

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2011-180**

ISSUE: When does an attorney violate rule 4-400 of the California Rules of Professional Conduct by accepting a gift from a client?

DIGEST: An attorney who demonstrates by words or conduct an intent to cause a client to give the attorney a substantial gift violates rule 4-400. Whether a gift is substantial must be determined by examining issues such as the value of the gift from the perspective of both the client and the attorney both financially and otherwise, as well as general standards of fairness.

AUTHORITIES

INTERPRETED: Rules 1-100(B)(2) and 4-400 of the California Rules of Professional Conduct.^{1/}

STATEMENT OF FACTS

Attorney represents Client in a real estate litigation matter in California that involves a second home that Client owns in Santa Barbara, California. Over the last year, Client has paid Attorney roughly \$20,000 in fees. During the course of negotiations regarding the Santa Barbara property, Attorney tells Client that although the house is normally rented for \$5,000 per week, Attorney feels that she has really earned a break and explains to Client that she would really be able to recharge her batteries and dive back into the case after relaxing for a week at the Santa Barbara property. Client, deeply invested in the result of the litigation but also facing difficult economic times herself, reluctantly hands Attorney the keys to the Santa Barbara house, agreeing that Attorney deserves a vacation and that she is free to stay there for one week without charge. Attorney gratefully accepts Client's offer, not having the funds to pay the \$5,000 for a week. Has Attorney violated rule 4-400?

DISCUSSION

Rule 4-400 of the California Rules of Professional Conduct, entitled "Gifts From Client," provides:

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.

The Discussion to rule 4-400 provides: "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."^{2/} Rule 4-400, Discussion, citing *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]. Because of an attorney's duty of fidelity to his or her client, all business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney's part.^{3/}

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} Rule 1-100(B)(2) defines "member" as a member of the State Bar of California.

^{3/} *Magee, supra*, 58 Cal.2d at 430 (holding that lawyer who drafted will for elderly client who left bulk of estate to lawyer and accepted \$4,500 cash gift from client did not violate any ethical duties, even though probate court set aside testamentary bequest, because client consulted with another lawyer regarding bequest); see also *People v. Kronemyer* (1987) 189 Cal.App.3d 314 [234 Cal.Rptr. 442] (lawyer, who claimed to have received \$956,000 in

1. Inducement

Rule 4-400 does not define “induce.” “Induce” commonly means “To lead (a person) by persuasion or some influence to (into, unto) some action, condition, belief, etc.; to move, influence, prevail upon (any one) to do something.” Oxford Universal Dictionary (3rd ed. 1964) at p. 944. We apply this definition of “induce” to rule 4-400 because it focuses on the attorney’s exertion of influence, which suits rule 4-400’s primary goal, which, as reflected in the Discussion, is to prohibit lawyers from exerting undue or impermissible influence on their clients. It follows that, for purposes of rule 4-400, the attorney must intend to cause the client to make the gift. Merely complimenting or admiring a client’s property, absent any intent on the part of the lawyer that the client offer its use as a gift, does not violate rule 4-400.

Although “induce” can mean “to cause” or “to bring about an act or course of conduct” (see, e.g., Black’s Law Dictionary (6th ed. 1990) at p. 775) (Black’s), we believe that such a definition is too broad for purposes of rule 4-400. In this sense, an attorney might “induce” a client to make a gift simply by using his or her legal prowess to obtain an extraordinary result in the engagement. One could say that the attorney “caused” or “brought about” the gift through exemplary legal service. To impose discipline under such circumstances would not be appropriate. Imposing discipline would also be inconsistent with rule 4-400’s primary goal of preventing lawyers from exerting undue or impermissible influence on their clients. If a client gives a gift – even a substantial gift – to his or her attorney solely because the client is pleased with the outcome of the representation, there is no violation of rule 4-400. (See, e.g., San Diego County Bar Association Formal Opn. 1977-2 (former legal aid lawyer violated no ethics rules by accepting unsolicited gift of \$500 from client “for the fine quality of representation” and “made wholly out of client’s beneficence”).)

We interpret “induce” as used in rule 4-400 to encompass both words and conduct. In this sense, rule 4-400 is broader than its ABA Model Rule counterpart,^{4/} which uses the term “solicit” rather than “induce.” ABA Model Rule 1.8(c) provides, in pertinent part, that a lawyer “shall not solicit any substantial gift from a client ...” The word “solicit” in its common usage connotes a verbal request. (See, e.g., Black’s, at p. 1392 (defining “solicit” as “to appeal for something ... to ask for the purpose of receiving...”); see also ABA Model Rule 1.8(c), Comment [6] (“... [D]ue to concerns about overreaching and imposition on clients, a lawyer may not *suggest* that a substantial gift be made to the lawyer ...”) (italics added).) On the other hand, “induce,” as we define it for purposes of rule 4-400, encompasses persuasion through both words and conduct. Thus, a lawyer who demonstrates by words or by conduct an intent to cause a client to give a substantial gift violates rule 4-400.

