SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 01-417 and 01-418

IN THE MATTER OF

LEONARD J. WITMAN AND

DANA A. BENNETT

ATTORNEYS AT LAW

Decision

Argued: February 7, 2002

Decided: May 8, 2002

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Jeffrey Speiser appeared on behalf of respondent Leonard J. Witman.

Lewis Cohn appeared on behalf of respondent Dana A. Bennett

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

These matters were before us based on special master Bernard A. Kuttner's recommendation that both respondents receive admonitions. Following a review of the records, we determined to bring the matters on for a hearing.

Witman was admitted to the New Jersey bar in 1975. He is a member of a law firm located in Florham Park, New Jersey. He has no disciplinary history.

Bennett was admitted to the New Jersey bar in 1996. She is an associate in Witman's law firm. She has no disciplinary history.

The ethics complaint against Witman alleged violations of RPC 3.3(a)(1) (false statement of material fact or law to a tribunal), RPC 3.3(a)(5) (failure to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure), RPC 5.1(b) (failure to ensure that a junior attorney conforms to the Rules of Professional Conduct), RPC 5.1(c)(1) (violation of the Rules of Professional Conduct by ordering or ratifying the conduct involved), RPC 5.1(c)(2) (failure to take reasonable remedial action by a supervising lawyer when the lawyer knows of misconduct by the lawyer being supervised), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The ethics complaint against Bennett alleged violations of RPC 3.3(a)(1) (false statement of material fact or law to a tribunal), RPC 3.3(a)(5) (failure to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice)

In July 1998, Judson Stein, Esq. asked Witman if he would represent Madell Gross in connection with her estate planning. Stein told Witman that he could not represent

Madell because of a conflict of interest, since he already represented Madell's son, Stanley Phillips. The record is silent as to whether Madell or Stanley initiated the contact. At that time, Madell was ninety-three years old, had hearing and vision difficulties and resided in a nursing home. She had only one son, Stanley; a grandson, Lance Phillips; and a granddaughter, Susan Richards. Lance and Susan each had two children.

The 1993 Trust Agreement

On July 2, 1998, Stein "faxed" to Witman a copy of a trust agreement executed by Madell in 1993. The agreement purportedly created revocable and irrevocable trusts. Stanley and Madell were the trustees and Lance the first successor trustee. The beneficiaries were Madell, Stanley, Lance and Lance's two children. After the deaths of Madell, Stanley and Lance, the trust assets were to go to Lance's children. Susan and her family stood to receive nothing. Arguably, the 1993 trust agreement gave Stanley the power to direct all of the trust assets to himself, after Madell's death. However, due to some inconsistencies in the provisions of the agreement, it was not clear that Stanley could exercise that power alone.

Walter LeVine, Esq. had prepared the 1993 trust agreement for Madell. In a July 2, 1998 memo to the file, Witman stated that "[w]e need to revoke the trust that [LeVine] provided for [Madell] and then try to establish with [Stein] who represents Stanley Phillips and the family exactly what needs to be done." Although Witman reviewed the trust

documents before he met Madell, there is no indication that he agreed to represent her before their meeting.

Stein and Witman had three additional telephone conversations about Madell, on July 13, 14 and 27, as well as a meeting on July 17, 1998. Stein and Witman discussed the 1993 trust agreement, as well as outstanding margin loans against Madell's brokerage accounts. Nothing in the record indicates that Stein and Witman discussed specific changes to the trust.

As of July 1998, most of Madell's assets were in two investment accounts: one at Smith Barney, Inc. and the other at Morgan Stanley Dean Witter. In a July 20, 1998 memo to the file, Witman listed the things he had to do for Madell, including get "rid of the margin accounts," draft a new will, determine Madell's wishes and incorporate noncontestability clauses in the new documents. The memo also noted that Madell probably wished to leave $1,000,000 to Lance and Susan and their children and that "Lance is on the 'out' this week."

Although Lance was not a trustee of Madell's trust, he had been handling the trust assets, apparently pursuant to a 1994 power-of-attorney that Madell had given him and Stanley. Lance was aggressively trading the assets in the brokerage accounts. As of June 1998, the gross value of the two accounts was $11,500,000. However, there was approximately $5,600,000 in margin loans, with approximately $37,000 a month in interest payments. In fact, in August 1998, Smith Barney requested that Stanley and Lance sign a letter as trustees of Madell's trust, acknowledging that they continued to be permitted to

"utilize our aggressive trading strategy including the use of margin," despite Smith Barney's advice that the account "be traded less actively." Smith Barney requested that Stanley and Lance assure it that the loss of the entire account principal would not negatively affect Madell's lifestyle and that Stanley and Lance agree, on behalf of Madell's heirs, to hold Smith Barney harmless from any claim related to the account.

