

BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion _____ March 3, 2008 Topic: Restrictions on disclosure by town attorney
of town legal files

Digest: Town attorney has duty to protect against
unauthorized disclosure of confidences and
secrets of town

Code: DR 4-101; DR 5-109

QUESTION

Under what circumstances is an attorney for a town governed by Article 3 of the New York Town Law* permitted and/or required to disclose contents of his or her files relating to town matters to persons, including members of the Town Board,** 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 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, unless duly authorized to do so in accordance with applicable law.

* All terms used in this opinion have the meanings ascribed to them in the New York Town Law. The opinion expressed herein does not cover attorneys for Suburban Towns.

** Examples of proper authorization might include, but are not necessarily limited to, a duly adopted resolution of the town board; however, no opinion is set forth herein with respect to what may constitute proper authorization since this committee refrains from issuing opinions as questions of law.

DISCUSSION

The client of an attorney representing a town is the town itself, and not its supervisor, individual 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 confidential communications 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. 2nd 1031(2ndCir. 1976). In order to protect the privilege, an attorney must confine disclosure of confidences to those directly responsible for the legal matter involved pursuant to authority granted by the Town Board.

Communication of town confidences to persons not authorized by appropriate legal action by the town board, which is collectively responsible for town matters such as litigation and other legal matters (See Town Law, Section 64), would violate the attorney-client privilege and therefore would also violate DR 4-101A. Similarly, communication of town secrets to any person other than a person designated by the town board 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. 2nd 62 N.Y. 2nd 324, 465 N.E. 2nd 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 later become subject to the attorney client privilege, *People v. Romer*, 579 N.Y.S.2ⁿ. 306, 153 Misc. 2nd 915. See also generally, *Mr. and Mrs. "B" v. Board of Education of the Syosset Central School Dist.*, 35 F. Supp. 2nd 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 the town board 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.

CONCLUSION

For purposes of complying with DR 4-101 (C)(1) (“A lawyer may reveal . . . [c]onfidences and secrets with the consent of the client . . .”), the consent that an attorney for a town (other than a “suburban town” as defined in Town Law) must obtain is the consent of the Town Board, or of one to whom the Town Board has properly delegated the power to give such consent.