

FILED

MAR 20 2014

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

ROBERT L. HAYES,
Lawyer (Bar No. 21239).

Proceeding No. 13#00095

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND HEARING OFFICER'S
RECOMMENDATIONS**

THIS MATTER came before the undersigned Hearing Officer on January 21st and 22nd, 2014, pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent Robert L. Hayes appeared, representing himself, and the Office of Disciplinary Counsel (ODC) was represented by Erica Temple.

Testifying at the hearing was Joseph A. Maplethorpe, III, Larry J. Couture, Michael W. Graham, and the Respondent Robert L. Hayes.

FORMAL COMPLAINT

The Respondent was charged by Formal Complaint, dated October 11, 2013, with three counts of violation of the Rules of Professional Conduct:

COUNT 1

By disclosing information in the Motion in the Hayes Declaration relating

*FINDINGS OF FACT, CONCLUSIONS OF LAW AND
HEARING OFFICER'S RECOMMENDATIONS*

Page 1

THE LAW OFFICES OF
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1 to the representation of Mr. Maplethorpe, Respondent violated RPC 1.6.

2 COUNT 2

3 By using information relating to Mr. Maplethorpe's representation and
4 litigation directly adverse to Mr. Maplethorpe's interest, without Mr.
5 Maplethorpe's informed consent, Respondent violated RPC 1.8(b).
6

7 COUNT 3

8 By continuing to represent Mr. Maplethorpe in the Superior Court case
9 while simultaneously suing him in the District Court case, Respondent violated
10 RPC 1.7(a) and/or RPC 8.4(d).
11

12 HEARING

13 At the hearing held on January 21 and January 22, 2014, witnesses were
14 sworn and presented testimony and exhibits were admitted into evidence. Having
15 considered the evidence and argument of counsel, the Hearing Officer makes the
16 following Findings of Fact, Conclusions and Recommendation.
17

18 FINDINGS OF FACT

19 The following Findings of Fact are based upon the evidence presented at
20 the hearing as well as the exhibits presented by the ODC and the Respondent.

21 1. Respondent was admitted to the practice of law in the State of
22 Washington on November 14, 1991.

23 2. On June 7, 2011, Joseph Maplethorpe, III, hired Respondent to
24 assist him in a legal separation and potential dissolution of marriage in Pierce
25 County Superior Court Cause No. 11-3-02209-8 (the Superior Court Case).

1 3. At the time Mr. Maplethorpe hired Mr. Hayes, he signed a written
2 Fee Agreement.

3 4. Prior to retaining Mr. Hayes, Mr. Maplethorpe and Mr. Hayes were
4 acquaintances who knew each other through a mutual interest in music played at
5 various establishments throughout Pierce County.
6

7 5. Mr. Maplethorpe originally gave Mr. Hayes \$2,000.00 as an
8 advance and when that was used up, Mr. Hayes would bill Mr. Maplethorpe and
9 Mr. Maplethorpe would pay the bills in accordance with the Fee Agreement.

10 6. In early 2012, Mr. Maplethorpe had paid almost \$12,000.00 and
11 didn't feel that he had moved any closer to a divorce than the day that he hired Mr.
12 Hayes and he was getting frustrated. As a result, he sent Mr. Hayes a letter telling
13 him that he would have no more money to pay him until the divorce was finalized.

14 Mr. Maplethorpe thought about getting a new attorney but decided that he was so
15 far in financially to Mr. Hayes that his previous money would be wasted if he fired
16 him at this point.
17

18 7. As the divorce trial, set for July 12, 2012, approached, the
19 relationship between Mr. Hayes and Mr. Maplethorpe deteriorated primarily as a
20 result of Mr. Maplethorpe not paying any further bills and Mr. Hayes believing
21 that he might never get paid.
22

23 8. Mr. Hayes decided that he needed to file a lawsuit for his fees but
24 he did not want to wait until after the divorce trial, because he was concerned that
25 Mr. Maplethorpe would file for bankruptcy. Mr. Hayes also thought that if he

1 filed suit, Mr. Maplethorpe would just default and he could easily obtain a
2 judgment against him.