On July 21, 1998, Stanley and his wife introduced Witman to Madell at the nursing home. After the introduction, Witman met with Madell alone. According to Witman's July 21 memo to the file, he and Madell had "a long and very fruitful conversation." He noted that she was "extremely hard of hearing" and had "trouble seeing a great distance so you have to get very close to her when you want to talk to her." According to the memo, Madell told Witman that she did not want to give away any of her assets during her lifetime and that her entire estate was to go to Stanley when she died. She also told Witman that she had mentioned to Lance that she was leaving her estate to Stanley and that Lance "was very surprised." Witman's memo indicated that he expected "a contest to either the Revocable Living Trust or the Will."

After his meeting with Madell, Witman asked Anne Marie Mazzu, his law partner, to prepare a will, power-of-attorney and an amendment and restatement of the trust agreement. The amendment removed Lance and his children as beneficiaries of the trust and named Stanley as its sole beneficiary. In the event Stanley predeceased Madell, Lance and

Susan became the beneficiaries. The will "poured over" all of Madell's assets into the trust. A new power-of-attorney named only Stanley as Madell's attorney-in-fact.

On July 30, 1998, Witman again met with Madell, accompanied by Bennett and Linda Fruendt, Witman's secretary. The purpose of the visit was to have Madell execute the new documents. However, Madell refused to sign them.

On August 4, 1998, Witman again visited Madell, accompanied by Bennett and Fruendt. Once more, Madell refused to sign the documents.

The August 5, 1998 Affidavits

Witman, Bennet and Fruendt executed affidavits[1] on August 5, 1998, in which they stated that, on July 30, 1998, Madell "became agitated and confused as to why she needed to sign documents as it was understood that all of her assets were to go to her son, Stanley. She would not sign them, wanted to think about them and asked us to come back the following week." With respect to the August 4, 1998 visit, they stated that Madell did not know who they were and "would not talk to us. When the subject of her estate planning was brought up to her she again informed us that upon her death Stanley was to receive all of her assets and that it was understood." In their affidavits, Witman, Bennet and Fruendt also

[1] The August 5, 1998 documents were affidavits, not certifications. Although some later documents were certifications, the term "affidavit" will be used here to denote both affidavits and certifications.

stated that Madell "was not fully aware of what is going on, and is not fully capable of declaring and publishing a new Will."

The Signing of the Will and Trust Documents

On August 25, 1998, Stein advised Witman that Madell was prepared to sign the documents on that day. Witman was not available to go see Madell because he had a meeting with Stein to discuss another matter. Therefore, he sent Bennett and Fruendt and another associate, Brad Kaplan, to witness the execution of the documents. Witman had had no direct communication with Madell between August 4 and August 25. Madell signed the documents. On August 26, 1998, Bennett, Fruendt and Kaplan executed affidavits stating that Madell understood the terms of the documents and was "fully competent," although she had some difficulty signing due to poor vision.

The Litigation

On August 18, 1998, Shirley Whitenack, Esq. filed a complaint and order to show cause on behalf of Lance, seeking to declare Madell incompetent and to invalidate any documents signed by her after April 1, 1998.[2] The order also provided that all documents signed by Madell "beginning April 1, 1998 are presumptively invalid pending a hearing in this matter." The affidavits of two psychiatrists were attached to the complaint. One of the

[2] Although the complaint and order to show cause were filed on August 18, 1998, it was not sent to Stein until August 26, 1998. Stein sent it to Witman.

psychiatrists had examined Madell on July 31, 1998; the other on August 5, 1998. Both concluded that Madell was not competent to manage her own affairs. Apparently, the request that the court invalidate any documents signed by Madell after April 1, 1998 was premised on an April 1998 note in the nursing home chart, indicating that Madell showed "persistent occasional confusion with a decrease in short-term memory."

