

Rule 1.8.3 [4-400] Gifts From Client
(Commission’s Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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 that complies with the requirements of Probate Code § 21384.
- (b) For purposes of this Rule, related persons* include a person* who is “related by blood or affinity” as that term is defined in California Probate Code § 21374(a).

Comment

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

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

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 4-400 (Gifts From Client) in accordance with the Commission Charter, with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The Commission also considered the American Bar Association (“ABA”) counterpart, Model Rule 1.8(c) (concerning gifts from clients). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules, including relevant Probate Code sections. The result of the Commission’s evaluation is proposed rule 1.8.3 (Gifts From Client). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The proposed rule reflects three significant changes from current rule 4-400. First, in paragraph (a)(1), the word “solicit” has been substituted for the word “induce.” In its study, the Commission was unable to identify any other jurisdiction using the term “induce.” The Commission is unaware of any problems concerning the operation of the rule in jurisdictions that employ the term “solicit.” Second, paragraph (a)(1) substitutes the phrase “a person related to the lawyer” for the phrase “the member’s parent, child, sibling or spouse” and defines the phrase in a separate paragraph (paragraph (b)), as “a person who is ‘related by blood or affinity’” with reference to Probate Code section 21374(a).¹ Defining which relatives are covered under the rule by reference to the Probate Code brings the rule in line with the definitions currently used in that Code. Third, the proposed rule adds a new black letter provision, paragraph (a)(2), that prohibits a lawyer from preparing an instrument that gives the lawyer or a related person a substantial gift, unless: (i) the lawyer or related person is related to the client, or (ii) an independent lawyer has reviewed the transfer and advised the client, and provided a “certificate of independent review” pursuant to Probate Code section 21384.² This amendment clarifies that

¹ 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).

² 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.

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

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

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

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

Section 21384(a) provides:

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

Rule 1.8.3 [4-400] Gifts From Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not:

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

(2) prepare on behalf of a client an instrument giving the lawyer or a person* related to the lawyer any substantial* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.

(b) For purposes of this Rule, related persons* include a person* who is "related by blood or affinity" as that term is defined in California Probate Code § 21374(a).

CommentDiscussion

[1] A ~~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, where impermissible influence occurred, A~~lawyer also does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate. ~~(where impermissible influence occurs. See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~

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