Committee Opinion
September 21, 1989

LEGAL ETHICS OPINION 1283 — ESTATE PLANNING: ETHICAL PROPRIETY OF ADVISING CLIENT OF "SELF-PROVING WILL" PROVISION.

You have asked the Committee four questions with regard to the ethical implications of § 64.1-87.1 of the Code of Virginia, which provides the form to be used in making a will "self-proving." The Committee will address each question in the order in which it was presented in the inquiry.

I. In the Committee's view, where a state statute or a federal law does not require a lawyer to make a will self-proving, the Code of Professional Responsibility would not place an ethical obligation on the lawyer to make a will self-proving. Therefore, since there is no legal requirement that a lawyer incorporate generally the self-proving clause in a will, there is nothing in the Code of Professional Responsibility which requires a lawyer to do so. In fact, if it is the client's wish not to include such a clause, the lawyer would have an ethical obligation to adhere to his request to the extent it is permitted by applicable law and not violative of a Disciplinary Rule. (See DR:7-101)

II. The Committee believes that even if a majority of the wills prepared by Virginia lawyers are "self-proving," neither that mere fact alone nor the fact that one or more lawyers do not include such a provision does not constitute an ethical violation whether or not the client has expressly requested that the "self-proving" language be omitted in his/her will. With regard to questions one and two, the Committee assumes that the client has been advised by counsel of the legal implications of a properly self-proving will. (See DR:7-101)

III. The Committee believes that a lawyer having knowledge of the provisions of § 64.1-87.1 and § 64.1-87.2 has an ethical obligation to advise his client not only of the statute's existence but also in particular its future legal impact. A lawyer's ignorance or unfamiliarity with the statute does not excuse him from his ethical obligation to represent a client competently. (See Canon 6 and DR:6-101)

IV. The Committee is of the view that a lawyer or law firm's policy decision that self-proved clauses will be omitted from all wills prepared by the lawyer or law firm since incorporation of the same provides relatively little benefit to the client and may be incongruous with the basic principle of zealous representation. Disciplinary Rule 7-101 provides in part that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rule; furthermore, Ethical Consideration 7-8 [EC:7-8] also provides that:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations [including, but not limited to, legal considerations].

In addition, it is the Committee's opinion that adoption of such a general policy by a lawyer or law firm in the hopes that the non-use of the self-proving clause will encourage

the client's heirs to return to the drafting attorney for assistance in the estate administration may be violative of DR:1-102(A)(1) if, in doing so, the client is not advised of the advantages and disadvantages of a self-proving will or not allowed to make the choice.