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May 19, 2016 OCTC Memo [Dresser] to RRC2:

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E. Consideration of Rule Addressing Gifts to Clients

Rule 1-320(B) prohibits a member from providing gifts of value for the purpose of recommending or securing employment.

May 26, 2016 Eaton Email to Difuntorum, Mohr & McCurdy:

I appreciate the thoughtful work of the drafting team in crafting a proposed new subparagraph (d) to proposed Rule 1.8.5. The proposed subparagraph would read: “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.” The basic rule to which this would be an exception is set out in subparagraph (a) which reads: “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.” (Emphasis added.)

The proposed new subparagraph (d) could not be more well-intentioned – or more conceptually unsound.

Initially, the proposed new subparagraph may be improper and subject to a procedural point of order. As the drafting team acknowledges in its May 23, 2016 memorandum, this is an attempt to get the Commission to “reconsider” action the Commission took at its November, 2015 meeting. The vote to delete the sum and substance of what is now being proposed as new subparagraph (d) was 8-7. Under Robert’s Rules, only a member in the majority may seek reconsideration of the earlier vote of a body. I am unsure whether Vice Chair Zipser or Judge Stout was in the majority in the earlier vote. (I do not believe Tobi Inlender had joined the Commission yet.) If neither Vice Chair Zipser nor Judge Stout was in the majority, someone who was in the majority would have to make the motion to adopt this new subparagraph. (I actually have a vague recollection that Judge Stout was in the majority that voted to delete this provision, which would moot this procedural point.)

Proceeding to the merits, I continue to believe that the substance of subparagraph (d) would continue to be an exception that would swallow the rule set out in (a), even though the intent behind subparagraph (d) could not be more noble. Three of the four examples given by the drafting team on page 2 vividly illustrate this point. A legal service lawyer’s giving the client money to travel to the lawyer’s office (example 1), a criminal defense lawyer giving the client a new shirt and tie to wear in court (example 2), and an appellate lawyer in a pending appeal giving books to a death row inmate working on the appeal (example 4) are all expenses the client would have to pay out of pocket, but for the attorney’s generosity. Those “gifts” are most naturally characterized as personal expenses associated with the troubles that brought the client to the attorney’s door in the first place. It is at the very least a stretch to characterize such outlays as “a bona fide gift, including a nominal or customary gift” as the drafting team does. Those are not the kinds of things that friends give as gifts to other friends unbidden. Each of these “gifts” is given as part and parcel, consideration if you will, of the client having established a professional relationship with the attorney and are given for the purpose of advancing the purpose of the representation.

It is the third of the four examples that illustrates the difference between a bona fide gift, on the one hand, and the indirect (at the very least) advance of a personal expense, on the other hand. The third example the drafting team gives is “a family law lawyer’s wedding anniversary gift to spouses who are longstanding clients.” An anniversary gift to clients who have become friends is not an “expense” in the way that basic transportation, basic clothing, and books needed for a representation undeniably are. That is even to acknowledge that the anniversary gift, like the other three examples, bears some connection to the matter that brought the clients to the lawyer for the purpose of receiving professional services. It is not, however, given for the purpose of advancing the purpose of the attorney-client relationship as the other three “gifts” obviously are.

There really is no conceptual limit to what (d) would allow: A multi-day wardrobe for the criminal defendant for trial? Rent to a destitute family law client to avoid an eviction that would jeopardize his chances of obtaining custody of his child? The payment of cosmetic dental surgery for a client with bad teeth whose presentation to the jury would be helped substantially by a better appearance? A make-work job for a personal injury plaintiff in her lawyer’s office to tide her over until settlement or verdict?

Attorney-client relationships do not generally arise as expressions of personal affection. They arise so that clients can get problems solved, problems the resolution of which carry certain direct and indirect expenses. It would subvert the purpose of this rule, and distort the nature of the attorney-client relationship -- and indeed the nature of true friendship -- to allow the lawyer to pay some of those expenses in the name of a personal “gift” that would not be made but for the attorney-client relationship and is made to advance the purpose for which that relationship was formed.

If the Commission wishes to allow advances to clients below a certain value, it ought to consider that issue forthrightly. This is not the way to do it.

May 29, 2016 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

Proposed Rule 1.8.5 (d) seems tautological. The second clause seems redundant given the basic definition of a “gift.” Black’s Law Dictionary defines a “gift” as the voluntary transfer of property to another without compensation. This Rule might be better if it borrowed from the language of current Rule 1-320(B) to read:

A lawyer does not violate this Rule by offering or giving a gift or gratuity to a prospective or existing client provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming in the future.

Also, the examples given in the Memorandum (buying a shirt and tie for a client or paying for transportation) don’t seem to fit the Rule since the minute the lawyer tells the client that the lawyer is paying for the shirt and tie, etc., there is an “understanding” that the lawyer is making a gift to the client.