

2010

In the Matter of the Discipline of Clayne I. Corey : Brief of Appellee

Utah Court of Appeals

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Charles Gruber; counsel for respondent.

Adam C. Bevis, Billy L. Walker; counsel for petitioner.

Recommended Citation

Brief of Appellee, *Corey v.*, No. 20100955 (Utah Court of Appeals, 2010).
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Charles A. Gruber, #7391
Charles A. Gruber (7391)
P.O. Box 900122
Sandy, UT 84090
Telephone: 801-577-4973
Fax: 801-523-3630
gruberattorney@yahoo.com

IN THE SUPREME COURT OF UTAH

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**In the Matter of the
Discipline of:**

CLAYNE I. COREY, #5847

Respondent/Appellant

Appellate Case No. 20100955-52

BRIEF OF THE RESPONDENT/ APPELLEE

Office of Professional Conduct
Utah State Bar, Appellant
Adam C. Bevis
Billy L. Walker
645 South 200 East
Salt Lake City, Utah 84111
Counsel for Petitioner/Appellant

Charles A. Gruber
POB 900122
Sandy UT 84090
Attorney for Clayne I. Corey
Respondent/Appellee

**FILED
UTAH APPELLATE COURT
APR 25 2011**

Charles A. Gruber, #7391
Charles A. Gruber (7391)
P.O. Box 900122
Sandy, UT 84090
Telephone: 801-577-4973
Fax: 801-523-3630
gruberattorney@yahoo.com

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Respondent/Appellant

Appellate Case No. ~~20100914~~ ^{20100955-SC}

BRIEF OF THE RESPONDENT/ APPELLEE

Office of Professional Conduct
Utah State Bar, Appellant
Adam C. Bevis
Billy L. Walker
645 South 200 East
Salt Lake City, Utah 84111
Counsel for Petitioner/Appellant

Charles A. Gruber
POB 900122
Sandy UT 84090
Attorney for Clayne I. Corey
Respondent/Appellee

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JURISDICTIONAL STATEMENT

The Utah State Bar Office of Professional Conduct, Petitioner/Appellant, (“OPC”) has appealed from the district court’s ruling suspending Mr. Clayne I. Corey, the Respondent/Appellee, (“Mr. Corey”) for three years and placing Mr. Corey on supervised probation following an adjudication trial and a sanctions hearing in Mr. Corey’s underlying attorney discipline case.

The Utah Supreme Court has jurisdiction over attorney discipline matters pursuant to Utah Constitution article VIII, section 4, which provides that “[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” Rule 14-517(a) makes the Utah Rules of Civil and Appellate Procedure applicable in formal attorney discipline cases.

The Trial Court’s decision in Mr. Corey’s attorney discipline matter was correct, and the Trial Court’s ruling should be affirmed by the Supreme Court.

STATEMENT OF ISSUES

I. The Trial Court was correct in ruling that the presumptive discipline was a suspension because it was not established that there was an intentional misappropriation of client funds. The OPC failed to prove the requisite intent to establish intentional misappropriation of client funds.

II. Regardless whether the presumptive discipline is disbarment or a suspension, the arachnoid brain cyst from which Mr. Corey likely had been suffering since birth, and which

impaired Mr. Corey's judgment, and the misdiagnosis of this organic brain disease, and resulting iatrogenic over-prescription of medication, which masked the symptoms of the cyst, which impaired Mr. Corey's judgment, are significant and truly compelling mitigating circumstances, which justify the Court's assessment of a three (3) year suspension, which was stayed and probated, pending extensive conditions placed on Mr. Corey by the Court, including monthly restitution payments.

III. It was within the Trial Court's discretion, pursuant to the Supreme Court's ruling in In re Discipline of Crawley, 2007 UT 44, 164 P.3d 1232, to order that probation was appropriate for Mr. Corey given the facts presented at trial and the mitigating circumstances.

IV. Since the OPC failed to object in any way, whether by motion in limine, Daubert type motion, or objection at trial to the testimony of the expert opinions offered by Mr. Corey's treating psychiatrist, the OPC has waived any objection to Mr. Corey offering the expert testimony of his treating psychiatrist. Further, Mr. Corey and his treating psychiatrist, Dr. Andersen, have met all requirements of Drew v. Lee, 2011 UT 15 (March 15, 2011), in that Dr. Andersen has been, and is Mr. Corey's on going treating doctor, and Mr. Corey disclosed Dr. Andersen to the OPC as a treating doctor, who would provide opinion testimony.

STANDARD OF APPELLATE REVIEW

Pursuant to the Rules of Lawyer Discipline and Disability, the standard of review for sanctions imposed for professional misconduct in attorney discipline actions before the state

district courts is a correctness standard and the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. *See In re Babilis*, 951 P.2d 207 (Utah 1997).

DETERMINATIVE LAW

Rule 14-603 of Article 6. Standards for Imposing Lawyer Sanctions.

Rule 14-604 of Article 6. Standards for Imposing Lawyer Sanctions.

Rule 14-605 of Article 6. Standards for Imposing Lawyer Sanctions.

Rule 14-607 of Article 6. Standards for Imposing Lawyer Sanctions.

Rule 14-517(a) of Article 5. Rules of Lawyer Discipline and Disability.

Rule 1.15 of Rules of Professional Conduct.

Rule 1.16 of Rules of Professional Conduct.

Rule 8.4 of Rules of Professional Conduct.

Rules 702, 703, or 705 of the Utah Rules of Evidence.

STATEMENT OF RELEVANT FACTS

1. In June 1999, Maxine Stager signed a fee agreement with Corey & Lund. (R.246)
2. On February 18, 2000, Ms. Stager accepted a settlement offer of \$122,500. (R.246)
3. Mr. Corey failed to deposit Ms. Stager's settlement funds into a trust account.
(R.246)
4. Sometime in February, 2000, Mr. Corey became aware of felony criminal charges being filed against his partner, Randy Lund. (R.246)

5. Ms. Stager agreed to receive \$500 payments each month for a period of time. Ms. Stager received 21 payments of \$500. (R.248)

6. Mr. Corey failed to return unearned excess funds to Ms. Stager. (R.248)

7. Mr. Corey failed to properly account for the settlement funds. (R.248)

8. Mr. Corey failed to protect funds belonging to Ms. Stager. (R.248)

9. Mr. Lund and Mr. Corey advised Ms. Stager on how to protect her personal injury settlement, so it would not adversely impact her government SSI benefits. (R.249)

10. In the summer of 2000, Ms. Stager, her sister Heidi, Mr. Lund and Mr. Corey held a meeting to discuss finalizing the trust to protect Ms. Stager's benefits. At the time of the meeting, Ms. Stager had been receiving \$500 a month payments from the law firm of Corey & Lund as part of a qualified plan which Mr. Corey and Mr. Lund contended would protect Ms. Stager's SSI supplemental government benefits, and which Mr. Corey and Mr. Lund advised might prevent anyone from asserting that Ms. Stager had taken title to the settlement funds which would disqualify her from receiving her SSI supplemental government benefits. (R.249)

11. Ms. Stager consented to the placement of the settlement funds into a trust which Mr. Corey and Mr. Lund advised would preserve Ms. Stager's settlement funds. (R.249)

12. A meeting was held in August, 2000 and was taped by Mr. Corey because Mr. Corey was concerned that Mr. Lund was not following through on the creation of the trust into which Ms. Stager's settlement funds were to be placed. (R.250)

13. Prior to the meeting late summer, 2000, Ms. Stager had met with Mr. Lund on two or three occasions to discuss setting up a trust, and putting her share of the settlement funds into the trust as part of Mr. Corey and Mr. Lund's plan to protect her SSI supplemental disability benefits. (R.250)

14. Five hundred dollars was an amount which Ms. Stager needed for her monthly expenses. (R.250)

15. The payments to Ms. Stager began in June, 2000. (R.251)

16. Prior to retaining Ms. Arnovick, when Ms. Stager needed money she would request \$500 a month payments from her settlement. (R.250)

17. Whenever Ms. Stager requested payments of \$500, she received a payment of \$500 a month from her settlement. (R.250)

18. Ms. Stager's sister Heidi Pierson worked for Corey & Lund, and she handled some of the financial matters for Corey & Lund, in so doing handled the preparation of some of the checks. (R.250)

19. Some of the \$500 checks were taken by Ms. Pierson to Ms. Stager. (R.250)

20. Ms. Stager retained a lawyer who demanded that the entire amount be paid. Ms. Stager's new attorney sued Mr. Corey for malpractice and filed a bar complaint against Mr. Corey. (R.251)

21. The amount of the contingency fee to which Corey & Lund were entitled from Ms. Stager's settlement is \$40,995.90. (R.251)

22. The total amount paid to Ms. Stager's medical providers by Mr. Corey is \$20,368.44. (R.251)

23. All medical liens in Ms. Stager's settlement were paid in full. (R.251)

24. The total amount paid to Ms. Stager was 21 payments of \$500 which equals \$10,500. (R.251)

25. The amount to which Ms. Stager was entitled from her settlement funds, but which she did not receive and is still owing to her is \$50,271.21, before interest is calculated. (R.251)

26. In 2000, Randall Lund was indicted and was investigated by the OPC. In October, 2000, Corey & Lund was dissolved and Randall Lund was removed from the law firm because of his criminal indictment and his criminal activity. (R.251)

27. Ms. Stager continues to receive her social security benefits and has not lost her benefits. (R.251).

28. Mr. Corey did not receive or charge an excessive fee. (R.254)

29. Mr. Corey violated Rule 1.15(a) by failing to place Ms. Stager's settlement funds in trust separate from his own funds, and by failing to completely and accurately account for Ms. Stager's settlement funds. (R.252)

30. Mr. Corey violated 1.15(b) by failing to take timely action to protect the funds of his client and third parties, and by failing to promptly deliver the funds to his client and third parties. (R.253)

31. Mr. Corey violated Rule 8.4(a) by violating the above Rules of Professional Conduct. (R.254)

32. Mr. Corey violated Rule 1.15(c) by failing to keep client and third party funds separate and safe until an accounting was made, or until the dispute was resolved. (R.253)

33. Mr. Corey violated Rule 1.16(d) by failing to protect his client's interests, by failing to return Ms. Stager's file, and by failing to return Ms. Stager's money to her. (R.253)

34. On February 8, 1993, Mr. Corey was hospitalized under the care of Dr. Joe C. Culbertson, M.D. psychiatrist. He was admitted for diagnostic evaluation because of a pattern of chaotic behavior that had led to a bankruptcy and multiple complaints about his law practice. His behavior had been erratic, and it was suspected that this might be the result of polysubstance abuse or possibly a major psychiatric disorder of Bipolar Mood Disorder (Manic Depressive Illness.) A drug urine screen at time of admission was negative. Dr. Culbertson opined that the erratic behavior and errors in judgment were related to his use of prescription medication which had been prescribed for him for treatment of depression or perhaps a manic episode of Bipolar Mood Disorder. (Corey Mitigation Trial Exhibits: Exhibit 13. Letter from Dr. Joe C. Culbertson to [sic] Dennis Haslam, attorney at law.)

35. On May 7, 2004, Dr. Mark Rada prepared a letter, as Mr. Corey's primary care physician, stating that he had been treating Mr. Corey for about five years, for among other things, headaches, anxiety and insomnia. He related that Mr. Corey's problems started at the time he went through a very difficult partnership dissolution. He listed Lexapro, Xanax,

Seroquel, and Fioricet as some of the medication which Mr. Corey was taking and which could cause dizziness, slurred speech, and confusion. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001704. Letter from Dr. Mark Rada dated May 7, 2004.)

36. On April 8, 2008, Mr. Corey attempted suicide, and his admitting and discharge diagnosis included severe anxiety disorder, depression and bipolar. The history and physical from his former treating doctor indicated a history of bipolar disorder, severe anxiety disorder, chronic daily headache, occipital neuralgia, and migraine. Dr. Rada stated that Mr. Corey “was in desperate need of psychiatric care and would require in patient care as he was clearly a harm to himself and others.” (Corey Mitigation Trial Exhibits: Exhibit 10 at 001672-73 Alta View Medical Center Discharge Summary and History and Physical by Dr. Mark Rada.)

37. On April 11, 2008, Mr. Corey was admitted to Utah Valley Regional Medical Center psychiatric service after his hospitalization at Alta View following his suicide attempt. The initial evaluation listed a past psychiatric history of being hospitalized in 1993 for a three day evaluation with a problem with Xanax. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001717, 1720 Utah Valley Regional Medical Center records.)

38. Mr. Corey came under the care of Dr. Jason L. Andersen, D.O., a psychiatrist, in April 2008. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001599 “Outpatient Psychiatric Progress Note” by Dr. Jason Andersen, Mr Corey’s treating psychiatrist.)

39. Mr. Corey initially presented to Dr. Andersen complaining of mood swings

suggestive of Bipolar Disorder and benzodiazepine dependence. Other symptoms included frequent and worsening headaches, memory problems and difficulty with visual acuity. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001599 “Outpatient Psychiatric Progress Note” by Dr. Jason Andersen, Mr. Corey’s treating psychiatrist.)

40. Between the stressors of his job, his family responsibilities and his seemingly refractory cognitive and emotional symptoms, Mr. Corey had developed a significant dependence on benzodiazepine. His benzodiazepine dependence proved to be iatrogenic—caused by his previous doctor who had been increasing Mr. Corey’s alprazolam (Xanax) doses in response to the global worsening of his symptoms. This further impaired his memory and cognitive functioning and exacerbated his mood swings. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001599 “Outpatient Psychiatric Progress Note” by Dr. Jason Andersen, Mr. Corey’s treating psychiatrist.)

41. In 2009, Mr. Corey was diagnosed as having a cyst in the occipital lobe of his brain. This cyst had likely been present most, if not all of his life. Although benign, its steady growth, especially over that last ten years resulted in increasing pressure on, and displacement of, surrounding tissues, and likely was responsible for much of his headaches, visual impairment, and memory and mood problems. This would explain the lack of response to certain psychiatric medications, and the need for increasing doses of alprazolam. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001599 “Outpatient Psychiatric Progress Note” by Dr. Jason Andersen, Mr. Corey’s treating psychiatrist.)

42. Mr. Corey was seen by Dr. Mark Reichman on June 3, 2009 for treatment of and removal of an intraventricular tumor. Dr. Reichman noted that Mr. Corey started having headaches in 1999. An MRI scan revealed what Dr. Reichman considered to be a intraventricular tumor within the occipital horn of the left lateral ventricle. Dr. Reichman stated that the mass needed to be resected surgically. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001793-94 Consultation Note, Dr. Reichman. Dr. Reichman letter to Dr. Butrum at 001795. See also Exhibit 14, MRI series, actual film.)

43. On June 30, 2009, Dr. Reichman removed a left lateral intraventricular mass lesion, which included an occipital craniotomy to open the dura. The cyst was carefully dissected and removed. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001796-97 Operative Report, Dr. Reichman.)

44. Mr. Corey's diagnostic impression from Dr. Jason Andersen, his treating psychiatrist, is cognitive disorder secondary to brain injury (cyst and subsequent surgery) and Benzodiazepine Dependence, iatrogenic. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001600 Outpatient Psychiatric Progress Note.)