The September 16, 1998 Affidavits

On September 17, 1998, Stein's law partner, Dino Bliablias, filed an answer and counterclaim on behalf of Stanley. The counterclaim sought to have Madell adjudged competent and to confirm the validity of the documents signed by her on August 25, 1998. Attached to the answer and counterclaim were affidavits of Witman, Bennett, Fruendt, Kaplan and Stanley, dated September 16, 1998. After Witman described his extensive experience in trust and estate work, he made the following statements in his affidavit: (1) when preparing a will or trust documents, his custom and practice was to meet with the client at least twice to ascertain that the client was competent, understood all of the relevant issues and understood the documents that were to be signed; (2) his usual practice was "intensified" when the client was hospitalized or in a nursing home; (3) his "inquiry" into Madell's competence "was magnified and included great detail"; (4) he had concluded that Madell was competent on July 21, 1998; (5) on July 30, 1998, Madell "indicated that she was not prepared to sign her will at this time and asked us to return the following week"; (6)

on August 4, 1998, Madell "appeared extremely agitated" and "indicated that she did not wish to sign her will"; (7) he was unable to meet with Madell on August 25 because he had a "previously scheduled commitment involving a meeting with a client which could not be re-scheduled"; and (8) "based upon my previous three meetings with Madell Gross and my determination that Mrs. Gross was in fact competent to execute her will, I directed [Bennett] and [Kaplan]...to meet with Mrs. Gross...for the purpose of supervising the will signing ceremony."

In his September 16, 1998 affidavit, Witman did not mention the August 5 affidavits that he, Bennett and Fruendt had prepared concerning their August 4 meeting with Madell, the fact that she did not recognize them at that time and their conclusion that Madell "was not fully aware of what was going on and is not fully capable of preparing and publishing a new Will."

In Bennett's September 16, 1998 affidavit, she stated that (1) on July 30, 1998, Madell indicated that she recalled her prior discussion with Witman about the disposition of her assets and reaffirmed that she wanted her estate to go to Stanley, but "said that she needed a bit more time to think things over and asked us to return the following week"; (2) on August 4, 1998, Madell "appeared extremely agitated and said that she did not want to sign the documents"; (3) on August 25, 1998, she repeatedly asked Madell "if she understood the terms of the documents and how they would affect her assets" and Madell

"indicated that she understood everything"; and (4) in her opinion, Madell was "fully competent at the time and executed the documents freely and willingly."

Like Witman, Bennett did not mention the prior affidavits about the August 4 meeting with Madell.

The October 5, 1998 Depositions

On October 5, 1998, Whitenack deposed Witman, Bennett, Kaplan and Fruendt. At that time, Whitenack was unaware of the August 5, 1998 affidavits of Witman, Bennett and Fruendt. Witman testified that (1) as of his July 21, 1998 meeting with Madell, he did not know that she had executed a trust agreement in 1993; (2) he first learned of the value and location of Madell's assets from Stanley, on July 21, 1998; (3) on July 21, 1998, he requested that Stanley send him copies of the brokerage statements, as well as any prior estate or trust documents executed by Madell; (4) when he later received the brokerage statements from Stanley, he "panicked" because there were "two large accounts with major big time loans against the accounts. I didn't even look at the revocable trust"; and (5) after reviewing the brokerage statements, he called Stanley to ask if he knew about the margin loans. Witman's testimony was inaccurate. As set forth above, he received Madell's 1993 trust agreement from Stein on July 2, 1998 and, on that same date, wrote a file memo about revoking that agreement. Furthermore, on July 20, 1998, Witman noted that, among the things he had to do for Madell, was to get "rid of the margin accounts."

During Bennett's deposition, she revealed that she had prepared an affidavit on August 26, 1998. Whitenack requested a copy. On October 7, 1998, Steven Charme, Witman's law partner, who represented Witman, Bennett and Fruendt at their depositions, sent his clients' August 5 and August 26 affidavits to Whitenack and Bliablias. By letter dated October 9, 1998, Bliablias sent the August 5 affidavits to the court because it was "apparent" that they "were not consistent" with the affidavits that he had submitted with the answer and counterclaim. Bliablias informed the court that he had not previously seen the August 5 affidavits and was unaware of their existence when he filed the answer and counterclaim.[3]

The Settlement of the Litigation

In September 1998, the court appointed Gesuele Lodato as attorney for Madell. The court also appointed two independent managers to administer the trust assets. In October 1998, another psychiatrist examined Madell, at the request of Bliablias. That psychiatrist concluded that, although Madell suffered from mild to moderate dementia, without delirium or delusions, she was competent to execute a will and to make everyday decisions. Thereafter, the case was settled without any determination on the issue of whether Madell was competent when she executed the August 25, 1998 documents. Bliablias advised the

[3] The court sent the affidavits to the Office of Attorney Ethics ("OAE").

court that Stanley was withdrawing his opposition to the appointment of a guardian for Madell.

