

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

LD-2019-0001

In the Matter of Joshua N. Mesmer, Esquire

RESPONDENT'S REPLY BRIEF

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

Introduction	5
A. Attorney Mesmer’s Misconduct was Not Strategic	5
B. The Baseline Sanction is Suspension, Not Disbarment	6
1. ABA Standards for Imposing Lawyer Sanctions	6
2. New Hampshire Case Law	8
C. Stayed Suspensions Have Been Recognized as a Worthwhile Sanction.	12
D. There is Ample Evidence of Attorney Mesmer’s Good Character.....	14
E. Attorney Mesmer Has Fully Regained His Capacity to Practice Law.....	14
Conclusion.....	16
Certificate of Compliance with Word Limit.....	17
Certificate of Service.....	18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Pages</u>
<i>Astles’ Case</i> , 134 N.H. 602 (1991)	9
<i>Basbanes’ Case</i> , 141 N.H. 1 (1996)	9
<i>Bruzga’s Case</i> , 145 N.H. 62 (2000).....	10, 12
<i>Cohen’s Case</i> , 143 N.H. 169 (1998).....	9
<i>Eshleman’s Case</i> , 126 N.H. 1 (1985)	9
<i>Feld’s Case</i> , 149 N.H. 19 (2002).....	10, 12
<i>Gallant, John F. advs. Attorney Discipline Office</i> , # 04-101 (2009).....	13
<i>Grew’s Case</i> , 156 N.H. 361 (2007)	10
<i>In re Lath</i> , 169 N.H. 616 (2017).....	15
<i>In the Matter of Phillip A. Brouillard</i> , LD-2013-0002 (2013)	14
<i>Jones’ Case</i> , 137 N.H. 351 (1993).....	9
<i>Kalil’s Case</i> , 146 N.H. 466 (2001)	12
<i>Nardi’s Case</i> , 142 N.H. 602 (1998).....	9
<i>O’Meara’s Case</i> , 150 N.H. 157 (2003)	11, 12
<i>Pasquina, Edward F. Jr. advs. Attorney Discipline Office</i> , # 09-032 (2012)	13
<i>Welts’ Case</i> , 136 N.H. 588 (1993)	11
<i>Witkus, Lanea A. advs. Hugh M. Tamoney</i> , # 06-029 (2009).....	13

<i>Wolterbeek’s Case</i> , 152 N.H. 710 (2005)	9
--	---

Miscellaneous

ABA Standards for Imposing Lawyer Sanctions

§4.6	6
§6.1	7
§6.11	8
§6.12	8
§6.13	8

INTRODUCTION

Attorney Mesmer submits his reply brief to address the issues raised by the Answering Brief of Disciplinary Counsel.

A. Attorney Mesmer's Misconduct Was Not Strategic.

Contrary to the contention in the Answering Brief of Disciplinary Counsel at 27-30, Attorney Mesmer's conduct at issue here was not strategic. It was illogical, but consistent with his impaired mental state.

Following Motostar's filing of the Petition to Set Aside Fraudulent Conveyance in January 2016, Attorney Mesmer's emails and time records reflect nearly daily actions in response to the Petition including correspondence, research, memoranda, and preparation of his appearance and answer. But the answer and appearance were not filed. A functioning attorney would expect activity following filing of an answer; and receiving none, would inquire as to the case status. Strategically, the attorney would follow up. But Attorney Mesmer did not.

Attorney Mesmer then received an email from opposing counsel in March and a phone call from his client in May, regarding the matter. Yet, Attorney Mesmer confused the correspondence as relating to other matters and did not realize that his appearance and answer were not filed. Had Attorney Mesmer realized his mistake, he could have filed a motion to strike as he had done before in previous cases, but again, he did not. From the end of January through May, he entered no time in the case. During this time, Attorney Mesmer's medical condition was impairing his ability to recognize that there was a problem with the case.

Attorney Mesmer did not realize the issues with the case until the Sheriff served the writ of execution in July. Attorney Mesmer then spent the next seven weeks working on pleadings that should have taken only a few days to write, because his medical condition affected his judgment and his sense of time. Attorney Mesmer responded “yes” to his clients’ questions, assuring them everything had been filed, and not to worry because Attorney Mesmer thought he would complete the motions and file them that day or the next.

Attorney Mesmer had nothing to gain from delaying the filings. Attorney Mesmer’s actions can only be explained by impaired thinking, impaired memory, impaired judgment, and a lost sense of time.

