

Proposed Rule 1.8.3 [4-400] “Gifts from Client”

(Draft # 5.1, 10/18/09)

Summary: Rule 1.8.3, which is based on Model Rule 1.8(c), addresses a lawyer’s duties with respect to gifts from a client. See Introduction for details as to how proposed Rule 1.8.3 differs substantively from Model Rule 1.8(c).

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules RPC 4-400

Statute Probate Code § 21350(b).

Case law *McGee v State Bar* (1962) 58 Cal.2nd 423.

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 12
Opposed Rule as Recommended for Adoption 0
Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Public commenters took issue with the Commission's proposed substitution of "induce" for the Model Rule's "solicit". Other commenters criticized broadening the Rule to include "attempts to induce". See Public Comment Chart, comments from San Diego County Bar Association and Ross Simmons. The Commission has replaced the "attempt to induce" standard with the Model Rule's "solicit" and believes that change may assuage the commenters' concerns.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.3* Gifts from Clients

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.3 is based on Model Rule 1.8(c), and is intended to replace current California rule 4-400. Proposed Rule 1.8.3 reorganizes ABA 1.8(c), and includes several changes that improve client protection and conform the rule to California law. First, the Rule retains the current California rule prohibition against “inducing” a gift, which provides broader protection than the Model Rule, in addition to the Model Rule standard, which prohibits “solicitation” of gifts. Second, rather than restate in the rule the scope of related persons excluded from the gift prohibition, reference instead is made to Probate Code § 21350(b), which defines “a person who is related by blood or marriage.” See proposed paragraph (b). Third, to conform to California law, the Commission has included a requirement in Comment [2] that an unrelated client have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule 1.8(c), cmt. [7] merely states that the client “should” have such advice.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted Model Rule 1.8(c), some with minor variations. See State Variations chart, below.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

* Proposed Rule 1.8.3, Draft #5,1 (10/18/09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.3 Gifts from Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(a) <u>A lawyer shall not:</u></p> <p>(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.</p>	<p>Proposed Rule 1.8.3 is based on Model Rule 1.8(c), but has been reorganized into three subparts to improve its readability.</p>
	<p>(1) <u>induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or</u></p>	<p>The Commission has retained the prohibition in current California rule 4-400, which prohibits “inducing” a client gift, and has also added the Model Rule’s “solicit” standard. Together, they provide broader client protection than the Model Rule, which simply prohibits “solicitation” of a gift. In response to public comment, the Commission has removed the “attempting to induce” standard proposed in the public comment draft because it is too vague a standard for a disciplinary rule.</p>

* Proposed Rule 1.8.3, Draft 5.1 (10/18/09).

BLUE UNDERLINE indicates that language has been added to the ABA Model Rule.

~~REDLINE STRIKEOUT~~ shows text that has been deleted from the ABA Model Rule.

~~Green STRIKEOUT~~ indicates that text from the ABA Model Rule has been moved and

Green UNDERLINE shows the new location where that language has been placed in the proposed Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><i><u>(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,</u></i></p>	<p>Subparagraph (2) is taken verbatim from Model Rule 1.8(c).</p>
	<p><i><u>unless the lawyer or other recipient of the gift is related to the client.</u></i></p>	<p>The closing clause of paragraph (a) is taken verbatim from Model Rule 1.8(c).</p>
	<p><i><u>(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).</u></i></p>	<p>Rather than restate in the Rule a description of people excluded from the Rule's coverage, as does Model Rule 1.8(c), the Commission recommends including a reference to Probate Code § 21350, which includes a statutory definition of "a person who is related by blood or marriage."</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.3 Gifts from Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Gifts to Lawyers</p> <p>[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).</p>	<p>Gifts to Lawyers</p> <p>[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).</p>	<p>See Explanation of Changes for Comment [1], below.</p>
	<p><u>[1] 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. However, a lawyer 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].)</u></p>	<p>Comment [1] is based on Model Rule 1.8(c), cmt. [6], but has been substantially revised to make it more concise and provide greater clarity. In particular, the Commission has changed the example to better illustrate the point of the Comment. Reference to Supreme Court authority confirming imposition of discipline where a lawyer induces a substantial gift has been included.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.3 Gifts from Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[7] If effectuation—ofeffecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client shouldmust have the detached advice thatindependent representation by another lawyer can—providein accordance with Probate Code, sections 21350 et seq. The sole exception to this Rule is where the client is a relative of the donee.</p>	<p>Comment [2] is based on Model Rule 1.8, cmt. [7]. Other than changing the text of the Model Rule comment for clarity, the Commission has retained the California requirement that an unrelated client actually have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule Comment [7] merely states that the client “should” have such advice. Thus, the proposed Comment provides greater client protection.</p>
<p>[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.</p>	<p>[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 provisionprovisions in Rule 1.7 (d)—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 consentto disclosing 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.</p>	<p>Comment [3] largely tracks the language in Model Rule 1.8, cmt. [8], except it deletes an explanation of what the referenced rule 1.7 states. The Commission has not recommended the adoption of the “materially limit” standard in Model Rule 1.7, so including the description would be inaccurate.</p> <p><i>Minority.</i> A minority of the Commission believes this explanation for deleting most of the second sentence from Model Rule, cmt. [2], illustrates the lack of public protection under proposed Rule 1.7(d) for conflicts described in this Comment that can materially affect a lawyer's duty of loyalty and professional judgment. Contrary to the rule in virtually every other jurisdiction, proposed Rule 1.7(d) imposes no obligation to obtain the client's consent where the lawyer seeks to have himself named or have a partner or associate in the firm named as executor, trustee or to another "potentially lucrative fiduciary position" no matter how significant the risk that the recommendation, or the appointment, will materially limit the lawyer's professional judgment. See Minority Report to proposed Rule 1.7.</p>

