

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-5
(March 2009)

The inquirer's firm ("Attorneys") are engaged to form an investment fund (the "Client") and represent the Client and on some occasions the general partner and investment manager of the Client, presumably with respect to Client matters. As specifically delineated in the investment documentation, neither the Client nor the attorneys represent investors in the Client. The Client is obligated to indemnify the managers, general partner and their affiliates, employees and agents against the claims of third parties, which parties include fund investors. The indemnification extends to claims which include and are related to misrepresentation. It is the intention to either specifically name the attorneys as indemnified persons or include them within the definition of "agents."

The inquirer asks, whether, consistent with Pennsylvania Rule of Professional Conduct (the "Rules") 1.8(h), an attorney can contract with a client (by inclusion in the engagement letter) for such indemnification against non-client third-party claims arising from the representation. The indemnification would not extend to a suit by the Client itself against the attorneys.

Rule 1.0 **Terminology** provides in part that,

(e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.8. **Conflict of Interest: Current Clients: Specific Rules** provides in relevant part that,

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

...

(h) A lawyer shall not

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

By its terms, RPC 1.8(h) applies only to agreements with respect to the liability of the lawyer to the client, which is not intended here. Thus Rule 1.8(h) is not a bar to the proposed agreement.

The proposed arrangement is however, a business transaction between the Client and the attorneys, and thus is governed by the provisions of Rule 1.8(a). Simply put, in exchange for the attorneys' agreement to undertake the representation, the Client is agreeing to both pay a fee and to hold the attorneys harmless for any misfeasance vis-à-vis third parties.

Therefore, the attorneys must form an opinion as to whether this agreement is fair and reasonable to the client. If they do, then they must fully disclose the terms in a comprehensible writing to the client, advise the client of the desirability of seeking independent legal counsel on the transaction, and obtain the client's informed consent in a writing setting forth the essential terms of the transaction and the lawyer's role.

Providing this is done, the proposed conduct is permissible under the Rules.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.