

**Rule 1.8.3 Gifts From Client**  
**(Proposed Rule Adopted by the Board on March 9, 2017)**

- (a) A lawyer shall not:
  - (1) solicit a client to make a substantial\* gift, including a testamentary gift, to the lawyer or a person\* related to the lawyer, unless the lawyer or other recipient of the gift is related to the client, or
  - (2) prepare on behalf of a client an instrument giving the lawyer or a person\* related to the lawyer any substantial\* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.
- (b) For purposes of this rule, related persons\* include a person\* who is “related by blood or affinity” as that term is defined in California Probate Code § 21374(a).

**Comment**

[1] A lawyer or a person\* related to a lawyer may accept a gift from the lawyer’s client, subject to general standards of fairness and absence of undue influence. A lawyer also does not violate this rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].

[2] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner\* or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to rule 1.7(b) and (c).



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.3**  
**(Current Rule 4-400)**  
**Gifts From Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 4-400 (Gifts From Client) in accordance with the Commission Charter. The Commission also considered the ABA Model Rule 1.8(c) (concerning gifts from clients). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules, including relevant Probate Code sections. The result of the Commission’s evaluation is proposed rule 1.8.3 (Gifts From Client).

**Rule As Issued For 90-day Public Comment**

The proposed rule reflects three significant changes from current rule 4-400. First, in paragraph (a)(1), the word “solicit” has been substituted for the word “induce.” In its study, the Commission was unable to identify any other jurisdiction using the term “induce.” The Commission is unaware of any problems concerning the operation of the rule in jurisdictions that employ the term “solicit.” Second, paragraph (a)(1) substitutes the phrase “a person related to the lawyer” for the phrase “the member’s parent, child, sibling or spouse” and defines the phrase in a separate paragraph (paragraph (b)), as “a person who is ‘related by blood or affinity’” with reference to Probate Code section 21374(a).<sup>1</sup> Defining which relatives are covered under the rule by reference to the Probate Code brings the rule in line with the definitions currently used in that Code. Third, the proposed rule adds a new black letter provision, paragraph (a)(2), that prohibits a lawyer from preparing an instrument that gives the lawyer or a related person a substantial gift, unless: (i) the lawyer or related person is related to the client, or (ii) an independent lawyer has reviewed the transfer and advised the client, and provided a “certificate of independent review” pursuant to Probate Code section 21384.<sup>2</sup> This amendment clarifies that

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<sup>1</sup> Probate Code § 21374(a) provides:

- (a) A person who is "related by blood or affinity" to a specified person means any of the following persons:
  - (1) A spouse or domestic partner of the specified person.
  - (2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.
  - (3) The spouse or domestic partner of a person described in paragraph (2).

<sup>2</sup> Under Probate Code § 21380(a), an instrument making a donative transfer “is presumed to be the product of fraud or undue influence” if the transfer is to:

- (1) The person who drafted the instrument.
- (2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.
- (3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.
- (4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

lawyers are permitted to draft an instrument that gives a gift to the lawyer or a related person under certain circumstances, as expressly permitted by the Probate Code. The addition brings California in line with every other jurisdiction as they have each adopted either an identical or substantially similar rule as Model Rule 1.8(c). Every other jurisdiction has adopted a rule expressly prohibiting a lawyer from preparing an instrument that gives a substantial gift to the lawyer or a person related to the lawyer, unless the lawyer or other recipient of the gift is related to the client.

There are two Comments to the rule. Comment [1] states a lawyer or a person related to a lawyer may accept a gift from a lawyer's client, subject to general standards of fairness and absence of undue influence. The last two sentences provide an example of what would not constitute an improper solicitation and a citation to a California Supreme Court case where impermissible influence was found. Comment [2] states the rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer appointed as executor of the client's estate, or to another potentially lucrative fiduciary position. However, such an appointment will be subject to proposed rule 1.7(b).

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission has added the phrase "unless the lawyer or other recipient of the gift is related to the client" in paragraph (a)(1). In addition, the Commission revised the reference in Comment [2] which stated "rule 1.7(b)" to read, "rules 1.7(b) and (c)." This change is made to comport to the revisions made to rule 1.7.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

### **Final Modifications to the Proposed Rule**

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

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Under sections 21382(a) and (b), the presumption does not apply to:

- (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.
- (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

Section 21384(a) provides:

- (a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate [in the form described in the statute].

