

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 641 - 2/16/93 (40-92)

TOPIC: Files; disposition procedures; compliance with recycling regulations

DIGEST: A lawyer must comply with an ordinance that requires recycling of all office paper. Confidences and secrets of clients must be given appropriate protection.

CODE: Canon 4, DR 4-101(A), DR 4-101(B), DR 4-101(C)(1), DR 4-101(C)(2), EC 4-6.

QUESTIONS

(1) Does the Code of Professional Responsibility exempt lawyers from compliance with a recycling law?

(2) If not, what duties does the Code impose upon lawyers when complying with a recycling law?

OPINION

The New York Solid Waste Management Act of 1988 required all municipalities to adopt a local law or ordinance by September 1, 1992, requiring separation of recyclable and reusable material from other solid waste. Paper is one of the categories of waste that must be recycled.

A lawyer's representation of a client always must be performed within the bounds of the law. Canon 7. Lawyers have no special license to violate the law. *Cf.* former Canon 32. Accordingly, lawyers are required to comply with laws of general applicability, including recycling laws in the locality in which they practice. Laws of general applicability, however, do not override the Code. Thus, a lawyer who is subject to a recycling law must ensure that compliance with that law does not entail violation of the lawyer's obligation to maintain the confidentiality of client information under Canon 4.

One of the hallmarks of the lawyer-client relationship is the preservation of the confidences and secrets of the client. Canon 4. Except when permitted under DR 4-101(C), a lawyer may not knowingly reveal confidences or secrets of the client. DR 4-101(B). This obligation continues after the termination of employment. EC 4-6. Some lawyer workpapers are clearly covered by the definition of confidences (information protected by the attorney-client privilege under applicable law) or secrets (information that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client). DR 4-101(A). Other papers are not. The manner in which the lawyer must dispose of papers belonging to the lawyer or the client depends upon the content of the papers.

DR 4-101(C)(2) allows a lawyer to reveal confidences and secrets of a client when revelation is required by law. Recycling ordinances, however, do not require the revelation of confidential client information; they merely prevent the disposition of workpapers in an ecologically unsound manner. Accordingly, we do not believe that DR 4-101(C)(2) exempts a lawyer from otherwise applicable recycling laws.

In N.Y. State 623 (1991), we discussed the procedures a lawyer should undertake when disposing of closed files. In general, we stated that client papers in closed files should be "destroyed" or "discarded, respecting the obligation to maintain confidentiality." The care with which the lawyer must dispose of client papers depends upon the sensitivity of the papers. The degree of sensitivity of the papers depends upon whether disclosure would be detrimental or embarrassing to the client. Naturally, a paper which may have been sensitive at the time of the representation may not possess the ability to harm or embarrass the client years after the representation has ended.

It follows that a lawyer must be careful as to how workpapers containing confidences and secrets are disposed. Thus, a lawyer must be familiar with any applicable recycling laws, and should know what will happen with discarded papers placed in the trash or into recycling containers. If these papers will be open to inspection by those outside the lawyer's office, it would be unacceptable for the lawyer to place the papers in the container in their original form. For example, if the papers are placed in opaque containers, such as black plastic bags, and are not sorted before they are combined with other papers for recycling, the lawyer may place workpapers in the bags. If, however, the papers are collected and sorted or are placed in clear plastic bags and the lawyer believes that the contents could be viewed, then the lawyer will have to shred the documents or make other arrangements to comply with the recycling law.

The lawyer must screen all papers either at the time of filing or the time of disposition to determine whether disposal and recycling in their original form is appropriate or whether shredding or another form of disposition is required.

CONCLUSION

A lawyer must comply with an ordinance requiring recycling of office paper in such a way to protect confidences and secrets of clients.
