

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

Case No. LD-2019-0001

In the Matter of Joshua N. Mesmer, Esq.

Brief of the Respondent, Joshua N. Mesmer, Esq.

Russell F. Hilliard, Esq.
NHBA #1159
Brooke Lovett Shilo, Esq.
NHBA # 20794
Upton & Hatfield, LLP
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com
bshilo@uptonhatfield.com

TABLE OF CONTENTS

1.	Table of Contents	2
2.	Table of Authorities.....	5
3.	Questions Presented for Review	9
4.	Statement of the Case.....	10
5.	Statement of Facts.....	11
	Representation of Tires, Inc. and the Balleses.....	11
	Attorney Mesmer's Deteriorating Medical Condition 2014-2016	13
	Recovery; Return to Attorney Position.....	17
6.	Summary of Argument.....	18
7.	Argument.....	20
	I. Standard of Review	21
	II. Attorney Mesmer's Misrepresentation to the Court was Not Knowing.....	22
	III. The Committee Did Not Give Appropriate Weight to Aggravating and Mitigating Factors	27
	A. Mitigating Factors Weigh in Favor of a Stayed Suspension	27
	1. Absence of a Prior Disciplinary Record.....	28
	2. Absence of a Dishonest or Selfish Motive.....	28

3.	Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct	29
4.	Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings	29
5.	Inexperience in the Practice of Law	29
6.	Character or Reputation	29
7.	Delay in Disciplinary Proceedings	29
8.	Imposition of Other Penalties or Sanctions.....	30
9.	Remorse	31
10.	Personal or Emotional Problems; Physical and Mental Disability	31
B.	The Committee's Finding that Attorney Mesmer's OSA was Mild is Not Supported by Clear and Convincing Evidence.....	31
C.	Attorney Mesmer's OSA is a Significant Mitigating Factor.....	37
D.	Contrary to the Committee's Finding, Aggravating Factors are Not Present	41
1.	Attorney Mesmer Did Not Act with Selfish or Dishonest Motive	42
2.	Attorney Mesmer Did Not Engage in a Pattern of Misconduct	42
IV.	The Committee's Sanction is Disproportionate to Attorney Mesmer's Conduct in Light of Other Recent Decisions	45
V.	A Three-Year Suspension Does Not Serve the Purposes of Attorney Discipline	49

8.	Conclusion	51
9.	Request for Oral Argument.....	52
10.	Certification of Compliance with Word Limit.....	52
11.	Certificate of Service	53
12.	Professional Conduct Committee Recommendation: Three Year Suspension with Eighteen Months Stayed dated February 19, 2019	54

TABLE OF AUTHORITIES

Cases

<i>Attorney Griev. Comm’n v. Cappell</i> , 886 A.2d 112, 123 (2005)	38, 39
<i>Attorney Griev. Comm’n v. Sheridan</i> , 741 A.2d 1143, 1158 (1999)	37
<i>Attorney Griev. Comm’n v. Tomaino</i> , 765 A.2d 653, 661 (2001).....	37
<i>Attorney Grievance v. Hayes</i> , 789 A.2d 119, 129 (Md. 2002).....	37
<i>Attorney Grievance v. Lang & Falusi</i> , 191 A.3d 474, 481-87, 515 (Md. 2018)	44
<i>Bosse’s Case</i> , 155 N.H. 128, 131 (2007)	22
<i>Brouillard, Philip A. advs. Attorney Discipline Office</i> , #10-053	45, 48
<i>Bruzga’s Case</i> , 145 N.H. 62, 68 (2000)	45, 47
<i>Coddington’s Case</i> , 155 N.H. 66, 68 917 A.2d 1284 (2007).....	21, 22
<i>Conner’s Case</i> , 158 N.H at 303	22
<i>Feld’s Case</i> , 149 N.H. 19, 21 (2002)	45, 46
<i>Fla. Bar v. Ratiner</i> , 238 So. 3d 117, 125 (Fla. 2018).....	44
<i>Glennon, Martin K. advs. Professional Conduct Committee</i> , #03-065	25, 26
<i>Grew’s Case</i> , 156 N.H. 361, 365, 367 (2007).....	<i>passim</i>
<i>In re Abrams</i> , 257 P.3d 167, 171 (2001)	43

<i>In re Albrecht</i> , 660 N.W.2d 790, 795-96 (Minn. 2003)	26
<i>In re Alexander</i> , 300 P.3d 536, 550 (Ariz. 2013)	43, 44
<i>In re Axelrod</i> , 225 A.D.2d 191, 192 (N.Y. 1996)	39
<i>In re Haws</i> , 801 P.2d 818 (1990)	44
<i>In re Hirschfeld</i> , 192 Ariz. 40, 41, 44 (1998)	43
<i>In re Kluge</i> , 27 P.3d 102, 109 (2001)	43
<i>In re Levine</i> , 847 P.2d 1093, 1118-19 (1993)	43
<i>In re Lopes</i> , 770 A.2d 561, 566 (2001)	37
<i>In re Luebke</i> , 722 P.2d 1221, 1228 (Or. 1986)	44
<i>In re McDonough</i> , 77 P.3d 306 (2003)	43
<i>In re Meyer</i> , 840 P.2d 522, 524 (Kan. 1992)	26, 40
<i>In re Tynan</i> , No. 04-0503 (Ariz. 2005) https://www.azcourts.gov/attorneydiscipline/ Disciplinary-Cases-Matrix/2005-Disciplinary-Cases-Matrix	26, 41
<i>In re Zawada</i> , 92 P.3d 862, 868 (2004)	43
<i>In the Matter of Sakas</i> , 769 S.E.2d 925, 926 (Ga. 2015)	39,40,41
<i>Morse’s Case</i> , 160 N.H. 538, 549 (N.H. 2010)	43
<i>O’Meara’s Case</i> , 164 N.H. 170, 176, 54 A.3d 762 (2012)	32
<i>State ex rel. Oklahoma Bar Ass’n. v. Southern</i> , 15 P.3d 1, 7 (Oklahoma 2000)	26, 37

<i>Warren Cty. Bar Ass’n. v. Bunce</i> , 689 N.E.2d 566, 566 (1998)	38
<i>Welts’ Case</i> , 136 N.H. 588, 593 (1993)	43

Rules

New Hampshire Professional Conduct Rule 1.1	10
New Hampshire Professional Conduct Rule 1.2	10
New Hampshire Professional Conduct Rule 1.3	10
New Hampshire Professional Conduct Rule 1.4	10
New Hampshire Professional Conduct Rule 1.5	10
New Hampshire Professional Conduct Rule 3.3	10
New Hampshire Professional Conduct Rule 3.3(a).....	10, 18
New Hampshire Professional Conduct Rule 8.4	10
New Hampshire Professional Conduct Rule 8.4(a).....	10
New Hampshire Professional Conduct Rule 8.4(c).....	10, 18
New Hampshire Supreme Court Rule 37(1)(f)(3)(c)(2)	21
New Hampshire Supreme Court Rule 37(14)(b).....	30
New Hampshire Supreme Court Rule 37(16)(b).....	11

Other

American Academy of Sleep Medicine.....	33,34,35
---	----------

American Bar Association’s Standards for Imposing
Lawyer Sanctions (2005).....*passim*

ABA Journal Article:

<http://www.abajournal.com/news/article/lawyer-blamed-sleep-apnea-for-inaction-on-case-but-remembered-to-bill-clients-committee-says>..... 30

Manchester Union Leader Article:

https://www.unionleader.com/news/courts/manchester-attorney-facing-three-year-suspension-blames-sleep-apnea/article_4708916b-7c0a-5e85-ba3d-4e0eb454748d.html..... 30

QUESTIONS PRESENTED FOR REVIEW

Attorney Mesmer seeks review of the three year suspension recommended by the Professional Conduct Committee because it: (1) does not take into account the severity of Attorney Mesmer's medical condition; (2) is disproportionate to other recent attorney disciplinary sanctions; and (3) does not serve the purposes of attorney discipline.

STATEMENT OF THE CASE

Attorney Mesmer has admitted to violating Professional Conduct Rules (“Rules”) 1.1, 1.2, 1.3, 1.4, 1.5, 8.4(a), and 8.4(c). Attorney Mesmer denies that he “knowingly” violated Rule 3.3(a).

Concerning Rule 8.4(c), Attorney Mesmer acknowledges that he “knowingly” sent false assurances to Kim Balles but denies that he “intentionally” meant to defraud or deceive her.

With respect to Attorney Mesmer’s false statements to the Court, during the period of misconduct, Attorney Mesmer was suffering from an undiagnosed and untreated medical condition that prevented him from having the requisite mental state to violate Rule 3.3 or Rule 8.4(c).

However, the Professional Conduct Committee (“Committee”) concluded that Attorney Mesmer made knowing misrepresentations to the tribunal and therefore violated Rule 3.3 and intentional misrepresentations to the client in violation of Rule 8.4(c). Thereafter, the Committee recommended a three-year suspension with eighteen months stayed.

STATEMENT OF THE FACTS¹

Representation of Tires, Inc. and the Ballese

Attorney Mesmer has been a member of the Massachusetts Bar since 2006 and the New Hampshire Bar since 2007. Tab 29, Exh. 2, ¶ 1². He joined Mesmer & Deleault, PLLC in August 2012 after five years with Hillsborough County Attorney's Office. *Id.*, ¶ 3. David and Kim Balles ("the Ballese") became clients of the firm in 2012. Tab 29, Exh. 1.

From 2013 through 2016, the Ballese worked exclusively with Attorney Mesmer, who represented their interests in two companies, Tires, Inc. ("Tires") and Club ManchVegas, Inc. ("Club").

For the Club, Attorney Mesmer assisted with ordinance compliance, trademark disputes, and music licensing. For Tires, Attorney Mesmer assisted in defending lawsuits by four creditors, including Motostar Tire and Auto Products, Inc. ("Motostar"), Summit Tires Northeast, Summit of New England, and Carroll's LLC. Tab 29, Exh. 2.

In 2015, Tires defaulted on a 2012 Settlement Agreement with creditor Motostar when the Ballese decided to close Tires and focus their

¹The following is a summary of the facts. More detailed facts are set forth in the Hearing Panel Report on Findings and Rulings ("Findings"). Tab 59. Respondent contests some findings as discussed below.

