



**THE STATE BAR
OF CALIFORNIA**

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III.G. Gifts to Clients
June 2-3, 2016
Open Session

MEMORANDUM

DATE: May 23, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: Gifts to Clients Drafting Team (Dean Zipser (L), Judge Stout, and Tobi Inlender)

SUBJECT: Consideration of a Proposed Rule Addressing the Ethical Propriety of a Lawyer Offering or Giving a Gift to a Prospective or Existing Client

Summary:

A drafting team was assigned to study whether there should be a rule addressing a lawyer's conduct in offering or giving a gift to a prospective or existing client. Following study, the drafting team recommends that the Commission reconsider the prior adoption of proposed rule 1.8.5 [4-210] ("Payment of Personal or Business Expenses Incurred by or for a Client") for the limited purpose of considering the addition of a new paragraph (d) that would address the issue of gifts to clients. (See Exhibit 1 for the full text of proposed rule 1.8.5 as recommended by the drafting team to include a new paragraph (d).)

Background:

This topic arose as a part of the Commission's discussion of rule 4-210 at the November 13 – 14, 2015 meeting. In revising rule 4-210 and renumbering it as proposed rule 1.8.5, a proposed subparagraph (b)(5) drafted by the rule 4-210 team was considered but not ultimately included in the proposed rule.¹ That subparagraph would have clarified that notwithstanding the rule's general prohibition against a lawyer paying a client's or prospective client's personal or business expenses, a lawyer would be permitted to: "offer or give a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client." Part of the concern giving rise to the Commission's action was that the issue of a gift was regarded as distinct from the subject matter of rule 1.8.5 because rule 1.8.5 rule pertained to bilateral agreements to make certain payments, as opposed to unilateral donative acts. After the November meeting, staff was asked to assign the topic of gifts for consideration as a possible standalone rule. In response, the drafting team met by teleconference on May 11, 2016 and discussed whether to recommend a standalone rule. Among the items considered by the team were RRC1's proposed rule 1.8.5 and an excerpt concerning rule 4-210 from Professor Mohr's November 13 – 14, 2015 meeting notes. As explained below, the drafting team is recommending that the Commission consider a new paragraph (d) for rule 1.8.5 that would permit gifts to clients.

¹ A motion was made to delete paragraph (b)(5) from the rule under consideration by the Commission and the motion passed: 8 yes, 7 no and 0 abstentions.

Discussion:

Proposed rule 1.8.5(a) provides that: “A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer’s law firm will pay the personal or business expenses of a prospective or existing client.” Paragraph (b) identifies conduct that is permitted notwithstanding the general prohibition in paragraph (a). None of the subparagraphs in paragraph (b) address whether giving a gift is permitted.

As adopted by the Commission, the drafting team believes that proposed rule 1.8.5 could impair a lawyer’s well-intentioned decision to give a prospective or existing client a bona fide gift, including a nominal or customary gift. This would include, as just some examples, the following:

1. a legal services lawyer’s monetary gift to a prospective client to help defray the expense of public transportation to travel to the lawyer’s clinic.
2. a criminal defense lawyer’s gift of a new shirt and tie for the client to wear during court proceedings.
3. a family law lawyer’s wedding anniversary gift to spouses who are longstanding clients.
4. an appellate lawyer’s periodic gift of books to a death row inmate who is contemplating whether to continue with appeals.

The general prohibition in proposed rule 1.8.5 could arguably be construed narrowly to exclude a gift because the act of giving a gift directly to a client is distinguishable from payments made to a third party to whom the client is indebted for some personal or business expense. This interpretation of the rule, however, is not the only one and the drafting team believes the threat of discipline could be viewed as an unacceptable risk that imposes an unfortunate chilling effect on a lawyer’s decision to give a client a bona fide gift.

To avoid this chilling effect, a new paragraph (d) could be added to make clear that a lawyer “does not violate this Rule by offering or giving a gift to a prospective or existing client, provided that anything given was not offered in consideration of any promise, agreement or understanding that the lawyer would make a gift to a client.” The drafting team determined that the issue of gift giving by lawyers is best placed within rule 1.8.5, rather than in a standalone rule, because the interplay with rule 1.8.5 otherwise might be overlooked.

The drafting team noted that some members of the Commission took the position at the November 2015 meeting that a “gifts exception” would create an unacceptable loophole and also undercut the basic purpose of the rule, which is to level the playing field among lawyers who might otherwise use the promise of gifts to persuade prospective clients to hire, or remain with, the gift giving law firm. While the drafting team appreciates this concern, on balance, the drafting team’s consensus position is that a pervasive chilling effect on bona fide gifts could be more harmful to access to justice and the public’s trust and confidence in the legal profession than the speculative potential that a respondent might elude culpability for a rule 1.8.5 violation through the pretext of gifts. In addition, if a loophole problem did manifest following promulgation of the rule, the drafting team believes the State Bar could respond by amending or deleting the provision concerning gifts.

Conclusion:

In accordance with the foregoing, the drafting team recommends that the Commission reconsider the prior adoption of proposed rule 1.8.5 for the limited purpose of

considering the addition of a new paragraph (d) expressly permitting gifts to a prospective or existing client.

EXHIBIT 1

Rule 4-210 [1.8.5] Payment of Personal or Business Expenses Incurred by or for a Client

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter;
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client; and
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client.
- (d) A lawyer does not violate this Rule by offering or giving a gift to a prospective or existing client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.
- (e) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9 [4-300].