N.J. STAT. ANN. § 38:16-1 (West 1990).

115 DR 2-110(B)(4).

116 Taylor v. Hoboken Bd. of Educ., 187 N.J. Super. 546, 559, 455 A.2d 552, 557 (App. Div.), *cert. denied*, 95 N.J. 228, 470 A.2d 441 (1983).

117 The reporting obligation under the UST regulations extends to "any person." N.J. ADMIN. CODE § 7:14B-7.3 (1990).

118 *See Taylor*, 187 N.J. Super. at 553, 455 A.2d at 552.

119 *See id.* Note that the general nature of the statute is mentioned early in the case and not later on in the holding.

120 *In re* Advisory Opinion No.544 of N.J. Supreme Ct., 103 N.J. 399, 410-11, 511 A.2d 609, 614 (1986).

121 *See* N.J. ADMIN. CODE § 7:14B-7.3(a) (1990).

122 *But see* Chicago Bar Assoc. Prof. Resp. Committee Op. 86-2 (1988) [hereinafter Chicago Op.] in which the Committee evaluated an attorney's duty to disclose

Even more difficult is the issue of whether the reporting requirement directly conflicts with an ethical rule as did the "Other law" in *Taylor*. Although the UST reporting requirement does conflict with a lawyer's general duty not to disclose information relating to the representation of a client,[123] the key difference between the UST-NJRPC conflict and the one presented in *Taylor* is that in the current situation, the "other law" exception to the duty of confidentiality would seem to eliminate the conflict.[124] The NJRPC, as thus interpreted, creates a vicious cycle for analyzing every law which requires disclosure of a client confidence. In order to fall within the "other law" exception, the other law must be valid and thus must not impermissibly encroach upon the judicial realm.[125] In evaluating the extent of the other law's encroachment into the judicial realm, however, one must determine whether the "other law" exception does apply, because if it does, there would be no conflict between the NJRPC and the other law.[126] There is simply no easy resolution to the conflict. What then, should an attorney do when faced with such a conflict?

---

under the IRS provision discussed *supra*, at note 82. Unlike the Arizona State Bar Committee, *id.*, the Chicago Committee held that the attorney should *not* disclose under the tax law and the "other law" exception to the Disciplinary Rules if the applicability of this "regulation of general application" to lawyers was unclear. *See* Chicago Op. *supra* note 122.

123 See NJRPC 1.6(a) (1990).

124 NJRPC 1.6(c)(3) (1990). One should also note, however, that the exceptions to the duty of confidentiality, both mandatory and permissive, authorize an attorney to reveal client information with regard to an illegal act only (1) where it may prevent an illegal act likely to result in substantial harm; (2) where it may prevent an illegal act likely to perpetrate a fraud on a tribunal; or (3) where it will rectify the consequences of a past illegal act in furtherance of which the lawyer's services had been used. NJRPC 1.6 (b), (c)(1) (1990). The effect of applying the UST discharge reporting requirement to an attorney would be to force the attorney to report a client's failure to report (which is an illegal act) whether or not it fits any of the three specific situations indicated above. It is important to consider whether the "other law" exception to the duty of confidentiality should be applied so as to add a *general* "illegal act" exception to NJRPC 1.6 (which would be the result in this instance). Of note in this regard is the fact that the former New Jersey Disciplinary Rules contained a general *crime* exception to the duty of confidentiality, DR 4-101(C)(3), which "permit[ted] the disclosure of otherwise privileged information necessary to prevent the commission by a client of *any* crime, not just crimes likely to result in death, substantial bodily harm, or substantial injury to the financial interests or property of another." REPORT OF DEBEVOISE COMMITTEE *supra* note 46, at 9 (emphasis in original). The general crime exception was not included in the current NJRPC. *See* NJRPC 1.6 (1990).

125 Knight v. Margate, 86 N.J. 374, 391, 431 A.2d 833, 840 (1981).

126 *See* Taylor v. Hoboken Bd. of Educ., 187 N.J. Super. 546, 455 A.2d 552 (App. Div.), *cert. denied.*, 95 N.J. 228, 470 A.2d 441 (1983).

b. *What an Attorney Can Do*

Probably the simplest and only "right" answer to the question of what an attorney can do when faced with a conflict between the UST regulations and the NJRPC is to examine his or her own ethical standards and determine whether reporting is required.[127] *Ethically*, an attorney cannot make a "wrong" choice since it would be reasonable to resolve the issue either way.[128] As was previously discussed, however, the attorney may realize other non-ethical ramifications of that final decision.[129]

To lessen the risk of these ramifications, there is one tactic an attorney may utilize. In an analogous situation, the Chicago Bar Association Professional Responsibility Committee has recommended that when an attorney is faced with the issue of whether to report (in that case, under an IRS reporting provision),[130] the attorney can[131] file the appropriate disclosure form, stating that the disclosable event has occurred, but that the specific information required to be disclosed is being withheld as privileged.[132] The government is then put on notice of the withheld information and may seek a judicial determination of the

---

127 *See* ABA FINAL DRAFT, *supra* note 37, at 5. The Preamble to the ABA FINAL DRAFT recognizes that there is potential for many difficult issues arising under the Rules which require the exercise of professional discretion. *Id.* "These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the principles underlying the Rules." *Id.*

128 *See* Chicago Op. *supra* note 122.