In April 1999, the court issued an order finding that Madell was incapable of managing her affairs and appointing Lance as guardian of Madell's person and property. The value of the property over which Lance had control was negligible, since most of Madell's assets were in trust. Lodato was appointed the trustee of the trust.

Madell died sometime prior to June 30, 1999. Stein's firm submitted Madell's 1998 will to probate. The record does not state whether there was a challenge to the will.

Witman's Testimony at the Ethics Hearing

Witman admitted that some of his deposition testimony was incorrect, but contended that it was the result of "mistake" and that he never intended to deceive anyone. As to his September 16 affidavit, Witman stated that, as the result of an "oversight," he did not mention the August 5 affidavit or his statement that Madell was incapable of executing a trust agreement on August 4, 1998. Witman explained that he had never intended to imply that Madell would not be capable of executing a trust after August 4, 1998, but only that she appeared incapable on that day. He admitted that it was not clear from the affidavit that he was referring only to Madell's competency on August 4, 1998.

Witman testified that he had no doubt that Madell was competent to execute the documents during his first and second visits with her. The fact that she refused to sign the

documents on July 30, 1998 did not surprise him because he had seen similar refusals "numerous times" during his years of practice. With respect to their August 4, 1998 meeting, Witman testified that Madell appeared agitated, turned away from him and refused to acknowledge him. According to Witman, he told her that she did not have to sign anything on that day, but to let him know if she ever changed her mind. Because he believed that, on that day, Madell was not capable of executing a trust or will, he requested that Bennett and Fruendt draft affidavits describing the meeting and had Fruendt draft an affidavit for him. Witman explained that he had requested affidavits, rather than memoranda to the file, because "this was a litigious family." According to Witman, he made no changes to the affidavit drafted by Fruendt and did not "focus" on the matter because it "was a grand total of $2,000 legal fee from beginning to end...And there was nothing in this instance that I felt I should be spending a tremendous amount of time on. I didn't even know if I was going to get paid. Because until you sign, I don't bill you."

As to why he did not meet with Madell on August 25, 1998, Witman stated that he had a previously scheduled meeting with Stein and one of Stein's clients for a matter in which "some time limitations were coming up." According to Witman, he did not want to delay the meeting with Madell due to her age and the fact that he was leaving for vacation on August 26, 1998. Witman stated that he first asked one of his partners to meet with Madell, but the partner was unavailable. However, according to Witman, Bennett had sufficient experience to witness Madell's execution of the documents because she had been

with the firm for one year and had been involved in fifteen to twenty-five will signings. Witman testified that, when he was told that Madell had signed the documents, he requested that Bennett, Kaplan and Fruendt prepare affidavits of their meeting.

According to Witman, Sarit Brosnick, a new associate, drafted his September 16, 1998 affidavit for him.[4] He explained that he considered the affidavit a "very minor event," merely "skimmed" the draft prepared by Brosnick, made one change to some biographical information and had Brosnick finalize it. Although Witman had initially consulted with Charme about the litigation, he did not confer with him about the affidavit because he did not consider it a "major enough issue." Charme did not consult Witman about the documents demanded in the deposition notices.

Witman contended that the 1993 trust agreement was an "abomination" for several reasons: (1) although the agreement indicated that both irrevocable and revocable trusts were being created, the irrevocable trust page was not completed; (2) if the irrevocable trust had been funded, a gift tax return should have been filed, but was not; and (3) Madell should not have been entitled to the income from the assets in the irrevocable trust, but the agreement stated that she was entitled to all of the income.

Witman stated that, prior to July 1998, he had spoken with LeVine about a similar trust agreement that LeVine had prepared for another client. According to Witman, LeVine had told him that, whenever he drafted trust agreements, he would not file anything with the

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[4] At his deposition, Witman testified that he asked Charme about the proper format for the affidavit and then prepared the chronology himself.

IRS and would decide what assets should be included in the irrevocable trust – and therefore excluded from the estate – after the client died. In Witman's opinion, this practice was illegal. Witman was also of the opinion that LeVine should not have prepared Madell's 1993 trust agreement because he was Lance's attorney.

