

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

LD-2019-0001

In the Matter of Joshua N. Mesmer, Esquire

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ANSWERING BRIEF FOR  
THE NEW HAMPSHIRE SUPREME COURT  
ATTORNEY DISCIPLINE OFFICE

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Attorney Discipline Office

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## **I. Questions Presented**

- A. Whether the Committee clearly erred in finding that Mr. Mesmer acted “knowingly” for purposes of a Rule 3.3 violation, notwithstanding his diagnosis of sleep apnea.
- B. Whether the Committee afforded appropriate weight to the mitigator of Mr. Mesmer’s sleep apnea, where it recommended a downward departure from a baseline disbarment, to a three-year suspension (stayed for 18 months), after finding that Mr. Mesmer violated Rules 1.1, 1.2, 1.3, 1.4, 1.5, 3.3 and 8.4(c), acted knowingly and intentionally, and caused significant harm to the public and his clients.

## **II. Statement of the Case**

The ADO issued a Notice of Charges on September 11, 2017, alleging that Mr. Mesmer had violated N.H. R. Prof. Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 3.3, 8.4(c) and 8.4(a). [PCC<sup>1</sup> 2] Mr. Mesmer admitted all Rule violations but Rule 3.3, defending that charge on the basis that a medical condition, obstructive sleep apnea (OSA), was so severe so as to prevent him from being able to reach a “knowing” state of mind.

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<sup>1</sup> Citations to the record are as follows: “PCC” denotes the entire record (consisting of 67 tabbed entries) before the PCC in this matter. For instance, “PCC 2” denotes Tab 2 of the record. Citations to Jointly Submitted Exhibits refer to Tab 29, Volume 1 and Tab 30, Volume 2. For instance, “PCC 29, Ex. 3” denotes Exhibit 3 of Tab 29 within the record.

A Hearing Panel held a three-day evidentiary hearing in June 2018, ultimately finding that all Rule violations were proven by clear and convincing evidence. [PCC 34, 59] Following a hearing on the issue of sanction [PCC 58], at which the ADO sought a three-year fully-served suspension, the Hearing Panel issued a Recommended Sanction on November 2, 2018. [PCC 59] The Hearing Panel recommended that Mr. Mesmer be suspended for 18 months.

The Committee reviewed the entire record and affirmed the Hearing Panel's assessment of the facts and all Rule violations. [PCC 67, p. 1] While keeping Mr. Mesmer's served suspension the same (18 months), the Committee increased the total suspension in this matter to three years: "[w]hile the Committee accepted much of the Hearing Panel's analysis, it concluded that these facts present a closer call between the sanction of disbarment versus suspension. For that reason, the Committee recommends a three-year suspension." [*Id.*, at p. 11]

### **III. Statement of the Facts<sup>2</sup>**

Mr. Mesmer represented Tires, Inc. ("Tires"), as well as the owners of the company, Kim and David Balles, from December 2015 through October 2016. [HP Rep. ¶ 5] Tires

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<sup>2</sup> The following is a summary of facts. Much more detailed facts were found by the Hearing Panel in a detailed 48-page Report. [PCC 59]

had been sued by Motostar Tire and Auto Products, Inc. (“Motostar”) in 2012 resulting in a judgment against Tires in excess of \$165,000 (“Tires I”). [HP Rep. ¶ 6]

**December 2015 - July 2016: The Fraudulent  
Conveyance Action, Default Judgment, and  
Writ of Execution**

On December 30, 2015, Motostar filed a Petition to Set Aside Fraudulent Conveyance, naming as defendants Tires and Kim and David Balles individually (the “Petition” or “Action”). [HP Rep. ¶ 10] Mr. DeCarolus represented Motostar. Mr. Mesmer received and reviewed a courtesy copy of the Petition on December 30, 2015. [*Id.*]

On January 6, 2016, Mr. Mesmer emailed a copy of the Petition to Kim. [HP Rep. ¶ 14] Mr. Mesmer told Kim, in writing, on at least three occasions in January 2016 that he would be filing a motion to dismiss or other response in the Action. [HP Rep. ¶¶ 15, 17, 20, 21] Contrary to these assurances, Mr. Mesmer filed no appearance in the matter, nor did he file a Motion to Dismiss or other responsive pleading such as an Answer. [HP Rep. ¶ 23] The Clerk issued a Notice of Default on February 26, 2016 for “failure to file a timely appearance and answer.” [HP Rep. ¶ 26] Mr. Mesmer was not copied on the Court's Notice because he had not filed an appearance in the Action. [*Id.*]

Mr. Mesmer did, however, thanks to the courtesy of opposing counsel, come to know of the default in his clients' matter. Mr. DeCarolis emailed Mr. Mesmer on March 14, 2016, asking "[d]id defendants intend to default in the fraudulent conveyance action?" [HP Rep. ¶ 27] Mr. Mesmer responded the same day, "[n]ot at all. Did you not receive a copy of the response?" Mr. DeCarolis immediately responded "no, only the default notice." A few days later, on March 18, 2016, Mr. DeCarolis again emailed Mr. Mesmer, updating him further and stating, "I have not seen anything." [HP Rep. ¶ 28]

Despite being on notice of the default in his client's matter, Mr. Mesmer took no remedial action, either in the days following Mr. DeCarolis' email, or in the months thereafter. Mr. Mesmer's billing records reflect no work done on the case between January 25 and May 6, 2016. [HP Rep. ¶ 30] Mr. Mesmer did not even call the Court to ascertain whether it had received an Answer. [*Id.*]

Predictably, Mr. DeCarolis thereafter filed a Motion for Final Judgment and Affidavit of Damages dated April 6, 2016 and mailed a copy to Mr. Mesmer. [HP Rep. ¶ 32-33] Mr. Mesmer did not respond to the Motion for Final Judgment, and it was granted on April 28, 2016. [HP Rep. ¶ 34-35] A Notice of Final Decision was mailed on May 4, 2016 to Mr. DeCarolis, Tires, and the Ballese for a judgment of over \$120,000. [HP Rep. ¶ 35]

On May 6, 2016, Kim Balles received the Notice of Final Decision in the mail. [HP Rep. ¶ 36] Alarmed, she called Mr. Mesmer the same day and informed him about the Notice of Final Decision. [HP Rep. ¶ 37] Though he had not billed time on her matter in months, Mr. Mesmer billed Kim for his time relating to this May 6 phone call. He made two separate time entries memorializing this conversation and stating he had “reviewed Notice of Final Decision,” would “conduct investigation,” and “prepare appropriate response.” [HP Rep. ¶¶ 38-40] During the May 6 conversation with Kim, Mr. Mesmer did not inform her that he had failed to file a Motion to Dismiss or any other responsive pleading. [HP Rep. ¶ 41] Mr. Mesmer instead told Kim that he was confused by the Notice of Final Decision, but that he would take care of it.<sup>3</sup> [HP Rep. ¶ 42]