² Citations to the record are as follows: "Tab" denotes the entire record (consisting of 67 tabbed entries) before the Committee. "Exh." signifies "Joint Exhibits," a two-volume book containing the 79 pre-marked exhibits, which are found in Tabs 29 and 30 of the record. Thus, "Tab 29, Exh. 2" denotes Joint Exhibit 2 of Tab 29 within the record of proceedings before the Committee that was submitted on February 19, 2019 under Supreme Court Rule 37(16)(b).

efforts on the Club. Tab 29, Exh. 19, Bates 105-08; Exh. 2, ¶¶ 5, 7.

Following Motostar's contempt proceeding, discovery led to Motostar filing a new action against the Ballesees individually to set aside alleged fraudulent conveyances. Tab 29, Exh. 21 at 147-51; Exh. 22 at 152-57; Exh. 2, ¶ 8.

Attorney Mesmer did not comprehend until July 2016 that Motostar had gone to default judgment against the Ballesees, due primarily to his undiagnosed mental impairment. Tab 29, Exh. 2, ¶ 174; T1³, 157-158. The cases of other Tires creditors had purposely gone to default because their claims were only against the defunct corporation, which added to his confusion. Tab 29, Exh. 20 at 147-151.

After a July 22, 2016, hearing on the default, Attorney Mesmer prepared 130 pages of pleadings on behalf of the Ballesees. But he did not file them until September 13, 2016. *See* Tab 29, Exhs. 41-47. The court deemed the filing too late to set aside the default. Tab 29, Exh. 56. During that period, Attorney Mesmer, in false text messages, repeatedly assured the Ballesees he had filed the papers. *See generally*, Tab 30, Exh. 63.

The pleadings prepared, but not timely filed, are evident from the superior court record. *See* Tab 29, Exh. 21. Attorney Mesmer's false assertions made matters worse as Attorney Mesmer attempted to complete them.

After Motostar prevailed in its collection effort, Attorney Mesmer and his firm reimbursed the Ballesees, Tab 58, ST 105-107; Tab 63, p. 7,

³ "T1 – T3" signifies the transcripts of the three-day hearing on the merits, held on June 11, 12, and 14, 2018.

leaving this disciplinary proceeding as the only unresolved aspect of the ill-fated Motostar-Tires-Balles case.

In October 2016, Attorney Mesmer met with the partners of his firm and told them that he was experiencing severe mental and physical health issues. Tab 27, p. 2; Tab 41, Tr. vol. I, 19:12-21; Tab 48 at 2. The partners removed him from cases, and he was placed in a paralegal-type position. *Id.*; Tabs 50-51.

On September 11, 2017, the Attorney Discipline Office issued the Notice of Charges.

On June 15, 2018, Attorney Mesmer's firm refunded the Balleses the \$6,000 payment they made in connection with the case. Tab 58, ST⁴ 105-107.

Attorney Mesmer's Deteriorating Medical Condition 2012 - 2016

In 2012, Attorney Mesmer began experiencing physical and mental changes. Tab 30, Exhs. 73-78. He consulted his primary care physician at Dartmouth-Hitchcock about his excessive daytime sleepiness and sudden weight gain. Tab 30, Exh. 75. He was referred to gastroenterology and later to endocrinology. *Id.* He responded to consultations and follow-ups and numerous laboratory tests. *Id.* Doctors variously diagnosed gastroenterological maladies such as h-pylori and IBS, and endocrine-related issues such as hypothyroidism. *Id.* By the end of 2013, he had visited with doctors and other specialists a total of eleven times. *Id.* But

⁴ "ST" signifies the transcripts of the sanction hearing, held on September 5, 2018 and located at Tab 58 in the Index of Record.

their diagnoses and treatments proved inconsequential to Attorney Mesmer's worsening symptoms. *Id.*

In 2014, Attorney Mesmer turned to Elliot Hospital, hoping for better luck with different providers. Tab 30, Exh. 76. He had 13 appointments with Elliot physicians, gastroenterologists, and endocrinologists in 2014, each with laboratory visits in between. *Id.* The gastroenterology department tested Attorney Mesmer for Chron's, Addison's and Celiac Disease, Lupus, IBS, and SIBO. Tab 30, Exh. 76. Endocrinology tested for thyroid, adrenal, and testosterone issues. *Id.* Like the providers before them, Elliot personnel were unable to identify the source of his symptoms, which now included edema, periods of insomnia, hypertension, attention deficit, weight gain, bouts of depression, unexplainable mood swings, and complaints of brain fog. *Id.*; Tab 30, Exh. 74. Attorney Mesmer went to the emergency room twice in 2014 for unexplained swelling of lower extremities. Tab 30, Exhs. 73, 74, 76.

By 2015, Attorney Mesmer had gone to more than 30 appointments with various physicians, gastroenterologists, endocrinologists, and other medical providers. He had submitted to countless laboratory tests, a cortical stimulation test, an upper endoscopy, and a colonoscopy. In July 2015, he even underwent hernia surgery, but this did not help. Tab 30, Exh. 75 at 24.

The source of the underlying problem remained undiagnosed. The visit notes and summaries prepared by these providers highlight the worsening symptoms. To illustrate:

Jul. 30, 2013	"Joshua comes in as part of a med check visit... <u>The patient complains of fatigue, not</u>
---------------	---

feeling refreshed in the morning.” Tab 30, Exh. 75, at 6.

Sept. 8, 2013 “Joshua Mesmer is a 32-year-old male... He has increased fatigue, increased weight.” *Id.* at 7.

Jul. 14, 2014 “This patient is a 33-year-old male... The patient also complains of extreme fatigue. He states that he is tired ‘all the time’ and can easily fall asleep during the day.” Tab 30, Exh. 76 at 6.

Jun. 15, 2014 “33-year-old male with bilateral lower extremity swelling and extreme tiredness...” *Id.* at 8.

Jun. 15, 2014 “This 33-year-old male ... states he has felt tired for the past several weeks [].” *Id.* at 12.

Jun. 18, 2014 “Joshua Mesmer is a 33-year-old male... There is still some fatigue.” *Id.* at 24.

Jul. 30, 2014 “This 33-year-old male presents with episode of fatigue or he felt overwhelmingly tired after eating a bag of peanuts and fell asleep on the table. Patient denies any injuries associated with the episode. Patient states this has been happening frequently... Patient states he is currently under the investigation by endocrinology for potential Addison’s disease.” *Id.* at 51.

Sept. 30, 2014 “... has morning fatigue, falling asleep during the day and other symptoms of sleep apnea...” *Id.* at 82.

May 20, 2015 “Joshua is a 34-year-old male, referred back by Dr. Joohahn Kim... He has an excessive amount of fatigue that has been ongoing... Frustrated with ongoing problems... Has impeded his life, had postponed wedding due to ongoing health issues.” Tab 30, Exh. 29, at 21.

May 21, 2015 “Thirty-four-year-old male... There has been excessive fatigue, ... he is having difficulty functioning.” *Id.* at 23.

Jun. 18, 2015 “There is still fatigue.” *Id.* at 24.

Thinking his condition might be a mental health problem, Attorney Mesmer sought alternative treatment through counseling. In May 2015, he consulted with Michelle Wright, a Licensed Clinical Mental Health Counselor. Tab 29, Exh. 10, ¶ 72. Ms. Wright reported her observations of Attorney Mesmer during this period in a letter to the ADO dated June 22, 2017. Tab 29, Exh. 9. At Attorney Mesmer’s first session with Ms. Wright, she wrote that Attorney Mesmer was “seeking behavioral health treatment due to a long and complex list of ongoing physical ailments that the traditional medical establishment had been unsuccessful in mitigating.” *Id.* His “physical ailments were also causing emotional distress including problems at work.” *Id.* Ms. Wright wrote, “[m]aking his situation even more difficult, [Attorney Mesmer] reported that his social support network was neither sensitive to, nor understanding of, his situation.” *Id.*

Ms. Wright observed Attorney Mesmer’s “confusion, difficulty focusing, challenges staying on topic, slightly slurred speech, droopy eyes, challenges staying awake to the point he sometimes used caffeine

beverages to help him stay awake during sessions held between 6:30 and 7:30 pm.” *Id.*

Recovery; Return to Attorney Position.

In January 2017, Attorney Mesmer was referred to the endocrinology department at Brigham and Women’s Hospital in Boston. Tab 30, Exh. 77. After two visits and multiple laboratory tests, Attorney Mesmer’s endocrinologist concluded that his symptoms were the result of obstructive sleep apnea (“OSA”). *Id.* Attorney Mesmer was referred to neurology for confirmation. Tab 30, Exh. 75, at 36. Following two at-home sleep studies, Attorney Mesmer was officially diagnosed with OSA. Tab 30, Exh. 77, at 19; Tab 30, Exh. 75, at 41.

On March 20, 2017, Attorney Mesmer began treating his OSA with a CPAP (Continuous Positive Air Pressure) machine. Tab 30, Exh. 75, at 41. Over the course of 12 months of CPAP treatment, Attorney Mesmer’s condition significantly improved. Tab 32. In March 2018, Attorney Mesmer was returned to an attorney position and now manages a full case load that is monitored by the firm’s attorneys and staff. Tab 42, Tr. vol. II, 84:5-15, 85:1-5; Tabs 50-51.

SUMMARY OF THE ARGUMENT

This case involves an attorney who, following a successful stint as a prosecutor and then several years into working in his father's law firm, made poor choices and violated the Rules of Professional Conduct in the face of unique circumstances related to his then-undiagnosed and difficult health challenges. The misconduct was not done with selfish motive or for personal gain. Rather, it was born out of a medical condition that Attorney Mesmer had been trying to identify and remedy for years.

While there are sharp disagreements between the ADO and Attorney Mesmer regarding the actual extent and impact of his illness, there is no dispute that his medical condition, ultimately diagnosed (and then treated) as obstructive sleep apnea, had some effect on his actions during 2016 in the underlying case.

The record is clear regarding the success of Attorney Mesmer's treatment, and the restoration of his ability to do work responsibly as a lawyer.

The substantial question presented by this appeal is whether the effects of Attorney Mesmer's illness, on him and on his work in 2016, have been properly accounted for, not only in the assessment of whether there is clear and convincing evidence of intentional or knowing conduct in the context of claimed violations of Rules 3.3(a) and 8.4(c), but also the appropriate weighing of these circumstances in identifying a baseline level of discipline, and ultimately the imposition of appropriate discipline consistent with the goals of our system – protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future.

While fully accepting responsibility for his misconduct, Attorney Mesmer respectfully submits that a three-year suspension, stayed for eighteen months, is unduly severe, and that a suspension, fully stayed with the appropriate conditions, will serve the purposes of discipline without unduly punishing him.