Bennett's Testimony at the Ethics Hearing

Bennett corroborated Witman's testimony regarding the July 30 and August 4, 1998 meetings with Madell. According to Bennett, Fruendt prepared all three August 5, 1998 affidavits. Bennett testified that she intended to convey her belief that Madell "was incapable of signing a will that day and that day only." According to Bennett, the affidavit was not clear on that point because she did not draft it and was not "focused on it because [she] was just a witness." Furthermore, Bennett stated, she "always thought it was common knowledge that somebody could be capable of signing a will one day and then incapable another, or vice versa."

As to her August 25, 1998 meeting with Madell, Bennett stated that she was confident that Madell was competent to sign the documents. According to Bennett, Madell stated that she wanted her estate to go to Stanley.

Bennett testified that she drafted her August 26 and September 16, 1998 affidavits and that no one told her what to include or to omit. She explained that, in her September 16

affidavit, she did not mention her prior conclusion that Madell was incapable of executing the trust and will because she

> thought the purpose of the certification was just to say that [Madell] was competent at the time she executed her estate planning documents, because that's what I thought the court fight was about. So I wasn't even focused on the other two visits because she didn't sign then. I mean, to me, those two visits were irrelevant and I wasn't even thinking about them because she didn't sign then.

Fruendt's Testimony at the Ethics Hearing

As of the 2001 ethics hearing, Fruendt no longer worked for the Witman firm. She confirmed Bennett's testimony that she prepared all three of the August 5, 1998 affidavits. With respect to the August 25 meeting with Madell, Fruendt stated that she believed that Madell was capable of executing the documents because Madell "listened, she was attentive, and she just kept reiterating what she wanted in the documents, and then she signed them." As to her September 16 affidavit, Fruendt stated that she used Bennett's affidavit "as a guide" for her own. However, according to Fruendt, no one told her what to include or exclude from her affidavits.

Brosnick's Testimony at the Ethics Hearing

As of the 2001 ethics hearing, Brosnick no longer worked for the Witman firm. She confirmed Witman's testimony that, during her first or second week at the Witman law firm,

Witman had requested that she prepare an affidavit for him. Prior to her employment by the Witman firm, she had served a one-year court clerkship in Maryland.

It was Brosnick's understanding that the affidavit was to convey Witman's belief that Madell was competent to sign her will on August 25, 1998. Brosnick claimed that she had reviewed the file prior to preparing the affidavit, but could not recall whether she had reviewed the August 5, 1998 affidavits. According to Brosnick, Witman did not give her any specific direction as to what should be contained in the affidavit and did not thereafter discuss its contents with her. It was Brosnick's recollection that she received the affidavit back with revisions to Witman's teaching background, but no substantive changes. As to her time records reflecting that she edited the affidavit "with regard to Madell Gross's competency," she clarified that the reference was to the nature of the affidavit, not to any substantive changes. Brosnick testified that she did not confer with anyone else about Witman's affidavit, was not instructed to omit anything from it and was unaware that other members of the firm were also preparing affidavits.

Charme's Testimony at the Ethics Hearing

Charme testified that he had no involvement in preparing the September 16, 1998 affidavits or in transmitting them to Bliablias. He was responsible for replying to the deposition subpoenas and representing the Witman firm employees at their depositions. Charme stated that the August 5 and August 26 affidavits "surprised" him because the

information in them would normally be put in memoranda to the file, rather than in affidavit form. After discussing the affidavits with Witman, Charme determined that they were equivalent to file memoranda and, therefore, work product, which was not required to be produced to Whitenack. Charme testified that he, not Witman, had made the decision that they did not have to produce the affidavits.

After Whitenack requested, at the October 5, 1998 depositions, that the August 26 affidavits be produced, Charme determined to turn over those affidavits, as well as the August 5 affidavits, "rather than start litigating the issue." According to Charme, he made that decision without "any input" by Witman.

Mazzu's Testimony at the Ethics Hearing

Anne Marie Mazzu, Witman's law partner, testified that she participated in the drafting of the 1998 will and trust documents. She described the 1993 trust agreement as ambiguous and inconsistent and noted that it "had tremendous tax problems."

Stein's Testimony at the Ethics Hearing

Judson Stein confirmed that he had contacted Witman about representing Madell because, as Stanley's attorney, there would be a conflict of interest if he also represented Madell. According to Stein, he referred the matter to Witman because he had known him for ten years, Witman had previously done work for Stein's firm in connection with the

firm's retirement plan and Witman's "reputation was as the top lawyer in New Jersey specifically concerning qualified [pension] plans and one of the very top people in New Jersey concerning estate planning generally."

