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**Giving Thanks:  
“Thank You” Gifts to Referral Sources**

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As we enter December, law firms and individual lawyers frequently take stock of the people who have sent them referrals during the course of the year. Traditional business practice and human nature often suggest sending those referral sources “thank you” gifts. In other instances, it is the firm or individual lawyers who are the ones being thanked. Both giving and receiving “thank you” gifts are permitted as long as the gift involved meets the general standard of ordinary business hospitality. In this column, we’ll look at the rules governing both giving and receiving “thank you” gifts.

Before we do, however, two qualifiers are in order. First, fee splits between lawyers at different firms are governed by RPC 1.5(d). The OSB *Ethical Oregon Lawyer* (Chapter 3) and the OSB *Fee Agreement Compendium* (Chapter 12) address fee splits in detail and both are available in the members section of the OSB web site. Second, formal reciprocal referral arrangements with nonlawyers are generally prohibited by RPC 5.4(e). OSB Formal Opinions 2005-2 (rev 2018) and 2005-175 (rev 2018) discuss this restriction and are also available on the OSB web site.

***Giving***

Historically, the lawyer marketing rules have prohibited paying for referrals. The prohibition traces its lineage to the use of paid “runners” to solicit injured workers. RPC 7.2(b) continues to summarize the prohibition today: “A lawyer shall not give anything of value to a person for recommending the lawyer’s services[.]”

At the same time, “thank you” gifts remained a common practice for many lawyers because they were simply expressing their appreciation rather than “paying” for referrals. OSB Formal Opinion 2005-73 (rev 2018) recognizes this distinction (at 2): “Lawyer . . . may provide de minimis gifts in the ordinary course of social or business hospitality as long as the proposed gifts are not payments in exchange for . . . [referral sources] . . . recommending Lawyer’s services.”

In 2018, the ABA significantly amended the lawyer marketing regulations in its influential Model Rules of Professional Conduct on which the Oregon RPCs are patterned. The ABA amendments included an exception to the general prohibition on paying for referrals that specifically permits “thank you” gifts. ABA Model Rule 7.2(b)(5) reads: “[A] lawyer may . . . give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to

be a form of compensation for recommending a lawyer's services." Comment 4 to ABA Model Rule 7.2 explains the thinking behind the exception:

"Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future."

To afford Oregon lawyers the enhanced clarity of a rule on this point, the Oregon State Bar in 2019 recommended to the Oregon Supreme Court an exception based on the ABA Model Rule formulation. The Supreme Court adopted the proposal earlier this year. New Oregon RPC 7.2(b)(4) reads:

"[A] lawyer may . . . give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services."

Although Oregon does not have comments to our RPCs, the report to the OSB House of Delegates with the proposal referenced both Comment 4 to ABA Model Rule 7.2 and OSB Formal Opinion 2005-73. Therefore, the rough gauge included in the ABA comment—"a token item as might be given for holidays, or other ordinary social hospitality"—is a prudent general standard. In other words, a bottle of wine or event tickets are likely "OK," but a new sports car is "not OK."

The exception does not distinguish between recipients. Therefore, the same general measure applies to lawyer and nonlawyer recipients alike.

***Receiving***

The rules make a slight analytical distinction between receiving gifts from lawyers and nonlawyers.

With lawyers, because it is now expressly permitted for a lawyer to give a “thank you” gift, it is also permitted to receive one—provided it otherwise meets the criteria noted in RPC 7.2(b)(4). As lawyers, we are prohibited under RPC 8.4(a)(1) from knowingly “assisting” another lawyer in violating the RPCs. In theory, therefore, a lawyer giver and a lawyer receiver could be liable for, respectively, providing and receiving a substantial gift exceeding the boundaries implicit in RPC 7.2(b)(4)—the sports car in my earlier example—for a referral.

With nonlawyers, RPC 5.4(e) specifically allows a lawyer to receive “thank you” gifts—again within the same general parameters for giving:

“A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.”

### ***Summing Up***

RPCs 7.2(b)(4) and 5.4(e) provide common sense guidance. As long as lawyers adhere to the standard of “ordinary business hospitality,” they should be safe to either give or receive.

### **ABOUT THE AUTHOR**

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