45. Mr. Corey had a non-cancerous arachnoid cyst in the occipital lobe of his brain. The seeds of the cyst had been present since before birth, but it is not known in this case how long the cyst had been developing. By 2009, the cyst was approximately one inch in circumference. (R.258-259)

46. The cyst was not discovered until April 2009, when Mr. Corey's treating

psychiatric physician, Dr. Jason Lee Andersen, ordered an MRI because of Mr. Corey's lack of progress. Dr. Andersen is the department chair of psychiatry at Utah Valley Regional Medical Center where he maintains a clinical practice and has worked since 2006. Dr. Andersen has treated Mr. Corey since 2008, following Mr. Corey's Xanax overdose. (R.259)

47. Following the discovery of the arachnoid cyst, Mr. Corey underwent surgery to remove the cyst in June 2009. The surgery was successful, and Mr. Corey has made a full recovery with respect to his mental capacity. (R.259)

48. While the cyst was benign in the sense that it was not cancerous, it did affect Mr. Corey in a number of ways, such as contributing to headaches, stress, causing stress, and contributing to poor judgment, mood swings, impulsive behavior, memory problems, etc. These effects were influenced by the size of the cyst and by what it was displacing in the brain. Additionally, the cyst likely contributed to the prescription of additional medication. (R.259)

49. As early as 1993, physicians suspected that Mr. Corey suffered from bi-polar disorder. However, the symptoms of bi-polar disorder exhibited by Mr. Corey were likely caused by the cyst, which at least contributed to, if not caused, Mr. Corey to experience mood swings and feelings of anxiety and frustration. (R.259)

50. Mr. Corey's prior physicians had prescribed a number of medications to mistakenly treat his bi-polar symptoms and headaches. Around early 2000, when trouble began with Mr. Corey's partner, Mr. Lund, and around the time of the misconduct in this

case, Mr. Corey was prescribed and began taking Xanax and other medications. These medications can slow down executive function and negatively impact memory. (R.260)

51. Mr. Corey overdosed on Xanax in April 2008. Mr. Corey's use and abuse of prescription medications were the result of treatment-induced dependency, as Mr. Corey's prior physicians sought to treat Mr. Corey's symptoms without knowledge of, and without addressing the underlying problem, the cyst. Since at least 1993, physicians had increased the strength and dosage of Mr. Corey's medications gradually as the medications failed to effectively treat Mr. Corey's symptoms. (R.260)

52. In the opinion of Dr. Andersen, the combination of treatment-induced dependency on medication like Xanax, and the cyst, contributed to Mr. Corey's behavior and deviation from the standard of care expected by an attorney with respect to Ms. Stager's case and others that occurred around the same time. (R.260)

53. The Trial Court found Dr. Andersen's testimony to be very credible and noted further that the testimony was uncontradicted. (R.260)

54. Mr. Corey did not transfer Ms. Stager's settlement funds into a trust account because he believed that Mr. Lund had created a special needs trust and taken care of the funds. (R.261)

55. Mr. Corey met his future law partner, Randall Lund, in law school, where they became friends and study partners. They lost contact for several years after law school, but were reacquainted in 1994. At that time, Mr. Corey was under discipline from the Utah State

Bar in the form of suspension. However, Mr. Lund became Mr. Corey's supervising attorney and mentor, and the suspension was lifted. (R.260-261)

56. Mr. Corey and Mr. Lund began a law practice together in 1999, when they formed Corey and Lund. Mr. Corey handled primarily criminal matters, while Mr. Lund handled primarily civil matters. As part of their practice, they took Maxine Stager's personal injury case, which was settled in February 2000. (R.261)

57. Mr. Corey began to notice problems and erratic behavior with Mr. Lund in January 2000. However, Mr. Corey had no reason to distrust Mr. Lund at that time, and only learned about Mr. Lund's criminal behavior later that year, in April 2000. (R.261)

58. Mr. Corey never attempted to get any money back from Mr. Lund, who has ongoing criminal cases and remains a fugitive with outstanding warrants now and at the time of the hearings at the trial level in this case. (R.262)

59. Mr. Corey's cyst, and the medications prescribed to treat the headaches and other symptoms caused by the cyst, causally contributed to Mr. Corey's behavior that resulted in the rule violations in this case pursuant to Rule 14-607(b)(9). (R.269)

60. A mental impairment, including substance abuse, may be considered a mitigating circumstance where the attorney is affected by a mental disability or substance abuse, where the mental disability or substance abuse causally contributed to the misconduct, where the attorney's recovery from the mental disability or substance abuse is demonstrated by a meaningful and sustained period of successful rehabilitation, and where the recovery has

arrested the misconduct and the recurrence of the misconduct is unlikely. RLDD Rule 14-607(b)(9). (R.269-270)

61. The effects of the cyst and medication, including headaches, mood swings, poor judgment, etc., constitute a mental impairment that had a significant effect on Mr. Corey. Moreover, pursuant to Dr. Andersen's testimony, Mr. Corey's use of Xanax and other medications, which had been prescribed to Mr. Corey to treat his symptoms since 1993, resulted in treatment-induced medication dependence, as the physicians at that time did not know about the cyst, and as a result were not addressing the underlying problem. (R.270)

62. Pursuant to the expert opinion of Dr. Andersen, which the Trial Court found credible, and which was unrebutted, the combination of the cyst and the medication causally contributed to Mr. Corey's misconduct. (R.270)

63. Since the surgery to remove the cyst in 2009, Dr. Andersen has observed a very good recovery by Mr. Corey, including a return to full mental capacity. (R.270)

64. Dr. Andersen has worked with Mr. Corey to taper his medications, and Dr. Andersen observed that Mr. Corey would be fine long-term at his current medication level. (R.270)

65. Mr. Corey's recovery since removal of the cyst over the past year and a half has been demonstrated by meaningful and sustained period of successful rehabilitation. (R.270)

66. Based on evidence from Dr. Andersen and Mr. Corey, the cyst and the taper in medication has arrested Mr. Corey's misconduct and that recurrence is unlikely. (R.270-271)

67. The arachnoid cyst and medication are significant mitigating factors in Mr. Corey's misconduct. (R.271)

68. Mr. Corey's continuing practice of law does not pose a substantial threat of irreparable harm to the public given his recovery. (R.270-271)

69. Because the effects of the cyst and medication have affected Mr. Corey since at least 1993, the mitigating effect of Mr. Corey's mental disability largely negates any aggravation caused by his prior disciplinary record. (R.271)

70. There is an absence of dishonest or selfish motive in this case, which is also a mitigating circumstance. (R.271)

71. Mr. Corey has also expressed at least some remorse and desire and obligation to make restitution to Ms. Stager. (R.271)

72. The duties violated by Mr. Corey are among the most important of all duties, the safekeeping of client property. This is a very serious violation as it strikes at the very foundation of the trust and honesty that are indispensable to the functioning of the attorney client relationship and indeed to the functioning of the legal profession itself. (R.271)

73. Mr. Corey's mental state is not as culpable as in cases of intentional misappropriation. (R.271)

74. Mr. Corey certainly knew or should have known that Ms. Stager's settlement funds were not placed in the trust account for safe keeping, but were placed in the operating account. He also should have known that funds were flowing out of the operating account,

and he should have been more watchful over all his accounts when suspicion arose regarding Mr. Lund. He also should have followed up with Mr. Lund to verify whether a separate trust was established for Ms. Stager, rather than assume that the matter had been resolved. Mr. Corey's behavior in this regard was very negligent. (R.272). The Trial Court imposed a three year suspension from the practice of law; however, the Court stayed the imposition of the suspension based on certain conditions. (R.273)

75. The Trial Court imposed a probationary period of length to be determined. The probationary period will last as long as it takes for Mr. Corey to complete payment for restitution to Ms. Stager. Mr. Corey may continue to practice law during the probationary period, so long as he remains current to making restitution to Ms. Stager, and in compliance with the Court's conditions. If Mr. Corey fails to remain current in restitution, or fails to comply with other conditions, the OPC may move to terminate the probation and impose the suspension up to a full three-year period. (R.273)

76. The Trial Court ordered Mr. Corey to pay restitution to Ms. Stager in the amount of \$50,371.21, plus interest. (R.273)

77. Mr. Corey shall continue treatment with Dr. Andersen for the foreseeable future as recommended by Dr. Andersen, with confidential progress reports being submitted at least quarterly to the OPC. Mr. Corey is to comply with all treatment recommendations made by Dr. Andersen. (R.274)

SUMMARY OF THE ARGUMENT

The State Trial Court was correct in ruling that the presumptive discipline was a suspension because it was not established that there was an intentional misappropriation of client funds.

Regardless whether or not the presumptive discipline is disbarment or a suspension, the arachnoid brain cyst from which Mr. Corey likely had been suffering since birth and which impaired Mr. Corey's judgment, and the misdiagnosis of this organic brain disease, and resulting over-prescribing of medication which impaired Mr. Corey's judgment, are significant and compelling mitigating circumstances.

It was within the Trial Court's discretion, pursuant to the Supreme Court's ruling in In re Discipline of Crawley, 2007 UT 44, 164 P.3d 1232, to rule that probation was appropriate for Mr. Corey given the facts presented at trial and the mitigating circumstances.

Since the OPC failed to object in any way to the opinion testimony offered by Mr. Corey's treating psychiatrist, the OPC has waived any objection to that testimony and has failed to preserve any such objection. The OPC further has failed to disclose to the Court that it they, in fact, had notice that Dr. Andersen would testify as to his care of Mr. Corey, and that he would offer opinion testimony.

ARGUMENT

I.

The Presumptive Discipline is a Suspension Because It Was Not Established That There Was an Intentional Misappropriation

The Trial Court's order of a three year stayed suspension is correct, and the Trial Court's order should be affirmed, first, because it was not proved that Mr. Corey intentionally misappropriated funds. While Mr. Corey clearly was negligent in the management of his law firm, and in the management of his bank accounts, there was not sufficient evidence to support the OPC's contention that he intentionally misappropriated client funds. The Trial Court repeatedly stated that it was not proved that Mr. Corey intentionally misappropriated funds. Mr. Corey does not dispute that the plan to protect Ms. Stager's government benefits by placing the settlement funds into an operating account and not the trust account before transferring them into a special needs type trust, while well intentioned, was ill advised and negligently mishandled. Mr. Corey did not transfer Ms. Stager's settlement funds into a trust account because he believed that Mr. Lund had created a special needs trust and taken care of the funds.(R.261) Mr. Corey was wrong, and he should have been more diligent to insure that his partner was in fact creating the trust and funding the trust appropriately. As the OPC has described in detail in its appellant opening brief, Mr. Corey's partner Mr. Lund was indicted on several felony counts.¹

There are two reasons that Mr. Corey did not have the requisite intent for intentional misappropriation. First, the Court found, after hearing hours of testimony from Mr. Corey and others, that Mr. Corey did not have the intent to misappropriate Ms. Stager's funds.

¹ For the many criminal acts committed by Mr. Lund, for some reason the OPC never pursued Mr. Lund regarding Ms. Stager's funds. At the time of the sanctions hearing, Mr. Lund remained a fugitive with an outstanding criminal felony warrant.

Unlike Mr. Johnson, Mr. Babablis and Mr. Ince, Mr. Corey did not set about intentionally stealing his client funds for his own personal use.² As the Trial Court found: (1) Mr. Corey certainly knew or should have known that Ms. Stager's settlement funds were not placed in the trust account for safe keeping, but were placed in the operating account; (2) He also should have known that funds were flowing out of the operating account, and he should have been more watchful over all his accounts when suspicion arose regarding Mr. Lund; and (3) He also should have followed up with Mr. Lund to verify whether a separate trust was established for Ms. Stager, rather than assume that the matter had been resolved. Mr. Corey's behavior in this regard was negligent. (R.272). He is culpable for his negligent acts, but he did not intentionally set about stealing Ms. Stager's funds for his own use. There is no proof in the record that he received any of Ms. Stager's funds for his own personal use.

Secondly, Mr. Corey had an organic brain disease. As early as 1993, physicians suspected that Mr. Corey suffered from bi-polar disorder. However, the symptoms of bi-polar disorder exhibited by Mr. Corey were likely caused by the cyst, which at least contributed to, if not caused, Mr. Corey to experience mood swings and feelings of anxiety and frustration. (R.259). In 2009, Mr. Corey was diagnosed as having the cyst in the occipital lobe of his brain. This cyst had likely been present most, if not all of his life. Although benign, its steady growth, especially over that last ten years resulted in increasing pressure on, and

² As the Supreme Court observed in In re Babilis: "In short, the record is replete with examples of deceit, dishonestly, and misrepresentation, all motivated by Babilis' desire to enrich himself." *supra* at 31.

displacement of, surrounding tissues, and likely was responsible for much of his headaches, visual impairment, memory and mood problems. This would explain the lack of response to certain psychiatric medications, and the need for increasing doses of alprazolam. (Corey Mitigation Trial Exhibits: Exhibit 10 at 001599 “Outpatient Psychiatric Progress Note” by Dr. Jason Andersen, Mr. Corey’s treating psychiatrist.) The reason that the cyst is such a compelling and significant mitigating circumstance is that the effects of the organic brain disease, over which Mr. Corey had no control, casually contributed to his poor judgment and inability to appropriately manage his law firm and bank accounts. The ability to comprehend, and to intentionally and knowingly commit an act is essential to proving that the lawyer “intended” to misappropriate a client’s funds. While the cyst was benign in the sense that it was not cancerous, it did affect Mr. Corey in a number of ways, such as contributing to headaches, stress, causing stress, and contributing to poor judgment, mood swings, impulsive behavior, memory problems, etc. Additionally, the cyst likely contributed to the prescription of additional medication. (R.259) All of these factors are evidence that even if Mr. Corey had intended to misappropriate Ms. Stager’s funds (which he did not), he likely did not have the mental acuity necessary to form the elements of an intentional act. It is more likely that the cyst and the medication clouded his judgment, such that he did not appropriately act to contain the risk in his law firm regarding Ms. Stager’s settlement funds, and the presence of Mr. Lund.

The Trial Court ruled that the presumptive sanction for intentional misappropriation

of client funds was disbarment; however, the Court did not find that Mr. Corey intentionally misappropriated client funds. Mr. Corey does not dispute that the presumptive discipline for the intentional misappropriation of client funds is disbarment. Mr. Corey does not dispute that this is the holding of the Babilis, Ince, or Ennenga cases. Mr. Corey's case can be distinguished from these four intentional misappropriation cases in two ways. First, in each of the intentional misappropriation cases, it was proved that the attorney intentionally stole funds from his client or law firm. It was not disputed that the attorney had stolen funds for his own personal use. Each attorney knew he was stealing money and had a specific need for the money he stole. Second, there is not even the remotest similarity between the organic brain disease and misdiagnosis and over medication from which Mr. Corey suffered, and the feeble mitigation circumstances offered of personal emotional problems by the disbarred attorneys in the intentional misappropriation cases.

Rule 14-605. Imposition of sanctions of the *Standards for Imposing Lawyer Sanctions* addresses when disbarment is the presumptive sanction. It states in relevant part:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

(a) Disbarment. Disbarment is generally appropriate when a lawyer:
(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct **with the intent to benefit the lawyer or another or to deceive the court, and** causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; ...(Emphasis added.)

