

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Witkus, Lanea A. advs. Hugh M. Tamoney # 06-029

SIX MONTH SUSPENSION
WITH FOUR MONTHS SUSPENDED PLUS CONDITIONS

On November 17, 2009, the Professional Conduct Committee heard Oral Argument in the above-captioned matter. Members present included: Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling and Jennifer L. Parent. David N. Cole, Thomas P. Connair, Gretchen Rule Hamel and James R. Martin were absent. Margaret H. Nelson recused herself and left the room. Landya B. McCafferty, Disciplinary Counsel, presented for the Attorney Discipline Office, John C. Kissinger, Jr., Esquire, represented the Respondent. Lanea A. Witkus, Esquire [REDACTED]
[REDACTED]

I. FINDINGS OF FACT

Upon consideration, the Committee voted to accept the Stipulation as to the Facts by clear and convincing evidence:

Ms. Witkus is an attorney licensed to practice law in New Hampshire. Ms. Witkus was admitted to practice in 1977. At all times material to this proceeding, Ms. Witkus operated her law office as Witkus & Wilson, P.C., 34 Belknap Avenue, P.O. Box 5, Newport, New Hampshire 03773.

On August 13, 2002, Patricia M. Tamoney executed both her Will and a trust document entitled the Patricia M. Tamoney Revocable Trust Agreement ("Tamoney Trust"). Ms. Witkus never represented Ms. Tamoney.

On April 2, 2005, Ms. Tamoney died.

Ms. Tamoney's Will was probated in Sullivan County Probate Court, Docket # 2005-0137 ("Probate Action").

By Order dated July 21, 2005, the Probate Court, by agreement of the parties, appointed Ms. Tamoney's sons, Hugh and Mark Tamoney, along with one of Ms. Tamoney's daughters, Megan Zazzaro, as Co-Executors of her Estate ("Tamoney Estate").

Because of alleged financial improprieties in the handling of large sums of Ms. Tamoney's money that Megan Zazzaro did not explain to their satisfaction, Mark and Hugh Tamoney filed a petition to remove Megan Zazzaro as Co-Executor. This petition was granted without objection by Order dated September 22, 2005.

Megan Zazzaro was therefore removed as Co-Executor.

At around that same time, Hugh and Mark Tamoney, as Co-Executors of the Tamoney Estate, initiated an action in Sullivan County Superior Court, Docket # 05-C-0056, against their sisters, Marabeth Hamilton and Megan Zazzaro ("Tamoney Lawsuit"). Michael Zazzaro and Lauren Hamilton were also named as defendants in the Tamoney Lawsuit.

In the Tamoney Lawsuit, Hugh and Mark Tamoney alleged that the Defendants improperly removed funds from the Tamoney Trust and improperly retained items belonging to the Tamoney Estate.

Megan Zazzaro and Marabeth Hamilton were represented by Ms. Witkus in the Probate Action and the Tamoney Lawsuit. Ms. Witkus' representation of them began in April 2005.

Originally, Hugh and Mark Tamoney were represented by R. Wells Chandler, Esquire. In or about late November 2005, Mr. Chandler withdrew and Hugh and Mark Tamoney retained David P. Eby, Esq. to represent them.

On September 26, 2005, Megan Zazzaro filed a motion to set aside the Court Order which granted the removal of her as Co-Executor. Megan Zazzaro also filed a motion to remove Hugh and Mark Tamoney as Co-Executors and requested the Court to appoint an independent executor.

In an Order dated September 29, 2005, the Court denied Megan Zazzaro's request to set aside her removal as Co-Executor and scheduled a hearing on the limited issue of appointing an independent executor.

The dispute between the Tamoney brothers and sisters was highly charged. The brothers alleged that the sisters had, among other things, stolen large sums of money from Ms. Tamoney. The sisters also asserted allegations of financial impropriety against the brothers.

Ms. Witkus' client, Marabeth, had assured Ms. Witkus that, while in Connecticut, Ms. Tamoney had given Marabeth a Power of Attorney (hereinafter referred to as the "POA"). Marabeth further assured Ms. Witkus that a Connecticut bank had honored the POA when Marabeth negotiated checks for Ms. Tamoney pursuant to the POA.

Based upon statements made to her by Marabeth, Ms. Witkus represented to opposing counsel that her client had made financial transactions in Connecticut under authority of the POA. At that time, Ms. Witkus did not yet have a copy of the POA in her possession and disclosed such to Mr. Chandler.

While representing Hugh and Mark Tamoney, Mr. Chandler made an oral request to Ms. Witkus that she supply him with a copy of the POA. Mr. Chandler did not put his request in writing. At that time, Ms. Witkus did not have the POA in her possession. Ms. Witkus concedes that she did not supply Mr. Chandler with a copy of the POA. Ms. Witkus believes that, upon receiving the POA, she had asked her secretary to forward a copy of the POA to Mr. Chandler.