129 *See supra* text accompanying notes 73-80. As discussed therein, civil and criminal sanctions on the one hand, and loss of client trust, on the other, are the Scylla and Charybdis the attorney faces in making the "non-ethically wrong" decision. *Id.*

130 *See* Chicago Op. *supra* note 122.

131 Note that one authority suggests that some such action is *required*. *Cf.* RESTATEMENT, THE LAW GOVERNING LAWYERS (Tentative Draft No. 3) § 115(c) (1990). Wherein the ALI states that "[a] lawyer generally is required to raise any reasonably available objection to an attempt by another person to obtain confidential client information from the lawyer if revealing the information would disadvantage the lawyer's client. . . .The duty to object arises when, under applicable law, a nonfrivolous argument. . .can be made that the law does not require the lawyer to use or disclose such information in responding to the inquiry." *Id.*

132 *See* Chicago Op. *supra* note 122. Of course, in the context of reporting under the UST regulations which require disclosure of a confirmed discharge via telephone, this tactic would create the somewhat comical situation, reminiscent of the childhood taunt "I know something you don't know," presented below:

DEP Representative: "Hello, DEP Emergency Hotline"

Attorney: "I am calling to report a confirmed discharge"

DEP Representative: "OK, where is the discharge?"

Attorney: "I can't tell you"

Id.

propriety of the withholding.[133] Although the attorney may ultimately be required to disclose,[134] at least it would be at the direction of the court, which can be trusted to defend its own prerogatives against legislative encroachment.[135] An attorney is thus not placed in the role of judge, of either the legality of the client's acts or the proper application of the NJRPC.

VI. CONCLUSION

As indicated above, there are many unresolved questions regarding whether the regulations were intended to require reporting from attorneys. There is certainly no indication that this is what the Legislature intended, and when given the chance to state its position in this regard, the Department refrained from comment. The absence of an applicable penalty provision raises further questions. Reporting may not actually be required.

In addition, finding a duty to report runs counter to salutary aspects of the legal system. Reporting would require an attorney to make a technical evaluation of risk or to cut a wide swath through the narrowly drafted exceptions to the duty of confidentiality which would likely weaken a client's confidence in his or her attorney and deter full disclosure between a client and counsel. Such drastic results must impinge on the Supreme Court's responsibility to regulate the practice of law.

Although questions remain due to the breadth of the regulatory requirement, the best result would be to uphold confidentiality in this aren. NJDEP could easily eliminate this conflict by

---

133 *Id.* Of course, the evidentiary attorney-client privilege, *see supra* note 37, would also be implicated at this point.

134 *Cf.* U.S. v. Fischetti, Pomerantz & Russo, DC SNY, No. M-18-304, 3-13-90, wherein the court, ruling from the bench, ordered defendant attorneys to disclose client information in compliance with 26 U.S.C. § 6050I (the IRS cash business transaction reporting requirement). *See supra* note 82). *Id.*; ABA/BNA Lawyer's Manual On Professional Conduct, Vol.6, No. 4 at 84 (Mar. 26, 1990). Note, however, that the court's ruling was apparently based on the fact that the information sought (client's name and payment of fees) was not privileged (apparently using an evidentiary privilege analysis), not that it was privileged but disclosable due to an "other law" exception to the ethical duty of confidentiality. *See* ABA/BNA Lawyer's Manual at 84.

135 *Cf. In re* Selser, 15 N.J. 393, 408, 105 A.2d 395, 401 (1954). In determining whether it is up to the attorney or the judge "to determine whether the seal of the privilege has been broken," the *Selser* Court stated that "[i]t would be a sorry day for the public. . .if to an accused's constitutional right to refuse to testify on the ground that it would incriminate him were to be added a right in his attorney or himself to decide what questions the attorney would answer. Fortunately for the public weal, the question has been decided otherwise." *Id.*

amending its regulations, but until such an amendment is adopted, individual attorneys will be faced with three options: report, file a report that is incomplete, or decline to report. Each option has consequences for both attorney and client, and none is completely satisfactory.