3 9. As a result of this dispute, Mr. Hayes filed a Complaint for
4 Damages in Pierce County District Court (the District Court case) on July 5, 2012
5 against Mr. Maplethorpe for breach of contract relating to his failure to pay Mr.
6 Hayes' legal fees.
7

8 10. In that lawsuit, Mr. Hayes claimed that he and Mr. Maplethorpe
9 executed a written Fee Agreement, Mr. Maplethorpe had made some payments but
10 had unpaid bills in April and June of 2012, and Mr. Maplethorpe was in breach of
11 contract.
12

13 11. Approximately a week prior to the July 12, 2012 trial, Mr. Hayes
14 and Mr. Maplethorpe met at the Parkland Library, ostensibly to prepare for the
15 trial.
16

17 12. Prior to that meeting, Mr. Hayes had arranged for a process server
18 to serve the District Court case on Mr. Maplethorpe at their meeting. However,
19 apparently as a result of a miscommunication, the process server never entered the
20 library and stayed in the parking lot and no service was affected.
21

22 13. At that meeting, Mr. Maplethorpe indicated that there was very
23 little discussion of the upcoming trial and a lot of discussion as to why Mr.
24 Maplethorpe was not paying his bill.
25

14. The relationship had so deteriorated at this point that Mr. Hayes
recorded and played at the hearing an exchange between he and Mr. Maplethorpe

1 screaming at each other with Mr. Maplethorpe saying, "sue me" and Mr. Hayes
2 yelling back, "I already have".

3 15. Mr. Hayes then attempted to have Mr. Maplethorpe served at his
4 place of residence, however the service was not affected and the process server
5 reported back that Mr. Maplethorpe lived in a condominium-type establishment
6 where it is necessary to call up to the resident to have the door unlocked and be
7 able to have face-to-face contact with the resident and the process server got no
8 response when attempting that contact.
9

10 16. Mr. Hayes then arranged for the process server, Michael Graham,
11 to serve Mr. Maplethorpe at the Pierce County Superior Court courtroom where
12 the divorce trial was being held, and just before it began.
13

14 17. Mr. Hayes had Mr. Maplethorpe come out into the hallway from
15 the courtroom and Mr. Graham handed the Summons and Complaint from the
16 District Court case to him, effecting service at that time.
17

18 18. Mr. Graham testified that Mr. Maplethorpe appeared disinterested
19 and not angry when he was served.

20 19. When Mr. Maplethorpe was asked how he and Mr. Hayes were
21 getting along prior to the trial, Mr. Maplethorpe described their relationship as
22 "piss-poor".
23

24 20. Mr. Maplethorpe testified that he was not surprised when he was
25 served on July 12th, because Mr. Hayes had been threatening to sue him for
months. He stuck the papers in his briefcase and indicated that he would worry

1 about that later, after the divorce trial.

2 21. Although Mr. Maplethorpe characterized Mr. Hayes'
3 representation of him during the divorce trial as "piss-poor", there was no credible
4 evidence presented that the District Court suit and service on Mr. Maplethorpe
5 affected Mr. Hayes' representation of Mr. Maplethorpe or their relationship which,
6 by the time suit was filed, had already severely deteriorated.
7

8 22. Once the trial was concluded on the third day, Mr. Hayes and Mr.
9 Maplethorpe parted ways and had no further conversations or contact until after
10 Mr. Maplethorpe had hired attorney Larry Couture to represent him in connection
11 with the finalizing of the divorce post decision and on the District Court case.
12

13 23. After the divorce trial and during the litigation of the District Court
14 case, Mr. Hayes filed a Motion and Declaration to Compel Discovery and Motion
15 for Sanctions on September 10, 2012.
16

17 24. In that Motion, Mr. Hayes revealed that "legally in his life, every
18 person Mr. Maplethorpe has been associated with for any significant period of
19 more than a year, he fails to maintain that relationship", which was information
20 that he acquired and learned during the course of his representation with Mr.
21 Maplethorpe.
22

23 25. In that Motion, Mr. Hayes revealed that Mr. Maplethorpe had a
24 "serious lack of anger management problem" which was information that he
25 learned during the course of his representation of Mr. Maplethorpe.

