



**December 22, 2020**

**FORMAL OPINION 2020-600**

**ETHICAL ISSUES WITH COVID WAIVERS**

COVID waivers are contractual provisions by which one party agrees to relinquish the right to receive compensation for injuries resulting from exposure to the COVID-19 virus. The Committee has been asked whether a lawyer asking a client for such a waiver would present any ethical issues. As outlined below, the Committee believes that a lawyer must obtain a client's informed consent consistent with the provisions of RPC 1.7(b).<sup>1</sup>

Three Rules of Professional Conduct are potentially applicable: Rules 1.7(a)(2), 1.8(a) and 1.8(h)(1). Rule 1.7(a)(2) prohibits a lawyer from representing a client if there is a risk that the representation will be materially limited by a personal interest of the lawyer. Here, the lawyer's interest in obtaining a waiver is directly contrary to the client's interest in giving one.

Thus, a lawyer may not seek such a waiver unless the lawyer complies with the provisions of Rule 1.7(b). These include that the client gives "informed consent" to the conflict. Informed consent means consent after the lawyer has communicated adequate information and an explanation about the material risks and reasonably available alternatives to the proposed course of conduct.

Rule 1.8(a) prohibits a lawyer from entering into a business transaction<sup>2</sup> with a client unless (i) the transaction is fair and reasonable to the client and fully disclosed to the client in writing in a manner that can be reasonably understood by the client, (ii) 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 (iii) the client gives informed consent in a

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<sup>1</sup> The analysis set forth in this opinion addresses situations where a lawyer seeks to obtain a COVID waiver from a client. Where a lawyer seeks to obtain such a waiver from a prospective client, Rule 4.3(a) and (b) would appear to apply because the prospective client would be an unrepresented person and the lawyer seeking the waiver would be representing himself or herself. In such circumstances, Rule 4.3(a) and (b) would require the lawyer to advise the prospective client to obtain independent counsel on the matter.

<sup>2</sup> We express no opinion whether seeking a COVID waiver from a client is a "business transaction" as that term is used in the Rule 1.8(a). However, we believe that it would be prudent practice to follow the dictates of Rule 1.8(a) in seeking such a waiver.

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.

Rule 1.8(h)(1) prohibits a lawyer from making an agreement prospectively limiting a lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement. This Rule does not apply because the liability for exposure to COVID would not be malpractice.

The enforceability of a COVID waiver is not an ethics issue. Therefore, this opinion does not address whether COVID waivers should be utilized by attorneys with clients or potential clients or the legal or factual issues that might be relevant to evaluating the enforceability of a COVID waiver in a particular case.

**CAVEAT:** The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.