B. The Baseline Sanction is Suspension, Not Disbarment.

Disciplinary Counsel argues that the Committee’s recommendation of a lengthy suspension is appropriate, given the downward departure from the baseline disbarment. Disbarment, however, is not the appropriate baseline.

Attorney Mesmer violated his duty to his clients to provide competent and diligent representation. He violated his duty to provide reasonable communication. And he violated his duty to his clients and to the public to maintain his personal integrity. The most severe sanctions arise from Attorney Mesmer’s misrepresentations.

1. ABA Standards for Imposing Lawyer Sanctions.

Section 4.6 – Lack of Candor

Section 4.6 of the Standards provides, in relevant part, that the following sanctions are generally appropriate in cases where the lawyer

engages in fraud, deceit, or misrepresentation directed toward a client:

§ 4.61 Disbarment is generally appropriate when 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.

§ 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

Attorney Mesmer does not dispute that he exercised poor judgment when he misrepresented to his clients the status of certain pleadings he had not yet filed. While Attorney Mesmer knew his statements were not accurate, his intention was never to “benefit [himself] or another.” Attorney Mesmer mistakenly and misguidedly believed he would be able to finish and file the pleadings the same day he made the statements. As such, the Standards prescribe a sanction of suspension.

Section 6.1 – False Statements, Fraud, and Misrepresentation¹

Section 6.1 of the Standards provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

¹ Attorney Mesmer does not agree that he knowingly misrepresented facts to the court, as discussed in his Brief, part II, but addresses this here to respond to the Answering Brief of Disciplinary Counsel.

§ 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

§ 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

§ 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

As explained in Brief of Respondent at § II, Attorney Mesmer did not knowingly make misrepresentations to the tribunal. As such, Attorney Mesmer's misrepresentation was negligent, because it was factually inaccurate but consistent with his impaired memory. Further, as discussed in Brief of Respondent, part III, C, Attorney Mesmer's obstructive sleep apnea ("OSA") is a significant mitigating factor.

2. New Hampshire Case Law.

New Hampshire case law demonstrates that the baseline sanction is a suspension. This Court has ordered disbarment as the appropriate sanction

when faced with a lawyer's dishonesty in the past, *see Jones' Case*, 137 N.H. 351, 353-56 (1993)²; *Eshleman's Case*, 126 N.H. 1, 6 (1985)³, but those cases involved additional and repeated misconduct, including the respondents' failure to cooperate with the Professional Conduct Committee.

Attorney Mesmer's conduct was significantly less egregious than that of the attorneys in such disbarment cases. Attorney Mesmer's rule violations, unlike in disbarment cases, involved an isolated instance of misconduct. For example, Attorney Mesmer's conduct did not span "several years," *Wolterbeek's Case*, 152 N.H. 710, 717 (2005); nor did it involve lying to the Committee, *Astles' Case*, 134 N.H. 602, 604-05 (1991); *Cohen's Case*, 143 N.H. 169, 171 (1998). Moreover, unlike the attorneys in *Wolterbeek's Case*, 152 N.H. at 716-17, and *Nardi's Case*, 142 N.H. 602, 608 (1998), Attorney Mesmer has no prior disciplinary offenses. Additionally, unlike the attorneys in *Basbanes' Case*, 141 N.H. 1, 7-8 (1996), and *Astles' Case*, 134 N.H. at 606, he cooperated fully with disciplinary counsel's investigation and "displayed genuine remorse by admitting his misconduct," *Wolterbeek's Case*, 152 N.H. at 716.

In the absence of such additional egregious conduct, the severe sanction of disbarment is generally not applied to cases involving

² *Jones' Case*, 137 N.H. 351, 353-56 (1993) (attorney disbarred where, against client's instructions, he leaked letter to news reporters, repeatedly lied to client about source of leak, and filed and signed numerous pleadings falsely accusing government of being source of leak).

³ *Eshleman's Case*, 126 N.H. 1, 2-3 (1985) (attorney disbarred where his trust account was out of trust by more than \$70,000.00, he lied at his disciplinary hearing, and failed to notify the PCC or the Court that he had been arrested for grand theft).

dishonesty. The Court has instead often found suspension or public censure to be the proper and appropriate sanction.

