

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 08-0001**

ISSUE: When does an attorney violate rule 4-400 of the California Rules of Professional Conduct by accepting a gift from a client?

DIGEST: An attorney who demonstrates by words or conduct an intent to cause a client to give the attorney a substantial gift violates rule 4-400. Whether a gift is substantial must be determined by examining the value of the gift from the perspective of both the client and the attorney. If the gift is substantial from either perspective, and the attorney said or did something with the intent to cause the gift to be given, the attorney violates rule 4-400.

AUTHORITIES

INTERPRETED: Rules 1-100(B)(2) and 4-400 of the Rules of Professional Conduct of the State Bar of California.^{1/}

STATEMENT OF FACTS

Attorney represents Client in several matters, including a real estate transaction that involves a second home that Client owns on the island of Molokai, Hawaii. Over the last year, Client has paid Attorney roughly \$20,000 in fees. During the course of negotiations regarding the Molokai property, Attorney mentions on a couple of occasions to Client that since the house stands vacant most of the time, she would love to stay there sometime, as she normally wouldn't be able to afford that kind of vacation destination. The transaction is completed to Client's satisfaction, and Attorney's fees are paid in full. Shortly thereafter, Client hands Attorney the keys to the Molokai house, telling her that she deserves a vacation and is free to stay there for one week without charge. Attorney gratefully accepts Client's offer. Although Client does not rent out the house, its fair rental value for one week is \$5,000. Has Attorney violated rule 4-400?

DISCUSSION

Rule 4-400 of the California Rules of Professional Conduct, entitled "Gifts From Client," provides:

A member shall not induce 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 related to the member.

The Discussion to rule 4-400 provides: "A member may accept a gift from a member'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, discipline is appropriate."^{2/} Rule 4-400, Discussion, citing *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]. Because of an attorney's duty of fidelity to his or her client, all business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney's part.^{3/}

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} Rule 1-100(B)(2) of the California Rules of Professional Conduct defines "member" as a member of the State Bar of California.

^{3/} *Magee, supra*, 58 Cal.2d at 430 (holding that lawyer who drafted will for elderly client that left bulk of estate to lawyer and accepted \$4,500 cash gift from client did not violate any ethical duties, even though probate court set

Inducement

Rule 4-400 does not define “induce.” “Induce” commonly means “To lead (a person) by persuasion or some influence to (into, unto) some action, condition, belief, etc.; to move, influence, prevail upon (any one) to do something.” Oxford Universal Dictionary (3rd ed. 1964) at p. 944. We apply this definition of “induce” to rule 4-400 because it focuses on the attorney’s exertion of influence, which better suits the rule’s primary goal. It follows that, for purposes of rule 4-400, the attorney must intend to cause the client to make the gift. Merely complimenting or admiring a client’s property, absent any intent on the part of the lawyer that the client offer its use as a gift, does not violate rule 4-400.

Although “induce” can mean “to cause” or “to bring about an act or course of conduct” (see, e.g., Black’s Law Dictionary (6th ed. 1990) at p. 775) (Black’s), we believe that such a definition is too broad for purposes of rule 4-400. In this sense, an attorney might “induce” a client to make a gift simply by using his or her legal prowess to obtain an extraordinary result in the engagement. One could say that the attorney “caused” or “brought about” the gift through exemplary legal service. To impose discipline under such circumstances would not be appropriate. Imposing discipline would also be inconsistent with rule 4-400’s primary goal, which, as reflected in the Discussion, is to prohibit lawyers from exerting undue or impermissible influence on their clients. If a client gives a gift – even a substantial gift – to his or her attorney solely because the client is pleased with the outcome of the representation, there is no violation of rule 4-400. See, e.g., San Diego County Bar Association Formal Op. 1977-2 (former legal aid lawyer violated no ethics rules by accepting unsolicited gift of \$500 from client “for the fine quality of representation” and “made wholly out of client’s beneficence”).

We interpret “induce” as used in rule 4-400 to encompass both words and conduct. In this sense, rule 4-400 is broader than its ABA Model Rule counterpart, which uses the term “solicit” rather than “induce.” ABA Model Rule 1.8(c) provides, in pertinent part, that a lawyer “shall not solicit any substantial gift from a client . . .” The word “solicit” in its common usage connotes a verbal request. See, e.g., Black’s, at p. 1392 (defining “solicit” as “to appeal for something ... to ask for the purpose of receiving...”); see also ABA Model Rule 1.8(c), Comment [6] (“[D]ue to concerns about overreaching and imposition on clients, a lawyer may not *suggest* that a substantial gift be made to the lawyer ...”) (italics added). On the other hand, “induce,” as we define it for purposes of rule 4-400, encompasses both words and other forms of persuasion. Thus, a lawyer who demonstrates by words or by conduct an intent to cause a client to give a substantial gift violates rule 4-400.