On or about November 30, 2005, Mr. Eby (on behalf of Hugh and Mark Tamoney) forwarded to Ms. Witkus Interrogatories and document requests. Question 17 of Marabeth's and Michael Zazzaro's Interrogatories asked:

Please identify and produce all Power of Attorney forms, whether signed or unsigned, in which Patricia Tamoney or Harry Tamoney is the principal, from 2000 to the present.

Question 16 of Megan Zazzaro's Interrogatories was identical.

Ms. Witkus did not object to the aforementioned November 30, 2005, discovery requests.

On December 8, 2005, a hearing on Ms. Witkus' motion to appoint an independent executor was held before the Court (Feeney, J.).

At that hearing, Ms. Witkus attempted to persuade the Court that the brothers, Hugh and Mark Tamoney, were biased against her clients, Marabeth and Megan, and, as a result, an independent executor was necessary.

As part of her argument to the Court, Ms. Witkus referenced the POA on several occasions, relying on its existence to support her position that Marabeth had negotiated a \$5000 check from Mark Tamoney made payable to Ms. Tamoney as a loan, which was subsequently repaid by Ms. Tamoney. Attorney Witkus' position was that because the funds had been repaid by Ms. Tamoney, any argument by the Tamoney brothers that Marabeth had absconded with such funds to the detriment of Ms. Tamoney was improper, and illustrated the alleged bias they had against Marabeth. Her conclusion was that such bias justified her position that the brothers were unqualified to serve as co-executors.

Ms. Witkus' arguments proved unavailing, as the Court indicated its intent from the bench to deny her request to appoint an independent executor. The Court determined that Hugh and Mark Tamoney should remain as Co-Executors; the Court raised concerns about the potential criminal liability of Ms. Witkus' clients, as alleged in the Tamoney Lawsuit.

On December 9, 2005, the day after the hearing, Mr. Eby sent Ms. Witkus a letter (via telefax) in which he requested, among other things, a copy of the POA that Ms. Witkus had repeatedly referenced at the hearing. Ms. Witkus asked her new secretary to forward the POA to Mr. Eby. Ms. Witkus concedes, however, that neither she nor her new secretary forwarded the POA to Mr. Eby at that time.

In an Order dated December 15, 2005, the Court denied the request to appoint an independent executor.

Having not received a copy of the POA, on January 4, 2006, Mr. Eby wrote Ms. Witkus a letter (via telefax) in which he again requested that she forward to him a copy of the POA. Ms. Witkus inquired of her secretary about the POA. Her secretary indicated that she had looked for the POA but could not locate it.

In an e-mail to Mr. Eby dated January 6, 2006, Ms. Witkus wrote:

“ . . . As for the poa, we sent a copy to Atty Chandler. It is not a part of the estate file. Why would it be? I will not be able to send it until next week as I am out of the office this afternoon and cannot retrieve it to be copies (sic) until then. . . .”

Prior to the evening of Friday, January 13, 2006, Ms. Witkus' secretary typed verbatim the interrogatory answers hand-written by Ms. Witkus' clients. The response written by her clients to Question 17, regarding the identification and

production of all power of attorney forms, was as follows: "Answer: Lanea A. Witkus." The same answer was provided to Question 16 of Megan Zazzaro's Interrogatories, and to other interrogatory answers that requested the production of documents. Ms. Witkus' clients intended to have Ms. Witkus revise the answer accordingly, which she failed to do. On the evening of Friday, January 13, 2006, Ms. Witkus and her clients set aside the documents in support of their answers, and signed the interrogatory answers. The POA was in one of three substantial piles of documents to be attached to the interrogatory answers to be copied the following business day. Sometime after the weekend, the document pile containing the POA was separated from the rest of the documents that were copied and attached to the interrogatories.

On or about January 19, 2006, Ms. Witkus forwarded Marabeth's and Michael Zazzaro's Answers to the Interrogatories propounded on her in November 2005. The Interrogatory answers pertaining to the production of the POA, as drafted by Ms. Witkus' clients and typed by her secretary, as described in the preceding paragraph were not revised.

No power of attorney form was attached to Marabeth's Answers to the Interrogatories. Several other documents, which were part of the same pile of documents in which the POA was placed, also were not attached.

In or about mid-January 2006, the parties began focusing on settlement negotiations to resolve the Tamoney Lawsuit.

A settlement agreement had been signed by each of Ms. Witkus' clients by February 17, 2006.

As part of the settlement negotiations, Hugh and Mark Tamoney presumed, based on Attorney Witkus' representations, that a valid POA existed.