Similar to his conduct in failing to file an Answer, and contrary to his May 6 representation to Kim that he would take care of the problem, Mr. Mesmer took no timely action and prepared no response to the Notice of Final Decision. [HP Rep. ¶ 45] On June 6, 2016, a Default Judgment for over \$120,000 was entered against Tires and the Ballese. [HP Rep. ¶ 48] Mr. Mesmer never informed his client about this

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<sup>3</sup> Mr. Mesmer testified that he had no recollection of the May 6, 2016 phone call. [HP Rep. ¶ 46] The Panel found this and similar claims of near-blackout memory events to be “not credible.” [HP Rep. ¶ 189]

development, despite receiving four emails from Kim in June 2016 repeatedly asking where the matter stood. [HP Rep. ¶¶ 49-52]

Kim came to know of the dire procedural posture of her case not from Mr. Mesmer, but rather when she was served with a Writ of Execution by the Hillsborough County Sheriff on July 1, 2016. [HP Rep. ¶ 53] In execution of that Writ, Motostar sought from the Ballesees their stock in Club ManchVegas, Inc., in which Kim and David Balles were 50% owners. [*Id.*]

By now Mr. Mesmer could no longer hide his failures in the case. Mr. Mesmer and Kim Balles met the day she was served with the Writ, July 1, 2016, to discuss this development. [HP Rep. ¶ 54] Mr. Mesmer testified that he had no recollection of that in-person meeting. [*Id.*] This blackout of memory too the Panel found not credible, because immediately after their meeting, Mr. Mesmer emailed Kim, stating in part:

I've been working on a Motion and Supporting Memorandum and plan on finishing them over the weekend. They will be filed in Nashua Superior first thing Monday morning . . . .

[HP Rep. ¶¶ 55, 189]

On July 5, 2016, Kim emailed Mr. Mesmer, stating: “Hi Josh: you are filing an appeal today correct? I haven't slept and are[sic] sick to my stomach . . . .” [HP Rep. ¶ 56] On July

5, 2016, Mr. Mesmer responded, “Yes. Be in touch soon.” Contrary to these assurances, Mr. Mesmer was not working on any documents to file on Kim's behalf. [HP Rep. ¶ 58] He filed nothing on behalf of his client the week of July 4, 2016. [Id.]

On July 14, 2016, the Sheriff served the Writ of Execution on Mr. Mesmer at his law office as registered agent of Tires. [HP Rep. ¶ 60] On July 15, 2016, Mr. Mesmer spoke on the phone with Kim, and billed her for this time, making time entries in his billing software regarding the “Sheriff's multiple services” and “seeking answers relating to execution of judgment.” [HP Rep. ¶ 61] Mr. Mesmer noted on his time slip on July 15 to: “Return to office; pull all files; conduct thorough review of documents and related material pertaining to procedural posture; create timeline; correspond with Kim Balles; relay findings.” [HP Rep. ¶ 62] Despite this allegedly “thorough review of documents” to ascertain “procedural posture,” even at this late juncture, Mr. Mesmer did not call the Court to determine the status of the case. [Id.]

On July 15, 2016, Motostar filed a Motion for Ex Parte Relief. [HP Rep. ¶ 63] The Court ordered that the defendants produce their stock certificates for Club ManchVegas on July 18, 2016 by 4:00 p.m., and set a hearing date for July 22, 2016. [Id.] Mr. DeCarolis emailed this Motion to Mr. Mesmer on the same day. [Id.]

On July 19, 2016, Mr. Mesmer, *for the first time since accepting service of the Petition in January 2016*, filed a pleading in the Action on his clients' behalf. [HP Rep. ¶ 66] He filed a one-page Expedited Motion to Stay Execution of Judgment. [*Id.*] Mr. Mesmer represented to the Court in his Motion to Stay: “Defendants filed a timely response and have received no information pertaining to this matter since that time and to date.” [HP Rep. ¶ 67] Motostar took issue with this representation, attaching to their Objection to the Motion to Stay Mr. DeCarolis’ March 2016 emails to Mr. Mesmer, and calling Mr. Mesmer’s representation “false.” [HP Rep. ¶ 69] Mr. Mesmer testified that he did not read Motostar’s Objection. [*Id.*] Mr. Mesmer knew around the time of filing the Motion to Stay, however, that he had not, in fact, filed an Answer and Appearance. [HP Rep. ¶ 70]

At the hearing on July 22, 2016, the Court granted Motostar's request for relief and ordered that Kim and David Balles deliver the stock certificates to the Hillsborough County Sheriff on or before the following Monday, July 25, 2016 by 11 a.m. [HP Rep. ¶ 72] Despite an explicit statement by the Court as to the pleading required by Tires to possibly obtain relief (*i.e.* a motion to vacate), Mr. Mesmer did not file a Motion to Vacate Default until almost two months later, on September 13, 2016. [HP Rep. ¶ 75-77]

**July - September 2016: Numerous Misrepresentations to Client Regarding Work Performed in the Matter Via Text, Email, and Billing Invoices**

Between the hearing on July 22, 2016, and when Mr. Mesmer actually filed pleadings on September 13, 2016, Mr. Mesmer, in numerous communications with Kim Balles, engaged in a pattern of deception towards his client. [HP Rep. ¶¶ 79-107] He repeatedly assured her that he would soon file, or had already filed, pleadings on her behalf when in fact he had not. [HP Rep. ¶¶ 80-105] Indeed, despite the objectively doomed posture of their case, Mr. Mesmer was hyperbolic in this assurances that all would be well and the Balleses would “prevail.” Later, Mr. Mesmer would impugn the integrity of the Court system and opposing counsel in order to mollify his client and shift blame from himself, saying the Court’s Orders involved “corrupt backwards shit,” and that opposing counsel had the Court in his “back pocket.”

For example, in a text message sent to Mr. Mesmer on July 25, 2016, Kim stated “now your [sic] gonna start on appeal correct and get me my stocks back without paying 122000.” [HP Rep. ¶ 79] Mr. Mesmer responded “yes, 100% And I’m not stopping until we have won and finished this once and for all.” [*Id.*] He later texted he was “confident [they would] prevail.” [HP Rep. ¶ 80] Later that day, Mr. Mesmer said he was “working on motions. Should be ready to file by morning.” [HP Rep. ¶ 81] On July 26, 27, and 28, 2016, Kim

asked via text whether “the appeal” had been filed. [HP Rep. ¶ 82] Mr. Mesmer responded on July 28, “Today, Kim. Getting filed today. Definitely. Will touch base around noon.” [HP Rep. ¶ 83]

Mr. Mesmer emailed Kim on July 29, 2016, saying that he would be heading to Nashua “in the next couple of hours to file our pleadings.” [HP Rep. ¶ 84] Although Mr. Mesmer billed Kim for over four hours of time for drafting various motions (to accept late filings, to strike default and to set aside default judgment), as well as affidavits of clients and counsel and a memorandum of law, and for filing these pleadings, he did not file anything with the Court on July 29, 2016. [HP Rep. ¶ 85] Nor is there any evidence that he met with the Ballese in this time period for them to sign affidavits. [*Id.*]

