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IN DISCIPLINARY DISTRICT IX  
OF THE  
BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

BOARD OF PROFESSIONAL  
RESPONSIBILITY

*RAW*  
EXEC. SEC'Y

IN RE: HOMER L. CODY  
BPR No. 10755  
Attorney Licensed to  
Practice Law in Tennessee  
(Shelby County)

DOCKET NO. 2011-2008-9-RS

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**JUDGMENT OF THE HEARING PANEL**

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This matter came on for hearing before a duly appointed Hearing Panel on September 8, 2011, upon a Petition for Discipline filed by the Board pursuant to Tennessee Supreme Court Rule 9, §14. Present were Saul Belz, Panel Chair; Nathan Bicks, Panel Member; Marjorie Baker, Panel Member; Randy Spivey, Disciplinary Counsel for the Board of Professional Responsibility, and Homer Cody, Respondent. Upon statements of counsel, evidence presented, and upon the entire record in this cause, the Panel makes the following findings and judgment.

**FINDINGS OF FACT**

1. On February 3, 2011, the Board filed a Petition for Discipline against Homer L. Cody.
2. The Petition for Discipline was entered into evidence at the hearing as Exhibit 1.
3. On February 25, 2011, Mr. Cody filed an Answer.
4. Mr. Cody's Answer was entered into evidence at the hearing, without exhibits, as Exhibit 2.

5. The Petition contains two complaints alleging violations of Rules of Professional Conduct 1.7, 3.1 and 8.4.

6. On April 14, 2010, the Board received a complaint from Michael McLaren, Robert Dinkelspiel, Robin Rasmussen, and Robert Cox, regarding the conduct of Mr. Cody. The matter was designated as File No. 33087-9-PS. A true and exact copy of the complainants' letter is attached to the Petition for Discipline as Exhibit A.

7. The Board notified Mr. Cody of the complaint and he responded by letter of May 9, 2010. A true and exact copy of Mr. Cody's response is attached to the Petition for Discipline as Exhibit B.

8. Mr. Cody represented Pee Wee Wisdom Child Development Center, Inc., (hereinafter, "Pee Wee"), a nonprofit corporation, and Vivian Braxton in a chancery court case.

9. In May of 2002, the State of Tennessee's Attorney General's Office was investigating Pee Wee to determine whether Pee Wee and Ms. Braxton had violated the Tennessee Nonprofit Corporation Act.

10. Prior to Mr. Cody's representation, Pee Wee and Ms. Braxton filed a Verified Complaint for Declaratory Judgment, Equitable Relief and Alternative Relief naming the Attorney General's Office as a defendant and seeking the dissolution of Pee Wee.

11. A copy of the Verified Complaint for Declaratory Judgment, Equitable Relief and Alternative Relief was entered into evidence during the hearing as Exhibit 3.

12. By Agreed Order entered on September 3, 2002, Robert Dinkelspiel was appointed as Receiver for Pee Wee.

13. The Agreed Order appointing Mr. Dinkelspiel as Receiver was entered into

evidence at the hearing as Exhibit 14.

14. The Agreed Order appointing the Receiver transferred the power to Mr. Dinkelspiel to “[e]ngage, employ, or continue to employ such managers, agents, employees, servants, attorneys, accountants, appraisers, and other persons to evaluate marshal, conserve, hold manage and protect any receivership property.”

15. On November 15, 2004, Mr. Cody entered a Notice of Appearance purporting to represent both Ms. Braxton and Pee Wee.

16. On November 19, 2004, Mr. Dinkelspiel sent Mr. Cody a letter, entered into evidence at the hearing as Exhibit 4, requesting that Mr. Cody correct his Notice of Appearance to reflect that he only represented Ms. Braxton.

17. Mr. Dinkelspiel’s letter stated that he, as receiver for Pee Wee, had not retained Mr. Cody.

18. Mr. Dinkelspiel testified at the hearing that, among others things, the allegations of conflict of interest transactions in favor of Ms. Braxton from Pee Wee raised by the Attorney General made Mr. Cody’s dual representation impossible.

19. Mr. Dinkelspiel testified that he did not believe that Mr. Cody could represent both the best interests of Ms. Braxton and the best interests of Pee Wee.

20. On February 1, 2005, Mr. Cody responded to Mr. Dinkelspiel’s letter, maintaining that he could represent both Ms. Braxton and Pee Wee.

21. A copy of Mr. Cody’s February 1, 2005 letter was entered into evidence at the hearing as Exhibit 5.

22. On February 17, 2006, Mr. Dinkelspiel filed the Report of the Receiver.

23. The Report of the Receiver states that Ms. Braxton impermissibly leased property to Pee Wee at a higher than market value rate, that Ms. Braxton illegally “borrowed” public funds intended for Pee Wee to benefit one of her “for-profit” daycare centers, and that Ms. Braxton failed to perform her fiduciary responsibilities to ensure that Pee Wee’s resources were used to achieve the Corporation’s charitable purposes.

24. A copy of the Report of the Receiver was entered in to evidence at the hearing as Exhibit 6.

25. The Chancery Court approved the Report of the Receiver by entering its Judgment Order on Motion to Approve Report of Receiver on August 28, 2006.