Even the cases cited in the Answering Brief of Disciplinary Counsel in support of a lengthy fully served suspension involve conduct more severe and widespread than in the case at bar, including: intentional fraud, benefit to the attorney, lack of remorse, failure to admit wrongdoing, failure to cooperate with disciplinary body, and intentional lies in support of criminal scheme or self-benefit. Attorney Mesmer's conduct contains none of these features.

In *Grew's Case*, 156 N.H. 361, 362-64 (2007), for instance, the Court suspended the attorney for two years where he lied to his insurance company about a motor vehicle accident and attempted multiple times to induce a member of the public to be dishonest for his personal benefit.

Similarly, in *Feld's Case*, 149 N.H. 19, 21, 30 (2002), the Court suspended the attorney for one year where he "orchestrated, assisted, counseled and tolerated the formulation of inaccurate and incomplete sworn [discovery] responses that he knew were inaccurate."

And in *Bruzga's Case*, 145 N.H. 62, 63-64 (2000), the Court suspended the attorney for one year where he knowingly made misrepresentations about his ex-wife in an abuse and neglect petition, submitted the petition to harass and injure her, and instead of expressing remorse for his misconduct, engaged in "semantical gamesmanship" to justify it. The Court explained that disbarment was not proper, in part, because the attorney faced discipline for the first time in his career and because the violations occurred in a single event. *Bruzga's Case*, 145 N.H. at 72.

Attorney Mesmer engaged in none of the misconduct identified in the cases above. This matter is more akin to cases where suspension was imposed.

In *Welts' Case*, 136 N.H. 588, 590 (1993) – similar to Attorney Mesmer here – the respondent was charged with violating Rules 1.1(a), 1.1(b)(5), 1.1(c)(4), 1.3(a), 1.4(a), and 8.4(c). The referee found by clear and convincing evidence that the attorney violated Rule 8.4(c) by misrepresenting the status of the litigation to his clients on more than one occasion, and recommended suspension of six months. *Id.* Despite Welts' having lied to his clients about filing a lawsuit on their behalf, the Court disagreed with the referee's recommendation and ordered public censure because Welts' violations of the rules "flow[ed] essentially from an isolated course of conduct." *Id.* at 593.

In Attorney Mesmer's case, his misconduct began with his initial failure to respond timely to the Petition, and flowed from there. Moreover, the entire course of misconduct arises from his then-undiagnosed and untreated OSA – a validly recognized mitigating factor.

Similarly, in *O'Meara's Case*, 150 N.H. 157, 159 (2003), the respondent was charged with violating Rules 3.1, 3.3(a)(1), 3.3(a)(3), 8.4(a), and 8.4(c). The Committee found by clear and convincing evidence that the respondent had lied to the court about the date on which he had issued a subpoena, and made allegations about his wife in a motion that were "gross embellishments on the truth lacking sound factual predicates." *Id.* at 158. In issuing the sanction of public censure, the Court observed that the attorney's dishonesty involved "two isolated incidents of misconduct." *Id.* at 159. The Court ruled that in the absence of factors that

justified imposing suspension, such as engaging in a concerted course of unethical conduct that involved multiple incidents occurring over an extended period of time, and because of the presence of mitigating factors, public censure was the proper sanction. *Id.* at 160.

The Court in *O'Meara's Case* also identified important distinctions between cases in which violation of Rule 8.4(c) warrants suspension, and those in which public censure is warranted. *Id.* (citing *Feld's Case*, 149 N.H. 19 (2002) (one-year suspension); *Bruzga's Case*, 145 N.H. 62 (2002) (one-year suspension); *see also Kalil's Case*, 146 N.H. 466 (2001) (three-month suspension)).

By illustration, the Court found that O'Meara did not: counsel another person to lie (*Feld's Case*); assert the attorney-client privilege in a bad faith attempt to avoid having his client answer a deposition question (*Feld's Case*); refuse to admit his misconduct before the referee or the Court (*Feld's Case*; *Bruzga's Case*); play word games before the referee to attempt to justify his misconduct (*Bruzga's Case*); lie twice about threatening a *pro se* litigant in direct response to a judge's questions about the event (*Kalil's Case*); select a judicial forum in order to embarrass, harass or intimidate a third party (*Bruzga's Case*); or engage in a concerted course of unethical conduct that involved multiple incidents occurring over an extended period of time (*Feld's Case*).

C. Stayed Suspensions Have Been Recognized as a Worthwhile Sanction.

Stayed suspensions are an effective sanction, particularly in cases involving conduct resulting from medical conditions:

- (1) A stayed suspension is a step below a suspension in terms of its

severity. An attorney who receives a stayed suspension would, in all probability, be suspended but for the existence of this option, and other circumstances that make it a viable option for that attorney.

