

'TIS THE SEASON...FOR ETHICAL BREACHES?

We are approaching the season of giving when it is not uncommon for friends, colleagues, even clients to exchange gifts. Many look forward to the opportunity to express gratitude and appreciation in the form of a gift. While often well-intentioned, an attorney's spider sense should tingle whenever a client seeks to gift something to counsel. There is a difference between paranoia and careful attention to the ethical rules governing attorneys and with that in mind, we will explore the ethical question: can an attorney accept a client's gift?

Don't forget that attorneys are professionals providing a service to clients in a time of need, often at a difficult crossroad in their personal and/or professional life. Clients may feel grateful to their attorney and may want to express that gratitude in the form of a gift. Depending on the form and circumstance of the gift, an attorney may accept with caution or make the decision to graciously decline.

The Model Rules of Professional Conduct under the ABA provide guidance on this quandary in the form of the rules governing conflicts of interest. As a general principle, all transactions between a client and their lawyer should be fair and reasonable to the client.

A gift exchange is considered a "transaction" under the rules. Rule 1.8(c) prohibits a lawyer from accepting "any substantial gift from a client." Of course, as is too often the case, this rule leaves room for interpretation and debate. The ethical rules governing client gifts are somewhat discretionary and permit an attorney to subjectively define the line between a year-end "thank you" and something substantial, which could lead to an ethical violation.

According to the commentary to the Model Rules, an attorney may accept "ordinary" gifts from a client "such as a present given at a holiday or as a token of appreciation." However, an attorney must be wary of accepting anything "more substantial" due to the "doctrine of undue influence." The rule is based upon concerns about overreaching and imposition on the client. According to an opinion reached by the New Hampshire Bar Association Ethics Committee, "the substantiality of a gift is determined by its size relative

to both the client's estate and the recipient's estate." Could an outsider interpret the gift as an attempt to alter the attorney-client relationship or, perhaps more importantly, create a sense of obligation by the attorney to client?

Although there is no bright line governing the size or substance of the gift, there can be no debate that an attorney cannot solicit any client gifts.

Much of the case law addressing client gifts exists in the context of wills and estates. Notably, there are many reported incidents of attorneys who are set to benefit from a testamentary document they drafted on behalf of their client. Although this type of transaction is not presumptively invalid, it certainly may raise red flags which call into question the transaction. Whenever a client is prepared to bequeath a gift to counsel, the best practice is to insist that the client engage an unaffiliated third-party attorney to draft the proposed document in order to avoid the appearance of impropriety under the conflict rules.

The lesson for attorneys is to use their best judgment. If a client gift feels a bit rich, it probably is and should be rejected graciously. On the other hand, counsel should feel free to accept token, modest gifts from their satisfied and grateful clients. This risk management tool should help to keep the attorney-client relationship merry and bright.



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