The critical element in (a)(1) is the requirement that the attorney knowingly engage

“with the intent to benefit the lawyer or another or to deceive the court”. The Trial Court found that Mr. Corey had knowledge of the situation, that is, the money was in a precarious place and he did not protect it, but the Trial Court specifically found that he did not have the “intent regarding the result”, in other words, Mr. Corey did not knowingly violate the Rules “with the intent to benefit the lawyer or another”. Since this critical element is missing, then there was not the requisite intent needed to establish a presumptive discipline of disbarment.

Neither (a)(2) nor (a)(3) of Rule 14-605 apply to Mr. Corey. They are as follows:

(a)(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

All of the actions described in (a)(2) and (a)(3) are intentional conduct. First there was no allegation and no finding by the Trial Court that Mr. Corey engaged in serious criminal conduct. But if there had been, the necessary element of that conduct is an “intentional” act. (a)(3) addressed other forms of “intentional misconduct”. The Court did not find that Mr. Corey engaged in any such intentional conduct, because there was no proof that Mr. Corey engaged in any such intentional conduct.

Rule 14-605(b) addresses when suspension is the presumptive sanction. It states in relevant part:

Absent aggravating or mitigating circumstances, upon application of the factors set

out in Rule 14-604, the following sanctions are generally appropriate...

(b) Suspension. Suspension is generally appropriate when a lawyer:

(b)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding;...

While Mr. Corey argued that his conduct was purely negligence, the Trial Court disagreed with Mr. Corey's argument that his conduct was purely negligent and ruled that Mr. Corey's case was a "case of mixed knowledge and negligence". (R.265) The Court found that Mr. Corey knew that (1) "Ms. Stager's settlement funds had been deposited into his firm's operating account" over which he had control; (2) Mr. Corey knew that checks were being written against the funds and (3) "Mr. Corey knew or should have known that Ms. Stager's funds were not being kept safe in the operating account, especially when he had reason to suspect wrongdoing by his partner, Mr. Lund." (R.265-266.) The Trial Court correctly concluded that while there may be a "knowledge of the situation" the "lack of intent regarding the result" warrants a suspension as opposed to disbarment. This is the critical point in the Trial Court's analysis. The Trial Court did not rule that Mr. Corey either knowingly misappropriated Ms. Stager's funds but ruled that he knew or should have known of the dangerous situation in which he had placed Ms. Stager's funds, especially in light of his growing knowledge of Mr. Lund's criminal activity. There was insufficient evidence at the trial to prove that Mr. Corey intentionally misappropriated those funds.

In Mr. Corey's case, the Trial Court correctly ruled that Mr. Corey's conduct was not intentional. In each of the cases of Babilis, Ince, or Ennenga, the OPC proved at trial that

each of those lawyers: (1) had intentionally misappropriated money and proved; and (2) the money had been used for the personal benefit of the lawyer. The OPC proved that these lawyers intentionally took money for their own personal use, and the OPC was able to trace those funds. The OPC did not prove those elements in Mr. Corey's case, because Mr. Corey did not intentionally misappropriate Ms. Stager funds for his own benefit. The Trial Court in Mr. Corey's case specifically found that "this case is not a case a [sic] of intentional misappropriations like Babilis, Johnson, or Ennenga." (R.266.) The Trial Court further ruled:

In those cases, there was clear evidence that the attorneys intended to take their clients' funds for their own benefit. Here there is no evidence regarding the fate of Ms. Stager's settlement funds. There is also no evidence that Mr. Corey intended to personally benefit or did personally benefit from the settlement funds. (R.267)

The Trial Court's analysis does not in any way undermine the rulings in Babilis, Ince, or Ennenga. It correctly applied the law in those cases because it did not find the necessary element of intentional conduct used for the benefit of Mr. Corey, which meant that the presumptive discipline should be suspension.

II.

There Are Compelling and Significant Mitigating Circumstances

Whether this Court concludes that the presumptive discipline for Mr. Corey is disbarment or suspension, there are truly compelling and significant mitigating circumstances which establish that the Trial Court's order of a three year stayed suspension is correct. The Trial Court's order should be affirmed because there are significant and compelling mitigating circumstances which warrant the Trial Court's order of a stayed three year

suspension. The arachnoid brain cyst from which Mr. Corey likely had been suffering since birth and which impaired Mr. Corey's judgment, and the misdiagnosis of this organic brain disease and resulting over-prescribing of medication which impaired Mr. Corey's judgment are significant and compelling mitigating circumstances, justifying the Trial Court's assessment of a three (3) year suspension, which was stayed and probated pending extensive conditions placed on Mr. Corey by the Trial Court.

The Supreme Court has repeatedly stated that the presumptive discipline for the intentional misappropriation of client funds is disbarment unless there are compelling and mitigating circumstances. While the Supreme Court has not yet found a case in which there are compelling and significant mitigating circumstances, the fact that the Supreme Court repeatedly has qualified its statement that disbarment is presumed, unless there are compelling and significant mitigating circumstances indicates that the Supreme Court believes that there does exist the possibility that there can be compelling and significant mitigating circumstances. Mr. Corey respectfully suggests to the Supreme Court that there is no case in Utah, and likely from any State, which presents such truly compelling and mitigating circumstances as an organic brain disease in the form of an arachnoid brain cyst and years of misdiagnosis of that disease along with over medication which impaired his judgment.

This is not a case like In re Ince, 957 P.2d 1233, where an attorney having financial problems and who wanted to buy his wife her dream house in Park City to make things better

in their life committed fraud, forged instruments and consciously stole money from his law firm to help finance the dream home. That attorney claimed personal and emotional problems along with other mitigating factors justified him warranted a reduction from disbarment. The Supreme Court disagreed. *Id.* at 1239.

This is not a case where an attorney steals his clients' money and claims a mitigating circumstance of "personal and emotional problems" relating from his inability to meet his regular financial obligations claiming that the pressure to be able to meet one's financial obligation mitigates stealing client funds. Personal finances cannot mitigate the offense of misappropriation. In re Ennenga, 2001 UT 111 at ¶14, 37 P.3d 1150.

This is not a case such as In re Babilis, 951 P.2d 207 (Utah 1997), where the Trial Court specifically found that the attorney took money from an estate trust account, intentionally failed to account for assets of the estate, and intentionally over-billed the Kerns for costs and expenses, and that he did all this with the intent to benefit himself, or to deceive the court. *Id.* at 30. Mr. Babilis then claimed "personal and emotional" problems from which he was suffering.

Mr. Corey's case is where an attorney has an undiagnosed organic brain disease in the form of a growing arachnoid cyst, which, while not malignant, is growing and displacing brain tissue. He is over medicated by doctors who have failed to diagnose his organic brain disease. Mr. Corey offered, and it was accepted without objection into the record, an MRI with contrast which documented the presence of the arachnoid cyst. Mr. Corey offered, and

it was accepted without objection into the record, the medical records of Dr. Mark Reichman, the neurosurgeon, which documented the Craniotomy which involved taking off a part of Mr. Corey's skull to remove the cyst in 2009. Mr. Corey offered, and it was accepted without objection into the record, the medical opinion testimony, and medical records of his treating psychiatrist, Dr. Andersen, who was the first to realize that Mr. Corey's long term erratic behavior and ultimate suicide attempt were likely caused by some organic brain disease process, as well a prolonged misdiagnosis, and over medication.

If this Court affirms the Trial Court's order, then the Supreme Court will set the bar extremely high for what is a compelling and significant mitigating circumstance. Mr. Corey asks that the Supreme Court affirm the Trial Court's ruling that the organic brain disease of the arachnoid cyst and years of over medication and misdiagnosis constitute compelling and significant mitigating circumstances, setting the standard distinctly in Utah.

In final arguments at that sanctions hearing, the OPC argued that the Colorado case of State of Colorado v. Lujan, 890 P.2d 109, represented an example of a compelling and mitigating circumstance. The facts of that case are remarkably similar to Mr. Corey's case. Mr. Corey agrees with the OPC that this case is pertinent and is helpful in understanding what is a truly compelling and significant mitigating circumstance.

In the Lujan case, a lawyer traveled to Egypt to meet her husband and was involved in a traffic accident and suffered a closed head injury. She later witnessed another traffic accident and recalled that she had been sexually assaulted when lying on the side of the road

after the accident in Egypt. Thereafter, the attorney began abusing her law firm credit card and was discharged from her firm after fraudulently billing clients. She used the money to buy clothes. Psychological evaluation concluded that the lawyer was suffering from major depression and from an obsessive compulsive disorder. The lawyer was suspended for one year, because the Court found various mitigating factors, namely the lawyer's mental disability, her timely and good faith effort to make restitution, and the full and free disclosure of information.³ The pertinent facts of the Colorado attorney's mitigating arguments included that she suffered a closed head injury, and required surgery to repair the brain damage inflicted by the accident. *Id.* at 110. The actual misappropriation of law firm and client funds that ensued by the Colorado lawyer are reminiscent of the facts of In re Ince, *supra* at 110-111. The Colorado attorney was seen by a psychologist, but as part of her disability proceedings she was required to be evaluated by another and new psychologist, who then correctly diagnosed the attorney, and concluded that the Colorado attorney was suffering from major depression and from an obsessive compulsive disorder. She was referred to a psychiatrist who prescribed appropriate medication to which the attorney immediately responded. *Id.* at 112.

The Colorado Supreme Court heard exceptions from disciplinary counsel who argued that a three year and not a one year suspension was appropriate. The Colorado Supreme

³At the sanctions hearing, the OPC thought that this case was an alcoholism case and argued that the alcoholism of the Colorado lawyer mitigated her intentional acts of theft.

Court, in reviewing the American Bar Associations' Standards for Imposing Lawyer Sanctions, observed that based on the Standards and on Colorado case law that disbarment is essentially automatic when a lawyer converts funds and there are no significant factors in mitigation. The Colorado Supreme Court quoted from the Standards the phrase "a lawyer engages in...intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that serious reflects on the lawyer's fitness to practice". *Id.* at 113.

The disciplinary board of review in the Colorado case had concluded that based on the expert evidence presented by the lawyer's own treating psychiatrist, and from the Court appointed psychologist, that "it was clear that the respondent's mental disability was a mitigating factor under standard 9.32(I)." *Id.* at 112. The disciplinary board also thought it significant that the type of disorder that the respondent suffers from "is a lifetime affliction of biological origin which cannot be controlled without medication." The disciplinary board further noted that the misconduct was arrested once the respondent's disorder was properly diagnosed and treated with the correct medication. *Id.* at 112. The Colorado Supreme Court accepted for the most part the disciplinary board's recommendation and suspended the lawyer for one year. While there were several mitigating factors considered, the focus of the Supreme Court's review was the issue of the lifetime affliction of biological origin which could not be controlled without medication.

The facts of the Lujan case are very similar to Mr. Corey's matter. The un rebutted medical testimony at the sanctions hearing was regarding the cyst, and the misdiagnosis of

the cyst, and the subsequent over medication, likely the consequences of which began at least by 1993. The un rebutted medical testimony by Dr. Andersen was that once the cyst and the misdiagnosis was discovered, and appropriate surgery was performed, and the appropriate dosage of medication achieved, Mr. Corey recovered from the organic brain disease, and from the over medication of the doctors who misdiagnosed the brain disease.

The OPC offered testimony of Mr. Corey's several prior disciplines. Mr. Corey does not dispute that evidence. However, it is now clear that Mr. Corey's erratic behavior was the cause of his first discipline in the early 1990s and likely most, if not all, of the other discipline. Because the growth of the cyst and medication have affected Mr. Corey since at least 1993, the mitigating effect of Mr. Corey's mental disability largely negates any aggravation caused by his prior disciplinary record. (R.271)

III.

It Was Within the Trial Court's Discretion to Order Probation

It was within the Trial Court's discretion, pursuant to the Supreme Court's ruling in In re Discipline of Crawley, 2007 UT 44, 164 P.3d 1232, to rule that probation was appropriate for Mr. Corey. In Crawley, the Supreme Court, addressed the issue as to whether or not the District Courts have discretion to order probation in discipline cases, if the District Court believes probation would be appropriate. The Supreme Court encouraged the District Courts to exercise this discretion. The OPC argues that probation is not appropriate in this matter. The OPC's arguments in this matter are similar to the arguments

which it advocated to the Supreme Court in Crawley, and which the Supreme Court rejected in Crawley. In Crawley, the OPC argued since there was a violation of Rule 8.4(c), and allegations of dishonesty, that probation was not appropriate for such a serious offence. *Id.* at ¶21. The Supreme Court disagreed and ruled that even with a violation of Rule 8.4(c) and allegations of dishonesty that the District Court could exercise its discretion and order probation in In re Discipline of Crawley. *Id.* at ¶22.

There was a finding of intentional dishonest conduct in In re Discipline of Crawley. There is no finding of intentional dishonest conduct in Mr. Corey's matter. In Crawley, the OPC argued that the weighing of the aggravating and mitigating circumstances in determining the sanction that should ultimately be imposed was producing "undesirable results with probation being inappropriately imposed as a final sanction". *Id.* at ¶21. In Crawley, the OPC further argued that probation should never be available in the case, when the duty violated, was the duty to deal honestly with clients, tribunals or third parties, and when the attorney's mental state in committing the misconduct was knowing or intentional. *Id.* at ¶21. The Supreme Court rejected these arguments by the OPC. The Supreme Court declined to accept the OPC's position on probation, and the Court observed as follows:

We are satisfied-indeed pleased-with the discretion currently being exercised by district courts in sanctioning attorneys for misconduct. It is a delicate and often difficult task to craft sanctions appropriate for individual attorneys, no two of which have engaged in the same misconduct under the same aggravating and mitigating circumstances. The standards "permit flexibility and creativity in assigning sanctions, and the district court have embraced this approach." *Id.* at ¶22.

The Supreme Court further noted as follows:

Our district court judges do a remarkable job of fulfilling a stated purpose of the standards-protecting the public and the administration of justice-while still providing the opportunity, when appropriate, for attorney rehabilitation. Were we to limit the circumstances under which probation is available we would very likely undermine the ability of the district courts to so effectively maintain this balance. In fact, we note that the imposition of probation with the right conditions may in some cases be more protective of the public than a period of suspension. Rather than simply punishing (suspending) an attorney for misconduct and then allowing the attorney to resume the practice of law, a district court that imposes probation and design attorney-specific terms provides an opportunity for the attorney to change his or her ways and, in so doing, protects the public from the attorney's future misconduct. Importantly, in this respect ours is a self-correcting system. Where probation does not adequately rehabilitate a lawyer, district courts will be wary of imposing similar probationary terms in similar situations in the future. Id. at ¶23.

Given the findings of the Trial Court and given the attorney specific terms of the probation and order, the Trial Court's order and its terms of the probation in Mr. Corey's case should be affirmed by the Supreme Court. The Trial Court appropriately followed the Supreme Court's guidelines in Crawley, and after meticulously reviewing the aggravating and mitigating factors, prepared its order, which included a three year probation with very strenuous requirements.

IV.

Dr. Andersen May Testify and Offer Expert Opinions as a Treating Doctor

A.

The OPC Did Not Preserve Their Objection to Dr. Andersen's Testimony

The OPC argues that the Trial Court erred when it incorrectly and "arbitrarily" applied the Utah Rules of Civil Procedure and Rules of Evidence with respect to the testimony of Dr.

