

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
Co-Drafters: Cardona, Tuft
Meeting Date: November 13 – 14, 2015

I. CURRENT CALIFORNIA RULE 4-400

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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

The drafting team members recommend a proposed amended rule as set forth below in Section III. The vote was two in favor of (Ham and Tuft), and one opposed (Cardona) to, making the recommendation.

III. PROPOSED RULE 1.8.3 (CLEAN)

Rule 1.8.3 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, 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 in accordance with 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).

Comments

[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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
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Meeting Date: November 13 – 14, 2015

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(a)(2).]

IV. PROPOSED RULE 1.8.3 (REDLINE TO CURRENT CALIFORNIA RULE 4-400)

Rule ~~4-400~~1.8.3 Gifts From Client

(a) A ~~member~~lawyer shall not:

- (1) ~~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, 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 in accordance with 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).~~

~~Discussion:~~Comments

[1] A ~~member~~lawyer 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, 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~~occurred, discipline is appropriate.~~ (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(a)(2).]~~

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
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Meeting Date: November 13 – 14, 2015

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 10/27/15:**

- **G. Rule 4-400: Gifts From Client**

1. Rule 4-400 should be revised to clearly prohibit a member's attempt to induce an improper gift from a client.
2. The rule does not prohibit a gift made in the absence of a member's inducement. Therefore, is not necessary to promulgate a more permissive rule to address gifts made within families.

- **RUSSELL WEINER, OCTC, 6/15/2010**

- **Rule 1.8.3. Gifts From a Client.**

1. The first sentence of Comment 1 seems unnecessary in light of the clear language of the rule.¹

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

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Illinois Rule 1.8(c) is identical to Model Rule 1.8(c):

Illinois Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

* * * * *

- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the

¹ The first sentence of RRC1's Comment [1] provided: "Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client." In its proposed rule, the drafting team has deleted that sentence. In its place, the drafting team recommends substituting the first sentence of current rule 4-400, Discussion ¶. 1, as amended.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
Co-Drafters: Cardona, Tuft
Meeting Date: November 13 – 14, 2015

gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.²

* * * * *

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 April 21, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf
- Twenty-eight jurisdictions have adopted Model Rule 1.8(c) verbatim.³ Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.8(c).⁴ California has

² Illinois Rule 1.8(c) is accompanied by three comments, similarly identical to the Model Rule comments:

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] 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. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
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Meeting Date: November 13 – 14, 2015

adopted a rule regulating gifts from a client that is substantially different from Model Rule 1.8(c).

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Introduction

The drafting team has recommended that the Commission recommend that the Board adopt and recommend to the Court a proposed Rule 1.8.3 that includes certain provisions that are intended to track the Probate Code and alert lawyers to their obligations and procedures available under the Probate Code that are related to the rule. As discussed in the Rule Assignment Memo, attached, in 1994 the State Bar proposed amendments to rule 4-400. The Supreme Court rejected that proposal because “[t]he proposed amendments appear to conflict with the provisions of Probate Code sections 23150 and 23151.” (See Assignment Memo, Section II.) Those statute provisions were repealed and replaced by Probate Code §§ 23180 et seq. In any event, the team’s proposed rule has been drafted to conform to the requirements of the Probate Code.

B. 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 drafting team is not aware of any problems with the operation of the rule in jurisdictions that employ the term “solicit.” The drafting time 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.

³ 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.

⁴ 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
Co-Drafters: Cardona, Tuft
Meeting Date: November 13 – 14, 2015

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).⁵
 - **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 § 21384.⁶

⁵ 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).

⁶ 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 section 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
Co-Drafters: Cardona, Tuft
Meeting Date: November 13 – 14, 2015

- 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. Unlike the proposed 1994 amendment to rule 4-400, the provision is drafted to conform to the statutory requirements. (See paragraph A (Introduction)). 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.
 - Cons: None identified.
4. Amend current rule 4-400, Discussion, as indicated, and include as Comment [1].
- Pros: The first sentence recognizes of proposed Comment [1] 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 are not unnecessary. They 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 adequate 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(a)(2) [Conflicts with current client]. Because it does not create an exception to this Rule, but merely provides a cross-

(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].