Mr. Mesmer testified that he went to the Court to file these pleadings, but got there just after the Court closed on Friday, July 29, 2016. [HP Rep. ¶ 87] He never modified his time slip to indicate that he had not in fact filed the motions, nor did he tell his client he had not, in fact, successfully filed the pleadings on July 29. [*Id.*]

On August 1, 2016 and again on August 4 and August 5, Kim texted Mr. Mesmer and asked for an update and whether Mr. Mesmer could confirm whether he had filed documents on her behalf. [HP Rep. ¶¶ 88-90] On August 5,

2016, Mr. Mesmer lied to his client via text and said, “the pleadings have been filed and now we wait.” [HP Rep. ¶ 91]

On August 9, 2016, the Ballesees received a Notice of Sheriff's Sale, scheduling the auction of their Club ManchVegas stock certificates for September 15, 2016 at 10:00 a.m. [HP Rep. ¶ 92] Again, Kim was confused because she believed, based on Mr. Mesmer's August 5, 2016 text, that he had filed a pleading to prevent, or at least delay, the Sheriff's sale.

On August 10, Mr. Mesmer texted Kim that he just “saw the sheriff” and was “working on motions that I'll be finishing up tonight and filing in Nashua first thing in the morning.” [HP Rep. ¶ 93] Kim, again, was confused. Because Mr. Mesmer had told her that he had filed pleadings just five days prior, she texted: “I thought we already did these motions, no?” [HP Rep. ¶ 94]

Mr. Mesmer, needing to keep his story straight, lied again. He again stated falsely that he had previously filed motions: “Oh no, I definitely filed motions after our hearing, but clearly we need more and now we need to also prevent this damn sale [the sheriff's sale]. You'll have everything within the next 12 hours.” [HP Rep. ¶ 94] To further mollify Kim, Mr. Mesmer also misrepresented during that exchange that his father,

Frank Mesmer, was working with him to clear up the problems in the case. [HP Rep. ¶ 95]

From August 10 until August 26, Kim texted Mr. Mesmer nearly daily asking for updates on the pleadings she believed were pending, when in fact, nothing had been filed by Mr. Mesmer – so naturally he had nothing on which to update her. [HP Rep. ¶ 96]

On August 26, 2016, Mr. Mesmer texted Kim that he had found some “solid arguments” for a “motion [to] file in Nashua today. Can I call you on my ride there to discuss the plan? Time is of the essence if I want to file it today.” [HP Rep. ¶ 98] Kim immediately responded, and over the next three hours texted Mr. Mesmer for an update. [HP Rep. ¶ 99] Mr. Mesmer did not file anything on behalf of Kim that day. [*Id.*]

On September 2, 2016, Kim asked “were the papers filed?” [HP Rep. ¶ 101] Mr. Mesmer lied and responded: “Yes.” [*Id.*] On September 7, 2016, Mr. Mesmer texted Kim that he had “drafted a supplemental motion to strike default and vacate judgment damages. I will file it tomorrow on an emergency basis.” [HP Rep. ¶ 102] He called his proposed motion a “supplemental motion,” to further deceive Kim into thinking he had already filed motions on her behalf. [*Id.*]

**September 2016: Motions Containing Further  
Misrepresentations, More Lies to the Client, and Failure  
to Address Pending Sheriff's Sale**

Mr. Mesmer billed the Ballesees for 25 hours of work, on September 8, 9, 12, and 13, 2016, on pleadings in their case. [HP Rep. ¶ 106] Mr. Mesmer texted Kim on September 13, 2016, asking “Can you and Dave meet me at the office for 1 minute in 30 minutes? I'm going to have you sign your affidavits and then I'm flying down to Nashua.” [HP Rep. ¶ 107] Kim and David met with Mr. Mesmer on September 13, 2016. [HP Rep. ¶ 108] The meeting lasted only a few minutes, and Mr. Mesmer simply instructed the Ballesees to sign their affidavits. [*Id.*] Mr. Mesmer did not instruct the Ballesees to read their affidavits before signing them and did not explain to them the significance of signing under oath. [HP Rep. ¶ 109]

Mr. Mesmer filed a flurry of pleadings with the Court on September 13 (the “first pleading packet”). Like his July 19, 2016 Motion to Stay, these pleadings contained further misrepresentations to the court. The pleadings in the first pleading packet included a Motion for Ex Parte Relief (to stay the sheriff's sale), a Limited Appearance, a Motion to Accept Late Filings, a Motion to Vacate Default (and Supporting Memorandum), a Motion to Dismiss [the Fraudulent Conveyance Action] (and Supporting Memorandum), as well

as affidavits of Mr. Mesmer, Kim, and Mr. Balles. [HP Rep. ¶ 110]

Several of these pleadings contained mis-statements as set forth by the Panel at Paragraphs 196-205. These misrepresentations generally involved statements concerning when Mr. Mesmer, and the Ballese, first became aware of the default and final judgment, as well as misstatements by Mr. Mesmer that he was represented the Ballese on a limited basis. Mr. Mesmer testified that he did not “knowingly” misrepresent these facts to the court because he forgot many significant events in the Balles’ case. The Panel did not find Mr. Mesmer credible in this respect, finding: “whether a responsive pleading had been filed with the Court was easily ‘knowable’ information with a call to the Court for verification. It is not credible that an attorney, truly baffled by the dire messages he was receiving from opposing counsel and his client, would not make that call.” [HP. Rep. ¶ 189, 194]

The Court denied the Motion to Stay the sale the same day it was filed, and Mr. Mesmer received the Court Order, sent via email at 3:19 p.m., when he returned to the office from having filed the motions.<sup>4</sup> [HP Rep. ¶ 118]

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<sup>4</sup> Mr. Mesmer filed on September 14, 2016, a Motion to Reconsider and a Motion to Accept Late Filing (collectively, the “second pleading packet”). [HP Rep. ¶ 119] The Court denied these Motions in an Order dated September 15, 2016. [HP Rep. ¶ 120]

Despite knowing he had lied to his client over months, and had done no work of any consequence in her matter until he was forced to because the Sheriff served him with a Writ, and a sale of his clients' stocks was imminent, Mr. Mesmer still did not take this opportunity to be truthful with his client. Instead, his texts to Kim shifted the blame to others within the system of justice. Mr. Mesmer was indignant about the judge and opposing counsel. [HP Rep. ¶ 121] He described the Court's rulings as "the most corrupt backwards shit I've seen in my years as an attorney. Frank agrees. . . ." [Id.] He referred to the other party as "assholes" and "shit heads." Mr. Mesmer further stated that "[D]ecarolis has the Nashua superior [court] in his pocket since he and his firm litigate there on a near weekly basis." [Id.]