Jason Andersen, D.O. The OPC further argues that Dr. Andersen was not qualified to testify as an “expert” and the Trial Court based incorrect findings on his testimony. The basis for Petitioner’s argument is failure to “disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.” The OPC further states that Mr. Corey failed to make this disclosure. These objections were not raised to the Trial Court for the Trial Court to rule on these issues, so the OPC has failed to preserve this issue on appeal.

Generally, a party cannot raise an issue for the first time on appeal. *See In re E.R.*, 2001 UT App 66, ¶ 9, 21 P.3d 680. Instead, the party must preserve the issue for appeal by presenting it “to the Trial Court in such a way that the Trial Court has an opportunity to rule on that issue.” *Robertson's Marine, Inc. v. I4 Solutions, Inc.*, 2010 UT App 9, ¶ 10, 223 P.3d 1141 (quoting *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801). “This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding.” (internal quotation marks omitted). Issues that are not properly preserved are usually deemed waived. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. *Lachance v. Richman*, 2011 UT App at ¶15.

The OPC failed appropriately to object in any way, whether by motion in limine⁴,

⁴ The OPC did file a motion in limine as to another witness at the sanctions hearing (R.237-238). The OPC knew to ask the Court to exclude Dr. Andersen at the sanctions hearing with a motion in limine. The OPC did not file a motion, so apparently did not object to Dr. Andersen. The OPC asked at the beginning of the sanction hearing to be heard on its motion in limine. (Transcript, Bench Trial On Sanctions September 24, 2010

Daubert type motion, or objection at trial to the testimony of the opinions offered by Mr. Corey's treating psychiatrist, Dr. Andersen. The OPC has waived any objection to Mr. Corey offering the opinion testimony of his treating psychiatrist, and has failed to preserve this issue for appeal.

Besides waiving any objection to Dr. Andersen's testimony, the OPC has failed to disclose to the Supreme Court that Dr. Andersen was listed on more than one document, including but not limited to, Mr. Corey's Trial Witness Designation. (R.154.) That Witness Designation states: "Dr. Andersen will testify regarding the facts related to the appropriate sanction and will testify as to facts related to any and all mitigating circumstances in the Standards, including but not limited to his treatment of Mr. Corey and his opinions as to mitigating circumstances caused by the cyst prior to resection, Mr. Corey's treatment with medication for the past ten (10) years and his current recovery and prognosis." (Emphasis added.) (R.154.) Dr. Andersen's medical records (as well as the other treating providers) were identified in the Exhibit Designation (R.155) and had been produced before the

pg. 2 l.1-pg. 2 l.14) However, the OPC did not file a motion in limine to exclude Dr. Andersen, and did not orally object at the sanctions hearing prior to his testimony. The one and only objection made by the OPC was after Dr. Andersen had been testifying for some time, the OPC objected on foundation because an answer sounded "like an opinion, sort of expert testimony question". The OPC further stated "Frankly I didn't understand it. So maybe he can rephrase it and I might withdraw my objection". The Trial Court then asked the witness if he understood the question, and Dr. Andersen stated that he did understand the question and the Court overruled the objection. The OPC did not object further to Dr. Andersen. (Transcript, Bench Trial On Sanctions September 24, 2010 pg. 53 ll. 1-8.)

sanctions hearing.⁵

In Mr. Corey's Trial Brief he described in detail the nature of Dr. Andersen's testimony, including his opinions relating to the arachnoid brain cyst, and this organic brain disease, and over medication, and that it affected Mr. Corey's ability to appropriately manage and control his law practice. (R.177) The OPC was fully aware of the nature of Dr. Andersen's testimony and his opinions prior to his testifying, and it did not move to exclude that testimony. The OPC was served with the Acceptance of Service of subpoena to testify at trial, served on Dr. Andersen as the treating psychiatrist. (R.162). The OPC was aware that Dr. Andersen as the treating psychiatrist for Mr. Corey was subpoenaed to testify at trial. From the date of his Answer to the Complaint, Mr. Corey has disclosed the diagnosis of the growth in his brain. Mr. Corey's Thirtieth Affirmative Defense described the growth of the

⁵ In addition to the matters in the Trial Court record, there are additional documents in which Mr. Corey disclosed to the OPC that Dr. Andersen would provide expert testimony. For example, the OPC has failed to disclose to the Supreme Court that on January 20, 2010, Mr. Corey served discovery responses on the OPC, nine months prior to the day when Dr. Andersen testified at the sanctions hearing. The responses stated: "The OPC has taken the position that such testimony by treating physicians is not expert testimony and is fact testimony. Given that policy by the OPC, the treating doctors are being designated as fact witnesses, although the testimony they offer will be in the nature of expert testimony regarding their diagnosis, treatment, care, and future prognosis of Mr. Corey." The OPC's Interrogatory No. 3 asked, "Identify each and every expert you intend to call in this matter to give testimony at the adjudication hearing or sanctions hearing..." Dr. Andersen was listed in the response to that interrogatory request and was identified as someone whose testimony would involve "Medical issues related to Mr. Corey's medical history and treatment." Since the OPC did not raise this at the sanctions hearing, Mr. Corey did not offer this document to show that he had disclosed the expert nature of Dr. Andersen's testimony. If the Supreme Court is so inclined, it may order Mr. Corey, or the OPC, to produce the responses to supplement the record.

cyst, and raised it as a mitigating factor in his Answer. (R.43) Without disclosing to the Supreme Court that Mr. Corey had repeatedly disclosed Dr. Andersen's opinions regarding the cyst, the OPC, now for the first time on appeal attempts to exclude his testimony. It is the obligation of an appellant to marshal the facts and to disclose all facts in support of its arguments so that the Supreme Court may review all facts relevant to the issue. The OPC has failed to do so, as to its arguments regarding Dr. Andersen. The OPC had months and months to object to Dr. Andersen testifying. It failed to object to the testimony until it filed its opening brief. It has waived its opportunity to make any such objection.

The OPC not only did not object to Dr. Andersen giving opinion testimony at trial on cross examination, the OPC attempted to solicit opinion testimony from Dr. Andersen. On cross examination, the OPC pressed Dr. Andersen to state an opinion that the arachnoid cyst did not contribute to his failure to return Ms. Stager's funds. By trying to solicit opinion testimony from Dr. Andersen, the OPC invited error, if it had been error, for Dr. Andersen to offer his opinion testimony. The OPC pressed for an opinion, and did not object to Dr. Andersen giving an opinion. The questioning was as follows:

Q: And-well, we need to get at whether or not this tumor could've cause that action or failure to act upon the part of Mr. Corey. And I need to now if you're giving an opinion here today-

A: And-and I'm-

Q: -that that caused it.

A: -I'm giving an opinion that it definitely contributed to poor judgment and mood swings.

MS. TOWNSEND: Okay. That's all I have. Thank you.
(Transcript, Bench Trial On Sanctions September 24, 2010 pg. 70 ll. 13-21.)

B.

Dr. Andersen as a Treating Doctor Did Not Need to Prepare a Report

The Supreme Court has recently clarified and removed any doubt as to the issue of whether a treating physician may offer opinion testimony and whether they need to produce a report. In Drew v. Lee, 2011 UT 15 (March 15, 2011), the Supreme Court ruled treating providers do not need to produce written expert reports.⁶

It is not disputed that Dr. Andersen has been since 2008, Mr. Corey's treating doctor. Dr. Andersen was not "retained" for the purposes of testifying as an expert. He testified at the hearing as a treating doctor. Dr. Andersen continues to be Mr. Corey's treating doctor. Part of the Trial Court's Order in this matter, orders Mr. Corey to continue treating with Dr. Andersen as his treating psychiatrist during the probation.

Mr. Corey and his treating psychiatrist, Dr. Andersen, have met all requirements in Drew v. Lee, 2011 UT 15 (March 15, 2011), in that Dr. Andersen has been, and is, Mr. Corey's on going treating doctor. Mr. Corey disclosed Dr. Andersen and his intent to offer opinion testimony in more than one document. At the very least, he was disclosed in the

⁶ Mr. Corey had produced to the OPC prior to the sanctions hearing Dr. Andersen's records which included an "Outpatient Psychiatric Progress Note" by Dr. Andersen. This progress note essentially stated Dr. Andersen's opinion testimony. In addition, all of Dr. Andersen's medical notes and the notes of other medical providers which he reviewed in his treatment were produced prior to the sanctions hearing to the OPC. See Corey Mitigation Trial Exhibits Exhibit 10 at 001599 "Outpatient Psychiatric Progress Note" by Dr. Jason Andersen, Mr. Corey's treating psychiatrist and other medical records included in Exhibit 10. All of these gave notice of Dr. Andersen's opinions. ,

Witness Designation prior to trial, without objection, as a treating doctor who would provide “opinion” testimony.

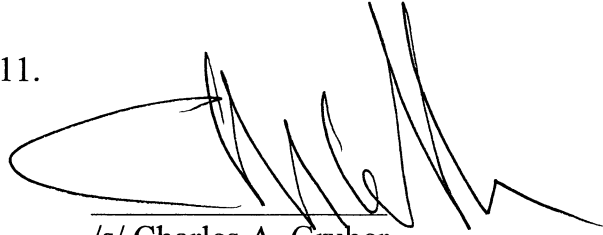
The OPC did not offer any evidence to rebut Dr. Andersen because there is no such scientific or medical evidence to dispute that Mr. Corey’s arachnoid cyst likely impaired his judgment at least since the early 1990s.

Although the OPC has failed to preserve the issue of Dr. Andersen for appeal and the fact that Dr. Andersen was disclosed to the OPC, and although he may testify pursuant to Drew v. Lee, this Court need not even address this issue. Even if Dr. Andersen were only a fact witness testifying as to his treatment of Mr. Corey and his prognosis for Mr. Corey, that testimony alone is sufficient to support a finding of compelling and significant mitigating circumstances. Dr. Andersen and the medical records prove that there was an arachnoid cyst in the occipital lobe. Dr. Andersen can testify as to his diagnosis and its effect on Mr. Corey. As part of his diagnosis of Mr. Corey’s condition, he can testify that based on the review of the medical records, the cyst has been affecting Mr. Corey since 1993, and his prognosis is that the removal will mean the likely end of Mr. Corey’s erratic conduct. The same may be said as to issue of misdiagnosis and over medication. The resolving of the misdiagnosis or failure to diagnose, and the reduction in medication are all part of Dr. Andersen’s treatment of Mr. Corey. As such, all of Dr. Andersen’s testimony may be considered the testimony of a fact witness, which the Court reviews and concludes justifies the finding of compelling and significant mitigating factors.

CONCLUSION

Mr. Corey respectfully requests that the Supreme Court affirm the District Court's ruling.

DATED this 25th day of April, 2011.

A handwritten signature in black ink, appearing to read 'Charles A. Gruber', written over a horizontal line.

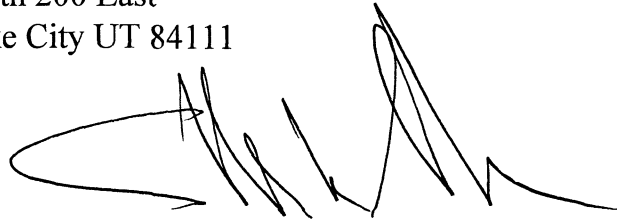
/s/ Charles A. Gruber

*Attorney for Mr. Corey,
Respondent/Appellee*

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2011, I caused to be mailed via United States mail, first class postage pre-paid, true and correct hard paper copy of the foregoing BRIEF OF THE RESPONDENT/APPELLEE to:

Adam Brevis
Billy Walker
Utah State Bar/Office of Professional Conduct
645 South 200 East
Salt Lake City UT 84111

A handwritten signature in black ink, appearing to read 'Charles A. Gruber', written over a horizontal line.

/s/ Charles A. Gruber
Attorney for Appellee Mr. Corey

ADDENDUM

I

Barbara Townsend, #5568
Assistant Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone: 801 531-9110



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
)	
Clayne I. Corey, #5847)	Civil No. 090909180
Respondent.)	Judge: John Paul Kennedy
)	

This matter came before the Court on July 6 and 7, 2010, for an Adjudication Trial pursuant to Rule 14-511(e) of the Rules of Lawyer Discipline and Disability ("RLDD"). Barbara L. Townsend appeared and represented the Utah State Bar's Office of Professional Conduct. Charles Gruber appeared and represented Respondent, Clayne I. Corey. Having heard the evidence and arguments of counsel in this matter, the Court now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Clayne I. Corey is an attorney licensed in the State of Utah and a member of the Utah State Bar. His address, according to the records of the Executive Director of the Utah State Bar is P.O. Box 902195, Sandy, UT 84090-2195

2. The Complaint was filed on behalf of the Utah State Bar's Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon an Informal Complaint submitted against Mr. Corey by Maxine Stager.

3. A Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court heard the Stager matter on March 10, 2005.

4. At the conclusion of the hearing on March 10, 2005, the Screening Panel directed the OPC to file a formal Complaint against Mr. Corey.

5. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability.

6. Venue is proper in this Court pursuant to Rule 14-511(b), Rules of Lawyer Discipline and Disability in that, at all relevant times, Mr. Corey resided or practiced law in Salt Lake County.

7. In June 1999, Maxine Stager retained Corey & Lund to represent her in a personal injury action.

8. On June 9, 1999, Ms. Stager signed a fee agreement with Corey & Lund.

9. The fee agreement allowed for a contingent fee of 33.3% of the settlement, unless the case went to trial. The case settled prior to trial.

10. Sometime in February, 2000, Mr. Corey became aware of felony criminal charges being filed against his partner, Randy Lund.

11. On February 18, 2000, Ms. Stager accepted a settlement offer of

\$122,500.

12. On February 18, 2000, Ms. Stager signed a release of all claims with the insurance company, "GAB."

13. On February 25, 2000, Clayne Corey had a telephone conversation with a representative of GAB.

14. On February 25, 2000, GAB issued the settlement check in the amount of \$122,500 to Maxine Stager and to her attorney, Clayne I. Corey.

15. On February 29, 2000, \$124,803.60 was deposited into Mr. Corey's operating account. This amount included Ms. Stager's settlement funds.

16. Mr. Corey was the signator on this operating account and had control over the account.

17. Mr. Corey knew early on that Ms. Stager's settlement funds went into his operating account.

18. Mr. Corey failed to deposit Ms. Stager's settlement funds into a client trust account.

19. Mr. Corey knew that checks were being written against the funds in the operating account.

20. The account balance for the operating account went from \$128,916.14 at the end of February, 2000 to \$2,909.12 at the end of June, 2000.

21. Ms. Stager did not authorize her settlement funds to be used by Mr. Corey for any purpose other than to pay her either directly or through a trust and to pay her

medical liens. She did not sign the trust documents prepared by Mr. Corey.

22. Ms. Stager agreed to receive \$500 payments each month for a period of time. Ms. Stager received 21 payments of \$500.

23. Ms. Stager eventually decided that she wanted to receive the bulk of her settlement funds. Ms. Stager requested a return of her file, the return of the remaining settlement money, and an accounting of her settlement.

24. Mr. Corey failed to return Ms. Stager's file.

25. Mr. Corey failed to return unearned excess funds to Ms. Stager.

26. Mr. Corey failed to properly account for the settlement funds.

27. Although the case settled in February, 2000 Mr. Corey did not pay the majority of the lien holders until December 31, 2000 leaving Ms. Stager exposed for those bills.

