IN THE MATTER OF ROBERT H. WATSON, JR.
A Member of the State Bar of Michigan,
Respondent.
File No. DP-209/82

Decided: July 18, 1983

OPINION OF THE BOARD

Due to the extenuating circumstances surrounding Respondent's drafting of a will naming himself as beneficiary, we affirm the hearing panel's decision that no discipline be imposed in this case. Normally no opinion would be necessary. However, in order to emphasize that the drafting practice involved here cannot and will not be condoned, barring such exceptional circumstances, we issue the following opinion for the advice and guidance of the bar:

Respondent was charged with professional misconduct in a two count Formal Complaint. One count was dismissed for lack of evidence. The second count charged Respondent with misconduct for drafting a will in which he was named sole beneficiary and executor. The hearing panel concluded that, absent fraud, duress or undue influence, Respondent's actions did not constitute misconduct prohibited by the Michigan General Court Rules or Canons of Ethics. The Grievance Administrator appealed. We affirm the hearing panel's decision, on the grounds that the exceptional circumstances of this case preclude a finding of misconduct.

The record shows that Respondent has a longstanding, unblemished record as a member of the Michigan Bar and had been the testator's legal advisor for several years prior to the drafting of the will. On December 20, 1979, the testator requested that the Respondent visit him at his home. Respondent did so on the following day and the testator explained that he would be going into the hospital on the following Wednesday, the day after Christmas, December 26, 1979. The testator requested that Respondent take care of the testator's house and assume responsibility for paying bills during the hospital stay.

The client was intestate at the time and Respondent concluded from the client's remarks that he believed and intended that a General Power of Attorney he had granted to the Respondent would function as a will. Respondent felt constrained to inquire what disposition the client intended to make of his estate. The client stated he wanted his estate to be given to the person who last cared for him. He indicated that Respondent was to be the object of his bounty because of the attention Respondent had given in the preceding years.

The testator and the Respondent believed that there were no living relatives. Thus, there was a chance that without a will the assets of the estate would be forfeited to the State of Michigan by operation of escheat, MCLA 700.104; MSA 27.5104, Sec. 104. The impending hospital stay and the intervening holidays made it particularly important to draft a will with haste. Because of the lateness of the day, and aware of the seriousness of the client's illness, Respondent called his office and instructed his secretary to begin typing the will. The Respondent did no suggest that the testator seek independent legal advice; while this omission is a cause for concern, we feel that the press of time and the impending holidays outweighed the propriety of obtaining independent counsel on the question of the bequest to Respondent.

Respondent finished drafting the will in his office and returned to the testator's home with two witnesses. The will was properly executed that afternoon. The testator died the following day, December 22, 1979. The will was offered for probate but was never admitted because previously unknown heirs from Austria appeared to contest the will. A settlement was reached and escheat was avoided, and the validity of the will has never been adjudicated by a court.

At issue here is whether Respondent's actions constitute professional misconduct. While there is a rebuttable presumption of undue influence in cases where a lawyer drafts a will naming himself as a beneficiary, we find that the record before us contains no evidence of undue influence and is sufficient to overcome such a presumption. See In re Woods Estate, 374 Mich 278, 132 NW2d 35 (1965); see also, State Bar of Michigan, Committee on Professional Ethics, Informal Ethics Opinion CI-831 (1982). However, a lawyer who drafts a will naming himself as a beneficiary does his client a disservice (even absent any questionable motive or natural inclination to overreach) by causing the instrument to be susceptible to attack. At issue is whether this disservice rises to the level of professional misconduct given the extraordinary circumstances present in this case. We believe that it does not.

The Michigan Supreme Court has warned the legal profession against the practice charged in the Formal Complaint.

> Although there is no statute to invalidate a bequest to a scrivener,...[it is] generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion. Abrey v Duffield, 149 Mich 248, 259, 112 NW 936, 940 (1907).

While this Board also looks upon such dispositions with suspicion, we weigh that suspicion against the following:

(1) The code of ethics referenced 75 years ago in Abrey 1907 has since been substantially revised and updated;

(2) The Abrey decision involves a probate controversy and is not a declaration or interpretation of professional disciplinary law;

(3) Abrey points out, and the same is true today, that there is no statute invalidating such bequests;

(4) Abrey and more recent probate decisions, see In the Estate of Karabatian, 17 Mich App 541, 170 NW2d 166 (1969); In re Powers Estate, 375 Mich 150, 134 NW2d 148 (1965), do not describe the conduct in question as prohibited, but merely characterize it as suspicious or undesirable. "Suspicion" alone is not grounds for a finding of misconduct.

(5) The guideline found in the American Bar Association Code of Professional Responsibility, Ethical Consideration 5.5 states:

> "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be

prepared by another lawyer selected by the client." (Emphasis added.)

The Michigan Code of Professional Responsibility does not directly prohibit the conduct in question. The only language that might possibly apply to such conduct is found in the broad, general terms of GCR 1963, 953(1)and(2), and Canon 1, DR 1-102(A)(5)and(6). Therefore, as a guide to the members of the Bar, we issue a warning that a lawyer who drafts a will naming himself as a beneficiary commits professional misconduct under the above-cite rules, unless he or she can demonstrate particularly exceptional circumstances which would make such conduct acceptable.

The case before us presents such exceptional circumstances with consistent and corroborating evidence in the record. The threat of serious illness, the impending hospital stay, and the intervening holidays made it difficult, if not impossible, for the testator to seek other counsel. The good faith belief that the testator had no heirs, and the lose personal relationship of Respondent made him a natural choice as a beneficiary for the testator. These circumstances also obviated the need for disclosure of possibly conflicting interests under Canon 5, DR 5-101(A). Making the will saved the estate from escheat, thereby benefitting the heirs, and while that fact alone does not exculpate misconduct it certainly points to the basic importance, and even urgency, of having some form of a will. Furthermore, the Respondent actually received nothing from the estate. Given all these exceptional factors, and the absence of fraud, duress, overreaching and any intended or actual ham, a finding of misconduct would be unreasonable.

We affirm the decision of the hearing panel and hereby place the Bar on notice that without a substantial showing of exceptional circumstances, the lawyer who drafts a will naming himself as a beneficiary may be guilty of misconduct under the general provisions of GCR 1963, 953(1)and(2), Canon 1, DR 1-102(A)(5)and(6) and/or Canon 7, DR 7-101(A)(3).

All concur except Board Secretary David Baker Lewis who did not participate in the hearing or decision in this matter.