In the latter part of the afternoon of February 16, 2006, and prior to Ms. Witkus' receipt of a final settlement agreement, Ms. Witkus instructed her secretary to fax the POA. The secretary confirmed to Ms. Witkus that she had done so. However, on February 17, 2006, Mr. Eby's office contacted Ms. Witkus' office, stating they had yet to receive the POA.

At or about 9:15 a.m. on February 17, 2006, Ms. Witkus' secretary faxed the POA, stating in a cover sheet that she had previously faxed the document. Mr. Eby received this particular fax.

At or around 10:45 a.m. on February 17, 2006, Ms. Witkus recalls her secretary told her that Mr. Eby's office was still questioning whether the POA was sent, and asked Ms. Witkus to make sure she had sent the right document. At that time, she

carefully reviewed the POA and discovered that it was clear on its face that it was invalid, as it had never been signed by the purported principal, Ms. Tamoney.

On that same date, Ms. Witkus forwarded a copy of the POA to Mr. Eby (via telefax). By that time, Hugh and Mark Tamoney had signed the settlement agreement.

Along with the invalid POA, Ms. Witkus included the following message in her cover letter to Mr. Eby:

“I never said valid. There is a POA. FYT”

Prior to sending the above message to Mr. Eby, Ms. Witkus reviewed the December 8, 2005, hearing transcript to ensure that she had not used the term “valid” or words to that effect in her offer of proof to the Court.

At some point after they signed the settlement agreement, Hugh and Mark Tamoney learned that Ms. Witkus had disclosed the POA, which was improperly signed and legally invalid.

On or about May 11, 2006, Hugh Tamoney filed a grievance with the Attorney Discipline Office, complaining inter alia, about Ms. Witkus’ conduct with respect to the POA.

See Stipulation as to Facts, Rules and Sanction ¶¶ 1-40, at 1 to 9.

Additional facts below are established by clear and convincing evidence, as found by the Hearing Panel Report:

Ms. Witkus acknowledged receiving the Power of Attorney sometime in October, 2005¹. She further acknowledged looking at it briefly but did not carefully review it.

On February 17, 2006², Ms. Witkus determined that the Power of Attorney was invalid.

See Hearing Panel Report at 4.

¹ The Committee notes the typographical error in the Hearing Panel Report of October, 2007.

² The Committee notes the typographical error in the Hearing Panel Report of February 17, 2008.

Ms. Witkus failed to adequately review the Power of Attorney before the December 8, 2005, hearing, or following the numerous requests from Mr. Eby that it be forwarded to him. Ms. Witkus stated that only when she reviewed the POA on February 17, 2006, she realized that the document was defective. This was easily determined because Ms. Tamoney never signed the POA as is required for it to be valid.

II. RULINGS OF LAW

The Respondent acknowledges violation of the Rules, and as found by the Hearing Panel. The Committee thus finds, by clear and convincing evidence, that the Respondent violated Rules 3.3(a)(1): Candor to the Tribunal, 3.4(d): Fairness to Opposing Party and Counsel and 8.4(a): Misconduct.

Rule 3.3(a)(1): Candor to the Tribunal

The *2004 ABA Model Code Comment* of Rule 3.3 Candor Toward The Tribunal, Representations by a Lawyer [3] states in pertinent part:

An assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

The Committee found by clear and convincing evidence that Ms. Witkus received the Power of Attorney sometime in October, 2005. According to Ms. Witkus, she determined that the POA was not valid on February 17, 2006 when she more carefully reviewed it.

Having failed to review the POA, Ms. Witkus could not have known nor did she know that the POA was valid. Further, having failed to review the POA, she did not make a reasonably diligent inquiry as to its validity. Ms. Witkus therefore did not have a reasonable basis to believe that the POA was valid.

Ms. Witkus repeatedly, on five (5) separate occasions, represented to a Court by way of offers of proof on December 8, 2005, that the Power of Attorney existed. Her representation

clearly implied that the Power of Attorney was valid. Her representations including her statement that she had the POA constitute a violation of Rule 3.3(a)(1).

Rule 3.4(d): Fairness to Opposing Party and Counsel

Attorney Eby had requested a copy of the Power of Attorney at least seven (7) times before he actually received it. The Committee finds that Mr. Eby requested the Power of Attorney as follows: (1) Via Interrogatories/Document Requests on or about November 30, 2005; (2) Orally after the December 8, 2005 hearing; (3) By letter sent via U.S. mail and fax on December 9, 2005; (4) By letter sent via U.S. mail and fax on January 4, 2006; (5) By email dated January 6, 2006; (6) By letter sent via U.S. mail and fax on January 9, 2006; and (7) By letter sent via U.S. mail and fax on January 25, 2006. Ms. Witkus failed to timely comply with a reasonable discovery request with respect to a document which was clearly relevant and material to the case.

