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**Tis the Season:
Gifts Given and Received**

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Around the holidays, lawyers often give gifts¹ to colleagues who have referred work to them during the year or are the recipients of such gifts. While usually an ordinary expression of business hospitality, gifts can become problematic depending on the circumstances. In this column, we'll look at both the mundane and the more suspect aspects of lawyer gift giving and receiving.

Before we do, two qualifiers are in order.

First, for gifts given, we'll focus on "thank you" gifts to colleagues who have or may refer work to the lawyers involved.²

Second, for gifts received, we'll focus on situations where a lawyer receives a gift directly from a client. Case law in this area includes scenarios where lawyers had themselves appointed by a client to lucrative positions through legal documents the lawyer prepared. That general area often invokes the business transaction rule—RPC 1.8(a)—or the broader lawyer self-interest conflict rule—RPC 1.7(a)(2).³ We'll save that topic for another day.

Gifts Given by Lawyers to Lawyers

Historically, the public policy concern with lawyer gift-giving revolved around improper payments for referrals.⁴ Washington's "barratry" statute, for example, traces its roots back to 1854.⁵ Similarly, ABA Canon 28—which was

titled “Stirring Up Litigation” and was adopted as part of the original set of ABA Canons in 1908—prohibited paying for referrals. As adopted in, respectively, 1983 and 1985, ABA Model Rule 7.2 and Washington RPC 7.2 continued the general prohibition on paying for referrals.⁶

The practical problem with both the ABA and the Washington versions of the prohibition as originally adopted, however, was that neither expressly distinguished paying for referrals from simple—and more common—“thank you” gifts such as a bottle of wine or a box of chocolates to colleagues who may have referred a case or client to a lawyer.⁷ The ABA addressed this ambiguity in 2018 and Washington followed in 2021 as part of a broad retooling of lawyer marketing regulation in both the ABA Model Rules and the Washington RPC. ABA Model Rule 7.2(b) now retains the general prohibition on paying for referrals but includes a specific exception—ABA Model Rule 7.2(b)(5)—permitting “nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending the lawyer’s services.”⁸ Washington adopted a roughly similar formulation in RPC 7.3(b)(5)—retaining the general prohibition on paying for referrals but exempting “nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending the lawyer’s services.”⁹

Although neither the ABA nor the Washington rule include a dollar definition of the word “nominal,” prudent practice suggests that it be interpreted reasonably when the recipient is someone who has or may refer work to the lawyer. Gifts along the line of dinner, a bottle of wine, or sports tickets would likely meet the intent of the “nominal gift” exception, while an all-expense paid trip to Tahiti would not.

Gifts Received from Clients

RPC 1.8(c) sets the benchmark for gifts received from clients.¹⁰ It is oriented around the concern over possible undue influence and draws a distinction between what amount to permissible “thank you” gifts similar to what we just discussed and “substantial” gifts where the concern for possible overreach is most acute:

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 spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.

Washington RPC 1.8(c) is functionally identical to the corresponding ABA Model Rule. Both were amended in two significant ways in the early 2000s that bear on the scope of its limitations today.

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First, the limitation on substantial gifts was expanded beyond simply preparing an instrument giving the lawyer a gift in the original formulation of the rule to more broadly soliciting any substantial gift.¹¹ The WSBA committee that developed the change put it this way in recommending adoption of the amended ABA approach: “There appears to be no sensible reason for regulating gifts made by instrument but not those made in other ways.”¹²

Second, the scope of the exception for gifts from family members was clarified to include a relatively broad definition of “related persons”: “For purposes of this paragraph, related persons include [a] spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.”¹³ The ABA borrowed this formulation from the ABA Model Code of Judicial Conduct¹⁴ and again Washington followed.¹⁵

Neither the text nor the comments to RPC 1.8 or its ABA Model Rule counterpart define “substantial” in dollar terms. The ABA drafters, however, noted that “insubstantial” gifts from clients¹⁶ are permitted outright and Comment 6 to RPC 1.8 describes permissible gifts as “simple gift[s] such as a present given at a holiday or a token of appreciation[.]” By contrast, the ABA drafters¹⁷ and Comment 6 also note that anything beyond that modest ceiling reasonably

moves the gift into the “substantial” category.¹⁸ Most instances involving lawyer discipline, however, do not involve fine gradations. In *In re Miller*, 149 Wn.2d 262, 66 P.3d 1069 (2003), for example, a lawyer was disbarred when he wrote himself into an elderly client’s will as the principal beneficiary for an estate ultimately valued at over \$750,000.

In addition to any regulatory consequences, Comment 6 to RPC 1.8 counsels that a substantial gift to a lawyer not falling within the “related persons” exception “may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.” In the probate companion to the *Miller* disciplinary case just noted, for example, the probate court set aside the will involved as the product of undue influence and the Court of Appeals affirmed.¹⁹

Notably, a conflict waiver is not available under RPC 1.8(c) to validate gifts.²⁰ In other words, soliciting a substantial gift from a client who does not fall within the “related persons” exception violates the rule.²¹

Even when a family member is involved, a lawyer-recipient as a matter of prudent practice may wish to consider having independent counsel from another firm prepare a will or other instrument conveying a substantial gift to the lawyer-recipient to avoid practical problems later.