28. Mr. Corey failed to handle the third party claims in a timely way.

29. Mr. Corey failed to protect funds belonging to Ms. Stager.

30. Pursuant to the Fee Agreement, attorney fees for the law firm of Corey & Lund were 1/3 of the gross settlement amount since the case was settled before a Complaint was filed in the matter.

31. Pursuant to the Fee Agreement, ¶15, in connection with the claims covered by the Fee Agreement, Ms. Stager gave Corey & Lund the power and authority to execute any and all claims, deposits, orders, and other papers which Ms. Stager could properly execute. Under the Fee Agreement, Ms. Stager further gave Corey &

Lund the authority to receive on Ms. Stager's behalf any monies or other things of value to which Ms. Stager was entitled because of any judgment recovered or any settlement received.

32. Mr. Lund and Mr. Corey advised Ms. Stager on how to protect her personal injury settlement, so it would not adversely impact her government SSI benefits.

33. Ms. Stager suffers from a debilitating seizure disorder and was on government disability and received SSI supplemental benefits at the time of her personal injury settlement.

34. In the summer of 2000, Ms. Stager, her sister Heidi, Mr. Lund and Mr. Corey held a meeting to discuss finalizing the trust to protect Ms. Stager's benefits. At the time of this meeting, Ms. Stager had been receiving \$500 a month payments from the law firm of Corey & Lund as part of a qualified plan which Mr. Corey and Mr. Lund contended would protect Ms. Stager's SSI supplemental government benefits and which Mr. Corey and Mr. Lund advised might prevent anyone from asserting that Ms. Stager had taken title to the settlement funds which would disqualify her from receiving her SSI supplemental government benefits.

35. Ms. Stager consented to the placement of the settlement funds into a trust which Mr. Corey and Mr. Lund advised would preserve Ms. Stager's settlement funds.

36. A meeting was held in August, 2000 and was taped by Mr. Corey because Mr. Corey was concerned that Mr. Lund was not following through on the creation of the trust into which Ms. Stager's settlement funds were to be placed.

37. Prior to the meeting late summer 2000, Ms. Stager had met with Mr. Lund on two or three occasions to discuss setting up a trust and putting her share of the settlement funds into the trust as part of Mr. Corey and Mr. Lund's plan to protect her SSI supplement disability benefits.

38. Ms. Stager was told by Mr. Corey and Mr. Lund that if she received her settlement funds in a lump sum that it would adversely affect her SSI supplemental benefits, and she did not want to lose her SSI supplemental benefits.

39. Five hundred dollars was an amount which Ms. Stager needed for her monthly expenses.

40. Prior to retaining Ms. Arnovick, when Ms. Stager needed money she would request \$500 a month payments from her settlement.

41. Whenever Ms. Stager requested a payment of \$500, she received a payment of \$500 from Mr. Corey.

42. Ms. Stager's sister Heidi Pierson worked for Corey & Lund, and she handled some of the financial matters for Corey & Lund in so doing handled the preparation of some of the checks.

43. Some of the \$500 checks were taken by Ms. Pierson to Ms. Stager.

44. Ms. Stager retained a lawyer who demanded that the entire amount be paid. Ms. Stager's new attorney sued Mr. Corey for malpractice and filed a bar complaint against Mr. Corey.

45. The amount of the contingency fee to which Corey & Lund was entitled from Ms. Stager's settlement is \$40,995.90.

46. The amount paid in liens to Ms. Stager's medical providers by Mr. Corey is \$20,368.44.

47. All medical liens in Ms. Stager's settlement were paid in full.

48. The total amount paid to Ms. Stager was 21 payments of \$500 which equals \$10,500.

49. The payments to Ms. Stager began in June, 2000.

50. In 2000, Randall Lund was indicted and was investigated by the OPC. In October, 2000, Corey & Lund was dissolved and Randall Lund was removed from the law firm because of his criminal indictment and his criminal activity.

51. The amount to which Ms. Stager was entitled from her settlement funds, but which she did not receive and is still owing to her is \$50,371.21, before interest is calculated.

52. Ms. Stager continues to receive her social security benefits and has not lost her benefits.

CONCLUSIONS OF LAW

Rule 1.15(a) Safekeeping Property

53. Rule 1.15(a). Safekeeping property. This rule states:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution which agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation

Mr. Corey violated this rule by failing to place Ms. Stager's settlement funds in trust separate from his own funds and by failing to completely and accurately account for Ms. Stager's settlement funds.

Rule 1.15(b) Safekeeping Property

54. Rule 1.15(b). Safekeeping Property. This rule states:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Mr. Corey violated this rule by failing to take timely action to protect the funds of his client and third parties, and by failing to promptly deliver the funds to his client and third parties.

1.15(c) Safekeeping Property

55. Rule 1.15(c). Safekeeping property. This rule states:

When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Mr. Corey violated this rule by failing to keep client and third party funds separate and safe until an accounting was made or until the dispute was resolved.

Rule 1.16(d) Declining or Terminating Representation

. 56. Rule 1.16(d). Declining or terminating representation. This rule states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

Mr. Corey violated this rule by failing to protect his client's interests, by failing to return Ms. Stager's file, and by failing to return Ms. Stager's money to her.

Rule 8.4(a) Misconduct

57. Rule 8.4(a). Misconduct. This rule states:

It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Mr. Corey violated this rule by violating the above Rules of Professional Conduct.

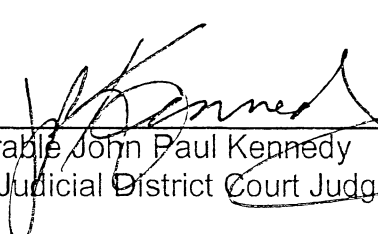
58. Mr. Corey did not receive or charge an excessive fee.

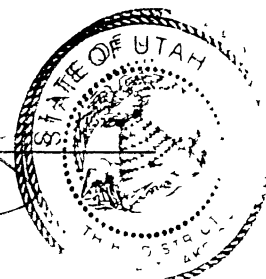
ORDER

Based upon the Court's Findings of Fact and Conclusions of Law of Mr. Corey's misconduct and violations of the Rules of Professional Conduct, IT IS HEREBY ORDERED THAT:

This matter be set pursuant to Rule 14-511(f) of the Rules of Lawyer Discipline and Disability for a sanctions hearing on September 24, 2010 at 10:30 a.m. At the sanctions hearing, as appropriate, the Court will consider relevant evidence of aggravation and mitigation of Mr. Corey's misconduct. The Court will then impose the appropriate sanction for Mr. Corey's professional misconduct as governed by the Standards for Imposing Lawyer Sanctions.

DATED this 27 day of Sept. 2010.


Honorable John Paul Kennedy
Third Judicial District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2010, I hand-delivered, a true and correct copy of the foregoing proposed FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER to:

Charles Gruber
P.O. Box 900122
Sandy, UT 84090

Alisa Webb


ADDENDUM

II

NOV 23 2010

SALT LAKE COUNTY

By


Deputy Clerk

THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY DEPARTMENT

In the Matter of the Discipline of:

CLAYNE I. COREY, #5847,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, and ORDER**

Case No. 090909180

Judge John Paul Kennedy

This matter came before the Court on September 24, 2010, for a Sanctions Hearing pursuant to Rule 14-511(f) of the Rules of Lawyer Discipline and Disability ("RLDD"). Barbara L. Townsend appeared and represented the Utah State Bar's Office of Professional Conduct ("OPC"). Charles Gruber appeared and represented Respondent Clayne I. Corey. At the conclusion of the hearing, the Court took the matter under advisement. Having received evidence relevant to aggravation and mitigation and upon consideration of the parties' arguments, the Court now enters findings of fact and conclusions of law relevant to aggravation and mitigation and enters its order sanctioning Mr. Corey.

FINDINGS OF FACT

1. Mr. Corey had a non-cancerous arachnoid cyst in the occipital lobe of his brain. The seeds of the cyst had been present since before birth, but it is not known in this case how

long the cyst had been developed. By 2009, the cyst was approximately one inch in circumference.

2. The cyst was not discovered until April 2009, when Mr. Corey's treating psychiatric physician, Dr. Jason Lee Andersen, ordered an MRI because of Mr. Corey's lack of progress. Dr. Andersen is the department chair of psychiatry at Utah Valley Regional Medical Center where he maintains a clinical practice and has worked since 2006. Dr. Andersen has treated Mr. Corey since 2008, following Mr. Corey's xanax overdose.
3. Following the discovery of the arachnoid cyst, Mr. Corey underwent surgery to remove the cyst in June 2009. The surgery was successful and Mr. Corey has made a full recovery with respect to his mental capacity.
4. While the cyst was benign in the sense that it was not cancerous, it did affect Mr. Corey in a number of ways, such as contributing to headaches, stress, causing stress, and contributing to poor judgment, mood swings, impulsive behavior, memory problems, etc. These effects were influenced by the size of the cyst and by what it was displacing in the brain. Additionally, the cyst likely contributed to the prescription of additional medication.
5. As early as 1993, physicians suspected that Mr. Corey suffered from bi-polar disorder. However, the symptoms of bi-polar disorder exhibited by Mr. Corey were likely caused by the cyst, which at least contributed to, if not caused, Mr. Corey to experience mood swings and feelings of anxiety and frustration.

6. Mr. Corey's prior physicians had prescribed a number of medications to mistakenly treat his bi-polar symptoms and headaches. Around early 2000, when trouble began with Mr. Corey's partner, Mr. Lund, and around the time of the misconduct in this case, Mr. Corey was prescribed and began taking Xanax and other medications. These medications can slow down executive function and negatively impact memory.
7. Mr. Corey overdosed on Xanax in April 2008. Mr. Corey's use and abuse of prescription medications was the result of treatment-induced dependency, as Mr. Corey's prior physicians sought to treat Mr. Corey's symptoms without knowledge of and without addressing the underlying problem, the cyst. Since at least 1993, physicians had increased the strength and dosage of Mr. Corey's medications gradually as the medications failed to effectively treat Mr. Corey's symptoms.
8. In the expert opinion of Dr. Andersen, the combination of treatment-induced dependency on medication like Xanax and the cyst contributed to Mr. Corey's behavior and deviation from the standard of care expected of an attorney with respect to Ms. Stager's case and others that occurred around the same time.
9. The Court finds Dr. Andersen's testimony to be very credible and notes further that his testimony was uncontradicted.
10. Mr. Corey met his future law partner, Randall Lund, in law school, where they became friends and study partners. They lost contact for several years after law school, but were reacquainted in 1994. At that time, Mr. Corey was under discipline from the Utah State

Bar in the form of a suspension. However, Mr. Lund became Mr. Corey's supervising attorney and mentor, and the suspension was lifted.

11. Mr. Corey and Mr. Lund began a law practice together in 1999, when they formed Corey and Lund. Mr. Corey handled primarily criminal matters, while Mr. Lund handled primarily civil matters. As part of their practice, they took Maxine Stager's personal injury case, which was settled in February 2000.
12. Mr. Corey began to notice problems and erratic behavior with Mr. Lund in January 2000. However, Mr. Corey had no reason to distrust Mr. Lund at that time, and only learned about Mr. Lund's criminal behavior later that year, in April 2000.
13. Mr. Corey did not transfer Ms. Stager's settlement funds into a trust account because he believed that Mr. Lund had created a special needs trust and taken care of the funds.
14. Mr. Corey stopped drinking alcohol in 2008.
15. Mr. Corey returned to activity in his religion since 2008.
16. During his legal career, Mr. Corey has been subject to discipline by the Utah State Bar a number of times. In December 1992, Mr. Corey received an interim suspension which was formalized in June 1993, for violation of a number of rules, including Rule 1.13(b) relating to use of the client trust account. As a result of the violations, Mr. Corey was suspended until October 1, 1993, ordered to obtain an opinion from a mental health professional regarding his fitness to practice law, ordered to pay restitution to twelve clients, and placed on supervised probation for a year following reinstatement.

Mr. Corey was admonished for matters relating to three separate clients in April 2002. One admonishment, involving the Ryan matter, was based on Mr. Corey's violation of Rule 1.16(d) relating to the termination of representation. The other two admonishments, involving the Price and Shumway matters, was based on Mr. Corey's violation of Rule 1.5 relating to fees.

Mr. Corey was publicly reprimanded in May 2005 for violation of Rule 8.4(b) for misconduct. The reprimand was based on Mr. Corey's guilty plea to a DUI charge.

In December 2005, Mr. Corey was admonished for rules violations in two cases. First, Mr. Corey was admonished for violations of Rule 1.1 (Competence), Rule 1.15(b) (Safekeeping Property), and Rule 8.1(b) that occurred during Mr. Corey's handling of the Urry matter. Specifically, Mr. Corey violated Rule 1.15(b) by failing to notify the client's former attorney of a settlement in the personal injury case and by failing to protect the former attorney's lien. Mr. Corey was also admonished for violation of Rule 1.5(b) (Fees) and Rule 1.15(b) (Safekeeping Property) related to his handling of the Chacon matter. Specifically, Mr. Corey violated Rule 1.15(b) by failing to render a full accounting of a tax refund he received for the client.

17. Mr. Corey never attempted to get any money back from Mr. Lund, who has on-going criminal cases and remained a fugitive with outstanding warrants at the time of the hearings in this case.

18. Mr. Corey states that he feels a moral obligation to pay Ms. Stager. However, Mr. Corey has not made any payments to Ms. Stager since she terminated his representation in 2004.

CONCLUSIONS OF LAW

1. Based upon Mr. Corey's violation of the Rules of Professional Conduct, specifically rules 1.15(a), 1.15(b), and 1.15(c) relating to the safekeeping of property, Rule 1.16(d) relating to the termination of representation, and Rule 8.4(a) related to misconduct for rules violations, the Court concludes that the presumptive sanction in this case is suspension from the practice of law.

OPC argues that the presumptive sanction should be disbarment, while Mr. Corey argues that the presumptive sanction should be reprimand. Rule 14-605(a) of the RLDD provides that disbarment is appropriate where a lawyer does the following:

- (1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system . . . ; or
- (2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft . . .
- (3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

On the other hand, pursuant to Rule 14-605(b)(1), suspension is the appropriate presumptive sanction where a lawyer “knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding.” In contrast, pursuant to Rule 14-605(c)(1), a reprimand is the appropriate presumptive sanction where a lawyer “negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding.”

Rule 14-601 of the RLDD defines “intent” as “the conscious objective or purpose to accomplish a particular result, while “knowledge” is defined as “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Similarly, Rule 14-601 defines “negligence” as “the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.”

The Utah Supreme Court has held that “intentional misappropriation of client funds will result in disbarment unless the lawyer can demonstrate truly compelling mitigating circumstances.” *In re Babilis*, 951 P.2d 207, 217 (Utah 1997). The *Babilis* Court reasoned, “Intentional misappropriation of a client’s funds is always indefensible; it strikes at the very

foundation of the trust and honesty that are indispensable to the functioning of the attorney-client relationship and, indeed, to the functioning of the legal profession itself.” *Id.* In *Babilis*, there was substantial evidence showing the lawyer’s dishonesty and misrepresentations, “all motivated by Babilis’ desire to enrich himself,” as he took substantial client funds and used them for personal purchases like cars. *Id.* at 209, 216.