ARGUMENT

During the time period at issue, Attorney Mesmer was suffering from an undiagnosed and untreated medical condition that prevented him from having a knowing state of mind with respect to the conduct at issue. Experts for both parties agreed that it is likely Mr. Mesmer suffered from Obstructive Sleep Apnea (“OSA”) during 2016 but disagreed as to the severity of Attorney Mesmer’s condition. The Hearings Panel agreed that OSA “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.” Tab 15 ¶165. However, the Hearings Panel and the PCC did not adequately take Attorney Mesmer’s condition into account because it found that while Mr. Mesmer suffered from sleep apnea, it did not prevent Mr. Mesmer possessing a knowing state of mind with respect to the conduct at issue.

The PCC’s sanction is unwarranted because it: (1) does not take into account the severity of Attorney Mesmer’s medical condition; (2) is disproportionate to other recent attorney discipline sanctions; and (3) does not serve the purposes of attorney discipline.

I. STANDARD OF REVIEW.

The Committee is authorized by rule to impose a variety of sanctions, *see* Rule 37(1)(f)(3)(c)(2) (“To dismiss grievances or complaints, administer a reprimand, public censure or a suspension not to exceed six (6) months.”), the imposition of a suspension of six months being the most severe sanction the Committee may impose without seeking an order from this Court.

This Court has made it plain that it reviews the issue of an appropriate sanction *de novo*, and that it is the final arbiter in this regard:

“[W]e retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the appropriate sanction.” [Coddington’s Case, 155 N.H. 66, 68, 917 A.2d 1284 \(2007\)](#) (quotation omitted). In exercising this authority, we remain “mindful that the purpose of attorney discipline is not to inflict punishment, but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.” *Id.* (quotation omitted). Accordingly, each attorney discipline case is judged upon “its own facts and circumstances, taking into account the severity of the misconduct and any mitigating circumstances appearing in the record.” *Id.* Ultimately, the attorney’s behavior, and not just the number of rules broken, is determinative of the gravity of the unprofessional conduct. *Id.*

Grew’s Case, 156 N.H. 361, 365 (2007).

There need not be a compelling reason to decline the sanction recommended by the Committee, nor is there an “unjust or unreasonable” threshold hurdle to review by this Court.

The Court looks to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") for guidance when selecting an appropriate sanction. *Bosse's Case*, 155 N.H. 128, 131 (2007). The *Standards* provide four factors to consider when imposing a sanction: (a) the duty violated by the lawyer; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. *Standards* § 3.0; *Coddington's Case*, 155 N.H. at 68.

"In applying these factors, the first step is to categorize the respondent's misconduct and identify the appropriate sanction." *Conner's Case*, 158 N.H. at 303. "After determining the sanction, [the Court] consider[s] the effect of any aggravating or mitigating factors on the ultimate sanction." *See id.*

"Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Standards* § 9.31.

II. ATTORNEY MESMER'S MISREPRESENTATION TO THE COURT WAS NOT KNOWING.

The Professional Conduct Committee found that Attorney Mesmer violated Rule 3.3(a) because he made a "knowing" misrepresentation to the Court. Tab 20, PCC Sanctions Recommendation at 7 of 11. The Committee wrote: "The Hearing Panel concluded, and this Committee agrees, that whatever external pressures Mr. Mesmer faced, the record fails to support a finding that sleep apnea impaired Mr. Mesmer's judgment to

the extent that he did not make knowing misrepresentations to the court.”

Tab 20, PCC Sanctions Recommendation, at 7 of 11. Likewise, the Hearings Panel wrote:

the Panel finds that sleep apnea did not impair Mr. Mesmer’s cognitive function to such an extent that he was incapable of achieving a “knowing state of mind for purposes of a Rule 3.3 violation. Mr. Mesmer was able to form ‘a conscious awareness of attendant circumstances’ during 2016, the pertinent time frame in question.

Tab 59, Hearings Panel Findings of Fact, ¶ 167. These statements demonstrate that the PCC and the Hearings Panel misapprehended Attorney Mesmer’s argument.

Attorney Mesmer’s sleep apnea did not cloud his judgment such that he may be excused for knowingly providing the court with false information. Rather, Attorney Mesmer believed he was providing the court with correct information. Tab 29, Exh. 2, ¶¶ 83-88. He provided the court with information consistent with his memory, but his sleep apnea caused him to have no memory of certain events. *Id.*; *see generally*, Tabs 41-42. Thus, the information Attorney Mesmer provided to the court was factually inaccurate but was consistent with his impaired memory.

Dr. Neal testified that it’s possible for a patient with severe OSA to have a phone conversation with someone and then forget that it ever happened. Similarly, it’s possible for such a patient to not recall an email exchange. Dr. Neal explained that it’s not a matter of forgetting the memory inasmuch as it is having never recorded the memory in the first place. Dr. Neal stated that an insidious aspect of OSA is that patients often do not realize the extent of the problem until after they have recovered.

They will often look back and realize the mistakes they made while suffering OSA.

Dr. Neal testified regarding the severe extent to which Attorney Mesmer was affected by OSA.

Q: In your opinion, would you consider Mr. Mesmer's [OSA] to be a physical disability as it affected him at the time before it was diagnosed?

A: Yes.

Q: In your opinion, would you consider Mr. Mesmer's [OSA] to be a mental disability as it affected him at the time, given the issues you have described earlier?

A: Yes.

Q: In your opinion, did Mr. Mesmer's [OSA] give rise to the conduct at issue in this case, in this proceeding, as you understand?

A: Probably, yes.

Q: Okay. For example, would his [OSA] and its attendant symptoms cause him to fail to follow up on his work, to make sure things were done properly?

A: It's a strong possibility. I would say probably, yes.

Q: And could it cause him to forget things that had happened, such as communications with others, as we discussed earlier?

A: Yes.

Q: Would it prevent him from fully recognizing implications and nuances of communications he might have with other people?

A: It could.

Q: And if Mr. Mesmer presented something as being true that turned out to be inaccurate but that he believed to be true, could that be a result of his [OSA], the symptoms that you described earlier?

A: It could be.

Tab 43, T3 at 72-74:1-20. Thus, the medical evidence supports Attorney Mesmer's testimony that he had no memory of certain events and thus did not make a knowing misrepresentation because his representation was consistent with his memory.

In *Glennon, Martin K. advs. Professional Conduct Committee #03-065*, an attorney failed to respond to discovery requests that led to the court granting the opposing party's motion for default judgment and directing a verdict on liability in favor of the opposing party. *Glennon, Martin K. advs. Professional Conduct Committee #03-065* at 2-3. Attorney Glennon also submitted a sworn affidavit to the court that contained a factually inaccurate statement: the affidavit stated that Attorney Glennon had been a member of good standing in the Bar since 1976, when in fact, he had been suspended for 90 days in 1994. *Glennon, Martin K. advs. Professional Conduct Committee #03-065* at 6.

At the time, Attorney Glennon suffered from sleep apnea and depression. Attorney Glennon explained that, due to his health condition, he overlooked the false statement. The PCC took Attorney Glennon's

compromised health from sleep apnea and depression into account and imposed a six-month suspension. *Id.* at 7; Mot. to Recons., *Glennon, Martin K. advs. Professional Conduct Committee #03-065*, at 3. Unlike Attorney Mesmer, Attorney Glennon had a prior history of discipline.

Moreover, attorney discipline systems throughout the country have recognized that sleep apnea and other medical conditions can impair memory. *In re Tynan*, No. 04-0503 (Ariz. 2005), available at <https://www.azcourts.gov/attorneydiscipline/Disciplinary-Cases-Matrix/2005-Disciplinary-Cases-Matrix> (Supreme Court of Arizona imposed an informal reprimand and two years of probation on an attorney who received suspension letter and continued to practice law because the attorney suffered from sleep apnea and had no memory of receiving the letter); *In re Albrecht*, 660 N.W.2d 790, 795-96 (Minn. 2003) (ruling that attorney's sleep apnea mitigated his conduct because attorney suffered from symptoms of memory impairment, lack of attention to detail, and lack of concentration.); *In Re Meyer*, 840 P.2d 522, 524 (Kan. 1992) (finding sleep apnea was a mitigating factor where "[a]s a consequence of [an attorney's] sleep disorder. . . the Respondent was always tired and sleepy, suffered memory loss, and was unable to function as he formerly had done in his profession."); *see also State ex rel. Oklahoma Bar Ass'n. v. Southern*, 15 P.3d 1, 7 (Okla. 2000) (finding no willful or voluntary misconduct in behavior of an attorney with a severe, untreated, vitamin B-12 deficiency which impaired his short-term memory and exasperated his depression).

Thus, because Attorney Mesmer did not remember the events at issue because of his medical condition, he did not make a knowing misrepresentation to the court.

III. THE COMMITTEE DID NOT GIVE APPROPRIATE WEIGHT TO AGGRAVATING AND MITIGATING FACTORS.

A. Mitigating Factors Weigh in Favor of a Stayed Suspension.

“Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” ABA Standards § 9.31. Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) There is medical evidence that the respondent is affected by a chemical dependency;
 - (2) The chemical dependency or mental disability caused the misconduct;
 - (3) The respondent’s recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) The recovery arrested the misconduct and recurrence of that misconduct is unlikely;
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse; and
- (m) remoteness of prior offenses.

ABA Standards § 9.32. Only one mitigating factor does not apply here: remoteness of prior offenses. Attorney Mesmer does not have any prior offenses. All other mitigating factors weigh in favor of a fully stayed suspension, for the following reasons.

1. Absence of a Prior Disciplinary Record.

Attorney Mesmer has been a member of the New Hampshire Bar for over 10 years. Aside from the instant matter, Attorney Mesmer has no disciplinary record.

2. Absence of a Dishonest or Selfish Motive.

Attorney Mesmer did not engage in this course of conduct for a dishonest or selfish motive. There is no logic to Attorney Mesmer's conduct. It is apparent from the record that throughout this course of conduct, Attorney Mesmer was confused, disoriented, and misguided, all of which are attributable to the medical condition from which he was suffering during the relevant period. Attorney Mesmer's attempts to ameliorate the Ballese's anxiety with false texts were not due to a dishonest or selfish motive. Attorney Mesmer did not personally gain from these actions.

3. Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct.

Attorney Mesmer and his firm swiftly reached agreement with the Ballese to provide full restitution. Attorney Mesmer also reported himself to the partners of his firm and was placed in a paralegal-type position until his health recovered.

4. Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings.

Attorney Mesmer fully and freely cooperated with the Attorney Discipline Office.

