

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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**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 "DeCarolis 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.*

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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.

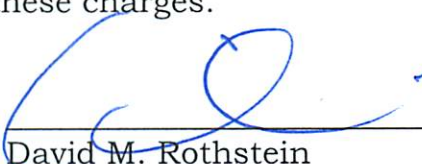
IV. COSTS

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
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