## **COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.3 [4-400]**

### **Commission Drafting Team Information**

**Lead Drafter:** James Ham

**Co-Drafters:** George Cardona, Mark Tuft

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### **I. CURRENT CALIFORNIA RULE**

#### **Rule 4-400 Gifts From Client**

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

#### **Discussion:**

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

### **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

#### **Commission:**

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.8.3 [4-400]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.8.3

Vote: 11 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE (CLEAN)**

#### **Rule 1.8.3 [4-400] Gifts From Client**

(a) A lawyer shall not:

- (1) solicit a client to make a substantial\* gift, including a testamentary gift, to the lawyer or a person\* related to the lawyer, unless the lawyer or other recipient of the gift is related to the client, or

- (2) prepare on behalf of a client an instrument giving the lawyer or a person\* related to the lawyer any substantial\* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.
- (b) For purposes of this rule, related persons\* include a person\* who is “related by blood or affinity” as that term is defined in California Probate Code § 21374(a).

#### **Comment**

[1] A lawyer or a person\* related to a lawyer may accept a gift from the lawyer’s client, subject to general standards of fairness and absence of undue influence. A lawyer also does not violate this rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].

[2] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner\* or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to rule 1.7(b) and (c).

#### **IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-400)**

##### **Rule 1.8.3 [4-400] Gifts From Client**

- (a) A lawyer shall not:
  - (1) A member shall not induce solicit a client to make a substantial\* gift, including a testamentary gift, to the member or to the member’s parent, child, sibling, or spouse, except where the client is lawyer or a person\* related to the member.lawyer, unless the lawyer or other recipient of the gift is related to the client, or
  - (2) prepare on behalf of a client an instrument giving the lawyer or a person\* related to the lawyer any substantial\* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.
- (b) For purposes of this rule, related persons\* include a person\* who is “related by blood or affinity” as that term is defined in California Probate Code § 21374(a).

## **CommentDiscussion**

[1] A ~~memberlawyer or a person\* related to a lawyer~~ may accept a gift from ~~a member's~~~~the lawyer's~~ client, subject to general standards of fairness and absence of undue influence. ~~The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, A lawyer also does not violate this rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement.~~ Discipline is appropriate.~~( where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~

[2] ~~This rule does not prohibit a lawyer from seeking to have the lawyer or a partner\* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to rule 1.7(b) and (c).~~

## **V. RULE HISTORY**

Current rule 4-400 originated with the State Bar's comprehensive revision and renumbering of the rules that became operative in 1989. (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987.) The State Bar's recommendation summarized proposed rule 4-400 as follows:

Proposed rule 4-400 is new and was developed as a result of consideration of ABA Model Rule 1.8(c) and Rule 8.11 of the American Trial Lawyers' Association American Lawyers' Code of Conduct. Rule 1.8(c) prohibits an attorney from preparing an instrument which gives a gift to the lawyer while Rule 8.11 prohibits a lawyer from participating in arranging for a gift from a client.

The absolute prohibition of these model rules is too broad. A lawyer may accept a gift from a client, subject to general standards of fairness and absence of undue influence. The lawyer who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. This is evident in existing case law, and the draft rule reflects this law (see *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]). Also, it was felt that the rules mentioned above cover symptoms of the problem and not the problem itself. In short, the question is not who writes the will but what caused the testator to provide for the gift in the will, the influence of the lawyer or the testator's own judgment. Rule 4-400 is intended to address the problem, not the draftsperson.

(December 1987 memorandum at pages 46 – 47.)

The text of the original 1989 rule provided:

#### **Rule 4-400. Gifts From Client**

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

#### **Discussion:**

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

In October 1994, the State Bar submitted to the Supreme Court a proposed amended version of rule 4-400. (See "Request That The Supreme Court Of California Approve Amendments To Rule 4-400 Of The Rules of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Supreme Court case no. S043016, October 1994.) Submission of that proposal followed the 1993 enactment of Probate Code § 21351 (Statutes 1993, Chapter 293, Assembly Bill No. 21), which implemented a new exception to the prohibition against an attorney's preparation of certain donative instruments. The proposed rule provided (redline markings show changes to the 1989 rule):

#### **Rule 4-400. Gifts From Client**

A member shall not:

- (A) ~~Induce~~ Induce a client to make ~~a substantial any~~ gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, ~~except where the client is related to the member~~, a person whom the member knows is related to the member; or
- (B) Prepare an instrument which provides for any gift from a client, including a testamentary gift, to the member or to a person whom the member knows is related to the member, ~~except where the client is related to the member or transferee~~.