5. Inexperience in the Practice of Law.

Attorney Mesmer was still a relatively new attorney at the time of the conduct at issue. While he had practiced as an Assistant County Attorney since 2007, he had only been in private practice for four years, since 2012.

6. Character or Reputation.

Prior to joining Mesmer and Deleault, Attorney Mesmer served as an Assistant County Attorney for Hillsborough County from 2007 to 2012. Attorney Mesmer has a good reputation among his colleagues and clients.

7. Delay in Disciplinary Proceedings.

There has been a significant delay between the conduct at issue that took place in 2016 and when the sanction will be imposed. Since 2016, Attorney Mesmer has:

- identified his mental and physical medical condition;
- self reported to his firm;
- been removed from his attorney position for a period of eighteen months;
- received treatment for his medical condition;
- recovered from his medical condition; and
- resumed his attorney position.

The sanction in the matter will not be imposed until the second half of 2019. Imposing a sanction approximately three years after the conduct at issue, and after Attorney Mesmer has suspended and resumed his attorney role, weighs in favor of mitigation. Additionally, the reinstatement procedure required for a period of suspension of over six months will remove Mr. Mesmer from practice for an even longer period of time. New Hampshire Supreme Court Rule 37(14)(b).

8. Imposition of Other Penalties or Sanctions.

While Attorney Mesmer has not received any other formal penalties or sanctions, this matter was widely reported in the press. *Manchester attorney facing three-year suspension blames sleep apnea*, UNION LEADER, available at https://www.unionleader.com/news/courts/manchester-attorney-facing-three-year-suspension-blames-sleep-apnea/article_4708916b-7c0a-5e85-ba3d-4e0eb454748d.html; *Lawyer who blamed sleep apnea for case inaction faces 3-year suspension*, ABA JOURNAL, available at <http://www.abajournal.com/news/article/lawyer-blamed-sleep-apnea-for-inaction-on-case-but-remembered-to-bill-clients->

[committee-says](#). This press coverage has already had an effect on Attorney Mesmer analogous to a public censure.

9. Remorse.

Attorney Mesmer has repeatedly expressed his sincere remorse in almost every filing throughout this case. Attorney Mesmer also apologized to Kim Balles again following testimony on day two of the liability hearing.

10. Personal or Emotional Problems; Physical and Mental Disability.

Attorney Mesmer's mental impairment from lack of sleep and oxygen made it physically difficult to complete tasks in a timely fashion. However, the Hearings Panel⁵ found that Attorney Mesmer did not have a mental disability or a physical disability based on his OSA. Tab 59, Sanctions Report, at 10-11, ¶ 37. The Panel implied that such a finding would be necessary to constitute a mitigating factor, and so declined to consider Attorney Mesmer's OSA a mitigating factor. Tab 59, Sanctions Report, at 11, ¶ 37.

B. The Committee's Finding that Attorney Mesmer's OSA was Mild is Not Supported by Clear and Convincing Evidence.

This Court has held that:

⁵ The Report on Sanction header states "Hearings Committee," but is signed by the Chair of the Hearings Panel. See PCC Index of Record, Tab 59, at 1, 13. Attorney Mesmer refers to this document as the Report on Sanction from the Hearings Panel.

In attorney discipline cases, we 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, 54 A.3d 762 (2012). We first consider whether there is sufficient evidence in the record to support the PCC's findings by clear and convincing evidence that the respondent violated the Rules. Sup. Ct. R. 37A(III)(d)(2)(C).

Salomon's Case, 202 A.3d 587, 593 (N.H. 2019).

In finding that Attorney Mesmer's OSA was "mild" and therefore not causally connected to his misconduct, the Committee overlooked substantial evidence in the record to the contrary.

OSA is characterized by repetitive episodes of complete (apnea) or partial (hypopnea) obstruction of the upper airway during sleep. These conditions usually result in oxygen desaturation and arousals from sleep. Oxygen desaturation is a drop in blood oxygen levels over a few seconds of time as a result of apnea or hypopnea. Blood oxygen levels are considered abnormal when they fall below 88%, and severely abnormal when they drop below 80%.

Together with excessive daytime sleepiness, OSA is also associated with neuropsychological symptoms such as anxiety and depression, and can cause a decline in a wide spectrum of cognitive dysfunction including deficits in attention, episodic memory, working memory, judgment, psychomotor performance, visuospatial abilities, verbal skills (both expressive and receptive) and executive function. *See generally* Tab 43, T3, at 5-106.

Executive function is the control of cognitive processes, including memory, reasoning, the ability to shift between tasks or mental sets, fluid reasoning, problem solving, vigilance, and planning and execution. *Id.*

Throughout the disciplinary proceedings, great focus was placed on the severity of Respondent's OSA. Tab 59, Hearing Panel Report on Findings and Rulings, at 34, ¶ 161. The sole issue before the Panel on liability was whether Respondent's medical condition was of a nature that it prevented him from having a "knowing" state of mind for purposes of Rule 3.3. Respondent's mental state was also to be at issue in determining a proper sanction. *Id.*

American Academy of Sleep Medicine ("AASM") guidelines provide that a diagnosis of OSA must be established by one of the two accepted methods of objective testing: in-laboratory polysomnography ("PSG") or at-home testing with portable monitors (PM). *See generally* Tab 43, T3, Dr. George Neal, at 5-106.

These tests measure Apnea Hypopnea Index ("AHI"). The AHI is represented by the number of apnea and hypopnea events per hour of sleep, each event lasting for at least 10 seconds. Using the AHI, the severity of OSA can be classified as mild, moderate, or severe. An AHI score of between 5-15 apneas or hypopneas per sleep hour is considered mild, 15-30 is moderate, and over 30, severe. *See id.*

PSG is the preferred method and considered the gold standard for diagnosing sleep-related breathing disorders. Unfortunately, Respondent was limited by insurance to two at-home PM tests. *Id.*

Respondent's first PM test recorded only four (4) hypopneas per hour, but showed a concerning oxygen desaturation score of 78%, which by all accounts is severe. Tab 30, Exh. 75, at 53.

Respondent's second sleep test, though "corrupted" for all but 2.5 hours of study time, recorded only seven (7) hypopneas per sleep hour, which is considered mild on the AHI. *Id.* at 59.

Based on Respondent's low AHI scores from his two at-home sleep studies, the ADO, the Panel, and the Committee each concluded that Respondent's sleep apnea was mild at best and did not constitute an adequate defense to the misconduct in question. Tab 59, Hearing Panel Report on Findings and Rulings, at 36, ¶ 167. The Committee's findings in this regard overlook important factors required by the AASM to be considered when determining the severity of OSA when viewing the scores of at-home testing and in so doing, disregarded material facts in evidence.

However, the AASM mandates that use of PM testing for the diagnosis of OSA must be performed in conjunction with a comprehensive sleep evaluation. Tab 43, T3, 27:2-19. This is because PM testing is considered less than reliable when it comes to determining the severity of OSA: PMs routinely **underestimate** the severity of events compared to the AHI by PSG. *Id.*

For example, while Respondent's second at-home sleep test recorded only seven hypopneas per sleep hour, it only recorded for 2.5 hours, of which Respondent may have only been asleep for 30 minutes.

Due to the known rate of false negative PM tests, the AASM provides that in-laboratory PSG should be performed in cases where PM is technically inadequate or fails to establish the diagnosis of OSA in patients

with a high pretest probability. *See generally* Tab 43, T3, at 5-106. As Dr. Neal testified, “false positives are very uncommon... [f]alse negatives are fairly common.” *Id.* at T3 146:11-14. Meaning, the tests can understate apneas and hypopneas, but do not overstate them.

As Dr. Neal testified, the frequency of apneas and hypopneas during sleep correlates poorly with the severity of daytime symptoms and the ultimate determination of severity. *See generally* Tab 43, T3, at 5-106. In severe sleep apnea extreme sleepiness can occur during activities that require more active attention, such as while eating, during conversation, walking, or driving. Tab 43, T3, at 148. Patients with severe OSA demonstrate marked symptoms, including excessive daytime sleepiness, waking up choking or gagging from sleep, insomnia, and impaired daytime functioning, including cognitive function, memory. Tab 43, T3, 15:2-11.

Dr. Neal found Respondent’s OSA to be severe. He based his diagnosis on his physical examination of Respondent and his review of Respondent’s medical records, which included a history of fatigue, excessive daytime sleepiness, hypertension, weight gain, blurred vision, stopping breathing in sleep, waking up choking or gagging, snoring, edema of lower extremities, mood swings, a period of insomnia, and occasional speech difficulties.

Dr. Neal reported that the severity of OSA depicted on sleep studies may not be predictive of a patient’s symptoms. “It is fundamental in the practice of sleep medicine that the results of tests be evaluated in the context of history and physical findings. It is an overtly stated position of the [AASM] that the results of sleep studies not be used in isolation for

patient care, but rather judged only in the context of a comprehensive sleep evaluation.”

When asked by the Panel Chair “Do you have any opinion today, when you take into account all of the information you’ve gathered, test results, information from the patient, and reviewing medical records and so forth, any characterization of [Respondent’s] – the severity of his sleep apnea within the range of other patients that you see?,” Dr. Neal replied, “I would call it severe.” Tab 43, T3 105:12-19.

Opposing expert Dr. Picard conceded that Attorney Mesmer’s symptoms were severe, Tab 43 T3, 157:7-9, that the medical records showed Attorney Mesmer had been reporting chronic fatigue for three years, *id.* at 150:20-1, and that it was not unreasonable for Attorney Mesmer not to report fatigue at a 2016 physical exam. *Id.* at 152. Dr. Picard observed that it was unusual for someone to still have sleepiness when taking Adderall and Vyvanse, two strong stimulants. *Id.* at 131-32, 159:5-15. Dr. Picard would not just prescribe these strong stimulants for someone with sleep apnea; he would treat the patient with a CPAP machine. *Id.* at 132-33.

Because both experts agreed that Attorney Mesmer’s symptom were consistent with severe sleep apnea, and Dr. Neal testified that the PM test had a high likelihood of a false negative result, the Committee’s finding that Attorney Mesmer’s OSA was mild is unsupported by the evidence.