Stein also confirmed his telephone calls and meeting with Witman, prior to Witman's July 21, 1998 meeting with Madell. Stein stated that, sometime after August 4, 1998, Witman told him that Madell had been very hostile, appeared very agitated, refused to speak with him and refused to sign the documents. According to Stein, they did not discuss whether Madell was competent to execute the documents and he was unaware of the existence of the August 5, 1998 affidavits, before they were turned over to Whitenack and Bliablias.

Bliablias' Testimony at the Ethics Hearing

Dino Bliablias testified that he requested affidavits from Witman and from the other individuals in the firm who had met with Madell, to be included with the answer and counterclaim that he was preparing for Stanley. After receiving affidavits limited to the events of August 25, 1998, Bliablias requested affidavits detailing all of the meetings with Madell. Bliablias did not ask to see the Witman firm's file for the matter and did not interview any of the affiants, even though his ususal practice was to interview witnesses first and then draft their affidavits. According to Bliablias, no one from the Witman firm told

him about the August 5 affidavits or about Witman, Bennet and Fruendt's belief that Madell was incapable of executing a will on August 4, 1998.

Bliablias testified that he became "concerned" when he received the August 5 affidavits, because he initially thought that they meant that Madell "was incapable of executing a will on any occasion." However, at some point, he learned otherwise. He also learned that there were different standards for competency to make a will or trust and competency to handle financial affairs. Bliablias indicated that it was Madell's physical, not mental, problems that had led Stanley to withdraw his opposition to a court determination that Madell was incompetent to manage her affairs.

Lodato's Testimony at the Ethics Hearing

Gesuele Lodato, Madell's court-appointed attorney, testified that he first met Madell on September 15, 1998. He confirmed that she suffered from severe vision and hearing problems. According to Lodato, Madell indicated that her relationship with both Stanley and Lance was good, but that she did not like Stanley's second wife. Madell told Lodato that she did not want Stanley "handling her money."

With respect to the 1993 trust agreement, Lodato testified that the agreement created both revocable and irrevocable trusts, but that the assets had been commingled from the inception of the trusts. Furthermore, according to Lodato, a prior brokerage firm had "churned" the account without regard to whether the assets were part of the revocable or

irrevocable trust, thereby making it impossible to identify the assets that should be part of each trust. To Lodato's knowledge, no gift tax return was filed when the trust was funded in 1993. According to Lodato, the IRS would, therefore, take the position that Madell had not made a transfer to the trust in 1993.

Lodato stated that, when the trust assets were turned over to him in 1999, the net value of the two brokerage accounts was approximately $2,600,000. As of the April 2001 ethics hearing, Lodato was still trying to determine which assets should comprise each trust.

* * *

Respondents also presented the testimony of two expert witnesses, who testified about the standard for "testamentary capacity."[5] Both experts agreed that the standard for executing wills and related documents is "a very low standard of understanding, intelligence, and the like...less than that required for the making of a contract...less than the standard where a person could be adjudicated by a court to be mentally incompetent." Both also testified that a person may lack the capacity for executing a will one day, but be capable of

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[5] See In re Will of Landsman, 319 N.J.Super. 252, 267 (App.Div.) certif. denied, 162 N.J. 127 (1999) ("Testamentary capacity exists where the testator can comprehend the property he is about to dispose of, the natural objects of his bounty, the meaning of the business he is engaged, the relation of each of those factors to the others, and the distribution that is made by the will. Old age and failure of memory do not of themselves take away a testator's capacity. Nor does blindness destroy it.") (Citations omitted); In re Will of Liebl, 260 N.J.Super. 519, 524 (App.Div.1992) certif. denied, 133 N.J. 432 (1993) ("[T]here is a legal presumption that 'the testator was of sound mind and competent when he executed the will'...Testamentary capacity is to be tested at the date of the execution of the will...the law requires only a very low degree of mental capacity for one executing a will." (Citations omitted).

doing so the following day or even at different times on the same day. Therefore, "an attorney has an affirmative duty to try as best as one can to let your client make a will if it can be done in the sense that the person can meet that minimum standard of capacity."

In the opinion of one of the experts, it was appropriate for Bennett to meet with Madell because she had sufficient experience in the execution of wills and had previously had the opportunity to observe Madell. That expert characterized the 1993 trust agreement as "bordering on the unintelligible."

* * *

Witman also presented the testimony of his rabbi, another attorney and a financial planner, who vouched for his good character and professional abilities.