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¹ The word "gift" in this column is used in its ordinary sense as a "voluntary transfer of property without consideration." *In re Marriage of Kile and Kendall*, 186 Wn. App. 864, 877, 347 P.3d 894 (2015) (citation omitted); see also Black's Law Dictionary (11th ed. 2019) ("The voluntary transfer of property to another without compensation.").

² Gifts to clients is a nuanced discussion unto itself and we'll save that for another day.

³ See RPC 1.8, cmt. 8 (discussing appointments to fiduciary positions); see, e.g., *In re Hall*, 180 Wn.2d 821, 329 P.3d 870 (2014) (lawyer disciplined under RPC 1.8(a) and 1.7(a)(2) for preparing legal documents appointing himself to fiduciary position without adequate conflict waiver).

⁴ RPC 7.3(b)(4) addresses reciprocal referral arrangements.

⁵ The current version of the barratry statute is at RCW 9.12.010. See generally *Danzig v. Danzig*, 79 Wn. App. 612, 904 P.2d 312 (1995) (discussing this historical prohibition under an earlier iteration of RCW 9.12.010 in the context of "runners"); see, e.g., *In re Kosher*, 61 Wn.2d 206, 377 P.2d 988 (1963) (disciplining attorney for, in relevant part, paying for referrals).

⁶ See ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 746-753 (2013) (ABA Legislative History) (adoption of ABA Model Rule 7.2); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 890-91 (1986) (adoption of Washington RPC 7.2).

⁷ See, e.g., WSBA Advisory Op. 1535 (1993) (struggling with this distinction in the context of a real estate lawyer providing restaurant gift certificates to real estate agents who referred work to the lawyer).

⁸ See ABA, *Annotated Model Rules of Professional Conduct*, 687-91 (10th ed. 2023).

⁹ See Supreme Court Order 25700-A-1333, Jan. 8, 2021 (adopting amendments to Title 7 to Washington RPC). For background on the lawyer marketing rule amendments ultimately adopted in 2021, see the related General Rule 9 cover sheet summary available on the Washington Courts' website at:

https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=2698

¹⁰ Beyond clients, lawyers are generally permitted to accept gifts from others in their professional circles subject to the limitations noted in the preceding section. See RPC 8.4(a) (classifying as professional misconduct “knowingly assist[ing] or induc[ing] another to” violate the RPC).

¹¹ See ABA Legislative History, *supra*, at 216 (“The current Rule has been criticized for regulating gifts made by instrument but not those made in other ways.”).

¹² WSBA, *Reporter’s Explanatory Memorandum to the Ethics 2003 Committee’s Proposed Rules of Professional Conduct* 155 (2004) (Reporter’s Memorandum).

¹³ See generally *Nunemaker v. Eriksen*, 2001 WL 324123 at *4 (Wn. App. Apr. 3, 2001) (unpublished) (noting ambiguity of “related to” in older formulation); WSBA Advisory Op. 2086 (2005) (same).

¹⁴ See ABA Legislative History, *supra*, at 216 (noting that the change “adopt[s] the more expansive and flexible definition of the ABA Model Code of Judicial Conduct . . . defining “member of the judge’s family” . . .”).

¹⁵ See Reporter’s Memorandum, *supra*, at 155 (noting that the clarifying amendment “adopt[s] a more expansive and flexible definition of those relationships”). See also Washington Courts’ Ethics Advisory Committee Op. 19-04 (2019) (discussing criteria for “close familial relationship”). See also *In re Osborne*, 187 Wn.2d 188, 197-98, 386 P.3d 288 (2016) (same).

¹⁶ See ABA Legislative History, *supra*, at 216.

¹⁷ *Id.*

¹⁸ See also Restatement (Third) of the Law Governing Lawyers § 127, cmt. f (2000) (discussing “substantial gifts” in a framework similar to ABA Model Rule 1.8(c)).

¹⁹ *In re Estate of Ottomeier v. Miller*, 1997 WL 162378 (Wn. App. Apr. 8, 1997) (unpublished). See also *In re Estate of Knowles*, 135 Wn. App. 351, 357, 143 P.3d 864 (2006) (addressing undue influence generally).

²⁰ *In re Gillingham*, 126 Wn.2d 454, 467, 896 P.2d 656 (1995) (“Unlike the other rules governing conflicts of interest, the prohibition on . . . gifts . . . does not include an exception when the client gives informed consent.”). Under Comment 8 to RPC 1.8, appointment of a lawyer-drafter (or a member of the lawyer-drafter’s firm) to a fiduciary position such as personal representative is subject to the general self-interest conflict rule—RPC 1.7(a)(2).

²¹ See *also* RPC 1.8, cmt. 7 (addressing this facet in the context of drafting instruments giving the lawyer a gift).