C. Attorney Mesmer's OSA is a Significant Mitigating Factor.

In conducting a sanctions analysis, the Court must consider the misconduct in its context. Disability or incapacity bear significantly on the appropriate disciplinary sanction. Physical and mental impairment can be mitigating factors and may tend to negate the willful or intentional nature of an attorney's misconduct. *Attorney Grievance v. Hayes*, 789 A.2d 119, 129 (Md. 2002) (stating that a hearing judge's factual findings with regard to mitigating factors tended to negate any dishonest or fraudulent intent); *Attorney Griev. Comm'n v. Tomaino*, 765 A.2d 653, 661 (2001) (noting that "the state of mind of the attorney at the time of the violation [is] 'important in the context of mitigation'"); *Attorney Griev. Comm'n v. Sheridan*, 741 A.2d 1143, 1158 (1999) (noting that the state of mind at the time the [attorney] violated the [disciplinary] rules is important in the context of mitigation); see *State ex rel. Oklahoma Bar Ass'n. v. Southern*, 15 P.3d 1, 7 (Oklahoma 2000) (finding no willful or voluntary misconduct in behavior of an attorney with a severe, untreated vitamin B-12 deficiency which impaired his short-term memory and exacerbated his depression).

Similarly, in *In re Lopes*, a consolidated case involving three original matters and a reciprocal, all of which involved primarily allegations of neglect and dishonesty in violation of more than a dozen rules, the attorney presented evidence of serious health problems, including depression and severe side effects from prescription medicine. 770 A.2d 561, 566 (2001). The hearing committee found that "Lopes' various infirmities substantially caused all of his misconduct, including not only his

neglect of his clients' matters, but also his acts of dishonesty and forgery," and recommended mitigating the sanction to a 60-day suspension stayed in favor of probation for one year with certain conditions, such as completion of a continuing legal education course. *Id.*

Also, in *Warren Cty. Bar Ass'n. v. Bunce*, the respondent was charged with violating the Ohio Rules of Professional Conduct by neglecting a legal matter entrusted to him. 689 N.E.2d 566, 566 (1998). The Supreme Court ruled that "when imposing a sanction, we will consider not only the duty violated, but the lawyer's mental state, the actual injury caused, and whether mitigating factors exist." *Id.* (internal citation omitted). The Court "note[d] respondent's numerous health problems that apparently existed at the time of the misconduct and the fact that he has accepted full responsibility for his inattentiveness to his client's needs. Respondent has shown remorse for his neglectful behavior, and he has also agreed to undergo treatment for his depression. Accordingly, respondent is hereby suspended from the practice of law for a period of one year, with the suspension stayed on the condition that respondent's practice be monitored by relator for a period of two years and that respondent undergo psychological treatment for his depression." *Id.*

In *Attorney Griev. Comm'n v. Cappell*, 886 A.2d 112, 123 (2005), the court found

Mr. Cappell's misconduct was not solely 'the result of any willful or dishonest conduct.' Moreover, in our view, the hearing judge's factual findings tend to cast doubt on whether respondent's misconduct was willful and intentionally dishonest. Although respondent appeared to concede facially at every level of the disciplinary process that he knew his conduct was wrong, the medical evidence supports the

hearing judge's conclusion that, during the time of Mr. Cappell's misconduct, his cognitive abilities were substantially impaired.

Id. Finding mental disability a mitigating factor, the court remanded the matter for consideration of Maryland's Diversion Program.

The same standards have been applied to cases where OSA was found to have contributed to the respondent's misconduct.

In *In re Axelrod*, the referee found that the respondent neglected legal matters, filed a verified answer containing misrepresentations, misrepresented the status of matters to clients, and made misrepresentations to petitioner during the course of its investigation. 225 A.D.2d 191, 192 (N.Y. 1996).

In determining the appropriate sanction, the Supreme Court found in mitigation that "the respondent suffered from obstructive sleep apnea syndrome, a medical condition that adversely affected his ability to practice law and for which he has since sought treatment, and that respondent's family business was undergoing financial difficulties that distracted respondent from his legal practice." *Id.* at 193. Finding the misconduct serious nonetheless, the Court concluded that the respondent should be censured. *Id.*

In *In the Matter of Sakas*, the respondent was charged with violating Rules 1.3 and 1.4 of the Georgia Rules of Professional Conduct for neglecting matters involving four clients. 769 S.E.2d 925, 926 (Ga. 2015).

In determining the appropriate sanction, the Supreme Court ruled that

[t]he record shows the following in mitigation: during the time period this conduct occurred, Sakas was suffering a disability caused by a combination of factors, including severe sleep apnea, heart problems, reaction to prescribed medication, and emotional problems related to a difficult divorce. Since receiving treatment and resolving his personal marital conflicts, he has not had any additional complaints regarding his law practice and he is now able to function on the high level required of a practicing attorney.

Id.

Finding that

[a]dditionally, the record reflects that Sakas is deeply remorseful; that he has taken the initiative of having his cases monitored by experienced legal staff to ensure that he is kept on schedule and will avoid the mistakes he has made; that he has continued to seek sufficient medical treatment for both his heart condition and severe sleep apnea; that both issues are medically under control and are well-treated,

the *Sakas* Court determined that public reprimand was the appropriate sanction. *Id.*

In *In re Meyer*, the complaints filed against the respondent alleged multiple violations of the Kansas Code of Professional Responsibility, Kansas Supreme Court Rules 207, 225, and 226, and the Model Rules of Professional Conduct. 840 P.2d 522 (Kan. 1992). The attorney discipline panel found that the respondent had a significant medical history, depression and sleep apnea. *Id.* at 525. Considering the respondent's mental and physical disabilities during the period of misconduct, the panel concluded that “[t]o suspend respondent from practice at a time when his functioning is no longer impaired can have only a punitive effect, not a rehabilitative one. The effect of a suspension would be the loss of his home

and other personal hardships; further, those whom he wronged but to whom he is making restitution would lose the benefit of his efforts. Such a result is unwarranted and far too harsh. The panel therefore recommends that respondent be publicly censured and placed upon supervised probation [for one year] pursuant to specific terms and conditions.” *Id.* at 525.

These cases are much like Attorney Mesmer’s case where the misconduct at issue arose from undiagnosed and untreated sleep apnea and related medical conditions. But for this state of physical and mental health during the period, such misconduct would not have occurred.

Like *Sakas*, Attorney Mesmer is deeply remorseful, and his legal work is being supervised to avoid recurrence. *See* Tab 29, Exh. 11; Hearing Transcript, Day 3, at 216. Like *Tynan* and others, Attorney Mesmer is diligently treating his OSA with a CPAP machine, he is no longer suffering the debilitating effects of OSA that led to the misconduct at issue, and there is no reason to believe that those symptoms will recur. Tab 29, Exh. 11; Hearing Transcript, Day 3, at 71-74.

D. Contrary to the Committee’s Finding, Aggravating Factors are Not Present.

The Committee overlooked material evidence in the record when finding aggravating factors, 1) that Attorney Mesmer acted with selfish or dishonest motive, *see Standards* § 9.22(b), and 2) that Respondent engaged in a pattern of misconduct, *Standards* § 9.22(c).

1. Attorney Mesmer Did Not Act with Selfish or Dishonest Motive.

The Committee found that Attorney Mesmer “kept his clients in the dark about his lack of attention to their defense,” and that Attorney Mesmer “intended to give his clients the impression he was working hard for them, when he was not. He billed them for services not performed and pressured them to pay, [all] to his firm’s financial benefit. Indeed, though [Respondent] was inattentive to many matters in this litigation, he remembered to bill his clients, and he remembered to make efforts to collect money from them that he had not earned.” Tab 67, PCC Sanctions Recommendation at 9 of 11.

Attorney Mesmer only entered time slips for work he had performed. Attorney Mesmer prepared 130 pages of pleadings (albeit filed untimely). *See* Tab 29, Exhs 41-47. While Attorney Mesmer was performing work for his clients, he was doing so without knowledge that his untreated medical condition was limiting his performance. The finding overlooks that once Attorney Mesmer discovered his error and limitations, he removed himself from the practice of law.

2. Attorney Mesmer Did Not Engage in a Pattern of Misconduct.

The Committee found that Attorney Mesmer’s pattern of misconduct was severe: “[Attorney Mesmer] lied to his clients over an extended period of time. The volume of lies coupled with the lack of any effort in his clients’ defense cannot be viewed as anything other than aggravating. [Attorney Mesmer] knew of his own lack of diligence and the unfavorable outcomes that resulted. If nothing else, he could have reached out to his

firm, in which his father was his boss, much earlier. If [Attorney Mesmer] did not intend to harm his clients, he acted with reckless disregard for the consequences of his conduct.” Tab 67 at 9 of 11.

Attorney Mesmer repeated the same false assurances from the July 22 hearing to early September 2016. Although Respondent committed multiple rule violations, he did not engage in a “pattern of misconduct.”

The New Hampshire Court has not found a “pattern of misconduct,” as that phrase is used in the *Standards*, from a single course of conduct, even a lengthy one. *See, e.g., Morse’s Case*, 160 N.H. 538, 549 (2010) (“prior, similar disciplinary offense” was an aggravating factor); *Welts’ Case*, 136 N.H. 588, 593 (1993) (despite finding respondent’s multiple rule violations, including misrepresentations, substantial, “his violations, however, flowed essentially from an isolated course of conduct” and “respondent does not have a prior disciplinary record”).

Similarly, other jurisdictions have found that “[c]ommission of multiple offenses does not necessarily equate to a ‘pattern of misconduct.’” *In re Alexander*, 300 P.3d 536, 550 (Ariz. 2013); *see, e.g., In re Abrams*, 257 P.3d 167, 171 (2011) (judge pursued sexual relationships with lawyers appearing before him over significant period of time); *In re Zawada*, 92 P.3d 862, 868 (2004) (prosecutor committed same type of misconduct in two cases separated by years); *In re Hirschfeld*, 192 Ariz. 40, 41, 44 (1998) (lawyer had past history of discipline and committed misconduct involving multiple clients in multiple cases); *see also In re Levine*, 847 P.2d 1093, 1118-19 (1993) (collecting cases); *see also re McDonough*, 77 P.3d 306 (2003) (finding pattern of misconduct where lawyer repeatedly committed multiple criminal offenses); *In re Kluge*, 27 P.3d 102, 109 (2001) (multiple

misrepresentations in various circumstances revealed pattern of dishonesty and misconduct); *In re Haws*, 801 P.2d 818 (1990) (finding pattern of misconduct where lawyer failed to respond fully and truthfully to 12 separate state Bar inquiries concerning alleged disciplinary violations); *In re Luebke*, 722 P.2d 1221, 1228 (Or. 1986) (finding pattern of misconduct where the accused committed the same violations in two separate cases); *Fla. Bar v. Ratiner*, 238 So. 3d 117, 125 (Fla. 2018) (holding that in view of respondent's prior misconduct, there clearly has emerged a pattern of similar misconduct); *Attorney Grievance v. Lang & Falusi*, 191 A.3d 474, 481-87, 515 (Md. 2018) (finding that respondent did not engage in a pattern of misconduct, but he did commit multiple violations). The Court in *Alexander* held that "[t]his Court has found patterns when a lawyer had a prior disciplinary record concerning similar misconduct, and a lawyer engaged in misconduct involving multiple parties in different matters that often occurred over an extended period of time." *Alexander*, 300 P.3d at 550. These cases demonstrate that the "pattern of misconduct" aggravating factor applies to attorneys who repeatedly engage in misconduct in different contexts.