Mr. Mesmer told Kim on September 15 that "we are working on an appeal [with] the supreme court" and assured her that "an appeal will be filed tomorrow." [HP Rep. ¶ 123] On September 16, 2016, Mr. Mesmer texted Kim and again lied to her, texting that the appeal was "done" and was being submitted "Monday morning," which would have been September 19, 2016. [HP Rep. ¶ 126] On September 20, Kim followed up and asked, "did it get filed?" Mr. Mesmer lied to his client again, and replied via text "Yes. Filed." [HP Rep. ¶ 127]

Mr. Mesmer did not file an appeal on the Ballese's behalf in September 2016. [HP Rep. ¶ 128] Mr. Mesmer testified that his father did not review any appeal-related documents at this time and that he lied to Kim about his involvement. [*Id.*]

Mr. Mesmer was given notice that the sale of the Ballese's stock would occur on September 15, 2016 at 10:00 a.m. [HP Rep. ¶ 129] Kim texted Mr. Mesmer at 6:16 p.m. on September 14, asking if the sale was going to happen the next day. [HP Rep. ¶ 130] Despite having notice that his motion to stay the sale had been denied, Mr. Mesmer responded that he was “under the impression” that “things are on hold pending some form of response from the court.” [*Id.*] He also told Kim that the sheriff “[d]efinitely can't sell stocks until the court rules on my motion to stay.” However, Mr. Mesmer knew the court had already denied his motion to stay the sale. [*Id.*]

The Sheriff's sale went forward, and Mr. Mesmer knew this because he had been in contact with Mr. DeCarolis, who went to the sale though Mr. Mesmer had not. [HP Rep. ¶ 131] Despite the sale already having taken place, and despite the fact that Mr. Mesmer never filed an appeal, Mr. Mesmer advised Kim at 4:03 p.m. on September 15 that she “might want to call Matt Estey sheriff and tell him your [sic] appealing case and it's being filed tomorrow and he will hold

off.” [HP Rep. ¶ 133] There was no legal basis for such advice, and Mr. Mesmer knew this.

### **October 2016 Hearing on Motion to Vacate**

During October 2016, and despite his allegedly debilitating and pervasive sleep apnea, Mr. Mesmer was able to muster sufficient cognition to press his clients, to whom he had been lying since July 1, for payment. He requested payment from Kim in an email dated October 13, 2016. [HP Rep. ¶ 139] As of that date, the amount billed to the Ballesees in connection with the Action totaled \$20,089.23. [*Id.*]

All of these motions and the hearing were necessitated by Mr. Mesmer's own knowing failure to competently represent his client in the Action and his repeated failure to take remedial measures once he was on notice of the default. [HP Rep. ¶ 141] These charges were the basis of Mr. Mesmer's Rule 1.5 admission, which he initially denied in his Answer. Kim made a payment of \$6,000 shortly thereafter. [HP Rep. ¶ 142]

On October 19, 2016, the Court held a hearing on the pending motions. [HP Rep. ¶ 146] On November 2, 2016, the Court issued an Order denying the Ballesees Motion to Vacate Default. [HP Rep. ¶ 148] Kim terminated Mr. Mesmer's engagement shortly thereafter. [HP Rep. ¶ 150]

#### **IV. Summary of Argument**

This case demonstrates egregious misconduct by an attorney who violated every duty a lawyer owes, who engaged in intentional and knowing dishonesty directed at his client and the Court, and who caused serious injury to both. Nonetheless, the Committee departed downward from what it deemed a baseline disbarment, instead imposing a suspension, and even stayed half of that suspension in recognition of several mitigators in this case – including the OSA that formed the core of Respondent’s defense: “[t]he Committee afforded weight to the mitigating factor – including Mr. Mesmer’s condition – by departing down from the baseline sanction of disbarment.”<sup>5</sup> [PCC Order at 11]

Under these circumstances, Mr. Mesmer’s argument that the Committee failed to grant appropriate weight to his sleep apnea is plainly contradicted by the actual result in this case – the downward departure to suspension. What Mr. Mesmer asks this Court to do is to effectuate a “double departure” – from baseline disbarment, to suspension, to a fully stayed suspension. Such a sanction is not appropriate for misconduct that “was severe, protracted and injurious” and involved a lawyer who “repeatedly lied to his clients over an extended period of time. The volume of lies coupled with

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<sup>5</sup> The ADO sought a three-year suspension fully served. [PCC 49]

the lack of any effort in his clients' defense cannot be viewed as anything other than aggravating." [PCC Order at 9, 11]

Mr. Mesmer further argues on appeal that the Committee erred in affirming the Hearing Panel's conclusion that he was able to form the requisite mental state to violate Rule 3.3 and make misrepresentations to the tribunal "knowingly." This argument likewise fails. The conclusion that Mr. Mesmer acted knowingly with respect to his statements to the Court is supported by three categories of evidence in this record. First, the record contains extensive documentary evidence such as emails, time records, invoices, and texts demonstrating that Mr. Mesmer knew various material facts (because he memorialized that knowledge in writing) prior to making subsequent statements to the contrary in his pleadings. Second, the Committee affirmed the fact finder's appropriate inference that if Mr. Mesmer could form an "intentional" state of mind to deceive his client (and his law firm) for months, and admitted his OSA had nothing to do with these decisions to lie, then Mr. Mesmer could form the less culpable "knowing" state of mind to misrepresent to the Court. Finally, the expert testimony regarding the severity of Mr. Mesmer's OSA conflicted, and Mr. Mesmer's expert admitted he was not opining on whether Mr. Mesmer could have acted "knowingly" during 2016.

## **V. Standard of Review**

This Court will “defer to the PCC’s factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the sanction.” *O’Meara’s Case*, 164 N.H. 170, 176 (2012).

## **VI. Argument**

All but one of the Rule violations in this matter were admitted, including the Rule 8.4(c) violations involving Mr. Mesmer’s lies to his client. The bulk of the hearing in this matter therefore focused on the only contested violation, the Rule 3.3 violation, and whether Mr. Mesmer could form a “knowing” state of mind for purposes of that Rule.

### **A. The Committee Appropriately Found that Mr. Mesmer Could Reach a “Knowing” State of Mind for his Misrepresentations to the Tribunal**

A “knowing” state of mind is less culpable than an intentional state of mind. It does not require any ill-intent, or a scheme or design to achieve a particular result, but simply “denotes actual knowledge of the fact[s] in question.” Rule 1.0(f) (definitions). A knowing state of mind is rarely admitted by a lawyer; it is usually proven because it can be “inferred from the circumstances.” [*Id.*] Acting knowingly means acting with a “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious

objective or purpose to accomplish a particular result.” *ABA Standards*, Sec. III (“Definitions”). *See also In Re Wyatt’s Case*, 159 N.H. 285, 307 (2009) (discussing “knowing” misconduct and stating “[w]hat is relevant ... is the volitional nature of the respondent’s acts, and not the external pressures that could potentially have hindered his judgment.”).

