

NEW HAMPSHIRE BAR ASSOCIATION

Limitations on Client Gifts to a Lawyer

Ethics Committee Advisory Opinion #2011-12/7

ABSTRACT

The Committee analyzed several scenarios where a lawyer was asked by a client to benefit either the lawyer or the lawyer's family by a present or testamentary gift. In this opinion, the Committee discussed the issues of direct gifts to the lawyer, gifts to individual related both to the testator and the lawyer, and a gift to a charitable organization for which the lawyer raised funds.

ANNOTATIONS

Guidance concerning gifts from a client is found in Professional Conduct Rule (hereafter "Rule") 1.8(c), that states as follows: "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."

Nothing in the Rule prohibits a lawyer from preparing a document that gives a client's assets to a person related to both the client and the lawyer. Thus, unless the client has an estranged relationship with his brother, he surely would be considered "a related person to the client" and therefore exempted from the application of this Rule.

The unsolicited gift to the lawyer of theater tickets and \$200 for dinner is not controlled by a reading of Rule 1.8(c). Nevertheless, because a lawyer holds a position of trust and confidence when representing a client, the proposed transaction in Scenario 3 must be evaluated based upon applicable standards governing fiduciary relationships.

The intended gift to the hospital clearly is nothing that benefits the lawyer or her family directly. Therefore, as long as the testamentary gift of \$50,000 is not the product of solicitation or encouragement on the part of the lawyer, preparing a trust that includes the gift is not prohibited under Rule 1.8(c). Because of the lawyer's direct and close involvement with the hospital, however, this intended gift must be closely scrutinized under Rule 1.7. Accordingly, the lawyer could only proceed to draft the provision for the client's bequest to the hospital's endowment fund after fully discussing the potential conflict with the client and obtaining the client's informed consent as required under Rule 1.7(b)(4).

OPINION

ISSUES PRESENTED:

What ethical guidelines or limitations apply when a lawyer is asked by a client to benefit either the lawyer or the lawyer's family by a present or testamentary gift?

Factual Background: Estate planning lawyers, especially in smaller New Hampshire communities, may be called upon by their clients when drafting client wills and trusts to include provisions that may benefit the drafting lawyer or that lawyer's family. In this situation, following a recent health scare, a long standing client is now focusing on estate planning matters. During discussions with the lawyer drafting a revocable trust for the client, the client desires to provide for certain distributions of money and items of tangible personal property from an estate valued at roughly 3 million dollars that possibly could benefit the lawyer or her family. Over the last twenty years, the lawyer has assisted the client with estate planning, business matters and a myriad of other assorted legal issues affecting the client and his family. In fact, the client's brother is married to the lawyer's daughter. The client is a long-standing board member for the local hospital, in which both client and the lawyer serve on the endowment committee to steer a major campaign (of which the lawyer is the chair). In this context, the client desires to make the following testamentary and lifetime gifts:

Scenario 1: Client desires to leave in his trust a recently purchased sports car to the lawyer's son-in-law (and the client's brother).

Scenario 2: Client desires to leave in his trust a valuable painting to the lawyer's daughter (and the client's sister-in-law).

Scenario 3: In appreciation for all the work provided over the years, client desires to give the lawyer tickets to the Palace Theater and \$200 for a nice dinner out for the lawyer and her husband.

Scenario 4: Client desires to leave in his trust \$50,000 to the hospital's endowment fund for general use purposes.

ANALYSIS: Guidance concerning gifts from a client is found in Professional Conduct Rule (hereafter "Rule") 1.8(c), that states as follows:

"(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."

This prohibition is triggered either through a solicitation by the lawyer (not involved in this situation) or the lawyer's preparation of an instrument containing a substantial gift, which clearly includes the lawyer's drafting of client's revocable trust. Quite clearly Rule 1.8 (c) prohibits the lawyer from including any provision in the trust that would provide any substantial gift directly to the lawyer drafting the trust unless the lawyer is related to the client.¹

¹ New Hampshire's Supreme Court addressed Rule 1.8(c) violations in two attorney disciplinary cases. The lawyer in *Kalled's Case*, 135 N.H. 557 (1992), pleading ignorance of Rule 1.8(c), and after undertaking several other egregious Rule violations in addition to preparing instruments awarding the lawyer substantial gifts, was disbarred. The Court in *Whelan's Case*, 136 N.H. 559 (1992), determined that the respondent/lawyer did not violate Rule 1.8(c), through imputation under Rule 1.10, since he had no participation in drafting the will that benefited another lawyer in his firm; this was decided prior to New Hampshire's adoption of Rule 1.8(k) (effective January 1, 2008).