#### **Discussion:**

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. ~~The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where~~

~~impermissible influence occurred, discipline is appropriate. (See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~

Rule 4-400 is intended to prohibit another lawyer in the member's law firm from preparing an instrument where the lawyer knows that the member is prohibited from preparing an instrument.

For purposes of this rule, a person "related to" the member means the member's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the member, the member's spouse or predeceased spouse; cohabitants with the member; partners or shareholders of any partnership or corporation in which any person described previously has a 10% or greater ownership interest, and any employee of any such person, partnership or corporation; and employees of the member.

For purposes of this rule, a client "related to" the member means the member's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the member, the member's spouse or predeceased spouse; and cohabitants with the member.

For purposes of this rule, a client "related to" the transferee means the transferee's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the transferee, the transferee's spouse or predeceased spouse; and cohabitants with the transferee.

Under Probate Code § 21351,<sup>1</sup> a lawyer's preparation of an instrument, including certain disqualified gifts (to the lawyer or to persons related to the lawyer), was not prohibited so long as an independent attorney counseled the client concerning the lawyer's preparation of the instrument and rendered a "certificate of independent review" as detailed in the statutory scheme. By following this procedure, both the gift and the lawyer's preparation of the instrument were authorized notwithstanding the general prohibitions in the Probate Code.

This statutory reform, however, did not appear to account for the preexisting attorney disciplinary standard in rule 4-400 that generally prohibited a lawyer from inducing a client to make a substantial gift (to the lawyer or to persons related to the lawyer). At the time § 21351 was enacted, rule 4-400 did not, and currently does not, have any exception comparable to a "certificate of independent review" procedure. However, the rule Discussion did, and currently does, contain the following guidance: "A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)"

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<sup>1</sup> Probate Code §§ 21350 et seq. were repealed operative January 1, 2014. Comparable provisions now appear at §§ 21380 et seq. The conflict with Rule 4-400, however, remains.

Rather than authorizing an otherwise prohibited gift through a “certificate of independent review” procedure, the State Bar’s 1994 proposal sought to enhance public protection, in part, by expanding the general prohibition on gifts to cover “any” gift as opposed to a “substantial” gift. In doing so, the State Bar’s proposal charted a different policy course from the Legislature by rejecting the Probate Code’s exception for a “certificate of independent review” procedure. The State Bar enumerated the following reasons for the 1994 proposal:

- 1) the proposed rule is the result of an extensive study;
- 2) the regulation of attorney conduct is best achieved through California Rules of Professional Conduct promulgated by this Court, not through legislative enactments;
- 3) the proposed amended rule offers greater public protection than Probate Code sections 21350 – 21355;
- 4) the proposed amended rule is written more clearly than the Probate Code, which is difficult to decipher;
- 5) the proposed amended rule is a reasoned, balanced rule that provides increased public protection and can be understood and followed by State Bar members;
- 6) the Legislature appears willing to seek amendment of the Probate Code to harmonize it with the amended rule; and
- 7) the State Bar should take a leadership role in this matter by adopting the best rule it can for transmission to this Court for approval.

(October 1994 memorandum at pages 14 – 15.)

In February 1995, the Supreme Court denied the State Bar’s request to approve proposed amended rule 4-400. The Supreme Court’s order stated:

The request of the State Bar Board of Governors that rule 4-400, State Bar Rules of Professional Conduct, be amended is denied. The proposed amendments appear to conflict with the provisions of Probate Code sections 23150 and 23151. The existence of a rule of professional conduct and statutory provisions governing the same conduct may in this instance be confusing to members of the bar and the public. ¶ Mosk, J. and Kennard, J. are of the opinion the request should be granted.

(Supreme Court Order No. S043016, filed February 23, 1995.)

## **VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016  
(In response to 90-day public comment circulation):**

1. OCTC supports this rule and the Comments.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017  
(In response to 45-day public comment circulation):**

1. OCTC supports this rule and the Comments.

Commission Response: No response required.