Here, Attorney Mesmer's misconduct arose from his course of conduct in a single matter on a single subject (filing pleadings), involved the same clients, and spanned approximately sixty days. He has no prior disciplinary record. Under these circumstances, Attorney Mesmer did not engage in a pattern of misconduct as the term is applied in the *Standards*.

IV. THE COMMITTEE’S SANCTION IS DISPROPORTIONATE TO ATTORNEY MESMER’S CONDUCT IN LIGHT OF OTHER RECENT DECISIONS.

When considering the mitigating and aggravating factors, the Committee’s recommended sanction is disproportionate to those imposed in four other lawyer discipline matters, *Grew’s Case*, *Feld’s Case*, *Brouillard v. Attorney Discipline Office*, and *Bruzga’s Case*. In these cases, substantially more serious conduct resulted in lesser sanctions.

In *Grew’s Case*, the New Hampshire Supreme Court suspended Attorney Grew for two years over the ADO’s argument that Attorney Grew should be disbarred. *Grew’s Case*, 156 N.H. 361, 362 (2007). In that case, Attorney Grew lied to his insurance company about hitting Mr. Labrie’s car in a parking. Attorney Grew also called Mr. Labrie three times attempting to induce Mr. Labrie to also lie about the accident to the insurance company. Attorney Grew pled guilty to a Class A misdemeanor as a result of his fraudulent statements to his insurance company.

Here Attorney Mesmer’s conduct did not involve fraud. Attorney Mesmer’s dishonest conduct, however misguided, was intended to aid his clients not himself.

The *Grew* Court found that Attorney Grew’s personal and financial problems and criminal penalties weighed in favor of mitigation, reasoning that “despite the purported prevalence of financial stress in many acts of attorney defalcation, we believe that it is important to distinguish those acts motivated by greed from those motivated by desperation by considering such personal and economic stressors.” *Grew’s Case*, 156 N.H. at 367.

Here, Attorney Mesmer's conduct was motivated by desperation related to his distressed health, not greed.

Though *Grew's Case* involved more severe misconduct with fewer mitigating factors, the Court imposed a two-year suspension, not a three-year suspension, stayed for eighteen months as recommended for Attorney Mesmer.

In *Feld's Case*, the attorney "orchestrated, assisted, counseled and tolerated the formulation of inaccurate and incomplete sworn [discovery] responses that he knew were inaccurate." *Feld's Case*, 149 N.H. 19, 21 (2002). During the disciplinary process, Attorney Feld maintained that a false discovery response to a request for admission was a "mistake." The Court found that this claim was "belied by the fact that Feld provided other false answers" regarding the same fact in an interrogatory question and by way of his client's deposition testimony." *Id.* at 23. Attorney Feld also made a claim of privilege in a "bad faith effort to impede [the opposing party's] discovery." *Id.* at 28. Finding that Attorney Feld lacked remorse because he did not admit to violating the Rules of Professional Conduct, the Court noted that the only mitigating factor was the absence of a prior disciplinary record. *Id.* at 30. The Court suspended Attorney Feld for one year.

Here, Attorney Mesmer's conduct stemmed from a serious medical condition and he has demonstrated sincere remorse for his conduct. Many more mitigating factors apply to Attorney Mesmer's case than that of Attorney Feld. Nevertheless, the sanction recommended for Attorney Mesmer is far harsher than that imposed on Attorney Feld.

In *Bruzga's Case*, the attorney engaged in a dishonest course of conduct to manipulate his children's custody proceeding. 145 N.H. 62 (2000). Using his knowledge of the legal system, Attorney Bruzga filed several dishonest pleadings alleging that his ex-wife abandoned their son and was an unfit mother because of her "mental incapacity." *Id.* at 68. The Court found that Attorney Bruzga "practiced law for two decades and handled numerous mental health and abuse and neglect matters. Thus, he was familiar with the triggering language which would cause the district court concern, and chose to distort the true nature of the material underlying events." *Id.* at 69. Further demonstrating Attorney Bruzga's intent, he "was represented by counsel during the relevant time period but chose to pursue the errant pleadings in an individual capacity." *Bruzga's Case*, 145 N.H. at 72.

Further, the Court noted that Attorney Bruzga engaged in semantical wordplay to explain his representations to the district court during the disciplinary proceeding, *id.* at 71, and insisted at oral argument that had done nothing wrong and continued to defend the absolute truth of his allegations that were found to be false, *id.* at 72. The Court suspended Attorney Baruzga for one year.

By contrast, Attorney Mesmer has admitted his misconduct. Unlike Attorney Bruzga, Attorney Mesmer had a medical condition that affected his conduct. Attorney Mesmer did not use his knowledge of the legal system to manipulate a proceeding for his own benefit. Although Attorney Mesmer's conduct was far less severe than that of Attorney Bruzga, his recommended sanction is far more severe.

In *Brouillard, Philip A. advs. Attorney Discipline Office*, #10-053, the attorney in his capacity as trustee for a trust that owned and managed real estate, “executed a contract with [a business that provided fire cleanup services] knowing he did not have insurance coverage while representing [to the cleanup business that] he had coverage.” *Brouillard, Philip A. advs. Attorney Discipline Office*, #10-053, at 4. Attorney Brouillard failed to clarify with the cleanup business that he did not have insurance, then failed to clarify the issue with the Belknap Superior Court in subsequent litigation brought by the cleanup service when Attorney Brouillard failed to pay his bill. Attorney Brouillard had two prior disciplinary actions, one arising from his representation of his live-in girlfriend in a child custody matter, and the other arising out of his acceptance of, and later withdrawal from, a case for personal reasons. The PCC found that Attorney Brouillard’s misrepresentation “involved a knowing and intentional state of mind” and recommended a two-year suspension. The Committee noted that Attorney Brouillard’s prior disciplinary actions involved “a history of being personally involved and blurring the boundaries of professional and personal relationships,” and that his “desire to maintain [a] relationship may have resulted in his behavior” at issue. *Id.* at 6. This Court imposed a two-year suspension, stayed for a period of two years.

Attorney Brouillard’s misconduct was more severe than the conduct at issue here because it involved dishonesty for a selfish or greedy purpose, and he did not have a debilitating medical condition. Attorney Brouillard’s prior disciplinary record was serious and related to the conduct at issue in the disciplinary proceeding, unlike Attorney Mesmer who has no prior discipline history. Despite Attorney Brouillard’s more serious conduct and

prior disciplinary record, he received a lesser sanction than the three-year suspension with eighteen months stayed recommended for Attorney Mesmer.

In all four of the above cases involving attorney dishonesty more severe than that of Attorney Mesmer, the sanction imposed was less severe than the Committee's recommendation for Attorney Mesmer.

V. A THREE-YEAR SUSPENSION DOES NOT SERVE THE PURPOSES OF ATTORNEY DISCIPLINE.

A three-year suspension with eighteen months stayed does not serve the purposes of attorney discipline in this case. "[T]he purpose of attorney discipline is not to inflict punishment, but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *Grew's Case*, 156 N.H. at 365. "Each attorney discipline case is judged upon its own facts and circumstances, taking into account the severity of the misconduct and any mitigating circumstances." *Id.*

Attorney Mesmer does not pose a risk to the public since the conduct at issue arose from his untreated medical condition for which he is now being treated. Once Attorney Mesmer realized the extent to which his medical condition was interfering with his ability to practice law, he took action to protect his clients and the public. He ceased working as an attorney while finding the diagnosis and treatment that restored him to good health. Attorney Mesmer remained voluntarily suspended from law practice for eighteen months until his health recovered. He has since returned to the practice of law without incident.

There is also no evidence that his clients were permanently harmed. The Balleeses did not lose their stock in Club ManchVegas, and Attorney Mesmer's firm settled their restitution claim swiftly. Attorney Mesmer fully recognizes his misconduct and has expressed sincere remorse for its emotional toll.

Given Attorney Mesmer's lack of prior disciplinary record and absence of danger to the public, a sanction of a completely stayed suspension would serve to "maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *Grew's Case*, 156 N.H. at 365.

CONCLUSION

While Attorney Mesmer's conduct warrants a serious sanction, the PCC's three-year suspension with eighteen months stayed does not reflect the totality of Attorney Mesmer's conduct, is disproportionate to the sanctions imposed in similar cases, and fails to serve the purposes of attorney discipline.

REQUEST FOR ORAL ARGUMENT

Joshua N. Mesmer, Esq. requests the opportunity for oral argument, through his undersigned counsel, before the full Court.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 9,292 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

Joshua N. Mesmer,

By his Attorneys,

UPTON & HATFIELD, LLP

Date: May 24, 2019

/s/ Russell F. Hilliard
Russell F. Hilliard
NHBA #1159
Brooke Lovett Shilo
NHBA #20794
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com
bshilo@uptonhatfield.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day through the Court's electronic filing system to Sara S. Greene, Esq., Frank B. Mesmer, Jr., Esq., and David M. Rothstein, Esq., counsel of record.

/s/ Russell F. Hilliard

Russell F. Hilliard

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
Ronald K. Ace*
Kathleen M. Ames*
Peter G. Beeson
Margaret R. Kerouac

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Caroline K. Leonard
Mona T. Movafaghi
Georges J. Roy*
Martha Van Oot
Daniel E. Will
* non attorney member
Barbara J. Guay, Legal Assistant

Mesmer, Joshua N. advs. Attorney Discipline Office - #16-044

**RECOMMENDATION: THREE YEAR SUSPENSION WITH
EIGHTEEN MONTHS STAYED**

On January 15, 2019, the Professional Conduct Committee (the “Committee”) deliberated the Hearing Panel’s recommended disposition of the notice of charges against Joshua N. Mesmer, Esq. Members present included David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Ronald K. Ace, Kathleen M. Ames, Margaret R. Kerouac, Mona T. Movafaghi, Georges J. Roy, Martha Van Oot and Daniel E. Will. Peter G. Beeson was not present, and Caroline K. Leonard was recused.

