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October 29, 2015 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 4-400 was received and is attached. Kevin incorporated these comments in the Report & Recommendation document that will be posted with the November agenda materials for this rule.

Attached:

RRC2 - [4-400][1.8.3] - 10-27-15 OCTC Memo to RRC2.pdf

October 27, 2015 OCTC Memo to Commission:

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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.

November 7, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

I am concerned that Paragraph (a)(2)(ii), which incorporates Probate Code § 21384 by reference, is too narrow. This Probate Code section, as I read it, applies to “donative transfers.” (See *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1139.) By incorporating this statutory scheme into the rule we are limiting the rule to whatever the Probate Code defines as a “donative transfer.” The rule would not reach transfers outside the Probate Code or transfers in other states where the Probate Code would not apply. By its terms, the required “certificate of independent review” under section 21384(a) applies where there is an “heir or proposed beneficiary.” However, not all gifts addressed by the rule involve heirs or beneficiaries. Also, is a “gift,” as used in the draft rule, the same as a “donative transfer”?

Another problem is that Paragraph (a)(2) applies only to “substantial gifts,” whereas the Probate Code provisions do not have that limitation. As such, the draft rule is narrower than the Probate Code. A lawyer could argue that he or she did not need to comply with § 21384(a) because the gift was not “substantial.”

I would suggest that the rule be divorced from the Probate Code and that we include our own independent counsel disclosure and consent language rather than default to the certificate of independent review. That approach would be consistent with other rules like 3-300 that require greater disclosure and consent than Probate Code § 21384 . A cross reference to section 21384(a) should suffice.