**1. Record Evidence of Actual Knowledge and “Conscious Awareness of Attendant Circumstances:” Documents and Testimony By Mr. Mesmer**

The finding that Mr. Mesmer acted “knowingly” when he made certain representations to the Court is supported most plainly by documents or correspondence authored *by Mr. Mesmer* demonstrating that he read, understood, and processed basic information that was material to the Ballesee case and subsequent default. These documents demonstrate actual knowledge by Mr. Mesmer of facts he later misrepresented to the Court, and they are laid out in detail in the Hearing Panel’s Report at ¶¶ 189-204. Without reiterating all of those findings herein, one example powerfully demonstrates why the Panel did not find Mr. Mesmer credible when he testified that “he forgot significant events in the case, and that, thus, his false statements were not made knowingly.” [HP Rep. ¶ 189]

Mr. Mesmer's Motion to Stay Execution of Judgment filed on July 19, 2016, made the following statement of fact: "Defendants filed a timely response and have received no information pertaining to this matter since that time and date." Attendant circumstances of which Mr. Mesmer was aware, because he had personally experienced them and memorialized them in writing, included:

- Mr. Mesmer received *and responded to* the March 14, 2016 email from Mr. DeCarolis putting him on notice of the default. Mr. Mesmer's response to the March 14, 2016 email told Mr. DeCarolis that Tires Inc. did not intend to default and asked Mr. DeCarolis if he had received Tires Inc's Answer. Mr. DeCarolis responded "no." [HP Rep. ¶ 191]
- Mr. Mesmer clearly understood the import of Kim's May 6, 2016 phone call. This conversation made an impression on Mr. Mesmer. He tracked his time (i.e. by manually typing in words to the firm's billing software) spent on the phone call and on follow-up work with a paralegal. Mr. Mesmer made two entries in his time-tracking software on May 6, which noted that his client told him she had "received Notice of Final Decision . . . ." His other time entry stated: "to conduct investigation; discuss with Rebekah (paralegal); will prepare appropriate response if necessary." [*Id.*]

- Mr. Mesmer’s July 22, 2016 apology to the Ballese demonstrates that he knew he had not filed an Answer in the Tires case. On the way to the July 22, 2016 hearing, Mr. Mesmer acknowledged to his clients that he had not filed an Answer. [HP Rep. ¶ 192] Yet he did not correct his previous misstatement in his July 19 pleading during this subsequent hearing.

These were attendant circumstances of which Mr. Mesmer was aware at the time he made the above-referenced representation in his July 19, 2016 pleading. The Panel therefore appropriately found he “knowingly” misrepresented facts to the tribunal. Similar documents and correspondence support the other Rule 3.3 findings in the Panel’s report at ¶¶ 190-205.

**2. Intentional, Strategic Behavior Throughout 2016, Including Months-Long Deceit of His Clients Contemporaneous with His Misrepresentations to the Court**

The Panel found, and the PCC affirmed, the Rule 8.4(c) violations in which Mr. Mesmer lied to his clients from July 1, 2016 through October 19, 2016, on at least fifteen occasions, concerning the status of their case and work he had performed on their matter. [HP Rep. ¶¶ 79-133] Mr. Mesmer “freely admitted” his sleep apnea had no impact on his lies to his client. [HP Rep. ¶ 189] Mr. Mesmer further admitted he

*intentionally* misled Kim Balles throughout the July -October 2016 period (Answer ¶¶176, 193), the same period in which he was misrepresenting to the Court.

On this basis the PCC affirmed the Panel’s finding that there was abundant evidence in the record that Mr. Mesmer’s lies constituted *strategic* conduct, motivated by self-interest: “Mr. Mesmer testified that his undiagnosed sleep disorder impacted his work performance and that, as a result, he made *conscious choices* about his work performance, such as the choice to lie to his client, to try and hide his performance deficits from his colleagues,<sup>6</sup> and to not be diligent in his representation of the Ballesees. It is not a leap to conclude that he also made false statements to the court in an attempt to ameliorate the situation he caused.” [HP Rep. ¶ 205]

For example, by August 10, Mr. Mesmer had lied to Kim and told her he had pulled Frank Mesmer into the case in order to give her a sense that he was bringing in additional help given the dire status of the case. In fact, he had not brought his father onto the case and had not shared with

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<sup>6</sup> For example, Mr. Mesmer, despite testifying he was finally aware of the “dire” condition of the fraudulent conveyance action as of July 14, 2016, kept the status of the case secret from his colleagues at the firm until September 2016. [PCC 41, 203: 2-20 (admitting he was worried about getting into trouble for failing to perform, and admitting he was “able to look out for [him]self and not get blamed”)].

anyone at the firm the fact that the case was in final default due to his inaction. [HP Rep. ¶ 95]

Later, when Mr. Mesmer told Kim that he was filing “Motions” in August, and she asked him (having remembered his earlier statements about such motions), “I thought we did all these motions, no?,” Mr. Mesmer again lied. But he did so in a way that kept his web of deceit to his client consistent: he answered, “oh no, I definitely filed motions after our hearing, but clearly we need more.” [HP Report at ¶ 94] Similarly, Mr. Mesmer later told Kim in September 2016 that he filed a “supplemental” motion to strike default, and admitted on cross examination that he used the word “supplemental” because he “had to call it that,” having already told her he filed the motion to strike. [HP Report at ¶102] Mr. Mesmer further admitted that he was able to “strategize enough to use that specific word to continue to deceive [his] client.” [PCC 41, 237: 18 - 238: 4] He admitted that despite his “haze” and being at the very “bottom” of his health, he sent his client “articulate” emails and texts setting forth misrepresentations as to specific actions he was taking on her behalf. [PCC 41, 261: 7-13]

Based on all of the above – documentary evidence demonstrating what Mr. Mesmer “knew” when, and his strategic lies to his clients over months – the PCC declined to overturn as clearly erroneous the simple inference that if Mr.

Mesmer, confronted with his allegedly debilitating sleep apnea, could form the requisite state of mind to *intentionally* deceive his client from July to September 2016, that same condition did not somehow prevent him from forming a lesser state of mind (i.e. awareness/”knowing”) for purposes of representations to the Court in the same time period.