* * *

The special master found that, "[l]ooking at all of the testimony, there is absolutely no doubt that this omission [the August 5, 1998 affidavits] in the [September 16, 1998] certification to the Court was a violation of respondents' duty to the Court in violation of RPC 8.4(d) and RPC 3.3(a)(1)." The special master dismissed the charges that Witman failed to supervise Bennett and Brosnick, finding that any such failure did not rise to the level of a violation of the ethics rules. The special master did not address whether Witman and Bennett also violated RPC 3.3(a)(5) and RPC 8.4(c) or whether Witman's deposition testimony violated the Rules of Professional Conduct.

In determining the appropriate discipline, the special master took into account Bennett's "relative youth and rather recent admission." As to Witman, the special master considered his previously unblemished twenty-six year legal career, his reputation as an outstanding estate practitioner, his charitable work and his belief that the 1993 trust agreement was deficient and probably illegal. The special master recommended that both respondents receive an admonition.

* * *

Upon a de novo review of the record, we are satisfied that the special master's conclusion that Witman and Bennett were guilty of unethical conduct is fully supported by clear and convincing evidence. It is undisputed that, in their September 16, 1998 affidavits, Witman and Bennett did not reveal their prior affidavits or their opinion that Madell was incapable of signing the will and trust documents on August 4, 1998. They contended, however, that their omissions were inadvertent and not intended to deceive the court.

The information in the August 4 documents was important enough for Witman to direct that it be memorialized in affidavit form, even though such information would normally have been put in a memorandum to the file. The affidavits contained all of the relevant information about respondents' July 30 and August 4 meetings with Madell. There were no other documents in the file with that information. Witman admitted that the affidavits were prepared in contemplation of litigation. Therefore, we do not find it credible

that respondents did not consider the earlier affidavits, when they prepared their September 16 affidavits. That is particularly true for Witman, who specifically stated that, based on his "previous three meetings" with Madell, he had determined that she was competent. We also considered that the special master, who had the opportunity to observe respondents' demeanor, rejected their contention that they did not knowingly omit material facts from their September 16 affidavits.

The information in the earlier affidavits was material to the court in determining Madell's testamentary capacity and competency to manage her own affairs. It was also material to the validity of documents signed by her after April 1, 1998. In not disclosing essential facts that could have influenced the court's scrutiny of Madell's competency, respondents violated RPC 3.3(a)(5), RPC 8.4(c) and RPC 8.4(d).

The complaints also charged that respondents' September 16 affidavits violated RPC 3.3(a)(1) (knowingly making a false statement of a material fact or law to a tribunal). However, the complaint against Bennett did not contain any factual allegations of affirmative misstatements in the affidavit. In its brief, the OAE argued that the September affidavits "convey" the "message" that Madell was competent on all of the visits. In light of the fact that RPC 3.3(a)(5) appropriately addresses the conduct charged in the complaint, we dismissed the charge that Bennett violated RPC 3.3(a)(1). As to Witman, the complaint alleged that his September 16 affidavit contained a misrepresentation, in that he stated that he did not meet with Madell on August 25 because of a "previously scheduled commitment

involving a meeting with a client which could not be rescheduled." Both Witman and Stein testified that there was such a meeting. Therefore, we dismissed the charge that Witman violated RPC 3.3(a)(1).

It is undisputed, however, that Witman gave inaccurate testimony at his October 5, 1998 deposition. He incorrectly testified that, as of his July 21, 1998 meeting with Madell, he did not know that she had executed a trust agreement in 1993, did not know the value and location of her assets, did not know that there were outstanding margin loans against her stock holdings and "panicked" when he saw the margin loans, after receiving the brokerage statements from Stanley sometime after July 21. In fact, Witman had received Madell's 1993 trust agreement from Stein, had spoken with Stein on four occasions about Madell and had written file memoranda about revoking the trust agreement and about getting "rid of the margin accounts," all prior to July 21, 1998.

As with his affidavit, Witman asserted that the misstatements during his deposition were the result of mistake, because he did not remember that he had obtained the information prior to meeting with Madell. We do not find it credible that, between July and October, Witman could have forgotten that, prior to meeting Madell, he had three telephone conversations and a meeting with Stein, had obtained Madell's 1993 trust agreement from Stein and had written two memos to the file, in which he listed the things he had to do for Madell. At his deposition, Witman did not show any hesitancy or confusion about when he learned the relevant facts. He recalled insignificant details about his meetings with Madell,

such as where he was when he was first introduced to her, where their various meetings took place, where he sat, etc. He testified with particularity about the purported conversation that he had with Stanley about the margin loans, after meeting with Madell. In fact, he stated that he did not immediately review the trust agreement because he "panicked" when he saw the size of the margin loan. The extent and specificity of the details provided by Witman are inconsistent with his contention that he simply forgot when he learned of the pertinent facts.