The Committee reviewed the record and approved the facts as found by the Hearing Panel by clear and convincing evidence. The Committee then approved the findings of violations of the Rules of Professional Conduct (the “Rules”) as found by the Hearing Panel. With respect to sanction, the Committee recommends a three year suspension with eighteen months stayed.

I. FINDINGS OF FACT

The facts are drawn from the evidentiary hearing and the Hearing Panel’s report.

Joshua N. Mesmer (“Mr. Mesmer”) is an attorney licensed to practice law in New Hampshire since 2007. Mr. Mesmer practices at Mesmer & Deleault,

PLLC, in Manchester, at which his father, Frank Mesmer, is a founding partner. At the time of the events giving rise to these proceedings, Mr. Mesmer's practice included business litigation.

A. Mr. Mesmer's Representation of Tires, Inc.

The events that led to Mr. Mesmer's professional conduct violations arose out of his representation of Tires, Inc. ("Tires"), owned by Kim and David Balles, in litigation brought by Motostar Tire and Auto Products ("Motostar"). In 2012, Motostar obtained judgment against Tires in excess of \$165,000. Mr. Mesmer's father, Frank, represented Tires. Tires negotiated a payment plan with Motostar, but in 2015, Motostar filed a motion for contempt after Tires ceased making payments. By then, Tires had become insolvent.

Initially, the dispute revolved around Motostar's discovery requests in connection with its motion for contempt. Mr. Mesmer represented Tires through the discovery process. In late December 2015, apparently based on discovery responses, Motostar filed a petition asking the superior court to set aside a claimed fraudulent conveyance. Motostar named the Balleses individually and sought to disgorge them of funds Motostar claimed that Tires improperly distributed to its owners.

Motostar's Counsel, Paul DeCarolus of Gottesman & Hollis, P.A., sent Mr. Mesmer a courtesy copy of the petition which Mr. Mesmer reviewed. On January 6, 2016, Mr. Mesmer emailed a copy of the petition to Ms. Balles. Mr. Mesmer told Ms. Balles that he was "drafting an objection to the petition and a motion to dismiss to boot" and promised to send her copies of the pleadings when complete, likely during the afternoon of the following day.

When she did not receive the pleadings, Ms. Balles emailed Mr. Mesmer. He responded that he was conducting additional research before finalizing them. He reassured Ms. Balles, "[T]ry not to stress about this. We're taking care of it."

This began a chain of broken promises that Mr. Mesmer made to Ms. Balles concerning all aspects of the defense of Motostar's suit, and lies he told her to prevent her from finding out that, in fact, he took no action, caused his clients to default, and allowed the entry of a default judgment. Mr. Mesmer only came to life at the tail end of the proceedings, in an ill-executed effort to prevent a sheriff's sale of his clients' personal assets. He took no action to defend the suit in the face of regular promptings from his clients and even opposing counsel. Mr. Mesmer's firm did nothing to ameliorate the impact of his inaction.

In addition to providing ineffective representation, Mr. Mesmer routinely lied to his clients about his work, the status of the case, and how much his clients owed him. The Hearing Panel's report reviews Mr. Mesmer's lies in detail. The lies were recounted in emails, texts and personal conversations over a period spanning months, in which Mr. Mesmer:

- repeatedly assured Ms. Balles that he was preparing, would, and did file numerous pleadings, including a motion to dismiss, when none of these things were true;
- told Ms. Balles that he was hard at work on pleadings to reverse adverse orders, when he was not;
- blamed bad outcomes on his own false allegations of corruption in the superior court, including characterizing the court's denials of his long overdue and desperate pleadings as "the most corrupt backwards shit I've seen in my years as an attorney";
- referred to opposing counsel and his law firm (who, among other things, provided courtesy copies of pleadings to Mr. Mesmer and reminded him of objection deadlines) as "assholes" and "shitheads";
- told his client that "DeCarolus had the Nashua superior [court] in his pocket since he and his firm litigate there on a near weekly basis"; and
- billed the Ballesees well in excess of any remote approximation of time he spent on their defense, and then, aggressively pursued payment from them.

Mr. Mesmer made misrepresentations to the court and directed his clients to execute inaccurate affidavits which Mr. Mesmer submitted to the court. For example, in a motion to stay, Mr. Mesmer represented that he had filed a timely response to Motostar's motion, which was false. He also stated that he had "received no information pertaining to this matter," which was also false. Mr. Mesmer had his clients sign an affidavit, which he filed with the court, stating that Mr. Mesmer believed his clients were receiving and handling all correspondence from Motostar and the court. This statement is false. Mr. Mesmer's affidavit repeated the claim that he did not receive filings from the plaintiff or orders from the court which he had, in fact, received.

Due to Mr. Mesmer's neglect, the Motostar suit went into default and ripened into a default judgment, imposing personal liability upon the Ballesees

and causing a sheriff's sale of their ownership interests in another business. Though the Mesmer firm eventually resolved the issues with the Balleses, including repayment of the value of what they had lost, Ms. Balles testified that the lengthy episode, much of which occurred as her husband's health declined, was harrowing and soured her on lawyers and the legal profession.

B. Evidence Concerning Mesmer's Medical Condition and its Effect on his Mental State.

Mr. Mesmer conceded that at least some of his lies were intentional – designed, as he characterized it, to shield his clients from bad news that would cause anxiety and concern. But Mr. Mesmer claimed that health issues caused his egregious inattention to the Motostar litigation and, by extension, at least to some extent contributed to his pattern of repeated lies and misrepresentations to his client and the court. Mr. Mesmer's state of mind relates both to the violation and penalty aspects of this proceeding, and its importance to the Hearing Panel's and this Committee's recommended dispositions merit a close review of the evidence.

1. Sleep Apnea.

Mr. Mesmer experienced undiagnosed sleep apnea for years, including the period encompassing these charges. Sleep apnea occurs when closures of the throat during sleep cause a cessation of breathing, triggering an instinctive awakening to re-commence breathing. The waking is not conscious, however, and can happen many times per hour. The result is that the subject never achieves quality sleep but does not know it, and, over time, can suffer physical and neurological impairments.

Mr. Mesmer testified that he suffered physical symptoms. He saw medical specialists, received diagnoses, and underwent a variety of courses of treatment before his doctors stumbled upon the correct diagnosis. Until proper diagnosis, Mr. Mesmer could not understand the various symptoms he experienced and became so concerned that he began seeing a mental health counselor, believing that "it was all in [his] head." Members of his firm noticed that Mr. Mesmer was struggling but were apparently unaware of his complete inattention to the Tires litigation and the string of lies he told to his clients and the court.

The diagnosing doctor prescribed a CPAP, a medical device consisting of a combination of a face mask and fan worn while sleeping which sends air down the subject's throat and prevents the closure that causes the apnea. After CPAP therapy, Mr. Mesmer purports to be back to his normal, fully functioning self, including professionally, where he carries a full caseload.

2. The Medical Evidence.

Before the Hearing Panel, Mr. Mesmer contended that severe sleep apnea, undiagnosed over a long period of time, caused physical and neurological maladies, including an inability to focus, multi-task, and exercise sound judgment. The Attorney Discipline Office (“ADO”) contested the severity of Mr. Mesmer’s sleep apnea and his effort to causally link the condition to his lapses in judgment. The issue became the extent to which sleep apnea compromised Mr. Mesmer’s ability to act intentionally and knowingly, particularly with respect to the array of lies he told his clients and his misrepresentations to the court.

Two experts offered reports and testimony to the Hearing Panel. Their testimony discussed sleep apnea generally, but revolved, in part, around two studies Mr. Mesmer underwent, which occurred in his home and monitored his sleep patterns and other information over the course of an evening. The first study demonstrated mild sleep apnea. The second also indicated mild sleep apnea, though much of its data was corrupted and not usable.

Mr. Mesmer’s expert, Dr. George B. Neal, testified that sleep apnea can cause physical maladies and symptoms, a reduction in productivity at work, and forgetfulness. Dr. Neal characterized this condition as “presenteeism,” meaning physically present at work but not fully functional.

Dr. Neal took some issue with the sleep studies, testifying that home studies – the only type for which Mr. Mesmer’s insurance would pay – lack the detail and reliability of those that occur in a “sleep lab,” a location to which patients travel to sleep. Dr. Neal also testified that symptom severity does not always correlate with sleep study results, meaning that the study does not necessarily reflect the severity of the sleep apnea. Dr. Neal acknowledged, however, that those with severe symptoms, but a mild objective diagnosis, are a minority of the sleep apnea population, less than ten to twenty percent.

Dr. Neal conducted an independent medical examination of Mr. Mesmer. This included Mr. Mesmer’s recitation of his symptom history, a review of a chronology Mr. Mesmer prepared of his medical background, a review of Mr. Mesmer’s medical records, and a physical examination. Dr. Neal concluded that (1) sleep apnea more likely than not affected Mr. Mesmer’s professional performance; (2) Mr. Mesmer’s sleep apnea “probably” gave rise to the conduct that led to these charges; and (3) Mr. Mesmer suffered “severe” sleep apnea.

With respect to the actual instances of misconduct, however, Dr. Neal acknowledged that he did not review the notice of charges and Mr. Mesmer’s answer to them, and he could not opine that sleep apnea caused any incident.

Dr. Neal testified only that “[i]t could be” that the sleep apnea caused Mr. Mesmer to present something as true that was in fact inaccurate. He confirmed that he could not conclude that Mr. Mesmer’s sleep apnea caused Mr. Mesmer to repeatedly lie to his clients.

The ADO presented the report and testimony of David C. Picard, M.D., FCCP, FASM. Dr. Picard did not examine Mr. Mesmer. He focused on the results of the two sleep studies and reviewed the notice of charges. After issuing his report, Dr. Picard reviewed Dr. Neal’s report and Mr. Mesmer’s medical records.

Dr. Picard found that the sleep study results revealed mild sleep apnea. From his review of Mr. Mesmer’s medical records, Dr. Picard did not see substantial evidence of symptomology consistent with severe sleep apnea. Finally, Dr. Picard stated that the symptoms Mr. Mesmer reported to Dr. Neal were not corroborated by Mr. Mesmer’s medical records.

The Hearing Panel found that, while Mr. Mesmer suffered sleep apnea, it did not prevent Mr. Mesmer from forming a knowing state of mind with respect to the charged misconduct. The Committee concludes, based on its review of the medical testimony, that the record supports, by clear and convincing evidence, the Hearing Panel’s conclusion.

