

MINUTES

COMMITTEE: Ethics Committee

DATE: April 4, 2013

Rule 3.4-37 and 3.4-39: Testamentary Instruments and Gifts

Rules 3.4-38 to 3.4-39 state:

3.4-37 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

3.4 39 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

The Committee considered whether rule 3.4-38 prevents a lawyer from taking instructions from a client to place a charging clause in the client's will if the client wants the lawyer to act as executor of the will. Such an interpretation would effectively prevent clients from choosing their lawyer as executor, even if the lawyer is the most appropriate person to fulfill that role, since lawyers would be precluded from charging executor fees. It was the Committee's view that the placing of a charging clause in a will at the request of a client does not constitute a "gift or benefit" within the meaning of rule 38. Such a clause is simply an authorization for a lawyer to charge a fee for performing executor services in the future and is subject to the same ethical constraints as any other fee.