Rule 1.8.3 Gifts From Client

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A lawyer shall not:
- (1) induce or ~~attempt to induce~~ 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 the lawyer or other recipient of the gift is related to the client.

unless the lawyer or other recipient of the gift is related to the client.

- (b) For purposes of this Rule, related persons include "a ~~spouse, registered domestic partner, person who is related by blood or equivalent marriage~~ as that term is defined in other jurisdictions Cal. Probate Code, ~~cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship~~ section 21350(b).

COMMENT

- [1] ~~Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, Paragraph (a) prohibits a lawyer may not induce or attempt to induce a substantial gift~~

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 ~~as set forth in paragraph (. However, a). (Compare Cal. Probate Code~~ lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, section 21350(b) such as by sending the client a wedding announcement.) Where Discipline is appropriate where impermissible influence occurs, ~~discipline is appropriate.~~ (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent ~~advice from~~ representation by another lawyer. ~~(Cal. in accordance with Probate Code, sections 21350 et seq.)~~ The sole exception is where the client is a relative of the donee.

- [3] 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 provisions in Rule 1.7(d) ~~{3-310(B)}~~. In disclosing 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.

Rule 4-4001.8.3 Gifts From Clients
(Comparison of the Current Proposed Rule to Current California Rule)

(a) A lawyer shall not:

- (1) ~~A member shall not~~ induce or solicit a client to make a substantial gift, including a testamentary gift, to the ~~member~~ lawyer or ~~to the member's parent, child, sibling, or spouse, except where the client is~~ 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 the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).

Discussion:- COMMENT

- [1] ~~A member may accept~~ 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. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in such as by sending the preparation of an instrument memorializing client a gift which wedding announcement. Discipline is otherwise permissible ought not to be subject to professional discipline. On the other

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

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code, sections 21350 et seq. The sole exception is where the client is a relative of the donee.

[3] 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 provisions in Rule 1.7(d). In disclosing 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.

Rule 1.8.3 Gifts From Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not:
- (1) induce or 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 the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).
- [3] 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 provisions in Rule 1.7(d). In disclosing 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.

COMMENT

- [1] 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. However, a lawyer 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] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code, sections 21350 et seq. The sole exception is where the client is a relative of the donee.

Rule 1.8.3: Gifts from Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.3 is highlighted.)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary

to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship

existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal

malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client’s consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)’s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the

lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s

inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client's ability to pay.” Finally, Oregon's rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer's employment,” a lawyer shall not make or negotiate an

agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 2**
Disagree = 1
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association (Trudy C. Levindofske)	A			<p>Rule conforms more closely to ABA Model Rule.</p> <p>Agree with proposal to extend rule to cover “attempts” to induce gifts.</p> <p>Clients are protected by prohibiting attorneys from drafting the documents that may be necessary to provide a gift to the attorney.</p>	<p>Following public comment, the Commission deleted “attempt to induce” from the Rule because it provides too vague a standard for a disciplinary rule. See also responses to S.D. County Bar Association & Ross Simmons.</p>
2	Sall Law Firm, The (Robert K. Sall)	D			<p>Unclear from (a)(1) and Comment [1] whether an attorney is prohibited from accepting a substantial gift from a client that the lawyer has not suggested or induced.</p>	<p>Comment [1]’s description of the purpose of the rule and the citation to California Supreme Court precedent is adequate to address this concern.</p>
3	San Diego County Bar Association (Ross Simmons)	M			<p>Rule should track ABA Model Rule 1.8(c) but replace the term “solicit” with “induce.”</p> <p>Greater instruction needed as to the terms “substantial” and “modest” as used in the rule and Comments [1] and [2].</p> <p>Rule should not include the phrase “attempt to induce” because it adds an unnecessarily broad sweep to the rule and is too subjective, making compliance and enforcement little more than conjecture.</p>	<p>This language was revised and the term “induce” is used.</p> <p>The language was revised and the term “modest” is no longer used.</p> <p>Commission agreed, and removed “attempts to induce” from the Rule.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 2**
Disagree = 1
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Statement in Comment [1] that lawyers may accept modest gifts should include the qualifier that is found in the Model Rule that the transaction must meet general standards of fairness. Add a Comment [4] which would state: "The term 'close, familial relationship' apart from those expressly set out in the Rule, is intended to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable)."</p> <p>Add a Comment [5] which would state: "In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term 'induce,' however, is intended to be broader than the term 'solicit.'"</p>	<p>Commission removed the discussion regarding "modest" gifts. Commission did not make the requested revision, in part, because the Probate Code references are adequate and controlling.</p> <p>Commission did not make the requested revision, in part, because it has removed "attempt to induce" from the Rule.</p>
4	San Francisco, Bar Association of (Philip Humphreys)	A			Rule should remain limited to legally defined relationships or, in the alternative, must define the term "close familial relationship" in paragraph (b).	Agree with alternative suggestion. Revised paragraph (b) to read "related persons include "a person who is related by blood or marriage: as that term is defined in Cal. Probate Code, section 21350(b)."

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 2**
Disagree = 1
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>If the gift is permissible, the lawyer does not provide any advice and only acts as scrivener. As such, Comment [1] should include the deleted second sentence of present Discussion paragraph 1, which reads: "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."</p> <p>Comment [2] should only require opportunity to obtain independent advice.</p> <p>Comment [3] should include the requirement that the client be advised of the circumstances and other alternatives which might preserve more of the estate. Comment should not mention conflict of interest because in the case of a testamentary document the client is dead and the beneficiaries have no attorney-client relationship.</p>	<p>The Commission did not make the requested revision, in part, because Comment [1] is focused on stating the purpose and underlying policy of the rule.</p> <p>Commission did not make the requested revision, in part, because the relevant code sections provide for an exception if an independent lawyer "counsels the client (transferor) about the nature of his or her intended transfer. . . ." Probate Code section 21352(b). Providing an opportunity to seek advice is not enough.</p> <p>Commission did not make the requested revision, in part, because the Commission believes that lawyers will be guided by referring to the conflicts rules and studying those rules will allow lawyers to make their own determination on possible conflict issues.</p>

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 2**
Disagree = 1
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Santa Clara County Bar Association (Christine Burdick)	M			<p>Change the last sentence of 1.8.3(a) to read “unless the lawyer or other recipient of the gift is related to the client or the client has had independent advice from another lawyer.” This eliminates the need for Comment [2] as currently drafted. Comment [2] can read: “It is the intent of this rule that it be applied consistent with PC 21350 et seq.”</p> <p>In the third line of 1.8.3(b) the word “and” should be changed to “or”</p>	<p>Commission did not make the requested revision, in part, because the language of the rule is accurate and Comment [2] provides additional guidance that should be helpful to lawyers who are unfamiliar with Probate Code section 21350.</p> <p>This language was revised in a manner that obviates the commenter’s requested revision.</p>
6	Simmons, Ross (as an individual)	M			<p>Defining what constitutes “inducing” is inexact and the language “attempt to induce” is even more ambiguous.</p> <p>Using the term “solicit” instead of “induce” would properly narrow the rule and more clearly define the prohibited conduct by requiring something more affirmative.</p> <p>Unclear what constitutes a “substantial” gift.</p>	<p>Commission deleted the reference to “attempt to induce” and also added “solicit” to provide a broader scope of protection.</p>