

5 Ways To Avoid The Hidden Ethical Dangers Of Client Gifts

By **Gavin Broady**

Law360, New York (February 23, 2015, 5:14 PM ET) -- Not all lawyers are lucky enough to have clients like Dr. Dre, who recently shelled out massive holiday cash bonuses to his longtime boutique counsel. But most attorneys with long-standing client relationships will receive a gift at some point, prompting the ethical question: How much is too much?

The ethical rules of accepting client gifts are largely discretionary and place the onus on attorneys to draw the distinction between an appropriate “token” offering and a more substantial gift that could be a recipe for headaches — or even disciplinary action — down the road.

“Attorneys too often forget that they are professionals who are providing a service to clients in a time of need, often at a difficult crossroad in their personal and professional life,” Goldberg Segalla LLP partner Seth Laver says. “That leaves clients feeling very grateful to attorneys and often wanting to express that gratitude in the form of gifts. You don’t want to insult your client, but you have to accept with caution.”

Here are four expert tips on how attorneys can stay in-bounds when they find themselves at the awkward intersection of etiquette and legal ethics.

It’s All Relative

American Bar Association Model Rule 1.8 and its commentary warn attorneys against accepting substantial gifts from clients, saying those gifts are deemed “presumptively fraudulent” because of the potential to create undue influence and upset the nuanced balance of power that is the attorney-client relationship.

However, the rules offer no bright-line definition of what constitutes a “substantial” gift — in part because the definition changes on a case-by-case basis. As a result, attorneys must consider factors that include the nature of the representation, the time of year, and the relative income of one’s client, one’s firm and oneself, experts say.

“In other words, \$300 noise-canceling headphones may be a substantial gift when received in the middle of May from a client who is seeking a Chapter 7 bankruptcy,” says University of Miami Law School professor Jan L. Jacobowitz, “but not when received during the holiday season from in-house counsel for one of your long-standing, large corporate clients who manufactures headphones.”

In weighing these factors, Patterson Belknap Webb & Tyler LLP partner Frederick B. Warder III says one question should be at the forefront of an attorney's mind: Will accepting this gift, whatever the cash value, change my relationship with the client or create any sense of obligation?

"Will the client think that the attorney is now beholden to the client in ways that go beyond the lawyer's professional and fiduciary duties?" Warder asks. "Lawyers push envelopes all the time for clients, in appropriate ways, but you don't want to accept a gift that makes you feel personally indebted to the client, or makes the client feel you owe him something more than your professional loyalty."

Never Solicit

While the line between token gifts and substantial offerings may be subjective, there is at least one hard and fast rule when it comes to client generosity, according to Montgomery McCracken Walker & Rhoads LLP partner Michael Hayes.

"The No. 1 rule is don't solicit gifts," Hayes says. "Don't solicit, don't suggest, don't request. Don't ask, period."

While this sounds like a no-brainer, particularly given that the model rules explicitly prohibit solicitation, experts say solicitation needn't always mean an outright request and can be construed to include hints, inferences and suggestions — such as offering up a gift of your own in a way that creates a sense of obligation or boasting about a gift offered by another client.

As a result, attorneys are advised to cover their bases by creating a paper trail, Laver says.

"Attorneys can protect themselves by ensuring that they've documented any gifts, even by way of sending a thank-you note to the client," Laver says. "A kind and meaningful note — with a copy kept in the attorney's file — can help to establish that the gift was unsolicited, if it were ever questioned down road."

Watch Out for Wills

The most dangerous ethical ground for attorneys when it comes to receiving gifts is in the realm of their clients' wills and estates, but a few simple rules can prevent accepting a client's generous final gesture from becoming a career-threatening mistake.

Most of the case law that exists in the area of contested gifts comes from the drafting of wills, particularly where an attorney stands to receive some benefit from a document he or she has helped prepare, according to Laver.

"Let's say I develop a relationship with a client that covers decades of representation, and the client doesn't have children or heirs and notifies me that she is interested in gifting me part of her estate," Laver says. "My antenna should immediately go up."

While attorneys can avoid problems by stepping aside and directing their client to another lawyer, Laver notes that throwing the work to a colleague at your firm won't solve the problem.

"Under the rules, I'm also prohibited from asking one of my partners to draft the documentation," he says. "Rather, I need to recommend that my client bring in independent, third-party counsel to

represent her.”

Run It by Your Firm

Attorneys also have to be aware that they have a fiduciary duty not only to their clients but also to their law firm, and lawyers have found themselves in trouble in the past for failing to report gifts that are large enough that they could be construed as a form of compensation, Warder says.

“No firm is likely to quibble over a bottle of wine at the holidays, but how about shares of stock in the client’s company?” Warder asks. “For some clients, shares in the client’s venture are an even more personal gift than a bottle of wine, so the client may not see a difference. But the lawyer’s firm might.”

Hayes notes that the “presumptively fraudulent” language outlined in the rules and commentary means the burden is on attorneys to prove that a gift is just that — a no-strings-attached expression of appreciation or affection — and not a covert way of bypassing appropriate methods of compensation for services.

“If a client of a lawyer at a firm says, I want to thank you by giving you a \$10,000 check, the lawyer needs to be thinking long and hard about whether this is coming in lieu of payment for services that were really provided by the firm as a whole,” Hayes says.

Gifts that are hefty enough to risk crossing the line into substantial offerings have been retroactively construed by courts as a portion of the client’s fee — which, when combined with the lawyer’s actual bill, would breach rules requiring lawyers to request only reasonable fees, according to Laver.

“Usually these issues are questioned later in the proceeding when the relationship sours for whatever reason, or if the client is deceased and it's being questioned by a third party,” Laver says.

Learn to Decline Gracefully

Finally, experts say attorneys have to accept that the more attractive the gift, the more likely it is they will have to decline — and they’d better learn how to say no without harming their professional relationship.

“It’s only hard in the short term to say, ‘No, thanks,’ to a substantial gift,” Warder says. “If you accept such a gift, it can be hard for the remainder of your relationship with the client to keep that gift from affecting your judgment or your client’s expectations.”

It’s no secret that attorneys and long-term clients often become friends, Warder says, but the power dynamic means that clients often don’t have a full grasp of the litany of ethical strictures to which legal professionals are subjected.

“In my experience, when you explain those ethical rules, clients understand and aren’t upset when you have to do something that seems foreign to them, like declining a gift,” Warder says. “Done deftly, you can turn saying, ‘No, thanks,’ to a client’s gift from seeming ungrateful to reassuring the client that he has a careful, ethical attorney.”

In the end, attorneys are likely to find turning down lump-sum cash gifts to be relatively easy from a personal standpoint, given that the value of the most-significant gifts a lawyer receives is often

symbolic, according to Hayes.

“Sometimes the most-meaningful gifts are tchotchkes, small things that are reminders of the successful representation — like a photograph, or a sample of the product involved in the case,” he says. “Most lawyers would tell you the most-meaningful gifts are the career milestones that wind up on your office shelf, and that no substantial gift of money is worth risking that career.”

--Additional reporting by Lisa Ryan. Editing by Kat Laskowski and Edrienne Su.

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