In light of the foregoing, we find that Witman violated RPC 8.4(c) and RPC 8.4(d) by his misstatements during his deposition.

However, we dismissed the charges that Witman violated RPC 5.1(b), RPC 5.1(c)(1) and RPC 5.1(c)(2), by sending Bennett to obtain Madell's signature on the trust documents without first ascertaining that Madell wanted to sign them. The unrebutted evidence is that Bennett had been working with Witman for one year, was considered to be an excellent attorney, had already been involved in fifteen to twenty-five will signings and had accompanied Witman during his two prior meetings with Madell. Furthermore, there is no clear and convincing evidence that Bennett violated any Rules of Professional Conduct during her August 25 meeting with Madell.

We also dismissed the charges that Witman violated RPC 5.1(b), RPC 5.1(c)(1) and RPC 5.1(c)(2), by having Brosnick prepare his affidavit and then not reviewing it carefully. Although Brosnick had been admitted to the New Jersey bar for only two weeks, she had

clerked for a trial judge in Maryland for one year and was familiar with affidavits. Furthermore, although Witman admitted that he spent little time reviewing the affidavit, he did review it, made one change and signed it. Finally, there is no evidence that Brosnick violated any Rules of Professional Conduct in her drafting of the affidavit.

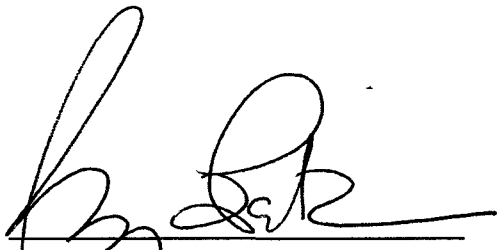
There remains the issue of the appropriate sanction. Similar cases have led to either an admonition or a reprimand. See In the Matter of Robert Simons, Docket No. DRB 98-189 (July 28, 1998) (admonition for signing another's name on an affidavit, notarizing the signature and attaching the affidavit to a complaint filed in federal court); In re Lewis, 138 N.J. 33 (1994) (admonition where the attorney attempted to deceive a municipal court by introducing into evidence a document falsely showing that a heating problem in an apartment of which he was the owner and landlord had been corrected prior to the issuance of a summons); In re Mazeau, 122 N.J. 236 (1990) (attorney reprimanded for failing to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim).

Like the special master, a five-member majority of the Board determined that Bennett should receive an admonition for her misconduct, taking into account the fact that she had been an attorney for only one year and was being supervised by the senior partner of the firm.

As to Witman, like the special master, we considered his previously unblemished twenty-six year legal career, his reputation as an outstanding estate and pension practitioner, his charitable work and his belief that the 1993 trust agreement was deficient and probably illegal. However, in our view, an admonition is not sufficient discipline for an experienced attorney who omitted material facts from an affidavit and made misrepresentations during his deposition. Therefore, a five-member majority voted to impose a reprimand. One member concurred with the result, but did not find that Witman had committed any impropriety with respect to his deposition testimony.

Three members dissented and would have dismissed both complaints for lack of clear and convincing evidence of unethical conduct. One member did not participate.

We further determined to require both respondents to reimburse the Disciplinary Oversight Committee for administrative costs.

By: 

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Leonard J. Witman
Docket No. DRB 01-417

Argued: February 7, 2002

Decided: May 8, 2002

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson			X				
Maudsley					X		
Boylan			X				
Brody			X				
Lolla							X
O'Shaughnessy			* X				
Pashman			X				
Schwartz					X		
Wissinger					X		
Total:			5		3		1

Robyn M. Hill 5/21/02
Robyn M. Hill
Chief Counsel

* Concurred with the decision to impose a reprimand, but did not find that respondent committed any impropriety with respect to his deposition testimony.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dana A. Bennett
Docket No. DRB 01-418

Argued: February 7, 2002

Decided: May 8, 200

Disposition: Admonition

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson				X			
Maudsley					X		
Boylan				X			
Brody				X			
Lolla							X
O'Shaughnessy				X			
Pashman				X			
Schwartz					X		
Wissinger					X		
Total:				5	3		1

Robyn M. Hill 5/22/02
Robyn M. Hill
Chief Counsel