26. In that Motion, Mr. Hayes revealed that "Mr. Maplethorpe has had

1 the money but made the decision to spend this money on a girlfriend instead of
2 paying his attorney's fees due to his hatred, disagreements, and inability to get
3 along with his attorney" which was information that he acquired and learned
4 during the course of his representation of Mr. Maplethorpe.

5
6 27. On May 3, 2013, Mr. Hayes filed a document entitled "Declaration
7 of Robert L. Hayes in Support of Motion for Summary Judgment" during the
8 course of the litigation in the District Court case.

9 28. In that Declaration, Mr. Hayes revealed information concerning
10 Mr. Maplethorpe's IRS Tax Form 1040 and Mr. Maplethorpe's IRA account,
11 which was information that Mr. Hayes acquired and learned during the course of
12 his representation of Mr. Maplethorpe.

13
14 29. In that Declaration, Mr. Hayes revealed that "Mr. Maplethorpe has
15 squandered thousands and thousands of dollars on Mr. Maplethorpe's female
16 friends" which was information that Mr. Hayes acquired and learned during the
17 course of his representation of Mr. Maplethorpe.

18
19 30. In that Declaration, Mr. Hayes revealed that Mr. Maplethorpe "was
20 charging hundreds of dollars at a time at various restaurants and extravagant
21 lingerie from Victoria's Secret" which was information that he acquired and
22 learned during the representation of Mr. Maplethorpe.

23
24 31. In that Declaration, Mr. Hayes revealed that "Mr. Maplethorpe had
25 clearly squandered money on other people" which was information that he
acquired and learned during the course of his representation of Mr. Maplethorpe.

1 32. All of the above information in Findings of Fact numbers 23
2 through 30 were revealed despite the fact that these facts or allegations were not
3 necessary or relevant to Mr. Hayes' allegations in the District Court case that he
4 was owed money by Mr. Maplethorpe for his representation nor were any of these
5 facts or allegations permitted by Mr. Maplethorpe or caused to be revealed by him.
6

7 33. Mr. Hayes defended the revelation of information in Findings of
8 Fact numbers 23 through 30 as being necessary to combat a fraud purportedly
9 being perpetrated by his client, Mr. Maplethorpe.
10

11 34. There is no credible evidence to believe, as alleged by Mr. Hayes,
12 that a substantial injury to the financial interest or property of another was
13 reasonably certain to result or had resulted from Mr. Maplethorpe's commission of
14 any crime or fraud in furtherance of which he had used Mr. Hayes' services. In
15 short, there was no credible evidence that Mr. Maplethorpe was using Mr. Hayes'
16 services to perpetuate any fraud.
17

18 35. The outcome of the Superior Court case, as indicated by Larry
19 Couture was fair and would not have been subject to appeal. Mr. Couture also
20 testified that it was unlikely that the outcome would have been any different had a
21 new trial been granted.
22

23 36. There was no credible evidence to suggest that the outcome of the
24 Superior Court case was in any way affected by any of the revelations Mr. Hayes
25 made concerning Mr. Maplethorpe in the District Court case and the District Court
case itself has yet to be resolved.

1 37. The information concerning Mr. Maplethorpe's address and secure
2 living situation was obtained during the course of the representation but was not
3 the type of information which results in a violation of RPC 1.8(b) because it is
4 general information and would not normally be expected to be unrevealed by a
5 client.

6
7 38. In 1998, Mr. Hayes received two reprimands for violation of RPC
8 1.1 (competence), RPC 1.3 (diligence), and RPC 8.2(a) (recklessly making untrue
9 statements about an adjudicating officer).