Scenario 1: The intended future gift of the sports car to the lawyer's son-in-law certainly could be construed as a potentially prohibited transaction to a person related to the lawyer were it not for the fact that the son-in-law is also the client's brother. Rule 1.8(c) defines related persons to include persons who "maintain a close, familial relationship," as well as those related by blood to the lawyer or client. However, nothing in the Rule prohibits a lawyer from preparing a document that gives a client's assets to a person related to both the client and the lawyer. Thus, unless the client has an estranged relationship with his brother, he surely would be considered "a related person to the client" and therefore exempted from the application of this Rule.

Scenario 2: The intended future gift of the valuable painting to the lawyer's daughter is clearly prohibited since she is definitely a "person related to the lawyer." It is possible that the client's sister-in-law (married to client's brother) may enjoy the same status of a person "related to the client" as is intended under Rule 1.8(c). Such a finding, however, would require a factual analysis of the familial relationship between the client and his sister-in-law to determine whether the relationship is "close" and similar to other familial relationships listed in Rule 1.8(c), such as a spouse, child, grandchild, or grandparent; it should not be summarily assumed by the lawyer that a sister-in-law would enjoy that status.

Scenario 3 and Unsolicited Client Gifts: The unsolicited gift of the tickets and \$200 for dinner is not controlled by a reading of Rule 1.8(c). Nevertheless, because a lawyer holds a position of trust and confidence when representing a client, the proposed transaction in Scenario 3 must be evaluated based upon applicable standards governing fiduciary relationships. ABA Comment [6] is instructive, stating in part:

"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. ..."

Substantial unsolicited gifts, however, will be closely scrutinized. *See, e.g., Restatement of The Law, The Law Governing Lawyers* (2000), §127 (2), which states:

- “(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
- (a) the lawyer is a relative or other natural object of the client’s generosity;
 - (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
 - (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.”

The rationale for this, as stated in Comment b. to Section 127, is that any valuable gift to the lawyer “invites suspicion that the lawyer overreached or used undue influence.” *See also* ABA Comment [6] to Rule 1.8 articulating the concerns of “overreaching and imposition on clients” which may accompany a lawyer’s receipt of a substantial gift from a client. Comment f. to Section 127 also provides helpful guidance in determining what constitutes a “substantial” gift, which is evaluated based upon the relative wealth of the client. Thus, depending upon the facts, a \$100 gift from a poor client may be considered substantial, whereas a \$1,000 gift from a wealthy client may seem insubstantial. This Restatement section cites many cases in which unsolicited substantial gifts from a client to the lawyer were set aside as being unfair, or in which the lawyer was forced to disgorge any benefit received from such gift. *See also*, those cases and other authority cited in *The American College of Trust and Estate Counsel Federation (ACTEC), Commentaries on the Model Rules of Professional Conduct* (4th Ed. 2006), Annotations to Rule 1.8 (“Gifts to Lawyer”), pages 114-117. The ACTEC Commentary to Rule 1.8 (*Ibid*, at page 112) also aids in assessing the “substantiality of a gift” by indicating it “is determined by reference both to the size of the client’s estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client *including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts.*” [emphasis added]

In this particular scenario, however, since this is an unsolicited gift of one-time theatre tickets and a dinner by a fairly wealthy client to his long time lawyer and friend, it would seem the unsolicited gratuity would be considered an insubstantial gift, and therefore, not prohibited either by Rule 1.8(c) or other law pertaining to gifts to lawyers.