**3. The Expert Testimony Conflicted Regarding the Severity of Mr. Mesmer’s Sleep Apnea Symptoms, and Mr. Mesmer’s Expert Admitted he Was Not Opining on State of Mind or Causation**

Mr. Mesmer relied on the testimony of Dr. Neal to support his theory that his sleep apnea was so pervasive and severe so as to prevent him from reaching a “knowing” state of mind for purposes of the Rule 3.3 violation. Mr. Mesmer argues in his Opening Brief (at p. 36) that Dr. Neal, and the ADO’s expert, Dr. David Picard, “agreed” that Attorney Mesmer’s symptoms of sleep apnea were “severe.” For this proposition, Mr. Mesmer cites testimony of the ADO’s expert, Dr. David Picard. [PCC 43, 157: 7-9]

Dr. Picard’s testimony, however, was not an agreement that Mr. Mesmer had “severe” symptoms of sleep apnea. To the contrary, Dr. Picard noted that although Mr. Mesmer *self-reported* severe symptoms during his 2018 IME with his hired expert, the actual medical records for the 2012-2016 time period demonstrate that Mr. Mesmer was not reporting to his

providers severe symptoms during that period, including during 2016, when the events in the Balles case occurred.

The testimony in its entirety makes this clear:

Q: Are you able, as we sit here this afternoon Doctor, to definitively say that Mr. Mesmer did not have severe symptoms of sleep apnea during the time frame we're discussing?

A: So, I mean, based on what was provided in the medical record, I don't see symptoms that I would consider severe symptoms of sleep apnea in the record from the different providers at the different institutions. The symptoms that are self-reported in 2017 [2018 was the actual date of the IME], I would agree many of those symptoms are severe.

[*Id.* at 156:22 - 157:9]

Dr. Picard did not agree that his review of all of the medical records, and the results of Mr. Mesmer's at home sleep studies, demonstrated severe symptoms of sleep apnea. He testified that even after reviewing all the same medical provided to Dr. Neal, he did not see evidence of an "individual profoundly impacted by sleepiness and affecting their daytime activities." Dr. Picard reiterated his opinion that the records were not indicative of someone who cannot carry out normal activities or who has their executive functioning "significantly impacted." [*Id.* at 122:8 - 123:6]

Crucially, Dr. Neal testified that he was *not* retained to opine on whether Mr. Mesmer could achieve any particular state of mind. [*Id.* at 78: 9-15] His testimony thus offers

nothing in support of the notion that sleep apnea prevented Mr. Mesmer from achieving a knowing state of mind. Dr. Neal acknowledged on cross examination that he did not review *any* of the specific facts, pleadings, emails, or texts in the Ballestes file, nor the Notice of Charges that led to this disciplinary action. [*Id.* at 77:12 – 79:16; PCC 67, pp. 5-6] He agreed that his opinion was general, and was *not* an opinion that “a specific set of actions or inaction by Mr. Mesmer in a particular legal matter was more likely than not caused by sleep apnea.” [PCC 43 at 92:18 – 93:10]

Unlike Dr. Neal, the ADO’s expert, Dr. Picard, reviewed the Notice of Charges in this matter. [*Id.* at 125: 10–13] He testified that he would be unable to opine that sleep apnea “caused” certain conduct without knowing, specifically, what conduct was at issue. [*Id.* at 141: 4–15] Dr. Neal was asked if he had ever, in 20 years of treating hundreds of sleep disordered patients a year, encountered a patient such as Mr. Mesmer, who reported experiencing complete blacks out as to entire conversations, written correspondence, etc. -- and answered no. [*Id.* at 139:1 – 140:15]

Dr. Picard testified that disordered patients such as Mr. Mesmer, who describe severe symptoms, though having a “mild” diagnosis as far as apneas per hour, represent a tiny fraction of sleep-disordered patients. He also found it unusual that Mr. Mesmer did not mention fatigue during his

2016 annual physical, when he was supposedly at the nadir of his fatigue symptoms. [*Id.* at 138:5-12; 131:2–19]

The fact-finders must determine issues like credibility and what weight to give evidence. In this case, based on the record before it, this Panel found that Mr. Mesmer’s sleep apnea was not so pervasive as he self-reported to Dr. Neal in 2018, at a time when he was also motivated to find an excuse for his professional misconduct. The Committee affirmed this finding after its own review of the expert evidence: “Dr. Neal’s opinions as to the causal link between sleep apnea and Mr. Mesmer’s conduct were tenuous. The Committee does not view the record as allowing a different conclusion. It cannot give more weight to Mr. Mesmer’s condition than did his own expert.” [PCC 67, pp. 9-10]

**B. The PCC Affirmed the Panel’s Extensive Findings Regarding Mr. Mesmer’s Sleep Apnea, and Accorded this and Other Mitigators Significant Weight, as Demonstrated by the Downward Departure from Baseline Disbarment**

Mr. Mesmer argues that as to his health issues, the Committee failed to grant sufficient weight in mitigation to his sleep apnea. This argument fails for two reasons. First, the record in this matter demonstrates that the Panel made numerous explicit findings about OSA throughout its well-organized Findings Report, in three different sections addressing separate issues. The PCC did not disturb these

findings. Second, the very result in this case, a downward departure to suspension from a baseline disbarment, powerfully demonstrates that both the Panel, and the PCC, considered and afforded considerable weight to Mr. Mesmer's OSA.

**1. The PCC Affirmed All of the Panel's Extensive Findings Regarding Sleep Apnea**

The Panel issued a 48-page report containing its findings of fact and conclusions of law. The Findings make clear that the Panel heard "substantial medical testimony from experts," reviewed medical records, and accepted Mr. Mesmer's hours-long testimony concerning his medical troubles and eventual diagnosis of OSA. The Panel found that Mr. Mesmer suffered from OSA at the time of the misconduct and that such condition may have "adversely affected some of Mr. Mesmer's functioning, in that his concentration and attention to detail may not have been at optimal levels." [HP Rep. ¶ 165]

Specifically, the Panel addressed OSA in three sections of its Report: at the conclusion of its overall fact section, in a ten-paragraph section analyzing "Medical Testimony and 'Knowing' State of Mind," and in its legal conclusion that Mr. Mesmer knowingly misrepresented facts to the tribunal. The PCC did not disturb any of these findings in its review.

First, the Panel found that in 2016 Mr. Mesmer was experiencing “worsening systems of what was later diagnosed as Obstructive Sleep Apnea.” The Panel cited no less than 21 separate page sections of the transcripts of hearing for this finding. [*Id.* at ¶¶ 152-153] Second, the Panel’s findings regarding OSA, and its analysis of whether and how it could affect Mr. Mesmer’s state of mind, occupied five pages of its Findings. [*Id.* at ¶¶ 154-167] In that section, the Panel notes that Rule 3.3 requires a “knowing” state of mind, defines that term, then proceeds to analyze whether Mr. Mesmer’s OSA was severe enough so as to have prevented him from reaching that state of mind. [*Id.* at ¶¶ 157-167]

Finally, the Panel addressed OSA in the context of its legal conclusion that Mr. Mesmer violated Rule 3.3. The Panel is charged with making credibility determinations, a determination granted deference on review. It found that Mr. Mesmer was “not credible on this account” when he testified, in defending his representations to the court in multiple pleadings, that he simply forgot significant events in the case, and thus could not have “knowingly” made misrepresentations to the Court. [*Id.* at ¶ 189]

The Committee did not disturb any the Panel’s extensive findings regarding this medical condition and its relevance to facts and liability. The Panel determined that Mr. Mesmer’s undiagnosed OSA and his attempts to find a solution were a

“personal problem” within the meaning of the *ABA Standards*. [*Id.* at ¶¶ 36-37] Again, the PCC affirmed this mitigator on this record.