10 39. In 2006, Respondent received another reprimand for a violation of
11 RPC 1.9(a) (conflict of interest). This reprimand was for representing two siblings
12 with adverse interests in an estate matter.

13
14 40. Respondent has demonstrated a lack of remorse and has refused to
15 acknowledge the wrongful nature of his actions.

16 41. Respondent wrote that "Mr. Maplethorpe got what he asked for and
17 what he deserved, which is my suing him in a cause of action for breach of
18 contract for his failure to honor his attorney fees." In his response to Mr.
19 Maplethorpe's grievance, Mr. Hayes wrote that, "instead of Mr. Maplethorpe
20 saying I had no business in representing Mr. Maplethorpe at trial because I sued
21 him, he should have been saying I have no business representing a deadbeat client
22 who fails to honor his attorney fees but instead squandered all of his money on
23 women he had met at a bar.", "instead of being commended for an A1 outstanding
24 effort at Mr. Maplethorpe's divorce trial, I received this unwarranted criticism
25

1 which I have had to take valuable time out to explain to the WSBA Disciplinary
2 Counsel.”

3 Based on the foregoing Findings of Fact, the Hearing Officer makes the
4 following:

5
6 CONCLUSIONS OF LAW

7 COUNT 1: The Hearing Officer concludes by a clear preponderance of
8 the evidence that by knowingly disclosing information relating to his
9 representation of Mr. Maplethorpe in the Motion and the Declaration and the
10 Motion for Sanctions, Mr. Hayes violated RPC 1.6.

11
12 COUNT 2: The Hearing Officer concludes that the ODC has not
13 proved by a clear preponderance of the evidence that Mr. Hayes violated RPC
14 1.8(b) by utilizing information as to Mr. Maplethorpe's location for the purposes
15 of service of the District Court case.

16
17 COUNT 3: The Hearing Officer concludes by a clear preponderance of
18 the evidence that in filing suit against and serving Mr. Maplethorpe with a lawsuit
19 for fees owed, Mr. Hayes put himself in a concurrent conflict of interest between
20 Mr. Maplethorpe and himself thereby putting himself in a position directly adverse
21 to Mr. Maplethorpe, contrary to RPC 1.7(a). The Hearing Officer further
22 concludes by a clear preponderance of the evidence that Mr. Maplethorpe did not
23 give informed consent, confirmed in writing to the conflict of interest. The
24 Hearing Officer also concludes that the filing and service of the District Court
25 lawsuit did not further deteriorate the relationship between Mr. Hayes and Mr.

1 Maplethorpe during the course of the divorce trial, did not affect the outcome of
2 the divorce trial, and was not, in this unique circumstance, prejudicial to the
3 administration of justice as alleged to be contrary to 8.4(d).

4 PRESUMPTIVE SANCTION

5 COUNT 1: ABA Standard 4.2 is most applicable to the duty to preserve
6 client confidences:
7

8 4.22 Suspension is generally appropriate when a lawyer knowingly
9 reveals information relating to the representation of a client not otherwise
10 lawfully permitted to be disclosed and this disclosure causes injury or
11 potential injury to a client.

12 COUNT 2: ABA Standard 4.3 is most applicable to the duty to avoid
13 conflicts of interest:

14 4.32 Suspension is generally appropriate when a lawyer knows of a
15 conflict of interest and does not fully disclose to a client the possible effect
16 of that conflict and causes injury or potential injury to a client.

17 PRIOR DISCIPLINE ORDERS

18 ABA Standard 8.2 Suspension is generally appropriate when a lawyer has
19 been reprimanded for the same or similar misconduct and engages in further
20 similar acts of misconduct that caused injury or potential injury to a client, the
21 public, the legal system, or the profession.

22 From the Findings of Fact and Conclusions of Law and application of the
23 ABA Standards, the appropriate presumptive sanction for each count is
24 suspension.