Similarly, in the case of *In re Johnson*, the attorney violated rules 1.15(a), 1.15(b), and 1.15(c) by intentionally misappropriating over \$28,000 for personal or business use. 2001 UT 110, ¶¶8-11, 48 P.3d 881. Johnson did not dispute that he used the funds for personal and business use, and he knew that the client did not mean to give him a gift of the money. *Id.* at ¶¶11-12. Likewise, disbarment was the presumptive sanction where another attorney collected money for a client but spent the entire amount, approximately \$18,000, on personal expenses, rather than hold the money in an interest bearing escrow account as requested by the client. *In re Ennenga*, 2001 UT 111, ¶¶3,11, 37 P.3d 1150.

In this case, the Court concludes that the presumptive sanction is suspension. Although Mr. Corey argues that this is a case of negligence, the Court does not entirely agree. At best it is a case of mixed knowledge and negligence. The evidence at the adjudication trial established that Mr. Corey knew early on that Ms. Stager’s settlement funds had been deposited into his firm’s operating account, over which Mr. Corey had control. Mr. Corey also knew that checks were being written against the funds in the operating account. He knew or should have known that Ms. Stager’s funds were not being

kept safe in the operating account, especially when he had reason to suspect wrongdoing by his partner, Mr. Lund.

However, Mr. Corey's knowledge was not accompanied by the intent that Ms. Stager be deprived of her funds or that the settlement funds be used to personally benefit himself or someone other than Ms. Stager. Mr. Corey did not intend to cause harm or injury to Ms. Stager. In fact, evidence shows that Mr. Corey intended to protect Ms. Stager and her funds. Mr. Corey knew that Ms. Stager was disabled and received federal SSI benefits, and he believed that the payment of the settlement funds in a large, lump sum payment, would put her eligibility for future benefits at risk. The evidence shows that Mr. Corey, and possibly even Mr. Lund, attempted to establish a trust to protect both the settlement funds and Ms. Stager's eligibility for federal benefits. However, Mr. Corey failed to do either, and failed to ensure that Mr. Lund did so. In this sense, the Court agrees with Mr. Corey that the cause of the loss of the funds and the injury to Ms. Stager was the result of Mr. Corey's negligence. Yet because Mr. Corey knew that the funds were not adequately protected in the operating account, the Court concludes that Mr. Corey's violations were, at least in part, knowing, and thus above the level of reprimand.

On the other hand, this case is not a case a of intentional misappropriation like *Bablilis*, *Johnson*, or *Ennenga*. In those cases, there was clear evidence that the attorneys intended to take their clients' funds for their own benefit. Here, there is no evidence regarding the fate of Ms. Stager's settlement funds. There is also no evidence that Mr. Corey

intended to personally benefit or did personally benefit from the settlement funds. While he likely enjoyed some benefit from the funds by virtue of their likely use for business expenses, there is no evidence that this was his intent. Mr. Corey's lack of intent removes this case from the circumstances of Rule 14-605(a). Therefore, the Court concludes that this case is distinguished from intentional misappropriation cases where disbarment is the presumptive sanction. Rather, the presumptive sanction in this case, based upon Mr. Corey's knowledge of the situation but lack of intent regarding the result, is a suspension from the practice of law.

2. The Court concludes that a number of aggravating circumstances exist in this case pursuant to Rule 14-607(a) of the RLDD. First, Mr. Corey has a number of instances of prior discipline. Among other violations, Mr. Corey's discipline in 1993 was imposed for a violation of the rule relating to safekeeping of funds and use of a client trust account, which is at issue in this case. Mr. Corey was admonished for three separate matters in 2002, one of which was based on Mr. Corey's violation of Rule 1.16(d) relating to the termination of representation, which is also at issue in this case. Mr. Corey was the subject of a public reprimand for a DUI conviction in 2005. Finally, Mr. Corey was also admonished in 2005 in two separate matters for violations of Rule 1.15(b), which is also at issue in this case. The Court concludes that these prior instances of discipline, particularly those involving violations similar to those at issue in this case, are aggravating circumstances. However, the Court notes that the discipline imposed in 2002 and 2005 resulted from cases that were

handled contemporaneously with Ms. Stager's case, which somewhat diminishes their aggravating effect. Even so, Mr. Corey should have learned of the importance of trust accounts and the safekeeping of client funds from his 1993 discipline.

Similarly, Mr. Corey's prior disciplinary matters do establish a pattern of carelessness relating to the safekeeping of client funds, which the Court considers to be an aggravating circumstance. Mr. Corey also had nearly a decade of experience practicing law at the time of this incident with Ms. Stager, which the Court considers to be an additional aggravating circumstance.

Perhaps most importantly, the Court also finds that there has not been a substantial good faith effort to make restitution to Ms. Stager. While payments in the amount of \$500 per month were made to Ms. Stager upon her request while she was represented by Mr. Corey, he has not made any payments since Ms. Stager terminated Mr. Corey's representation in 2004, despite Ms. Stager's demands and the demands of Ms. Stager's new attorney. As a result, Ms. Stager has been without her funds, over \$50,000, for over five years. While evidence of Ms. Stager's financial situation and the effect of living without access to those funds was not presented to the Court, the Court infers at least some hardship on the part of Ms. Stager by being deprived of a significant amount of money for a significant amount of time. *See Ennenga*, 2001 UT 111 at ¶13. While Mr. Corey put on some evidence of his personal and financial struggle during that time, the Court notes that Mr. Corey's personal financial pressures cannot mitigate or excuse his failure to make efforts

to repay Ms. Stager. The Court has not seen evidence of those efforts on the part of Mr. Corey and considers this to be a significant aggravating circumstance in this case.

Finally, the OPC also argues that the Court should consider Ms. Stager a vulnerable victim and thus an additional aggravating circumstance. While there was evidence that Ms. Stager suffers from a seizure disorder, there was not evidence regarding her mental capacity or any mental disability. Additionally, Ms. Stager's sister was an employee of Corey & Lund, and having her sister on the inside of the firm watching out for her interests could be considered a good thing, especially where there is no evidence that her sister was involved in the mishandling of the settlement funds. Therefore, the Court considers any aggravating circumstance from Ms. Stager's physical disability to be minimal.

3. The Court concludes that a number of mitigating circumstances also exist in this case pursuant to Rule 14-607(b). Most importantly, Mr. Corey's cyst and the medications prescribed to treat the headaches and other symptoms caused by the cyst causally contributed to Mr. Corey's behavior that resulted in the rules violations in this case pursuant to Rule 14-607(b)(9). A mental impairment, including substance abuse, may be considered a mitigating circumstance where the attorney is affected by a mental disability or substance abuse, where the mental disability or substance abuse causally contributed to the misconduct, where the attorney's recovery from the mental disability or substance abuse is demonstrated by a meaningful and sustained period of successful rehabilitation, and where the recovery has

arrested the misconduct and the recurrence of the misconduct is unlikely. RLDD Rule 14-607(b)(9).

The Court concludes that the effects of the cyst and medication, including headaches, mood swings, poor judgment, etc., constitute a mental impairment that had a significant effect on Mr. Corey. Moreover, pursuant to Dr. Andersen's testimony, Mr. Corey's use of Xanax and other medications, which had been prescribed to Mr. Corey to treat his symptoms since 1993, resulted to treatment-induced medication dependence, as the physicians at that time did not know about the cyst and as a result were not addressing the underlying problem. Pursuant to the expert opinion of Dr. Andersen, which the Court finds credible and which was unrebutted, the combination of the cyst and the medication causally contributed to Mr. Corey's misconduct. Since surgery to remove the cyst in 2009, Dr. Andersen has observed a very good recovery by Mr. Corey, including a return to full mental capacity. Dr. Andersen has also worked with Mr. Corey to taper his medications, and Dr. Andersen observed that Mr. Corey would be fine long-term at his current medication level. Mr. Corey also stopped drinking alcohol in 2008. Dr. Andersen will continue to see Mr. Corey for the foreseeable future. Dr. Andersen opined that Mr. Corey will have no difficulty continuing his professional life as an attorney. Mr. Corey has also resumed activity in his religion and feels better than he has in years. On the basis of this evidence, the Court concludes that Mr. Corey's recovery since removal of the cyst over the past year and a half has been demonstrated by meaningful and sustained period of successful rehabilitation. The Court also concludes, based on evidence from Dr. Andersen and Mr. Corey, that the cyst and the

taper in medication has arrested Mr. Corey's misconduct and that recurrence is unlikely. The Court considers the arachnoid cyst and medication to be a significant mitigating factor in Mr. Corey's misconduct, and the Court is satisfied that Mr. Corey's continuing practice of law does not pose a substantial threat of irreparable harm to the public given his recovery.

Additionally, because the effects of the cyst and medication have affected Mr. Corey since at least 1993, the Court concludes that the mitigating effect of Mr. Corey's mental disability largely negates any aggravation caused by his prior disciplinary record.

The Court also finds that there is an absence of dishonest or selfish motive in this case, which is also a mitigating circumstance to which the Court gives at least some weight. Mr. Corey has also expressed at least some remorse and a desire and obligation to make restitution to Ms. Stager, although the Court gives little weight or importance to this factor.

4. In considering all of the factors in imposing sanctions, the Court's primary concern at this point is that restitution be paid to Ms. Stager. Pursuant to Rule 14-604, the Court considers the duties violated by Mr. Corey to be among the most important of all duties, the safekeeping of client property. This is a very serious violation, as "it strikes at the very foundation of the trust and honesty that are indispensable to the functioning of the attorney-client relationship and, indeed, to the functioning of the legal profession itself." *Babilis*, 951 P.2d at 217.

However, the Court concludes that Mr. Corey's mental state is not as culpable as in cases of intentional misappropriation. As the Court has explained in conjunction with its

analysis of the presumptive sanction, Mr. Corey certainly knew and should have known that Ms. Stager's settlement funds were not placed in the trust account for safe keeping, but were placed in the operating account. He also should have known that funds were flowing out of the operating account, and he should have been more watchful over all his accounts when suspicion arose regarding Mr. Lund. He also should have followed up with Mr. Lund to verify whether a separate trust was established for Ms. Stager, rather than assume that the matter had been resolved. Mr. Corey's behavior in this regard was very negligent. However, the Court concludes that Mr. Corey did not intend to injure Ms. Stager by using her funds for the benefit of himself or someone other than Ms. Stager.

While Mr. Corey did not intend to injure Ms. Stager, the fact remains that Ms. Stager was seriously injured in being deprived of over \$50,000, a significant amount of money, for over five years. While no evidence was presented regarding the actual effect on Ms. Stager, the Court infers that it would cause at least some hardship.

Finally, the Court notes that Mr. Corey's mental impairment has a large mitigating effect. However, the Court is not convinced that the mitigating circumstances completely offset the seriousness of the injury and the fact that Ms. Stager has not received any of her funds for a number of years. While the Court concludes that Mr. Corey's continuing practice of law does not pose a substantial threat to the public, the Court's primary concern is restitution to Ms. Stager, and the Court expects a significant effort in that regard on the part of Mr. Corey. Therefore, the Court finds it appropriate in this case to impose a sanction that

includes a stayed suspension, probation, restitution, and other conditions. The Court stays the suspension based on the compelling mitigating circumstances in this case, but holds the suspension in reserve should Mr. Corey fail to comply with additional terms of the disciplinary order.

ORDER

Wherefore, it is ORDERED that Mr. Corey be subject to the following disciplinary sanction:

1. The Court imposes up to a three-year suspension from the practice of law. However, the Court stays imposition of the suspension based on the conditions that follow.
2. The Court imposes a probationary period of length to be determined. The probationary period will last as long as it takes for Mr. Corey to complete payment of restitution to Ms. Stager. Mr. Corey may continue to practice law during the probationary period so long as he remains current to making restitution to Ms. Stager and in compliance with the Court's other conditions. If Mr. Corey fails to remain current in restitution or fails to comply with other conditions herein, the OPC may move to terminate the probation and impose the suspension up to a full three-year period. The Court will determine the length of probation at a future hearing based on an evidentiary showing of Mr Corey's ability to pay restitution in installment payments and/or a lump-sum payment.
3. The Court orders that Mr. Corey pay Ms. Stager full restitution in the amount of \$50,371.21, plus interest according to statute. Mr. Corey has suggested monthly payments in the amount of \$500 per month. However, the Court finds that amount inadequate and

concludes that Mr. Corey should make a greater effort at restitution, including some significant personal sacrifices, if appropriate. Because the Court lacks detailed information regarding Mr. Corey's ability to pay, and because the amount of restitution and period of probation depend on his ability to pay, the Court orders Mr. Corey and the OPC to appear at a hearing prepared to present evidence of Mr. Corey's ability to pay restitution, whether in lump sums or via monthly payments. The notice of hearing is attached to this Order.

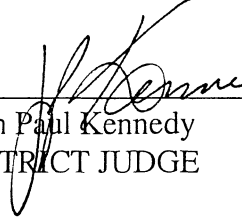
4. The Court orders Mr. Corey to complete twice the required hours of MCLE for ethics and professional responsibility over the next two-year reporting period, in addition to the minimum requirement, amounting to at least 6 hours of ethics/professional responsibility and a total of 27 hours of CLE. Additionally, as part of the 27 hours of CLE, Mr. Corey shall attend at least one course on the subject of law practice management. Finally, Mr. Corey shall also take and pass the professional responsibility examination (MPRE) by the end of 2011.

5. Mr. Corey shall continue treatment with Dr. Andersen for the foreseeable future as recommended by Dr. Andersen, with confidential progress reports being submitted at least quarterly to the OPC. Mr. Corey shall comply with all treatment recommendations made by Dr. Andersen.

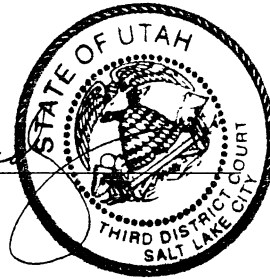
6. After the scheduled evidentiary hearing, the Court may fashion other appropriate remedies in this matter.

DATED this 23 day of November, 2010.

BY THE COURT:



John Paul Kennedy
DISTRICT JUDGE



ADDENDUM

III

JOE C. CULBERTSON, M.D.
PSYCHIATRY

DAVID E. BONE, M.D.
PSYCHIATRY

FEBRUARY 8, 1993

RECEIVED

FEB 11 1993

ATTN: David Haslan
Attorney
175 S. 200 West #4000
Box 2668
SLC UT 84110

WINDER & HASLAM

SUBJECT: CLAYNE COREY

Clayne Corey was hospitalized under my care from Feb. 1 to Feb. 4, 1993. He was admitted for a diagnostic evaluation because of a pattern of chaotic behavior that had led to a bankruptcy and multiple complaints about his law practice. His behavior had been erratic and it was suspected that this might be the result of polysubstance abuse or possibly a major psychiatric disorder of Bipolar Mood Disorder (Manic Depressive Illness).

During the hospital stay Mr. Corey was pleasant and thoroughly cooperative. He denied any abuse of substances. A drug urine screen at the time of admission was negative. There was no evidence of Bipolar Mood Disorder. It is possible that his erratic behavior and errors in judgement were related to his use of prescription medication. For several years he had taken a rather high dose of amphetamine or stimulant for treatment of depression. I have discussed this possibility with Mr. Corey and the prescribing physician and have recommended that he not continue this medication.