Rule 8.4(a): General Rule

In light of the above rule violations, there is necessarily clear and convincing evidence of a violation of Rule 8.4(a).

III. ANALYSIS

The purpose of the Court's disciplinary power "is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *E.g., Coffey's Case*, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). "The sanction must take into account the severity of the misconduct." *Id.*

Under the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*"), when imposing a sanction for attorney misconduct the following factors are considered: (a) the duty violated; (b) the attorney's mental state; (c) the potential or actual injury caused by the misconduct; and (d) aggravating and mitigating factors. *See, e.g., Shillen's Case*, 149 N.H. 132, 139 (2003) (noting that, although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

- a. **Candor to a tribunal and fairness to an opposing party and counsel is essential to the integrity of the adjudicative process. Ms. Witkus breached both of these duties.**
- b. **Ms. Witkus did not engage in any obvious self-dealing or intentional deceit in the course of her misconduct.**
- c. **Potential injury was caused to the Tamoney brothers when a settlement agreement was reached based on their belief that a valid Power of Attorney existed. A different agreement might have resulted had they known the Power of Attorney was invalid.**
- d. **The Committee also noted the following aggravating factors, as found by clear and convincing evidence by the Hearing Panel:**

Ms. Witkus' prior disciplinary record, which includes: (1) a warning issued on August 28, 2000, with regard to Rule 1.9 (dismissing the matter and finding no professional misconduct); and (2) a reprimand issued December 18, 2007, a violation of Rule 3.3(d) (failure to inform tribunal of adverse material facts) and Rule 8.4(a) (general rule), were taken into consideration.

Ms. Witkus' defensive and unapologetic demeanor during the two hearings in this matter. Upon cross-examination, Ms. Witkus was reticent to admit wrongdoing and failed to show any true remorse, despite entering into a Stipulation. The Committee was troubled that upon determining that the Power of Attorney was invalid, Ms. Witkus sent a terse fax to opposing counsel rather than deal with it in a forthright manner and offer an explanation or an apology.

The Respondent has been practicing for over thirty years. The Committee found that she should have taken the time to carefully review the Power of Attorney given her repeated reliance on it, prior to making reference to it in Court. Furthermore, Respondent's years in practice also should have guided her toward being more forthcoming with opposing counsel with regard to a legitimate discovery request for a document that the Respondent had in her possession.

The Committee noted the following mitigating factors, also found by clear and convincing evidence by the Hearing Panel: Ms. Witkus' credible testimony that she has devoted extensive hours to Pro-Bono and reduced fee clients. The Committee is mindful that Ms. Witkus provides a needed service to her community.

IV. SANCTION

The Committee considered the above factors and discussed the need to maintain the integrity of the legal profession, the gravity of the Rules violated and the need to deter future ethical infractions. Accordingly, the Committee voted to issue a six month suspension with four months suspended, to be imposed on March 1, 2010. The suspended portion of the suspension shall be conditional upon no further violations for a period of two years. If Ms. Witkus violates the Rules during this time, the Committee shall schedule a further hearing to determine whether a portion or all of the 6 (six) month suspension shall be imposed. If a grievance is filed but remains unresolved during this two year period, the stay of the suspension shall be extended until such time as the grievance is resolved.

Ms. Witkus shall attend six hours of CLE on office management within the next six months, with in-person attendance. These additional credits shall be in addition to the twelve annual credits required by the NH MCLE Board, and shall not be used as carry over credits for the following reporting year.


V. CONCLUSION

Based on the above reasons, having found violations of N.H. R. Prof. Conduct 3.3(a)(1); 3.4(d) and 8.4(a) by clear and convincing evidence, the Committee issues a six month suspension, with four months suspended for two years with conditions.

The Respondent shall pay all costs associated with the investigation and prosecution of this matter. Said costs shall be paid in full in the first instance, or arrangements made for a

Committee-approved payment plan following the review of a financial affidavit, prior to any request for reinstatement.

December 15, 2009


Benette Pizzimenti
Vice Chair

Distribution:

Landya B. McCafferty, Disciplinary Counsel
John C. Kissinger, Jr., Esquire
File

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. LD-2010-0006, In the Matter of Lanea A. Witkus, the court on May 13, 2010, issued the following order:

Attorney Lanea Witkus was suspended from the practice of law in New Hampshire for a period of six months, with four months stayed, commencing March 1, 2010. Attorney Witkus has filed a motion for reinstatement and an affidavit stating that she has fully complied with the terms of the suspension order and requesting that she be reinstated to the practice of law. In accordance with the provisions of Rule 37(14)(f), Attorney Witkus' motion for reinstatement is granted. Attorney Lanea Witkus is reinstated to the practice of law in New Hampshire, effective immediately.

Broderick, C.J., and Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**

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