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
Co-Drafters: Cardona, Tuft
Meeting Date: November 13 – 14, 2015

- 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.
- **NOTE:** The drafting team has bracketed the reference to Rule 1.7(a)(2) because that Rule has not yet been considered by the Commission. In addition, the drafting team notes that Model Rule 1.7(a)(2) requires that the client give his or her informed written consent to the appointment. An earlier version of RRC1's proposed Rule 1.8.3 contained a cross-reference to a provision in the version of Rule 1.7 that had carried forward current rule 3-310(B) nearly verbatim. That cross-reference was heavily criticized because 3-310(B) does not require the client's informed consent; it requires only that the lawyer provide the client with disclosure. That is not sufficient under circumstances when a lawyer is seeking to be appointed as executor of the client's estate. Regardless of what version of the conflicts rules the Commission approves for Board consideration, once they are approved, it is important that this cross-reference be checked to ensure that the referenced conflicts provision requires informed written consent. The Model Comment on which this proposed comment is based also includes the expectation that informed consent will be obtained. ("Moreover, the lawyer must obtain the client's informed consent.")

C. Concepts Rejected (Pros and Cons):

1. Retaining the term "induce" in the rule in addition to the term "solicit".
 - **Pros:** See paragraph B.1, "Pros".
 - **Cons:** See paragraph B.1, "Pros".

D. 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.
 - **Pros:** See paragraph B.3, "Pros".
 - **Cons:** See paragraph B.3, "Cons".

E. Non-Substantive Changes to the Current Rule:

1. Substitute the term "solicit" for "induce".
 - **Pros:** See paragraph B.1, "Pros".
 - **Cons:** See paragraph B.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 paragraph B.2, "Pros".
 - **Cons:** See paragraph B.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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
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Meeting Date: November 13 – 14, 2015

- 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 drafting team agrees with the approach taken by RRC1. RRC1 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, RRC1 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.

F. Alternatives Considered:

1. None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-400 [1.8.3]

Lead Drafter: Ham
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Meeting Date: November 13 – 14, 2015

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

- (1) Although the drafting team has proposed the substitution of the term “solicit” (as used in every other jurisdiction and the Model Rules) for “induce,” as used in the current rule, that recommendation is not unanimous. It therefore requests that the Commission members consider whether the term “induce,” should be included in the rule in addition to the term “solicit”. (See Section VIII.B.1, above.)
- (2) Whether to include the second & third sentences of Comment [1]. (See Section VIII.B.4, above.)

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None.

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 4-400 [1.8.3] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4-400 [1.8.3] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



THE STATE BAR OF CALIFORNIA

Date: October 27, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for November 2015 meeting

CONTENTS

- B. Opening Comment
- C. Points for Consideration, as calendared
 - A. Rule 1-310: Forming a Partnership with a Non-Lawyer, Rule 1-320: Financial Arrangements with Non-Lawyers and Model Rule 5.4 Professional Independence
 - B. Rule 1-400: Advertising and Solicitation
 - C. Rule 1-600: Legal Service Programs
 - D. Rule 1-650: Limited Legal Services Program
 - E. Rule 4-210: Payment of Personal or Business Expenses Incurred by or for a Client
 - F. Rule 4-300: Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
 - G. Rule 4-400: Gifts From Client
- D. Closing Comment

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's November 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.
POINTS FOR CONSIDERATION

[TEXT OMITTED]

G. Rule 4-400: Gifts From Client

1. Rule 4-400 should be revised to clearly prohibit a member's *attempt* to induce an improper gift from a client.
2. The rule does not prohibit a gift made in the absence of a member's inducement. Therefore, is not necessary to promulgate a more permissive rule to address gifts made within families.

III.
CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

CURRENT CALIFORNIA RULE 4-400
“Gifts from Client”

I. Text of Current Rule:

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. Background/Purpose:

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 drafts person.

(December 1987 memorandum at pages 46 – 47. Emphasis in the original.)

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 § 21351,¹ 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].)”

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;

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

- 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.)