Should a lawyer receive any substantial unsolicited gift from a client, either during life or by testamentary transfer, the best practice would be for the lawyer either to obtain, if feasible, Court approval before accepting such gift or secure the consent of all other beneficiaries or devisees. In a probate proceeding, this could be obtained by the lawyer filing a motion to validate the gift as being fair under the circumstances and not the product of undue influence or fraud. In a trust context, this similarly could be handled by an appropriate Nonjudicial Settlement Agreement under RSA § 564-B:1-111, or by requesting a specific order from the Probate Court affirming the same points, *e.g.*, RSA §§ 564-B:2-201(c), -203(a).

Scenario 4: The intended gift to the hospital clearly is nothing that benefits the lawyer or her family directly. Therefore, as long as the testamentary gift of \$50,000 is not the product of solicitation or encouragement on the part of the lawyer, preparing a trust that includes the gift is not prohibited under Rule 1.8(c). Because of the lawyer's direct and close involvement with the hospital, however, this intended gift must be closely scrutinized under Rule 1.7. As chair of the endowment committee, the lawyer has fiduciary responsibilities to the hospital as well as a personal interest in furthering the endowment committee's success. These personal and fiduciary connections to the hospital, as the intended donee of the client's gift, certainly present "a personal interest of the lawyer" and "responsibilities to...a third party" that would constitute a concurrent conflict of interest under Rule 1.7(a)(2). In analyzing this issue the lawyer should further be mindful of the application of New Hampshire's "harsh reality" rule, as is discussed extensively under the Ethics Committee Comment to Rule 1.7.

This "harsh reality" test effectively establishes a two-step process in proceeding under a Rule 1.7 analysis. The first step is whether a disinterested, objective lawyer reasonably believes that an existing concurrent "conflict of interest" (in this situation the lawyer's own personal interest in furthering the objectives of the hospital's endowment committee) actually can be

waived by the client in the first instance. Only after satisfying that first step may the lawyer then seek to accomplish the second step, which is to obtain the client's informed consent. It is important to keep in mind, however, that the first step of this analysis always is reviewed after the fact, when something has gone wrong, by a disinterested lawyer, and **not** through the subjective lens and belief of the lawyer actually making the initial decision to proceed with the representation. It should also be noted that in Maryland's Ethics Op. 2003-08 (2003), that Committee concluded that a lawyer on a church legacy committee may **not** prepare wills for church members who wish to bequeath property to the church. That Committee took the position that the drafting lawyer's membership on the church legacy committee impeded the lawyer's independent professional judgment and ability to render candid advice (under Rule 2.1), thus prohibiting the lawyer from forming a reasonable belief that representation of fellow church members would not be "adversely affected." This Committee, however, does not conclude that mere membership on an endowment committee of a hospital benefitting under a client's estate plan creates such a concurrent conflict of interest that would, in all situations, prohibit the lawyer from seeking client consent in compliance with Rule 1.7(b).

Accordingly, the lawyer could only proceed to draft the provision for the client's bequest to the hospital's endowment fund after fully discussing the potential conflict with the client and obtaining the client's informed consent as required under Rule 1.7(b)(4). So while the lawyer is not prohibited from this transaction, care must be taken that the lawyer has sufficiently disclosed all "material risks of and reasonably available alternatives to the proposed course of conduct" (*see*, definition of "informed consent" provided in Rule 1.0(e)). It is important to be mindful that Rule 1.7(b)(4) requires that such informed consent be "confirmed in writing" as is defined in Rule 1.0(b).

While Rule 1.7 does not require the client to sign and acknowledge the informed consent, certainly the best practice is to do so.

SUMMARY: In conclusion, however innocuous a client's request may be to have the lawyer accept a gift or draft legal documents that could be construed to benefit the lawyer or the

lawyer's family, each transaction must be carefully scrutinized under the above Rules of Professional Conduct and law pertaining to clients making gifts to lawyers.

Rule References:

Rule 1.8(c)
Rule 1.7
Rule 1.7(a)(2)
Rule 1.7((b)(4)
Rule 1.0(f)
Rule 1.0(b)
Rule 2.1

Subjects:

Client Gifts to Lawyer
Conflict of Interests
Informed Consent
Confirmed in Writing

- **By the NHBA Ethics Committee**

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