- **State Bar Court:** No comments received from State Bar Court.

## **VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule and one comment agreed only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

### **A. Related California Law**

1. Probate Code §§ 21380 et seq. may conflict with the improper inducement standard in Rule 4-400.
2. Primacy of Judicial Regulation of the Legal Profession. Legislative standards for discipline are only minimal standards and the Supreme Court retains inherent power to expand upon them. See, *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889-90 [123 Cal.Rptr. 101, 102, 538 P.2d 229]. The Supreme Court of California extensively addresses its inherent authority over the legal profession in *In re Attorney Discipline System* (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836]. The Court states:

Our inherent authority over the discipline of licensed attorneys in this state is well established. Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, municipal courts, and justice courts. "Since the 'courts are set up by the Constitution without any special limitations' on their power, they

'have . all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. [Citations.]' [Citations.] ¶ In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. [Citation.] 'This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.' [Citations.]" (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337, fns. omitted.) "This principle, which was first recognized in California in 1850 [citation], has been reaffirmed on numerous occasions. [Citations.]" (*Id.* at p. 336, fn. 5, 178 Cal.Rptr. 801, 636 P.2d 1139; see also *In re Shannon* (Ariz.1994) 179 Ariz. 52, 876 P.2d 548, 571 ["The judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292."]; *Martineau, The Supreme Court and State Regulation of the Legal Profession* (1980-1981) 8 Hastings Const.L.Q. 199, 202 ["In each state it is the supreme court, with or without the legislative approval, that dictates the standards for education, admission and discipline of attorneys." (Fn. omitted.)].) Our more recent decisions have continued to recognize this power. (E.g., *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 542-544, 28 Cal.Rptr.2d 617, 869 P.2d 1142; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418, 25 Cal.Rptr.2d 80, 863 P.2d 150.)

Witkin has described our authority in this area as follows: "The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power. [Citations.]" (1 Witkin, *Cal. Procedure* (4th ed.1996) *Attorneys*, § 356, p. 438, original italics.)

*In re Attorney Discipline* at pp. 592-593 (Footnotes omitted.)

## B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf) [Last visited 2/7/17]

- Twenty-eight jurisdictions have adopted Model Rule 1.8(c) verbatim.<sup>2</sup> Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.8(c).<sup>3</sup> California has adopted a rule regulating gifts from a client that is substantially different from Model Rule 1.8(c).

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

1. In paragraph (a)(1), substitute the word “solicit” for the word “induce” used in current Rule 4-400.
  - Pros: Almost every other jurisdiction uses ABA Model Rules term “solicit” rather than “induce.” The Commission is not aware of any problems with the operation of the rule in jurisdictions that employ the term “solicit.” The Commission was unable to identify any other jurisdiction using the term “induce.” Uniformity is desirable where consistent with advancing the goal of public protection. The term “induce” is arguably vague, implying that nonverbal conduct which causes a gift to be made could be subject to discipline, such as by inducing a gift by providing loyal and excellent legal services to a client over many years.
  - Cons: The word “induce” is used in the current Rule 4-400 and there is no evidence that it has caused any problems in applying the rule to lawyers who have inappropriately sought a gift from a client. It would reach conduct that might not be considered a “solicitation” but nevertheless reflects the undue influence and other overreaching conduct by a lawyer that the rule is intended to address.
2. In paragraph (a)(1), substitute the phrase “a person related to the lawyer” for the phrase “the member’s parent, child, sibling or spouse” and define the term in a separate paragraph, (paragraph (b)), as “person who is related by blood or affinity” by reference to Probate Code § 21374(a).<sup>4</sup>

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<sup>2</sup> The twenty-eight jurisdictions are: Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, and West Virginia.

<sup>3</sup> The twenty-two jurisdictions are: Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

<sup>4</sup> Probate Code § 21374(a) provides:

(a) A person who is "related by blood or affinity" to a specified person means any of the following persons:

(1) A spouse or domestic partner of the specified person.