The most likely explanation for his unusual behaviors would be that his own intense personality style was exaggerated by the use of prescribed stimulants. However, I cannot eliminate the possibility of past substance abuse or of a manic episode of Bipolar Mood Disorder. I have several specific recommendations that should help us understand his behaviors.

RECOMMENDATIONS:

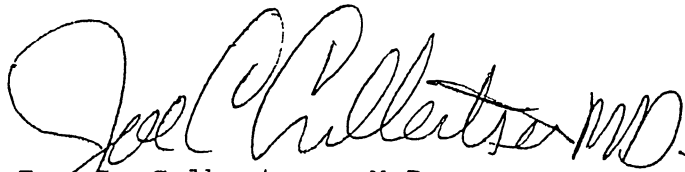
1. No further use of prescribed Dexadrine.
2. Random drug urine screens over the next six months.
3. Outpatient counselling so that a knowledgeable therapist could observe him for signs of major shifts in mood.
4. That he be on no medications and minimize his use of

Page 2
Clayne Corey

alcohol.

I have encouraged him to see Social Worker, Lucille Hesse on a weekly basis.

Sincerely,

A handwritten signature in cursive script that reads "Joe Culbertson M.D.". The signature is written in dark ink and is positioned above the printed name.

Joe C. Culbertson, M.D.

JCC/ns

ADDENDUM

IV

COREY, Clayne

01 March, 2010

Outpatient Psychiatric Progress Note

Mr Corey is a 50 year old married white male who has been in my care since April 2008. He initially presented complaining of mood swings suggestive of Bipolar Disorder, and benzodiazepine dependence. Other symptoms included frequent and worsening headaches, memory problems and difficulty with visual acuity. Between the stressors of his job, his family responsibilities, and his seemingly refractory cognitive and emotional symptoms, Mr Corey developed a significant dependence on benzodiazepines. His benzodiazepine dependence proved to be iatrogenic--caused by his previous doctor who had been increasing Mr. Corey's alprazolam (Xanax) doses in response to the global worsening of his symptoms. This further impaired his memory and cognitive functioning and exacerbated his mood swings. In 2009 he was diagnosed as having a cyst in the occipital lobe of his brain. This cyst had likely been present most, if not all of his life. Although benign, it's steady growth, especially over that last ten years resulted in increasing pressure on, and displacement of, surrounding tissues, and likely was responsible for much of his headaches, visual impairment, and memory and mood problems. This would explain the lack of response to certain psychiatric medications, and the need for increasing doses of alprazolam.

In the summer of 2009, Mr Corey underwent brain surgery to resect said cyst. Although the surgery was necessary and successful, it resulted in some further cognitive, speech, and emotional sequelae. Mr. Corey is progressing, but brain injuries are very slow to heal. Mr Corey tends to be a "workaholic," and is frustrated by these limitations. I continue to reassure him that he is making good progress, but he will continue to experience some difficulties with speech and memory processing speed.

MSE:

Pleasant and cooperative.

Alert.

Oriented to person, place, time, and situation

Affect: Congruent

Mood: Cheerful, with some occasional irritability. Impatient

Thought Production: Some residual speech processing delay. Enunciation is much improved, almost back to pre-surgery levels.

Thought Content: No evidence of psychosis. No suicidal or homicidal ideations.

Impression:

Axis I: 1) Mood Disorder NOS,
r/o Mood Disorder secondary to brain injury
r/o Bipolar Disorder
2) Cognitive Disorder secondary to brain injury (cyst and subsequent surgery)
3) Benzodiazepine Dependence, iatrogenic.

Plan

- 1) Resume valium taper, but continue slowly.
- 2) Don't work so hard!

Jason L. Andersen, DO

ADDENDUM

V

CONFIDENTIAL DATA *** SUPERVISING PHYSICIAN COPY #FAX TO: RADA, MARK A. 18015711369 AT AVH
documents accompanying this telecopy transmission contain confidential information, belonging to the sender, that is
privately privileged. This information is intended only for the use of the individual or entity named above. The authorized
recipient of this information is prohibited from disclosing this information to any other party and is required to destroy
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ALTA VIEW MEDICAL CENTER

Discharge Summary
Page 1

Date of Service: 04/11/2008

ADMITTING DIAGNOSES: Suicide attempt, severe anxiety disorder, depression,
hyperlipidemia, and bipolar.

DISCHARGE DIAGNOSES: Suicide attempt, severe anxiety disorder, depression,
hyperlipidemia, and bipolar.

CONSULTATIONS: Crisis psychiatric nurse practitioner.

HISTORY OF PRESENT ILLNESS: For details regarding history and physical, please see
dictated history and physical.

HOSPITAL COURSE: Mr. Corey was admitted to the medical floor, after been sedated
with IV Geodon. He awoke from that and we used Seroquel and Ativan for his severe
anxiety.

It was felt by crisis worker that he should be transferred to inpatient psych care
for ongoing psychiatric care. As soon as a bed is available today, he will be
transferred, under the care of psychiatrist. Discharge medications as per accepting
psych physician. Follow up with inpatient psychiatric physician. He will follow up
with me as an outpatient once he is discharged from the inpatient psych unit.

MARK A RADA MD

Date: _____

MAR/kb VID: 500187 TID: 610054 D: 04/11/2008 08:13:00 T: 04/11/2008 11:37:35

PT NAME: COREY, CLAYNE IRA

SERVICE DATE: 04/11/08

MRF: 204925

PHYSICIAN: RADA, MARK A.

ADMIT: 04/08/08

ENCT#: 64939465

ROOM: DS 04/11 Discharge Summary

EMMI#:

282136

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se documents. AVH Phone #: 442-5000 INTERFACE

ALTA VIEW MEDICAL CENTER

History and Physical Report

Page 1

Date of Service: 04/08/2008

HISTORY OF PRESENT ILLNESS: Mr. Corey is a 48-year-old white male with a past
medical history significant for bipolar and severe anxiety disorder, as well as
chronic daily headache and occipital neuralgia, who is admitted to Alta View
Hospital for benzodiazepine overdose.

I have been working with Mr. Corey over the last 5 to 7 years regarding his bipolar,
but predominantly anxiety disorder. We have used multiple anti-anxiety medications
and multiple atypical antipsychotics in an attempt to treat his anxiety disorder.
Eventually we found the benzodiazepines was one of the only things that really helps
Mr. Corey. We began Xanax XR but changed that to short-acting Xanax due to
financial concerns since Cory has not had insurance. He has done relatively well
over the past several years with a combination of Xanax and Seroquel. I have been
seeing him a few times a year to follow up these issues which have been relatively
stable.

I have insisted that Mr. Corey see a psychiatrist on multiple occasions but
continues not to do so due to either dislike of the psychiatrist or due to lack of
funds and ability to pay for specialty care (or so he has reported).

It has been my desire to help Mr. Corey so I have continued to work with him
throughout these years that he has not had medical insurance.

Apparently Mr. Corey has been somewhat depressed and has left multiple suicide notes
around the house. He took the remainder of the bottle of Xanax, which had 120
tablets. He also took an unknown amount of Seroquel tablets. In the ER, he was
combative and agitated and threatening to staff. He was sedated with Geodon.

Currently, at time of interview, Mr. Corey is sedated but appears to be breathing
well on protecting his airway. He moves all 4 extremities. Otherwise, I am unable
to do any history.

PAST MEDICAL HISTORY: Bipolar disorder, severe anxiety disorder, chronic daily
headache, occipital neuralgia, migraine.

CURRENT MEDICATIONS: Seroquel 300 mg nightly, Xanax 1 mg q.i.d., Fioricet p.r.n.,
Vytorin for cholesterol.

ALLERGIES: No known medical allergies.

PT NAME	COREY, CLAYNE IRA	SERVICE DATE	04/08/08	MR#	204925
PHYSICIAN	RADA, MARK A.	ADMIT	04/08/08	ENCT#	64939465
ROOM	ICU ⁴	History and Physical Report		ENMT#	282136

ADDENDUM

VI

May 7, 2004

To Whom it may concern:

I am Clayne I. Corey's primary care physician, and I have been treating him for about five years now for elevated levels of cholesterol and triglycerides, headaches, anxiety and insomnia. I have prescribed several medications during the course of his treatment, primarily for his cholesterol, severe anxiety and insomnia, and at one point, I referred him to a psychiatrist. Mr. Corey's problems started at the time when he went through a very difficult partnership dissolution and had an overly burdensome workload. Mr. Corey's mother was also diagnosed with renal cell carcinoma (kidney and lung cancer), and been through surgery and treatment since November 2003, only to recently discover that treatment has not been entirely successful and her cancer persists. This new development in Mr. Corey's life has added difficulty to the treatment of his already severe anxiety and insomnia. He is making progress, and while he has no medical insurance, he has persisted in following my treatment recommendations – no longer requiring the psychiatrist's services.

At this time, Mr. Corey is currently prescribed and taking the following medications:

Lescol XL: 80 mg, once every night before bed – for cholesterol
Lexapro: 20 mg, once every night before bed – for anxiety and insomnia
Xanax XR: 3 mg, once every night before bed – for anxiety and insomnia
Seroquel: 200 mg, once every night before bed – for anxiety and insomnia
Fioricet: 1-2 tablets every six hours as needed – for headaches

The above listed prescriptions (*see attached Rx.com drug information*) can have side effects, including but not limited to, the following:

Dizziness, slurred speech, confusion, drowsiness, irregular pulse, sweating, etc.

Please feel free to contact me if you have any further questions.

Sincerely,

Mark Rada, M.D.

ADDENDUM

VII

PRIMARY CARE PHYSICIAN: SAM J COATES

COMPLAINT: "I took the whole rest of my bottle of Xanax in the early morning hours and my wife found me and had me taken to the hospital at Alta View."

HISTORY OF PRESENT ILLNESS: This 46-year-old twice married, once divorced father of 7 daughters, 6 of whom are living, was admitted to the Utah Valley Regional Medical Center psychiatric service after he was hospitalized 4 days for an overdose ingestion of Xanax where he had lost consciousness. He was in the intensive care unit at Alta View Hospital in Sandy, where he lives recovering from this overdose. He was previously admitted to this hospital for psychiatric care. He states he has been under a lot of stress and when his sleep was disturbed several nights ago, he was awake and took his whole bottle of what was the remaining of his bottle of Xanax. His main physical complaint is that he has high cholesterol and high triglycerides in addition to being dependent on Xanax.

DIETARY: Seroquel 300 mg at night, Ativan 1 mg as needed, Xanax 1 mg 4-6 times a day, Fioricet as needed for headaches Vytorin recently changed to Zocor, multiple vitamin once daily.

ALLERGIES: No known medication allergies.

SURGICAL HISTORY: He had a lipoma removed from his right shoulder.

TRAUMA: He had a left fourth metacarpal fracture, a bad right ankle ligament tear.

CHRONIC ILLNESSES: He has been told he has had some high blood pressure, high cholesterol, high triglycerides. He gets frequent mix of different types of headaches.

Tobacco: None. Alcohol: He states he binge drinks. Last time was a couple weeks ago. Illicit drugs: None.

FAMILY HISTORY: He is not aware of any family history of mental illness. His mother died of kidney cancer. His father has had heart disease and is on medication for it. He is not aware of any family history of diabetes.

SOCIAL HISTORY: The patient is originally from Idaho. He graduated from high school in Boise. He has a bachelor's degree of college under graduate degrees and a master's in business and a law degree from the University of Idaho. He lives in Sandy, Utah. He has been married twice and has 5 children daughters with his first marriage. He was apparently divorced. He is remarried and has 2 daughters with his second marriages. One of his oldest daughters from the first marriage died in a motor vehicle crash apparently. The patient practices law, is very busy and stressed out with this.

Utah Valley Regional Medical Center
P.O. Box 390
Provo, UT 84604-3337
(801) 357-7850

PATIENT: COREY, CLAYNE I
MRN: 802875 | ENC: 144-45361359
EMMI: 282136
DOB: 11/02/1959
PHYSICIAN: JOSEPH K MINER MD
ADMIT: 04/11/2008
DISCHARGE:
DATE OF SERVICE: 04/11/2008

HISTORY AND PHYSICAL REPORT

PRIMARY CARE PHYSICIAN: SAM J COATES

REVIEW OF SYSTEMS:

HEENT: Negative.

RESPIRATORY: He denies cough, pain, shortness of breath, or palpitations.

GASTROINTESTINAL: He denies nausea, diarrhea, constipation, or sign of bleeding.

UROLOGICAL: He denies dysuria, hematuria, frequency, or urgency.

MUSCULOSKELETAL: Negative.

SKIN: He has a large mole behind his right shoulder.

NEUROLOGIC: He denies headaches or numbness or weakness of extremities.

PHYSICAL EXAMINATION:

GENERAL APPEARANCE: The patient is a large normally developed, normally nourished, casually dressed male. He is very pleasant and cooperative. He is very upbeat almost euphoric. He does not appear to be in any acute physical distress. He states he is not feeling depressed currently, but his depression was 5 days

VITAL SIGNS: Blood pressure 120/70, pulse 84 and regular, respirations 16, temperature afebrile.

HEENT: Negative.

EYES: Pupils are equal, round, and reactive to light and accommodation. Extraocular movements are intact. Peripheral vision is intact. Visual acuity is grossly intact.

HEARING: Within normal limits.

THYROID: No adenopathy, thyroid enlargement, or carotid bruit.

HEART: Clear to auscultation. Normal breath sounds.

LUNGS: Regular rhythm without murmur, gallop, or rub.

ABDOMEN: Soft and nontender. There is no palpable organ enlargement or other abnormal masses.

LYMPH NODES: There is no cervical or axillary adenopathy.

NEURALGIA: Deferred.

NEURALGIA: Deferred.

EXTREMITIES: The patient has full range of motion. There is no dependent edema. Peripheral pulses are

SKIN: The patient has a large cherry angioma behind his right shoulder.

NEUROLOGIC: The patient's gait is normal. He has no tremor. Rapid alternating movements and dexterity normal. Motor strength appears symmetrical in all extremities. Sensory appears intact in all extremities. Deep tendon reflexes are grade 2/4 and symmetrical.

ANAL NERVES:

Intact to coffee.

III, IV, VI: See eyes. Normal facial sensation.

II: Symmetrical normal facial movement.

Utah Valley Regional Medical Center

P.O. Box 390
1034 North 500 West
Provo, UT 84604-3337
(801) 357-7850

PATIENT: COREY, CLAYNE I

ENC: 144-45361359

EMMI: 282136

DOB: 11/02/1959

PHYSICIAN: JOSEPH K MINER MD

ADMIT: 20080411164800

DISCHARGE:

ARY CARE PHYSICIAN: SAM J COATES

Intact to soft spoken voice.

l X: Symmetrical uvula movement and normal phonation.

mmetrical anterior neck muscle mass and shoulder shrug.

ongue is symmetrical and protrudes midline.

SSION:

ective disorder, depressed, possibly bipolar features.

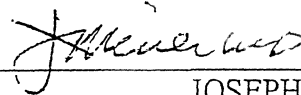
rdose ingestion of Xanax 4 to 5 days ago.

omnia.

erlipidemia.

olesterol and triglycerides.

: Psychiatric evaluation and treatment as per Dr. Sam Coates. We will review the patient's admission lab and continue his maintenance medications.



