L.E.I. 83-3

(January 28, 1983 -- L.E.C. 81-18)

GENERALLY A LAWYER MAY NOT ETHICALLY PREPARE A WILL IN WHICH THE LAWYER IS NAMED AS A BENEFICIARY OR GRANTEE

This matter, having been set for hearing, was submitted to the hearing subcommittee upon stipulated record.

The respondent attorney is a member of The West Virginia State Bar and has been actively engaged in the practice of law for 17 years. In January, 1980, Ms. A, a 67 year old blind woman, employed the respondent to draft her will. The respondent and Ms. A were personally acquainted and had known each other for approximately 34 years, the respondent having resided as a child in the same community as Ms. A. The respondent had performed legal services for Ms. A on several occasions prior to the preparation of the will in question.

During January, 1980, the respondent prepared a will for Ms. A. Pursuant to her instructions, the will devised valuable surface and mineral interests in approximately 400 acres of land in several parcels to the respondent. The will also named the respondent as Executor. The will was executed at the respondent's office in the presence of the respondent, his wife, and two attesting witnesses who had brought Ms. A to the respondent's office.

Before having Ms. A execute the will, the respondent spoke with a fellow member of his local Bar about the practical problems attendant upon the execution of a will by a blind person, but at

no time did he discuss the propriety of naming himself as beneficiary and Executor in such a will.

Furthermore, at no time did the respondent require Ms. A to discuss her will and the proposed devise to him with other counsel. Nor did he insist or suggest that she should have other counsel prepare her will and advise her with regard to her wish to devise a substantial amount of her property to him.

Before Ms. A executed the will the respondent read to her the entire will, item by item, and asked her from time to time if the portion of the will just read was agreeable, to which she replied affirmatively in each case. There appears to have been no discussion of the devise of the real estate to the respondent.

Ms. A appears to have had no relatives other than her brother and some half-brothers and sisters, for whom she exhibited an intense dislike. She remarked on several occasions that if she became ill or died, her brother was not to be called. She told the respondent she wanted him to have her real property so her relatives would never get it.

Ms. A died a few months after the will was executed, and the respondent offered the will for probate and was appointed and qualified as Executor thereof.

The appraised value of Ms. A's estate was approximately $53,000.00. The real estate devised to the respondent was appraised at $22,400.00. However, it was stipulated that the real estate devised to the respondent had a value of at least $18,750.00. This complaint was filed by Ms. A's brother.

It is a basic principle of professional conduct that an attorney must faithfully, honestly and consistently represent the interests and protect the rights of his client, and that he is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith, and to inform his client promptly of any known information important to him. These duties apply with particular force to situations where an attorney has personal transactions with a client. Such dealings are closely scrutinized by the courts, to the extent of attaching a rebuttable presumption of fraud or undue influence where a lawyer is designated as one of the principal beneficiaries of a will that he has drafted for a client.

The suspicion which attaches to transactions between attorney and client is best demonstrated by the general holding that an attorney may not permit his private interests to conflict with his client's interest, nor may he take any personal advantage of, or derive benefit from, his client without first advising him to seek independent advice. Following this reasoning, it has been held that ordinary prudence requires that, where a testator wishes to make an attorney or a member of the latter's immediate family a beneficiary under his will, the will should be drawn by another lawyer chosen by the client. Re Davis' Will, 14 N.J.L. 166, 101 A.2d 521.

Where a will is involved, the attorney draftsman who is also a beneficiary thereof (1) exposes himself to a conflict of interest; (2) renders himself incompetent to testify because of a transaction

with the deceased; (3) possibly places the will in jeopardy if it is contested; (4) causes possible harm to other beneficiaries; and (5) undermines the public trust and confidence in the integrity of the legal profession.

This Committee believes that it is highly imprudent, if not totally improper, for an attorney to name himself as beneficiary in a will which he has prepared for a client. This is true even in the absence of fraud or undue influence.

Under what circumstances an attorney exposes himself to disciplinary action based upon a charge of unprofessional conduct as a result of drafting a will in which he is named as beneficiary depends upon the facts and circumstances of a given case.

An attorney who drafted a will for a client in which the attorney was sole beneficiary, absent proof of exceptional circumstances to excuse such conduct, was held to be guilty of unethical conduct and was disbarred. Committee on Professional Ethics & Conduct of the Iowa State Bar v. Randall, 285 N.W.2d 161 (Iowa 1979). Likewise, an attorney who named himself as contingent beneficiary in a will drafted for a client was suspended for a period of three years without reinstatement. Committee on Professional Ethics & Conduct of the Iowa State Bar v. Behnke, 276 N.W.2d 838 (Iowa 1979). The drafting of a will for a client in which the attorney was named as residuary legatee was held, in and of itself, to warrant a reprimand. Re Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893. In this case there is no evidence of overreaching, fraud or undue influence, and the testatrix appears to have pro-

posed the devise of her real estate to the respondent so that "her relatives would never get it." However, the respondent was remiss and guilty of an impropriety in not advising and insisting that the will be drafted by another attorney or that at least Ms. A seek independent advice with respect to the devise to the respondent and the naming of him as Executor of her will. Under the facts and circumstances of this case, the Committee believes that a private reprimand is appropriate and the respondent is therefore privately reprimanded for his conduct. DR 5-101, Code of Professional Responsibility.

Members of the State Bar are advised that this Committee frowns upon the practice of an attorney drafting an instrument in which he is the grantee or a beneficiary.

If a testator insists upon naming the attorney draftsman as a beneficiary in his will, the attorney should insist that the testator have the will prepared by another attorney or at least should advise the client to seek independent advice concerning the proposed devise or bequest and the naming of the attorney as Executor.