- Pros: Retaining the current rule's scope of application to extend to a lawyer's relatives continues the public protection of avoiding undue influence or overreaching that could occur when the transferee is a relative of the lawyer. Defining which relatives are covered under the rule by reference to the Probate Code brings the rule in line with the definitions currently used in the Code. Those definitions will automatically be updated when the Probate Code sections are updated.
  - Cons: None identified.
3. Add a new blackletter provision, paragraph (a)(2), that prohibits a lawyer from preparing the instrument that gives the lawyer or related person a substantial gift, *unless* (i) the lawyer or related person is related to the client or (ii) an independent lawyer has reviewed the transfer and advised the client, and provided a "certificate of independent review" pursuant to Probate Code § 21384.<sup>5</sup>

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(2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.

(3) The spouse or domestic partner of a person described in paragraph (2).

<sup>5</sup> Under Probate Code § 21380(a), an instrument making a donative transfer "is presumed to be the product of fraud or undue influence" if the transfer is to:

- (1) The person who drafted the instrument.
- (2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.
- (3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.
- (4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

Under § 21382(a) and (b), the presumption does not apply to:

- (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.
- (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

Section 21384(a) provides:

- (a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate [in the form described in the statute].

- Pros: The amendment would clarify that lawyers are permitted to draft an instrument that gives a gift to the lawyer or related person under certain circumstances, as expressly permitted by the Probate Code. This provision will alert lawyers to the requirements under the Code and promote compliance with the law. Further, this additional paragraph brings California in line with all other jurisdictions that have adopted either an identical or substantially similar rule as Model Rule 1.8(c). All of those rules expressly prohibit a lawyer preparing an instrument that gives a substantial gift to a lawyer or relative unless the client is related. Finally, including an exception where the lawyer or related person is related to the client creates a parallel construction with subparagraph (a)(1), which carries forward that exception from current rule 4-400.
- Cons: None identified.

4. Amend current rule 4-400, Discussion and include as Comment [1].

- Pros: The first sentence of proposed Comment [1] recognizes that the rule is intended to prevent a lawyer from exercising undue influence over a client or engaging in other overreaching conduct. It provides important interpretive guidance in applying the rule to a course of conduct. The last two sentences provide, respectively, an example of what would not constitute an improper solicitation and a citation to California Supreme Court case where overreaching was found. Both provide valuable guidance on applying and complying with the Rule.

- Cons: The last two sentences of the Comment are unnecessary surplusage. The first sentence adequately describes the scope of the rule. Further, the rule should not cite to an opinion that was decided before the rule was promulgated.

5. Add a new Comment [2], based on Model Rule 1.8, Cmt. [3], to the effect that the Rule does not prohibit a lawyer from seeking appointment as executor of a client's estate.

- Pros: The Comment does not create an exception to the Rule but alerts the reader to the fact that the Rules do not prohibit a lawyer or lawyer associated with that lawyer from being appointed as an executor of the client's estate provided the lawyer or associated lawyer complies with Rule 1.7(b) and (c) [conflicts with current client]. Because it does not create an exception to this Rule, but merely provides a cross-reference to duties in another rule, it is more appropriate as a Comment.
- Cons: The provision, which alerts a lawyer to the ability to be appointed as an executor of the estate, thus creating a potential conflict between lawyer and client, belongs in the blackletter.

## **B. Concepts Rejected (Pros and Cons):**

1. Retaining the term “induce” in the rule in addition to the term “solicit”.
  - Pros: See Section IX.A.1, “Cons.”
  - Cons: See Section IX.A.1, “Pros.”

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

## **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. Addition of paragraph (a)(2) regarding the drafting of an instrument giving the lawyer or related person a substantial gift in conformance with the Probate Code.
  - Pros: See Section IX.A.3, “Pros.”
  - Cons: See Section IX.A.3, “Cons.”

## **D. Non-Substantive Changes to the Current Rule:**

1. Substitute the term “solicit” for “induce.”
  - Pros: See Section IX.A.1, “Pros.”
  - Cons: See Section IX.A.1, “Cons.”
2. Substitute the phrase “a person related to the lawyer” for the phrase “the member’s parent, child, sibling or spouse”.
  - Pros: See Section IX.A.2, “Pros.”
  - Cons: See Section IX.A.2, “Cons.”
3. Substitute the term “lawyer” for “member.”
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

4. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
5. Assign the number 1.8.3 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(c).
  - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.
  - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

**E. Alternatives Considered:**

None.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

The Commission recommends adoption of proposed Rule 1.8.3 [4-400] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.3 [4-400] in the form attached to this Report and Recommendation.