2. Substantial

Rule 4-400 prohibits a lawyer from inducing a client to make a substantial gift. The rule does not define the term “substantial.” “Substantial” commonly means “of real worth and importance; of considerable value; valuable.” Black’s, at p. 1428; see also *Atchison, Topeka and Santa Fe Railway Co. v. Kings County Water Dist.* (1956) 47 Cal.2d 140, 144 [302 P.2d 1] (defining “substantial” in phrase “supported by substantial evidence in light of the whole record” as “material; ... not seeming or imaginary; ... real; true; ... important; essential ...”). A lawyer who induces a client to give an insubstantial gift does not violate rule 4-400. (See, e.g., ABA Model Rule 1.8, Comment [6] (accepting a “simple” gift is permissible, “such as a present given at a holiday or as a token of appreciation.”).)

The Comment to Section 127(2) of Restatement Third of the Law Governing Lawyers provides that in deciding whether a gift is “insubstantial,” one must consider the financial situation of both the client and the lawyer. “To a poor client, a gift of \$100 might be substantial, suggesting that such an extraordinary act was the result of the

client property as gift, convicted of grand theft and perjury); and Probate Code, section 21350(b) (prohibiting transfers to lawyer who drafted will absent certain circumstances). While *Magee* predates the adoption of rule 4-400, the Court in *Magee* concluded that a gift procured by undue influence may be subject to discipline. *Magee, supra*, 58 Cal.2d at 429 (“An attorney who by undue influence obtains a gift from a client *inter vivos* or in a will is guilty of an act involving moral turpitude.”).

^{4/} The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do no conflict with California policy. See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799].

lawyer's overreaching. To a wealthy client, a gift of \$1,000 might seem insubstantial in relation to the client's assets, but if substantial in relation to the lawyer's assets, it suggests a motivation on the part of the lawyer to overreach the client-donor. Under either set of circumstances, the lawyer violates the client's rights by accepting such a gift." We could interpret the term "substantial" in accordance with the Restatement's analysis.⁵

However, such interpretation could subject a lawyer to discipline based solely on the relative wealth of the client or the attorney, which does not appear to be the intent of the rule. The determination of whether a gift is substantial should depend on the surrounding circumstances of the event, in addition to the standard provided in the Restatement. Although there is no truly objective standard, there are certain factors that should be considered to determine if the gift is substantial. Such factors include the monetary value of the gift, nature of the gift, the fairness of the transaction, the appropriateness of the lawyer's actions or behavior, the sophistication of the client, the emotional or sentimental value of the gift, whether the gift is substantial from the perspective of the client, and whether the gift is substantial from the perspective of the attorney. We interpret the term "substantial" applying these factors.

APPLICATION TO THE FACTS

Applying these principles to our factual scenario, we conclude that Attorney violates rule 4-400 by accepting Client's offer to use the Santa Barbara property rent-free for a week, because the gift was induced by Attorney and appears to be substantial to Attorney and also to Client.

By intentionally tying her desire to stay at the Santa Barbara property to the quality of work on the case, Attorney induced the gift within the meaning of rule 4-400. Even though Client told Attorney she "deserved a vacation" while handing over the keys, this act was presumably done due to Attorney's statement about having earned a vacation and specifically wanting to stay at the property to recharge her batteries.

The gift was substantial to Attorney especially because she could not afford to rent the property. The gift's value at \$5,000 is likely substantial from Client's perspective as well, because Client only reluctantly offered the property considering the loss of a week's income. Therefore, Attorney violates rule 4-400 by inducing the gift.

CONCLUSION

We conclude that an attorney who demonstrates by words or conduct an intent to cause a client to give the attorney a substantial gift violates rule 4-400. In determining whether a gift is substantial, we must examine the value of the gift from the perspective of both the client and the attorney both financially and otherwise, as well as general standards of fairness.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.^{6/}

^{5/} See also *In re the Complaint as to the Conduct of Ronald D. Schenk* (2008) 345 Or. 350 [194 P.3d 804] (concluding without discussion that client's \$1,000 gift to lawyer's wife was "substantial").

^{6/} This opinion does not comment on the propriety of accepting client property that is tendered as a fee as opposed to a gift. Whether or not those types of arrangements violate rule 4-200 of the California Rules of Professional Conduct, entitled Fees for Legal Services, is beyond the scope of this opinion.