25 AGGRAVATING AND MITIGATING CIRCUMSTANCES

The following aggravating factors found in Section 9.22 of the ABA

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1 Standards are applicable in this case:

- 2 a) Prior disciplinary offenses
3 d) Multiple offenses
4 g) Refusal to acknowledge wrongful nature of conduct
5 i) Substantial experience in the practice of law.
6

7 I do not find that the dishonest or selfish motive aggravator is present in
8 this case in as much as I find that Mr. Hayes was acting out of a fear that he was
9 not going to get paid what was rightfully earned by him. I also do not find that the
10 aggravator of a pattern of misconduct is applied because the two violations,
11 Counts 1 and 3 are distinguished from one another and Mr. Hayes had a separate
12 motive for each violation.
13

14 I find that the following mitigating factors found in Section 9.32 of the
15 ABA Standards are applicable in this case:

- 16 b) Absence of a dishonest or selfish motive
17 m) Remoteness of prior offenses
18

19 Although Mr. Hayes was thinking of himself more than he was his client in
20 filing the lawsuit against Mr. Maplethorpe, his actions were motivated by a need to
21 be paid what he believed to be appropriate compensation for the work that he had
22 performed. I believe that motivates most lawyers to ensure that they are paid up
23 front or take appropriate measures to ensure that they are going to be paid in the
24 future. I also conclude that an appropriate mitigating factor is that although Mr.
25 Hayes' actions were potentially harmful to Mr. Maplethorpe, no actual harm

1 resulted from his action. The evidence indicated that most of the revelations and
2 allegations that Mr. Hayes put in the District Court case motions and declarations
3 had already been revealed in the divorce case and were a matter of public record.
4 There was no evidence presented that these allegations or revelations did any
5 additional harm to Mr. Maplethorpe. In addition, the filing of the lawsuit against
6 Mr. Maplethorpe, although during the representation, did not result in any actual
7 harm because Mr. Maplethorpe when he was served decided to simply put it away
8 and worry about it after the divorce trial was concluded. Their relationship was
9 already bad and the filing and service of the lawsuit did not make it any worse. He
10 then ultimately retained Mr. Couture to represent him on that matter as well as the
11 finalizing of the divorce.
12

13
14 Having said that, Mr. Hayes' argument that he did nothing wrong by filing
15 the lawsuit before the end of the representation is completely meritless. The fact
16 that there is no Washington Supreme Court decision prohibiting doing so does not
17 make it ethical. Disciplinary Counsel is completely correct when she quotes from
18 the California Supreme Court in *Santa Clara County Counsel Attorney's*
19 *Association v. Woodside*, 7 CAL 4th 525 (1994):
20

21 No reported appellate cases in the state have considered the extent
22 to which an attorney's duty of loyalty to a client prohibits the attorney from
23 suing the client. It may well be that the lack of case law is due to the
24 obviousness of the prohibition. As one court has stated: "the almost
25 complete absence of authority governing the situation where, as in the
present case, the lawyer is still representing the client whom he sues clearly
indicates to us that the common understanding and the common
conscience of the Bar is in accord with our holding that such a suit
constitutes a reprehensible breach of loyalty and a violation of the
preamble to the Canons of Professional Ethics".


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No thinking lawyer would have considered Mr. Hayes' action in suing Mr. Maplethorpe an appropriate and ethical action and an appropriate punishment should be imposed.

RECOMMENDATION

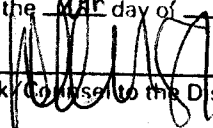
The Hearing Officer recommends that Respondent be suspended for a period of six months.

DATED this 18th day of March, 2014.


Joseph M. Mano, Jr., WSBA #5128
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, ORG HO Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Robert Hayes Respondent/Respondent's Counsel
at PO Box 44779 Tacoma, WA 98402 by Certified first class mail
 postage prepaid on the 30th day of March, 2014


Clerk/Counsel to the Disciplinary Board