II. RULES VIOLATED

The ADO charged Mr. Mesmer with violating Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 3.3 and 8.4. He admitted to violating Rules 1.1, 1.2, 1.3, 1.4, and 1.5. The Committee finds that these rule violations are supported by clear and convincing evidence.

Mr. Mesmer admitted in part to violating Rule 8.4(c) and contested the alleged violation of Rule 3.3. The Committee deals with these rules below.

Rule 8.4(c)

Rule of Professional Conduct 8.4(c) provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

The Panel’s report details a series of lies Mr. Mesmer told to his clients, all to assure them that he was defending their interests when he was not, or to explain away the poor results he was achieving. Mr. Mesmer acknowledged that he lied to his clients. Moreover, clear and convincing evidence supported the Panel’s finding that sleep apnea did not impair Mr. Mesmer’s cognitive

function to the extent that it caused him to lie. Accordingly, the Committee finds that clear and convincing evidence supports Mr. Mesmer's violation of Rule 8.4(c).

Rule 3.3

Rule 3.3 concerns candor to the tribunal and provides generally that a lawyer shall not "knowingly" make a false statement of fact or law to a tribunal or offer evidence that the lawyer knows is false. Mr. Mesmer contended that he did not knowingly make false statements to the court.

The New Hampshire Supreme Court has explained that, in ascertaining mental state, "[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." *Wyatt's Case*, 159 N.H. 285, 307 (2009) (citation omitted). The Hearing Panel concluded, and this Committee agrees, that whatever external pressures Mr. Mesmer faced, the record fails to support a finding that sleep apnea impaired Mr. Mesmer's judgment to the extent that he did not make knowing misrepresentations to the court.

Mr. Mesmer admitted he knew he was lying to his clients. His expert, at best, opined "it could be" that sleep apnea caused Mr. Mesmer to lie, but admitted that he could not say that it caused any of Mr. Mesmer's acts or omissions. Dr. Neal did not review the charges against Mr. Mesmer and did not provide any basis on which to conclude that sleep apnea impaired Mr. Mesmer's judgment to an extent that his misrepresentations to the court were any less knowing than those to his clients.

The Committee thus concludes the Panel's finding that Mr. Mesmer violated Rule 3.3 is supported by clear and convincing evidence.

III. SANCTIONS

Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support the sanction of a three-year suspension with eighteen months stayed. The Court has emphasized that "[t]he sanction . . . must take into account the severity of the misconduct." *Coffey's Case*, 152 N.H. 503, 513 (2005). The Committee concluded that its sanction accounts for the protracted and severe nature of Mr. Mesmer's conduct, while affording him the opportunity to resume his practice after a period of suspension.

Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner's Case*, 158 N.H. at 303. The *Standards* set forth a four-

part analysis for courts to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 156 N.H. 613, 621 (2007)); *Standards*, § 3.0.

The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. See *Conner’s Case*, 158 N.H. at 303. Once the baseline sanction is determined, the Court then looks to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. See *id.*

The *Standards* set forth a four-part analysis to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’s Case*, 156 N.H. 613, 621 (2007)); *Standards*, § 3.0. In this case, there are multiple acts of misconduct. Therefore, the sanction imposed must be consistent with the sanction for the most serious instance of misconduct. See *Morse’s Case*, 160 N.H. 538, 547 (2010) (citing *Wyatt’s Case*, 159 N.H. at 306).

The Committee adopts the Hearing Panel’s findings that Mr. Mesmer violated duties to his clients, the legal system and the public. Mr. Mesmer told repeated lies to his clients and allowed a claim against them to become a default judgment that resulted in significant personal, emotional and financial losses.

Mr. Mesmer violated duties owed to the legal system and to the public. He owed a duty to the legal system to maintain candor toward the court, which he failed to discharge when he knowingly made misrepresentations. Mr. Mesmer violated his duty to the public through conduct that undermined its confidence in attorneys. Ms. Balles testified that she has lost faith in lawyers. When a lawyer engages in the type of misconduct that occurred in this case, the public has reason to question the truthfulness and competence of all lawyers. If a lawyer tells his client he is taking care of her case, that client is entitled to assume that he is. If he is not, or cannot, the lawyer cannot continue to do nothing and repeatedly lie about the matter.

Violations of Rules 3.3 and 8.4(c) all require a knowing state of mind. The Committee adopted the Hearing Panel’s findings that Mr. Mesmer acted knowingly. Mr. Mesmer admitted that he lied to his clients, and clear and convincing evidence supported the Hearing Panel’s conclusion that sleep apnea did not so impair Mr. Mesmer’s judgment as to prevent him from acting

knowingly.

The Committee also adopted the Hearing Panel's findings that Mr. Mesmer caused serious injury to his client. The Ballese suffered a default judgment in the Tires litigation. While the Mesmer law firm paid the Ballese the value of the ownership interests they lost due to Mr. Mesmer's conduct, they may have intended to retain those interests rather than liquidate them, which Mr. Mesmer's misconduct forced them to do.

Finally, the Committee adopted the Hearing Panel's finding that the baseline sanction in this case is disbarment. *See Standards*, §§ 4.41, 4.61 and 7.1.

Mr. Mesmer's case has aggravating and mitigating factors. Mr. Mesmer acted with a selfish or dishonest motive. He kept his clients in the dark about his lack of attention to their defense and the results that ensued. The Hearing Panel gave this factor less weight, based on its conclusion that Mr. Mesmer did not generally act to enrich himself. However, Mr. Mesmer intended to give his clients the impression he was working hard for them, when he was not. He billed them for services not performed and pressured them to pay, to his and his firm's financial benefit. Indeed, though Mr. Mesmer was inattentive to many matters in this litigation, he remembered to bill his clients, and he remembered to make efforts to collect money from them that he had not earned.

The Committee agrees with the Hearing Panel that the pattern of misconduct was severe. Mr. Mesmer repeatedly lied to his clients over an extended period of time. The volume of lies coupled with the lack of any effort in his clients' defense cannot be viewed as anything other than aggravating. Mr. Mesmer knew of his own lack of diligence and the unfavorable outcomes that resulted. If nothing else, he could have reached out to his firm, in which his father was his boss, much earlier. If Mr. Mesmer did not intend to harm his clients, he acted with reckless disregard for the consequences of his conduct.

With respect to mitigating factors, Mr. Mesmer has no disciplinary history and cooperated with the ADO. The parties contested the extent to which sleep apnea can be viewed as a mitigating factor. The Panel concluded that Mr. Mesmer's frustration at his medical condition and inability to get it resolved constituted a personal problem that fell into the mitigating factor column. The Panel unequivocally concluded, however, that sleep apnea did not rise to the level of a physical disability, and, therefore, did not view it as a mitigating cause of Mr. Mesmer's professional misconduct. The Committee agrees. As detailed above, 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 for a different conclusion. It cannot give more weight to Mr. Mesmer's condition than did his own expert.

At oral argument, Mr. Mesmer argued that the baseline sanction is suspension because he did not steal money or personally benefit from his misconduct. At least three ABA standards set disbarment as the baseline sanction in this case.

First, under *Standards* § 4.41, disbarment is the baseline sanction for a violation of Rules 1.2, 1.3 or 1.4, where a lawyer knowingly fails to perform a service for a client and causes serious or potentially serious injury. Both circumstances exist here. No proof of fraud or financial benefit is necessary.

Second, under *Standards* § 4.61, disbarment is the baseline sanction for a violation of Rule 8.4(c) where "a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client." Here, Mr. Mesmer knowingly deceived his clients, and caused serious injury. While he did not act with intent to benefit himself or another at the outset of the course of conduct, Mr. Mesmer eventually lied to give his clients the impression that he was working hard on his case so that his firm, and he, would be able to continue billing them, and he would continue to be paid for services he knew he was not providing.

Finally, under *Standards* § 7.1, disbarment is the baseline sanction for a violation of Rule 1.5 where the lawyer violates his professional duty with the intent to benefit himself or another and causes serious or potentially serious injury to the client, the public, or the legal system. All of these circumstances exist in this case. Mr. Mesmer violated numerous professional duties. As described above, as the course of conduct worsened, he acted with the intent to perpetuate the image of a hard-working advocate so he could justify his continued billing. And, he injured or potentially injured all three entities covered by the standard.

Mr. Mesmer argued that the appropriate sanction is a stayed suspension. With disbarment as a baseline sanction, this Committee would have to depart downward one level to suspension, and another level to a full stay of that suspension, to reach that result. While a one-level departure is warranted, a stay of the suspension is not. Even if the baseline sanction was suspension instead of disbarment, the Committee would not recommend a complete stay of the suspension.

As discussed above, even if severe sleep apnea could explain Mr. Mesmer's conduct, the apnea here was not severe. Mr. Mesmer argued that,

now that the sleep apnea has been diagnosed and treated, he has been cured and no suspension is warranted – especially since the firm imposed its own “suspension” after this misconduct came to light. The Committee rejects this argument as well. Mr. Mesmer’s conduct was severe, protracted and injurious. The same law firm that has pronounced him fit to practice failed over several months to apprehend that he was doing no work in this case, lying to his clients and the court, and trying to get his clients to pay legal fees that neither he nor the firm had earned. This Committee has an obligation to protect the public, and any recommendation less than a significant period of suspension would be inappropriate. Before he can resume his practice, Mr. Mesmer must apply for reinstatement, and bear the burden of demonstrating his fitness to resume the practice of law. *Sup. Ct. R. 37(14)(b)*.

Thus, the Committee afforded weight to the mitigating factors – including Mr. Mesmer’s condition – by departing down from the baseline sanction of disbarment. While 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. Eighteen months of that period is suspended if Mr. Mesmer engages in no professional misconduct and pays the costs for investigation and prosecution of this matter. The additional stayed suspension will, in the Committee’s view, provide protection to the public, and deter Mr. Mesmer from committing future misconduct.

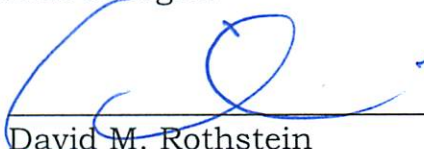
IV. COSTS

Mr. Mesmer shall be responsible for all costs associated with the investigation and prosecution of this matter.

V. CONCLUSION

For the above reasons, the Committee recommends that Mr. Mesmer be suspended for three years, with eighteen months stayed, and that he pays the costs for investigation and prosecution of these charges.

February 19, 2019


David M. Rothstein
Chair

cc: Sara S. Greene, Disciplinary Counsel
Frank B. Mesmer, Jr., Esquire
File