

**BAR ASSOCIATION OF ERIE COUNTY**  
**COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 0702

Topic: Restrictions on disclosure by town attorney of file contents to persons other than county supervisor

Digest: Disclosure of confidences and secrets of town as distinguished from any person restricted or protected

Code: DR 4-101; DR 5-109

**QUESTION**

Under what circumstances may an attorney for a town governed by the New York Town Law\* disclose contents of his or her files relating to town matters to persons (including members of the Town Board) other than the town supervisor, without receiving a subpoena or a court order to do so,

**ANSWER**

An attorney acting for a town may not disclose information in his or her or her files which is a "confidence" or a "secret" of the town, as those terms are used and defined in DR 4-101A., to any person other than the town supervisor or a person specifically designated by the town supervisor. An attorney acting for a town may but cannot be not required to disclose information in his or her files which is neither a confidence or a secret of the town to members of the town board and others, except that he or she may be required to disclose material which neither a confidence nor a secret of the town pursuant to an investigation authorized by the town board pursuant to subsection 4 of Section 51 of the Town Law.

\* All terms used in this opinion have the meanings ascribed to them in the New York Town Law.

**DISCUSSION**

The client of an attorney representing a town is the town itself, and not its supervisor, town board members or employees. See DR 5-109. The duty to preserve confidences and secrets runs to the town exclusively and, as set forth at DR 4-104A, the definition of "confidence" is meant to cover information protected by the attorney-client privilege. The attorney-client privilege covers only communication between the town and the attorney. *U.S. v Upjohn* 449 U.S. 383, 101 S. C. 677, 66 L Ed. 594 (1981) Courts have limited communications considered to be between an organization and its attorney to communications "disseminated to [one] who needs to know the material because he has a direct responsibility over the subject matter." *In Re Grand Jury Subpoena* 561 F. Supp 1247, D.D.C. (1981); *U. S. v Am. Tel. & Tel. Co.* 86 F.R.D. 603 (D.D.C. 1980; *SCM Corp v. Xerox Corp.* 70 F.R.D. 508, (D.Conn.) app. dismissed 534 F. 2<sup>nd</sup> 1031 (2<sup>nd</sup> Cir. 1976). In order to protect the privilege, an attorney must confine disclosure of confidences to those directly responsible for the legal matter involved..

The New York Town Law reposes direct responsibility for legal and administrative matters in the town supervisor.. Town Law ,Section 52 and reposes no similar authority in the Town Board or members of the town Board. Town Law, Section 51. The Town Law contemplates that the town supervisor will "[k]eep the town board informed generally concerning town affairs.....Town Law, Section 52, Subsection 7.. Section 51, subsection 3.. Communication of town confidences to persons other than the town supervisor or the designee of the town supervisor would violate the attorney-client privilege, and therefore would also violate DR 4-101A..Similarly communication of town secrets to any person other than the town supervisor or a person designated by the town supervisor would violate DR 4-101A, unless such communication was required by valid legal process, although the term "secret" does not refer necessarily to material protected by the attorney-client privilege.

No opinion is expressed herein as to what may constitute a confidence or a secret in any given situation; the broad spectrum of possible factual and evidentiary patterns makes a generally applicable analysis impractical. Some useful guidance is provided, however, by the statement by the New York Court of Appeals in *Matter of Bekins Record Storage Co., Inc.* 476 N.Y.S. 2<sup>nd</sup> 62 N.Y. 2<sup>nd</sup> 324, 465 N.E. 2<sup>nd</sup> 345: "[D]ocuments are not privileged if they were not prepared for litigation or for the purpose of imparting legal advice, and they are not otherwise subject to privilege against disclosure." Documents that are not privileged at the time they were handed to an attorney can not alter become subject to the attorney client privilege, *People v. Romer*, 579 N.Y.S.2<sup>nd</sup>. 306, 153 Misc. 2<sup>nd</sup> 915. See also generally, *Mr. and Mrs. "B" v. Board of Education of the Syosset Central School Dist.*, 35 F. Supp. 2<sup>nd</sup> 224 (E.D.N.Y. 1988) . It should be noted that non-privileged information may be a secret under DR 4-101A and subject to the restrictions on disclosure imposed by that Disciplinary Rule, although not subject to the evidentiary privilege.

With respect to material in the file of an attorney who represents a New York town , not constituting confidences or secrets, because persons such as town board members are not clients of the attorney, they would not be entitled as a matter of right to disclosure, but disclosure in the discretion of the attorney would not be restricted by the Disciplinary

Rules discussed above. One possible circumstance under which an attorney representing a town might be required to disclose the contents of his or her file, *other than information constituting confidences and protected by the evidentiary privilege*, is the application of Section 51, subsection 4 of the Town Law which gives town boards the power to make "studies and investigations as it deems to be in the best interests of the town and in connection therewith, to.....subpoena witnesses, administer oaths and require the production of books, papers and other evidence deemed necessary or material for any such study or investigation." The application of the subsection quoted above is a matter of law, and no opinion is expressed herein with respect to its effect on an attorney representing a town regarding information, whether or not subject to evidentiary privilege.