



Committee on Professional Ethics

Opinion #472 - 7/14/77 (72-77)

Topic: Independent professional judgment; general counsel.

Digest: General counsel not required to commence litigation which he believes to be without merit.

Code: DR 2-109(A)(1) and (2), 7-102(A)(1) and (2);
EC 7-1, 7-4, 7-5, 7-19

QUESTION

Should general counsel comply with his client's direction to commence litigation which he believes to be without merit?

OPINION

The obligation of a lawyer to maintain the highest standards of ethical conduct may not be modified or diminished by the provisions of a retainer agreement. As stated in Drinker, Legal Ethics (1953), at page 146:

"The acceptance of a retainer to act as general counsel implies a purpose to observe the Canons and creates no obligation to violate them in order to further the interest of the client"

The subsequent adoption of our present Code of Professional Responsibility has not altered the validity of Drinker's view. Indeed, the Code today expressly provides that where the lawyer is convinced that a claim is not warranted under existing law, and cannot be supported by a good faith argument for its extension or modification, he should not advance the claim. DR 2-109(A)(2); DR 7-102(A)(2). See also, EC 7-1, EC 7-4, EC 7-5, EC 7-19, DR 2-109(A)(1) and DR 7-102(A)(1). It is the lawyer's conscience and judgment which must dictate the result, not that of his client.

Consistent with these principles in N.Y. State 469 (1977), we held that it would be improper for a lawyer to interpose a general denial when he knows that his client has no valid defense to a civil complaint.

The same principles preclude a lawyer from commencing litigation which he believes to be without merit; and, the fact that the lawyer in question has been employed pursuant to a general retainer is of no relevance to the ethical rule.

For the reasons stated, the question posed is answered in the negative.
