Ethics Opinion No. 79-2

Is it Proper for an Attorney or an Attorney's Agent to Go to the Trash Receptacle Used by Opposing Counsel and Remove Materials that were Discarded in the Normal Cause of Operation?

The question posed to the Committee is:

Is it proper for an attorney or an attorney's agent to go to the trash receptacle used by opposing counsel and remove bags of trash containing, among other things, copies of pleadings, correspondence, etc., that were discarded in the normal course of opposing counsel's operations?

The basic facts appear to be that as a hotly-contested case, involving substantial amounts of money, neared trial and while settlement negotiations were in progress, one attorney dispatched an investigator or someone else on the attorney's behalf to go to the trash receptacle used by his opposing counsel and remove bags of trash that had been disposed there in the normal operation of the opposing counsel's office.

Since a lawyer who removes or causes removal of trash containing documents from opposing counsel's office violates, if not the express letter of the Code of Professional Responsibility, then at least the spirit of it, this Committee finds such actions to be improper. Such conduct violates EC 1-5 inasmuch as it is not in keeping with "high standards of professional conduct" and is not "temperate and dignified." While it is not quite such a clear violation, in this Committee's opinion, digging through and removing opposing counsel's trash is "prejudicial to the administration of justice" and "adversely reflects on his fitness to practice law" in contravention of DR 1-102 (B)(5) and (6). A violation of DR 7-106 (C)(6) also exists inasmuch as counsel has engaged "in undignified or discourteous conduct which is degrading," in the Committee's opinion, "to the tribunal." Finally, such acts clearly contravene Canon 9's mandate that a lawyer should avoid even the appearance of professional impropriety. EC 9-2 and 9-6. While the conduct does not appear to be illegal, it nevertheless "diminishes public confidence in the legal system or in the legal profession." EC 9-2. Clearly, a lawyer engaging in such activities has failed to:

conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety. EC 9-6.

Such an attorney might be ethically required to withdraw from the case if she or he came across any confidential information. As said by Henry Drinker:

A lawyer must also observe the customs of the Bar as well as the confidences of another lawyer, although indiscreetly given and improperly received, and

although this may entail his withdrawal from the case. Drinker, *Legal Ethics*, 195 (1958).

See, also, Op. No. 107, Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyer's Association (1958 ed.). Formal Opinion No. 47 of the American Bar Association requires withdrawal by an attorney who, even inadvertently, receives an improper disclosure of the opposing party's confidences.

In conclusion, while this Committee takes no position on whether an attorney engaging in the actions considered herein should be subject to discipline, it does find the conduct to be improper.

Adopted by the Board of Governors on September 9, 1979.