- (2) A stayed suspension is a worthwhile sanction. It is especially useful in cases where the attorney's misconduct was partially the product of issues such as substance abuse or poor office management. By addressing these issues, the attorney can avoid suspension and increase his long-term prospects for success in the profession. Even though the Court has not specifically opined with regard to its validity, the Committee felt that the Court would support it, and the Committee appreciates the flexibility it may provide in appropriate cases.

See PCC Index of Record, Tab 65, Exhibit 1 (PCC opinion on stayed sanctions).

This Court (and the Committee) has imposed fully stayed suspensions, including for conduct involving dishonesty.

In *Witkus, Lanea A. advs. Hugh M. Tamoney*, #06-029 at 6-8 (2009), the respondent materially misrepresented the existence of a limited power of attorney in a proceeding to contest a will. She received a six-month suspension, stayed for four months, plus conditions for violating Rules 3.3(a)(1), 3.4(d), and 8.4(a). *Id.* at 12.

In *Pasquina, Edward F. Jr. advs. Attorney Discipline Office*, #09-032 at 2, 21 (2012), the Massachusetts respondent signed a New Hampshire attorney's name to a writ of summons despite being advised to obtain *pro hac vice* admission to the New Hampshire Bar. He received a six-month suspension, stayed for one year for violating Rules 3.3(a)(1), 3.4(c), 8.1(a), 8.4(a) and 8.4(c).

In *Gallant, John F. advs. Attorney Discipline Office*, # 04-101 at 1-2

(2009), the respondent failed to advise the Court and opposing counsel after learning of a material error in the prejudgment order attaching a parcel of real property in violation of Rules 3.3(a), 4.1, and 8.4(a). He received a six-month suspension, stayed for two years. *Id.* at 6.

In *In the Matter of Phillip A. Brouillard*, LD-2013-0002 at 1 (2013), the respondent knowingly made false statements of fact, failed to correct them, and misrepresented the availability of insurance coverage in violation of Rules 3.3, 8.4(a) and 8.4(c). He received a two-year suspension, stayed for two years, plus conditions. *Id.*

Notably, unlike the instant appeal, none of the above-cited cases involved an attorney suffering from a physical or mental disability at the time of their misconduct.

D. There is Ample Evidence of Attorney Mesmer's Good Character.

Four letters of support were submitted at the September 2018 Sanction Hearing. PCC Index of Record at Tabs 50-53. No “bad character” evidence as such was adduced.⁴

E. Attorney Mesmer Has Fully Regained His Capacity to Practice Law.

Attorney Mesmer resumed the practice of law in March 2018. Since that time, Attorney Mesmer has competently represented his clients without incident. Attorney Mesmer continues to treat his OSA with a CPAP machine and with that treatment, has recovered his health. Attorney

⁴ Attorney Mesmer has filed a Motion to Enlarge the Record, seeking to submit additional supporting character letters.

Mesmer no longer experiences the OSA symptoms that caused the behavior at issue in this matter.

The ADO argues that a long-term suspension is necessary because Attorney Mesmer will have to meet the reinstatement requirements of Rule 37(14). Long-term suspension is not necessary, however, because Attorney Mesmer has already effectively served an eighteen-month voluntary suspension. Attorney Mesmer should not be penalized for doing what one would hope an incapacitated attorney would do: recognize his incapacity, and remove himself from the practice of law. Imposing a further suspension would discourage attorneys from removing themselves from practice until a sanction was formally imposed. “[T]he essential purpose of the attorney discipline system [is] to protect the public.” *In re Lath*, 169 N.H. 616, 623 (2017). Discouraging an attorney from voluntarily removing him or herself from practice by, in effect, doubling the period of suspension contravenes this essential purpose of attorney discipline.

Further, if a stayed suspension was imposed, Attorney Mesmer would be subject to terms and conditions set forth in a suspension order. *See* Rule 37(2)(j). A lengthy unstayed suspension is not necessary to ensure that Attorney Mesmer has regained his fitness to practice law and achieve the purposes of attorney discipline.

CONCLUSION

As noted in his opening brief, and further demonstrated by this reply, Attorney Mesmer's conduct warrants a serious sanction, but 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.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within reply brief complies with Sup. Ct. R. 26 (7) and contains 2,800 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: July 15, 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