JOSEPH K MINER MD

b D 04/11/2008 19:32:44 T:04/11/2008 21:48:56 VID: 502601 TID: 612607

Utah Valley Regional Medical Center

P.O. Box 390
1034 North 500 West
Provo, UT 84604-3337
(801) 357-7850

PATIENT: COREY, CLAYNE I
ENC: 144-45361359
EMMI: 282136
DOB: 11/02/1959
PHYSICIAN: JOSEPH K MINER MD
ADMIT: 20080411164800
DISCHARGE:

HISTORY AND PHYSICAL REPORT

LARY CARE PHYSICIAN: SAM J COATES

7 COMPLAINT: "I made an irrational and impulsive decision."

ORY OF PRESENT ILLNESS: This is a 48-year-old married male who was admitted through the Alta Hospital ICU after taking an overdose of Xanax and Seroquel demanding that his wife not seek help and leaving a suicide noted. On arrival at Alta View Hospital he was combative and agitated and threatening aff. He was admitted to the ICU in restraints.

7 years ago, he had a major issue with his partner at their law firm, and he had to have him disbarred. and that time he felt like he was "in over his head." He was also going through some custody battles with his wife which was very difficult for him. He began seeing Dr. Rada his internist and was using Xanax at a gradually increasing dose to manage his anxiety in the sense of being overwhelmed. He eventually worked up to taking 6 mg of Xanax daily. When Dr. Rada was feeling uncomfortable with the dose of Xanax he was up to, he referred him to see a psychiatrist, but Clayne only went to see the psychiatrist once because he did not feel he could relate well to him. He then returned to see Dr. Rada who tried transitioning him off of Xanax and Seroquel. He eventually worked up to 300 mg of Seroquel but was unable to decrease the Xanax very much. Dr. Rada notes that he has been impulsive, verbally abusive, abused alcohol, and has had extreme anxiety and has been suicidal including writing multiple suicide notes in the past. Dr. Rada has felt that his psychiatric issues have been too much for him to deal with and he feels he needs specialized psychiatric care in inpatient admission especially after this suicide attempt.

Recently, Clayne indicates that he was going through a number of stressors including having a trial on this Tuesday. He states he puts a lot of pressure on himself because he has been a defense attorney and not lost his criminal defense in the last 17 years. As of this last Tuesday morning at about 4:00 a.m. he was feeling extremely overwhelmed and decided to impulsively take an overdose of Xanax and Seroquel. He then wrote a suicide note and eventually ended up in the ICU at Alta View Hospital. He is now regretting what he had done and wants to get off of both the Xanax and Seroquel and handle things more naturally. He feels that Xanax has increased his problems and definitely wants to work his way off of it.

DEPRESSIVE FEATURES: He notes having more depression in the last 2 months. During this period of time, he has had some suicidal thoughts. His depression has mainly been manifest in the form of anger and irritability. This has come out with his wife who works with him as a paralegal and has caused some degree of marital conflict for which they have been in therapy.

MANIC FEATURES: He feels he can control his mood states except for problems related to his medication such as the Xanax. He has been called manic by others at times in the past. He has had anxiety, anger and depression all at the same time recently. He denies episodes of extreme mania such as having no need for sleep or taking risks.

Utah Valley Regional Medical Center
P.O. Box 390
Provo, UT 84604-3337
(801) 357-7850

PATIENT: COREY, CLAYNE J
MRN: 802875 | ENC: 114 45361359
EMMI: 282136
DOB: 11/02/1959
PHYSICIAN: DAVID L PAULSON MD
ADMIT: 04 11 2008
DISCHARGE:
DATE OF SERVICE: 04 11 2008

PSYCHIATRIC ADMISSION REPORT

ADDENDUM

VIII

PATIENT: Clayne Corey

CHART: 8706

DATE: 06/03/2009

CHIEF COMPLAINT: This is a 49-year-old male seen in neurosurgical consultation on referral from Dr. Matthew Butrum for evaluation and treatment advice regarding an intraventricular tumor. The patient has a fairly complicated past history. He began having headaches in 1999. He was also having a great deal of stress at the time. He was initially started on Xanax for the stress and Fioricet for the headaches. The headaches gradually escalated, as did his requirement for medication. He increased his Xanax and Fioricet at least four or five fold over the ensuing few years. In 2004 he was started on Seroquel, which did not seem to help his headaches much, but did help him with sleep. He had a waxing and waning course, but was able to continue his legal practice. He had a medication overdose in April 2008. At the time he was taking several medications and got up in the night and took an excessive amount of Xanax. He has been trying to taper his medications and has developed blurred vision, slurred speech, etc. Ultimately, an MRI was performed, which demonstrated an intraventricular tumor.

PAST MEDICAL HISTORY: Hypercholesterolemia, hypertension, headaches, and anxiety.

PAST SURGICAL HISTORY: Lipoma removal.

PRESENT MEDICATIONS: Trileptal, Xanax, mirtazapine, melatonin, and Aleve.

ALLERGIES: No known medical allergies.

SOCIAL HISTORY: He is a married attorney. He does not use tobacco or alcohol.

FAMILY HISTORY: Coronary artery disease, hypertension, kidney cancer, and sister died with glioblastoma.

REVIEW OF SYSTEMS: Noncontributory other than the presenting problem. All other systems are negative.

PHYSICAL EXAM:

APPEARANCE: Healthy appearing 49-year-old male in no acute distress

VITAL SIGNS: WT: 234 lbs; BP: 122/80; PR: 68; RR: 16.

ORIENTATION: The patient is oriented to person, place, time, and situation.

CARDIOVASCULAR: Regular rate and rhythm without murmur.

MUSCULOSKELETAL & NEUROLOGIC TESTING:

RECENT & REMOTE MEMORY: Within normal limits

ATTENTION SPAN & CONCENTRATION: Normal.

LANGUAGE FUNCTION: Within normal limits.

FUND OF KNOWLEDGE: Within normal limits.

GAIT & STATION: Normal.

CRANIAL NERVES II – XII:

II: Visual fields and acuity normal and intact on confrontation exam.

III, IV, VI: Extra ocular movements intact.

V: Facial sensation normal.

VII: Facial resting tone and movement symmetrical.

VIII: Hearing intact grossly.

IX: No swallowing difficulties.

X: Gag/palate normal.

XI: Sternocleidomastoid and trapezius normal.

XII: Tongue movement and tone symmetrical.

MUSCLE TONE: Normal in the upper and lower extremities.

(Continued)

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Clayne Corey
06/03/2009

MUSCULOSKELETAL & NEUROLOGIC TESTING: (continued)

MUSCLE STRENGTH OF THE UPPER AND LOWER EXTREMITIES:

	RIGHT	LEFT
Deltoid:	5/5	5/5
Biceps:	5/5	5/5
Triceps:	5/5	5/5
Grasp:	5/5	5/5
Hip Flexors:	5/5	5/5
Quadriceps:	5/5	5/5
Ankle Dorsiflexion:	5/5	5/5
Ankle Plantar Flexion:	5/5	5/5

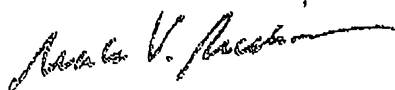
SENSATION: No detectable deficits to pinprick or fine touch.

COORDINATION: Normal in upper and lower extremities.

RADIOLOGIC STUDIES: On review of his brain MRI study, there is a mass within the occipital horn of the left lateral ventricle. The ventricles appear very slightly enlarged. There is no ballooning of the ventricle or specific hydrocephalus. The mass does not enhance with contrast. The radiology interpretation describes the highest likelihood to be an intraventricular epidermoid. This is a very rare condition. The mass appears more consistent with an *ependymoma*, *choroid plexus papilloma*, or possibly a low grade *astrocytoma*. It might represent a *dermoid*. It would not be consistent with a *teratoma*.

IMPRESSION: This patient has an intraventricular tumor as described on his MRI. The mass appears low grade. It does not enhance with contrast. There may be a slight increase in his spinal fluid volume. There is no specific ventricular obstruction.

PLAN: This patient has an intraventricular tumor as described on his MRI. It is low grade, whatever the pathology. This will require surgical resection. My advice would be MRI-guided stereotactic localization, left occipital craniotomy, and resection of the tumor. I discussed this with the patient at length along with the indications, inherent risks, etc. He would like to proceed with this option. He will discuss the timing with his family and get back with me. He will likely proceed in the next month or so.



Mark V. Reichman, MD

MVR/H/8706a

NEUROSURGICAL ASSOCIATES, L.L.C.
5169 SOUTH COTTONWOOD STREET #500
MURRAY, UTAH 84107
PHONE (801) 507-9555
FAX (801) 507-9550

MARK V. REICHMAN, M.D. P.C.
JOHN R. MACFARLANE, M.D. P.C.

RICHARD H. TIPPETS, M.D. P.C.
CHARLES C. RICH, M.D. P.C.

June 3, 2009

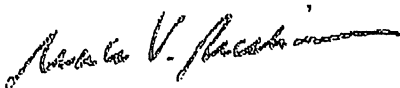
Matthew Butrum, MD
1134 North 500 West #102
Provo, UT 84604
Fax: 801-357-4090

Re: Clayne Corey

Dear Dr. Butrum:

I appreciated evaluating Clayne Corey in neurosurgical consultation. I have included a copy of my office consultation for your records. As you are recall, he was recently diagnosed with an intraventricular intracranial mass. Mr. Corey has a left occipital intraventricular mass, which was read by the radiologist to be most consistent with an intraventricular epidermoid. I think ependymoma or choroid plexus papilloma would be a more likely diagnosis. Intraventricular ependymomas are extremely rare. In any event, the mass needs to be resected surgically. I discussed this with the patient and his family at length including the indications, inherent risks, etc. They would like to proceed with this option. They will discuss the timing and get back to me. I will keep you advised of my further follow up with him. Again, I appreciate participating in his care.

Sincerely,



Mark V. Reichman, MD

MVR/rll/8706

Cc: Jason Andersen, DO
Outpatient Psychiatry
1034 North 500 West
Provo, UT 84604
Fax: 801-357-7746

Enclosure

ADDENDUM

IX

INTERMOUNTAIN MEDICAL CENTER
MedRec # 84810
Page 1

Operative Report

T422
EMMI# 282136
PT ENCT# 25447863

4-87012

Date of Service: 06/30/2009

PREOPERATIVE DIAGNOSIS: Left lateral intraventricular mass lesion.

POSTOPERATIVE DIAGNOSIS: Left lateral intraventricular mass lesion.

PROCEDURE PERFORMED: MRI guided stereotactic localization, left occipital craniotomy, resection of intraventricular mass lesion, microsurgical technique.

SURGEON: Mark V. Reichman, MD

ASSISTANT: Dawndi Lee, CRNPA

ANESTHESIA: General endotracheal.

INDICATION FOR PROCEDURE: This patient has had difficulty with waxing and waning headache for 5 years or so. He has had a fairly difficult course. Ultimately, an MRI was performed revealing an intraventricular mass. He is taken now for operative intervention.

DESCRIPTION OF PROCEDURE: The patient was brought initially taken to the MRI after placement of fiducial points on the scalp in standard fashion. A localizing MRI was then performed. After the MRI was completed, the patient was taken to the operating room. Anesthesia was then induced and the patient was endotracheally intubated in routine fashion. The data from the MRI was loaded on to the Stealth stereotactic workstation and a 3 dimensional surgical plan was created. After placement of appropriate monitoring lines, the patient was positioned and prepared for surgery. He was placed in a prone position on the operating table. The head was secured in a Mayfield 3 pin head holder. The fiducial points on the patient's scalp were digitized and overlaid on to the 3 dimensional surgical plan for accuracy. The trajectory to the mass lesion in the surgical plan were then created. After the calculations were completed, the patient was prepared for surgery. The left occipital region was shaved and then prepped and draped in the standard fashion. An inverted horseshoe incisional site was marked on the left occipital region and infiltrated with local injection. The incision was opened and carried through the subcutaneous fatty tissue, galea, and periosteum. The skin flap was reflected inferiorly. Two bur holes were placed in the skull and a 4-5 cm diameter left occipital craniotomy was fashioned with a high speed air drill. The dura was opened in a curvilinear fashion. The operating microscope was brought into facilitate the remainder of the operation. The arachnoid over a sulcus was then divided and dissection was then gradually carried deeply along the plane of the trajectory. The localizing probe was then utilized to traverse through the white matter tracts down to the exact location of the mass within the left lateral ventricle. A self retaining retractor was placed and the bipolar was utilized to carefully dissect along the posterior wall of the left lateral ventricle. There was a mass lesion within the ventricle. The mass had an appearance of a typical colloid cyst. The mass was dissected circumferentially from the ventricular walls. The mass was

PT: COREY, CLAYNE IRA
DOB: 11/02/59

REICHMAN, MARK V.

SERVICE DATE: 06/30/09

Operative Report

INTERMOUNTAIN MEDICAL CENTER
MedRec # 84810
Page 2

Operative Report

T422
EMMI# 282136
PT ENCT# 25447863

attached to the choroid. The vascular supply from the choroid was carefully coagulated and divided and the mass was carefully dissected and removed from the choroid. The cyst was then opened and proteinaceous fluid similar to a colloid cyst was removed. The cyst was then carefully removed totally. The resection bed was inspected and meticulous hemostasis was achieved. There were small hematomas within the ventricle, which were removed as well. The ventricle was then copiously irrigated with normal saline solution. After the mass lesion was completely resected, Surgicel was laid along the approach site. The wound was then closed. Closure was accomplished using interrupted and running 4-0 nylon suture to close the dura. Dural tack up sutures were placed. Duragen was placed over this dural repair. The bone flap was returned to its position using rigid fixation placement screws. The galea was closed with interrupted 3-0 Vicryl suture. A running 2-0 Prolene suture was used to close the skin edges. The wound was cleaned and sterile dressing was applied. The estimated blood loss of the procedure was 100 mL. Sponge and needle counts were correct in all counts. There were no intraoperative complications. The patient tolerated the procedure well and was taken to the neuro critical care unit for postoperative observation.

MARK V REICHMAN MD

MVR/as VID: 1931385 TID: 2090007 D: 06/30/2009 16:50:37 T: 06/30/2009 23:35:56

T: COREY, CLAYNE IRA
OB: 11/02/59

REICHMAN, MARK V.

SERVICE DATE: 06/30/09

Operative Report

ADDENDUM

X

1 THE COURT: Counsel - Counsel. The issue here - I
2 don't know that we can presuppose that he took the money as
3 you phrased it. So I'm sustaining it on the form of the
4 question, so...

5 MS. TOWNSEND: I'll rephrase it.

6 Q (BY MS. TOWNSEND) We're talking about conduct that
7 involved Mr. Corey's failure to return a client's funds to
8 her back in 2000. Are you aware of that?

9 A I'm not aware of the details, I know that that -
10 that's an issue that - I guess the heart of this issue.

11 Q And -

12 A The detail I'm not sure I understand.

13 Q And - well, we need to get at whether or not this
14 tumor could've caused that action or failure to act upon the
15 part of Mr. Corey. And I need to know if you're giving an
16 opinion here today -

17 A And - and I'm -

18 Q - that that caused it.

19 A - I'm giving an opinion that it definitely
20 contributed to poor judgment and mood swings.

21 MS. TOWNSEND: Okay. That's all I have. Thank you.

22 THE COURT: Any redirect?

23 MR. GRUBER: Just one quick question, Your Honor.

24 ///

25 ///