**2. The Committee Affirmed the Downward Departure from Baseline Disbarment, in Recognition of Mr. Mesmer’s Sleep Apnea and Other Mitigators**

The Committee did not extend the length of Ms. Mesmer’s actual served suspension of 18 months. Although the PCC did extend the total suspension to three years, so that upon any reinstatement, Mr. Mesmer could be monitored for no further misconduct, it affirmed the fundamental “break” given to Mr. Mesmer due to his OSA – the downward departure from disbarment.

The significance of this downward departure cannot be overstated in the context of Mr. Mesmer’s serious misconduct. The Panel’s Sanction Report found that he “violated every duty owed as an attorney” and he “engaged in misconduct on multiple occasions and of various types.” [Sanction Rep. ¶ 5, 34] He violated duties to his client, to the court, to the public, and to the legal system. He acted intentionally and knowingly, deceiving both his client and the court. [*Id.* at ¶ 9] The injury to his client was “actual, not potential” and “serious, not minimal.” [*Id.* at ¶ 13] While not acting for significant personal monetary gain, he acted with a selfish

and dishonest motive in seeking to cover up his own failures.  
[*Id.* at ¶ 33]

The downward departure is notable for another important reason – while Mr. Mesmer argued that his OSA affected his diligence and competence violations, and pursued OSA as a complete defense to the Rule 3.3 violation, he admitted throughout this proceeding that OSA *did not have anything to do with his months-long deception of his client.* [Tab 3 (Answer); HP Rep. ¶ 153; PCC 42, pp. 50-51] Put differently, there was zero mitigating effect of sleep apnea for Mr. Mesmer’s Rule 8.4(c) violation, arguably the most serious of the Rule violations. The Committee’s downward departure is generous under these circumstances.

**C. The Committee’s Findings in Aggravation and Mitigation Are Amply Supported by the Record**

Mr. Mesmer argues that the Committee erred by failing to find that *every* mitigator found in the *ABA Standards* applies to his case. The PCC did not err in finding that three — and not twelve — mitigators apply here.

Mr. Mesmer misstates the record when he asserts that the Panel, by finding that sleep apnea did not constitute a physical or mental disability, “declined to consider Attorney Mesmer’s OSA a mitigation factor.” [Opening Brief at 3] The Panel *did* find sleep apnea fell into a particular mitigator – as a “personal problem” that “impacted [his] work performance

in 2016.” The Panel simply did not find that OSA “caused his most serious misconduct.” [HP Report at ¶¶ 36-37]

Every other mitigator was appropriately rejected as not supported by this record.

Mental or Physical Disability. First, the Committee correctly declined to find that OSA constituted a mental or physical disability. This issue was briefed extensively for the Hearing Panel and the ADO incorporates those arguments here. [Tab 49, ¶¶ 44-58] In any event, even if the Panel erred and there is sufficient record evidence of a disability, such error would be harmless because Mr. Mesmer already received the full benefit of mitigation by way of the Panel’s downward departure from disbarment to suspension.

Absence of a dishonest or selfish motive. The Committee did not apply this mitigator, finding instead in aggravation that Mr. Mesmer *did* have a selfish or dishonest motive: “he kept his clients in the dark . . . intend[ing] to give [them] the impression he was working hard for them, when he had not. He billed them for services not performed and pressured them to pay, to his and his firm’s financial benefit.” [PCC 67, p. 9] Respondent’s dishonesty was aimed at concealing his own failures from his client and his colleagues at work, and to avoid consequences to himself for this inaction. [HP Rep. ¶ 33]

Timely good faith effort to make restitution or to rectify consequences of misconduct. This mitigator is not present on this record because Mr. Mesmer's efforts were not timely, and they were not in good faith. His firm ultimately paid Kim Balles because she hired counsel and was about to file a malpractice suit, not because Respondent or anyone at the firm voluntarily chose to make her whole. Indeed, the firm never voluntarily disgorged the \$6,000 that Mr. Mesmer pressed Kim Balles to pay in October 2016, requested for legal work necessitated entirely by his own misconduct, and at a time when Mr. Mesmer was actively deceiving Kim. Only following the hearing in this matter, after cross examination by Disciplinary Counsel on this issue, did Frank Mesmer disgorge this fee. [PCC 42, pp. 208-209; Sanction Rep. ¶ 14]

Mr. Mesmer claims he "self-reported" to the partners in the firm, but this did not occur until October 2016, and even then his disclosure excluded his months-long deception of his clients. [PCC 43, 204:12 – 205:19]

Inexperience in the practice of law. The Panel did not find this mitigator because Mr. Mesmer had been a practicing attorney for a decade by the time of his misconduct. [HP Rep. ¶ 3]

Character or reputation. In support of this mitigator, Mr. Mesmer states, with no reference to the record, that he was a County Attorney for five years and "has a good

reputation among his colleagues and clients.” There is no evidence in the record for this bald assertion. Mr. Mesmer offered no character witnesses during his sanction hearing. He submitted four letters submitted at the sanction hearing which addressed observations by his mother and other staff at the Mesmer firm of his worsening physical symptoms and subsequent improvement after treatment for OSA. They are not character letters attesting to Mr. Mesmer’s reputation in the legal community. [Tabs 50-53]

Delay in Disciplinary Proceedings. The Notice of Charges in this case issued within seven months of Disciplinary Counsel’s receipt of the matter from the Complaint Screening Committee. There was no delay.

Imposition of Other Penalties or Sanctions. Mr. Mesmer argues that press coverage of his misconduct is another penalty or sanction in this matter. Press coverage is not cognizable as a mitigator under the *Standards*.

Remorse. For this mitigator, Mr. Mesmer notes his apology to Kim following the second day of hearing in this matter, as well as his communications to the ADO describing his remorse. The Panel likely declined to find this mitigator because Mr. Mesmer’s alleged apology was flatly contradicted by Kim Balles’ testimony. Mr. Mesmer had earlier testified that he apologized to her after the mediation on her malpractice claim. [PCC 42, pp. 113, 246] Kim testified that

quite the opposite occurred, and Mr. Mesmer told her following the mediation: “I never lied. I just want to let you know, I never lied to you.” As to Mr. Mesmer’s correspondence to the ADO in which he expresses remorse, these expressions were forthcoming only after the ADO discovered the voluminous texts containing lies to his client. [PCC 29, Ex. 4 (initial response to ADO); PCC 29, Ex. 10 (letter to ADO following ADO’s receipt of texts)]

**D. A Served Suspension is Consistent with New Hampshire Precedent and the ABA Standards, and Stayed Suspensions Are Not Appropriate in Cases Involving Intentional Dishonesty**

Not satisfied with a downward departure from disbarment to suspension, Mr. Mesmer seeks a “double downward departure” in this matter, from suspension to a fully-stayed suspension. This result is not supportable by the *ABA Standards*, New Hampshire case law, nor the underlying purpose of stayed suspensions.