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

- A. In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 4-400:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

- B. In a 2001 Letter to the first Commission, OCTC Provided the Following Comment on Rule 4-400:

None.²

IV. Potential Deficiencies in the Current Rule:

- A. See above input from OCTC.

² In addition, in a June 15, 2015 memorandum to RRC1, OCTC suggested that the "first sentence of [RRC1's proposed] Comment 1 seems unnecessary in light of the clear language of the rule." RRC1's proposed rule is provided with this Rule Assignment memo.

- B. The prohibition in the current rule arguably is inconsistent with the provisions of the Probate Code, sections 21380 et seq., (see discussion above in section II) to the extent that the standard set by the rule is an improper inducement. It is uncertain whether a lawyer's compliance with the Probate Code's procedure for a "certificate of independent review" would preclude a State Bar Court finding that an improper inducement occurred. Put another way, it is unclear whether a gift made pursuant the "certificate of independent review" procedure is conclusively a gift that satisfies general standards of fairness and is not the product of undue influence.
- C. The term "induce" appears to be vague. The current rule provides that "a member shall not induce a client to make a substantial gift," but it is not clear whether the prohibition extends to a situation where a lawyer solicits a gift but that solicitation fails to induce the client to make a gift.
- D. The description of related persons (parent, child, sibling, spouse) who would trigger a lawyer's duties under current rule 4-400 may be too narrow. Compare Probate Code § 21374.³

³ Section 21374 provides:

§ 21374 "Related by Blood or Affinity" and "Spouse or Domestic Partner"– Defined

(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).

(b) For the purposes of this section, "spouse or domestic partner" includes a predeceased spouse or predeceased domestic partner.

(c) In determining a relationship under this section, Sections 6406 and 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6, are applicable. (Added by Stats. 2010, ch. 620.)

"Domestic partner" is defined in Prob. Code § 21368 as having "the meaning provided in Section 297 of the Family Code," which in turn provides:

(a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.

(b) A domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met:

- (1) Both persons have a common residence.
- (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.

V. California Context:

- A. Probate Code sections 21380 et seq. may conflict with the improper inducement standard in Rule 4-400. (See discussion above in section II.)
- B. 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

(3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.

(4) Both persons are at least 18 years of age.

(5) Either of the following:

(A) Both persons are members of the same sex.

(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

(6) Both persons are capable of consenting to the domestic partnership.

(c) "Have a common residence" means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.

[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.)

VI. Approach In Other Jurisdictions (National Backdrop):

A. The analogous ABA Model Rule is MR 1.8(c), which provides:

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.⁴

⁴ Model Rule 1.8(c) also has three comments:

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer’s benefit, except where the lawyer is related to the client as set forth in paragraph (c).

- B. 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 April 21, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf

- Twenty-eight jurisdictions have adopted Model Rule 1.8(c) verbatim.⁵ Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.8(c).⁶ California has adopted a v rule regulating gifts from a client that is substantially different from Model Rule 1.8(c).⁷

VII. Public Comment Received by the First Commission:

- A. The clean text of a proposed new rule 1.8.3 drafted by the first Commission and adopted by the Board to replace rule 4-400 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 4-400, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 4-400 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] 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. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

⁵ The twenty-eight jurisdictions are: Arkansas, California, 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.

⁶ 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.

⁷ The one state is: California.

Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. *Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:*

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should be amended to prohibit a lawyer from soliciting a gift as well as inducing a gift.

(2) Whether the rule should be amended to conform to related Probate Code restrictions that prohibit a lawyer from preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. This change would include the Probate Code's "certificate of independent review" procedure which functions as an exception to the statutory prohibition. (See discussion above in section II.)

(3) Whether the rule should be amended to expand the definition of related persons who trigger the duty of a lawyer to comply with rule 4-400 [1.8.3] so that the rule conforms to the scope of the Probate Code.

IX. *Research Resources:*

- [Magee v. State Bar](#) (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]
- Probate Code § 21380 et seq. (cf., 21350 et seq. – repealed)
- [CAL 2011-180](#) (Gifts from Clients)
- In re Attorney Discipline System (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836]
- Stratmore v. State Bar (1975) 14 Cal.3d 887 [123 Cal.Rptr. 101]