Substantial

Rule 4-400 prohibits a lawyer from inducing a client to make a substantial gift. The rule does not define the term “substantial.” “Substantial” commonly means “of real worth and importance; of considerable value; valuable.” Black’s, at p. 1428; see also *Atchison, Topeka and Santa Fe Railway Co. v. Kings County Water Dist.* (1956) 47 Cal.2d 140, 144 [302 P.2d 1] (defining “substantial” in phrase “supported by substantial evidence in light of the whole record” as “material; ... not seeming or imaginary; ... real; true; ... important; essential ...”). Thus, a lawyer who induces a client to give a gift that is not substantial does not violate rule 4-400. See, e.g., ABA Model Rule 1.8, Comment [6] (accepting a “simple” gift is permissible, “such as a present given at a holiday or as a token of appreciation.”). Thus, a lawyer may send his or her client an invitation to a birthday party or wedding, for example, without violating rule 4-400.

In interpreting the term “substantial” in rule 4-400, we take guidance from section 127(2) of The Restatement Third of the Law Governing Lawyers. Section 127(2), like California rule 4-400 and ABA Model Rule 1.8(c), prohibits a

aside testamentary bequest, because client consulted with another lawyer regarding bequest); see also *People v. Kronemyer* (1987) 189 Cal.App.3d 314 [234 Cal.Rptr. 442] (lawyer, who claimed to have received \$956,000 in client property as gift, convicted of grand theft and perjury); Probate Code, section 21350(b) (prohibiting transfers to lawyer who drafted will absent certain circumstances). While *Magee* predates the adoption of rule 4-400, the Court in *Magee* concluded that a gift procured by undue influence may be subject to discipline. *Magee, supra*, 58 Cal.2d at 429 (“An attorney who by undue influence obtains a gift from a client inter vivos or in a will is guilty of an act involving moral turpitude.”).

lawyer, absent certain circumstances, from accepting a client gift unless it is “insubstantial in amount.”^{4/} The Comment to section 127(2) provides that in deciding whether a gift is “insubstantial,” one must consider the financial situation of both the client and the lawyer. “To a poor client, a gift of \$100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer’s overreaching. To a wealthy client, a gift of \$1,000 might seem insubstantial in relation to the client’s assets, but if substantial in relation to the lawyer’s assets, it suggests a motivation on the part of the lawyer to overreach the client-donor. Under either set of circumstances, the lawyer violates the client’s rights by accepting such a gift.” Restatement Third of the Law Governing Lawyers, section 127(2), Comment. We interpret the term “substantial” in accordance with the Restatement’s analysis.

CONCLUSION

Applying these principles to our factual scenario, we conclude that Attorney violates rule 4-400 by accepting Client’s offer to use the Molokai property rent-free for a week, because the gift was induced by Attorney and is substantial to Attorney.

By mentioning her desire to stay at the Molokai house on a couple of occasions, Attorney “induced” the gift within the meaning of rule 4-400. Because Attorney made this comment more than once to Client, we can infer her intent was to cause Client to give the gift, which Client did. Even though Client told Attorney she “deserved a vacation” while handing over the keys, this act was presumably done due to Attorney’s repeated statement about wanting to stay at the property.

The gift’s value at \$5,000 is probably not substantial from Client’s perspective because the Molokai property is Client’s second home, is not rented out, and often sits vacant, all of which suggests that the incremental cost to the Client of the gift is not substantial. However, from our factual scenario, it appears that the value of the proposed gift is “substantial” from Attorney’s perspective, because Attorney could not normally afford such a vacation destination. Therefore, Attorney violates rule 4-400 by inducing the gift.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.^{5/}

^{4/} Section 127(2) provides, “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.”

^{5/} This opinion does not comment on the propriety of accepting client property that is tendered as a fee as opposed to a gift. Whether or not those types of arrangements violate rule 4-200 of the California Rules of Professional Conduct, entitled Fees for Legal Services, is beyond the scope of this opinion.