Nothing in the *ABA Standards* framework supports a fully-stayed suspension. Given Mr. Mesmer’s intentional lies to his client, his knowing misrepresentations to the Court, his knowing failure to perform services for his client and pattern of neglect as to her matter, and the serious injury he caused, the *Standards* provide for baseline disbarment. [Sanction Rep. ¶¶ 17-19 (*citing, inter alia, Standards* 4.41(b),(c); 4.61;

7.1)] There is no way to get “from here to there” (i.e. from disbarment to fully stayed suspension), with any adherence to the *Standards* framework.

Furthermore, a sanction of a long-term, served suspension is proportional to discipline imposed in other cases involving breaches of the most serious Rule violations here: Rules 3.3 and 8.4(c). Although the New Hampshire Supreme Court routinely disbars attorneys for violating Rules 8.4(c) and/or Rule 3.3, the Court has also suspended attorneys for periods of a year or greater for dishonest conduct that violates Rule 8.4 or 3.3. The Court has imposed such long-term suspensions for conduct less severe than Mr. Mesmer’s – for example, even where such conduct did not injure a client, or where the lawyer’s misrepresentations occurred only in the context of his personal life and not while representing a client. *See Grew’s Case*, 156 N.H. 361 (2007) (suspending attorney for 2 years for dishonest conduct resulting in misdemeanor insurance fraud, departing from baseline of disbarment and noting mitigator of personal and emotional problems); *Feld’s Case*, 149 N.H. 19, 21 (2002) (suspending an attorney for one year where he “orchestrated, assisted, counseled and tolerated the formulation of inaccurate and incomplete sworn [discovery] responses that he knew were inaccurate” (quotation omitted)); *Bruzga’s Case*, 145 N.H. 62, 71-72 (2000) (suspending an attorney for one

year for making misrepresentations about his ex-wife in an abuse and neglect petition).

Finally, stayed suspensions may be appropriate sanctions in cases that involve an underlying problem such as substance abuse, poor office management, or health issues which *both* caused the misconduct, and which can be rehabilitated through conditions imposed by and monitored by the ADO. Here, OSA did not cause Mr. Mesmer to lie to his client (a fact admitted by Mr. Mesmer), and OSA did not cause him to lie to the Court (a finding by the Panel and affirmed by the PCC). Put differently, OSA did not cause the most serious misconduct at issue here – the Rule 8.4(c) and 3.3 violations – and OSA thus cannot be the basis for the stay of any suspension period.

The Panel and PCC both believed that a long-term (i.e. over six month) suspension was appropriate because it would trigger reinstatement requirements under Rule 37(14), in which it would be Mr. Mesmer's burden to show that he has the learning in the law and good character to resume practice. Given the seven rule violations, including dishonesty and candor to the tribunal violations, and the extended course of misconduct spanning almost a year, this requirement is necessary before Mr. Mesmer should be allowed to resume practice.

**E. Mr. Mesmer's Case Law is Unavailing Because it Does Not Involve Dishonesty or Candor Violations**

Mr. Mesmer cites no controlling New Hampshire precedent for his proposition that an attorney who knowingly and intentionally violates seven ethical rules (including those that violate “bedrock duties” of honesty to clients and candor to courts, while causing significant harm to his client and the legal system, should receive a fully stayed suspension.

*O'Meara's Case*, 164 N.H. 170, 180 (2012) That is because there is none.

Nor do his cited out-of-state cases support such a notion. Mr. Mesmer cites six cases from other jurisdictions in support of his argument that sleep apnea is a “significant” mitigating factor. [Opening Br. At p. 37-41] As an initial matter, sleep apnea was found to mitigating in this case, as a “personal problem” significant enough that the Committee departed downward from baseline suspension. That said, four of the six cases cited by Mr. Mesmer in support of his request for double downward departure *did not involve a single allegation of dishonesty*, but rather, were simple neglect cases. *See, e.g., In re Sakas*, 296 Ga. 690 (2015); *Matter of Meyer*, 251 Kan. 838 (1992); *Attorney Grievance Com'n of Maryland v. Cappell*, 389 Md. 402 (2005); and *Warren Cty. Bar Ass'n v. Bunce*, 81 Ohio St.3d 112 (1998). Here, Mr. Mesmer lied to his client and admitted his sleep apnea had *no*

*effect* on those decisions. He urged a complete “apnea defense” to the Rule 3.3 violation that was rejected. These four cases out of state cases are thus inapposite given this stark difference in the nature of the misconduct.

One of the cases on which Mr. Mesmer relied did involve misconduct that included dishonesty. Mr. Mesmer cites *In re Lopes* for the proposition that a lawyer who neglected a client matter and engaged in dishonesty, who suffered from depression and health problems (though not sleep apnea), received a sanction of a 60-day suspension stayed for one year with conditions. 770 A.2d 561 (D.C. Cir. 2001). But the D.C. Circuit in *Lopes* actually *reversed* this sanction, imposing instead a *served* six-month suspension with two years of probation. The *Lopes* court further found that Mr. Lopes’ depression and other health issues did not *cause* his dishonesty or “render him unable to understand that he was being dishonest or unable to behave otherwise.” [*Id.* at 569, 572 (emphasis added)] The *Lopes* court thus held that any mitigating effect of medical conditions applied only to the neglect-related violations and none of the dishonesty violations. [*Id.* at 568-69] (“There is no evidence, however, that the physical and psychological impairments, separately or in combination, either rendered Respondent unable to understand that he was being dishonest or unable to behave otherwise.”)

**VII. Conclusion**

This Court should affirm the recommendation of the Committee that Mr. Mesmer be suspended for three years, 18 months stayed for his misconduct in violating Rules 1.1, 1.2, 1.3, 1.4, 1.5, 3.3 and 8.4(c)

**VIII. Request for Oral Argument**

The ADO requests the opportunity for oral argument, before the full Court.

**IX. Certification of Compliance with Word Limit**

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 9,384 words, excluding the cover page, table of contents, table of authorities, statutes, rules and appendix.

Respectfully submitted,  
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Dated: June 25, 2019

By: /s/Sara S. Greene  
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**X. Certification**

I, Sara S. Greene, as disciplinary counsel for the Attorney Discipline Office, certify that the aforesaid Answering Brief of the Attorney Discipline Office was forwarded on this 25<sup>th</sup> day of June 2019, to Russell F Hilliard, Esq., counsel for Joshua N. Mesmer, Esq., through the Court's electronic filing system.

/s/Sara S. Greene  
Sara S. Greene  
Disciplinary Counsel