26. A copy of the Judgment Order on Motion to Approve Report of Receiver was entered into evidence at the hearing as Exhibit 7.

27. The Judgment Order on Motion to Approve Report of Receiver entered a judgment in the amount of \$296,190.50 in favor of Pee Wee against Ms. Braxton.

28. Mr. Cody did not consult with either Pee Wee or Ms. Braxton regarding the conflict of interest.

29. Mr. Cody testified that he did not discuss the entry of the Judgment with Ms. Braxton or Pee Wee or how the entry of the Judgment might affect his dual representation.

30. Mr. Cody testified that Ms. Braxton was present for most, if not all, of the meetings he had with his client representative for Pee Wee.

31. On August 14, 2003, Ms. Braxton was indicted on two counts of theft of property over \$60,000 and two counts of evidence tampering.

32. The indictments arose out of Ms. Braxton’s management of Pee Wee.

33. The evidence tampering indictments arose out of allegations that Ms. Braxton forged signatures of the Board of Directors.

34. Ms. Braxton entered a guilty plea to one count of theft between \$10,000 and \$60,000.

35. Mr. Cody testified that he did not speak to Ms. Braxton or to Pee Wee about Ms. Braxton's indictment and how it might affect his dual representation of Ms. Braxton and Pee Wee.

36. Mr. Cody further testified that he made no investigation into the facts giving rise to the indictments.

37. Ms. Braxton served time in prison as a result of her guilty plea.

38. Mr. Dinkelspiel, determined that Mr. Cody's dual representation of Pee Wee and Ms. Braxton constituted a conflict of interest, given that Pee Wee had been awarded a judgment against Ms. Braxton.

39. Mr. Dinkelspiel, through counsel, filed a motion to disqualify Mr. Cody on January 31, 2007.

40. On June 22, 2007, the Chancery Court denied the motion to disqualify Mr. Cody.

41. On January 29, 2008, while considering the litigation on appeal, the Court of Appeals entered an order disqualifying Mr. Cody from representing either Ms. Braxton or Pee Wee in any matters related to the litigation.

42. A copy of the January 29, 2008, Order of the Court of Appeals was entered into evidence at the hearing as Exhibit 10.

43. The Court of Appeals also ordered Mr. Dinkelspiel to retain independent counsel

to represent the interests of Pee Wee, and Mr. Dinkelspiel retained Mr. McLaren.

44. In violation of the Order of the Court of Appeals, Mr. Cody, on behalf of Ms. Braxton, filed a subpoena requiring Mr. Dinkelspiel to attend a hearing on November 20, 2009, before the Chancery Court.

45. A copy of the subpoena issued by Mr. Cody was entered into evidence at the hearing as Exhibit 11.

46. Mr. Dinkelspiel, through counsel, moved to quash Mr. Cody's subpoena and that motion was granted by the Chancery Court on December 4, 2009.

47. The Chancery Court's Order on the Motion to Quash was entered into evidence at the hearing as Exhibit 12.

48. The Order on the Motion to Quash also stated that Mr. Cody "can neither represent Vivian Braxton nor Pee Wee Wisdom Child Development Center, Inc. in any matters relating to this litigation."

49. Despite this Order, Mr. Cody continued to represent Pee Wee and Ms. Braxton.

50. Mr. Cody testified at the hearing that he continues, as of the date of the hearing, to represent Pee Wee and Ms. Braxton.

51. Mr. Cody entered a timesheet of Coleman Garret into evidence as Exhibit 19.

52. The timesheet shows that as late as February 9, 2009, a year after the January 29, 2009, Court of Appeals Order, Mr. Garrett, who represented Ms. Braxton, and Mr. Cody were meeting to discuss strategy in the Pee Wee litigation.

53. Mr. Dinkelspiel, through counsel, filed a Motion to Show Cause for Scire Facias and Civil Contempt in the Court of Appeals as a result of Mr. Cody's continued representation of

Pee Wee and Ms. Braxton.

54. On August 27, 2010, the Court of Appeals entered an Order reaffirming its previous disqualification of Mr. Cody.

55. On September 15, 2010, after the entry of the August 27, 2010, Order, the Board received a copy of the Order.

56. The matter was designated as File No. 33470-9-PS.

### CONCLUSIONS OF LAW

1. Mr. Cody is an attorney admitted by the Supreme Court of Tennessee to practice law in the State of Tennessee.

2. Pursuant to Section 1 of Rule 9, any attorney admitted to practice law in Tennessee is subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the Hearing Committee, hereinafter established, and the Circuit and Chancery Courts.

3. Pursuant to Section 3 of Rule 9, the license to practice law in this state is a privilege and it is the duty of every recipient of that privilege to conduct himself or herself at all times in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

4. Acts or omissions by an attorney which violate the Rules of Professional Conduct of the State of Tennessee shall constitute misconduct and be grounds for discipline.

5. Mr. Cody has failed to conduct himself in conformity with said standards and is guilty of acts and omissions that constitute ethical misconduct in violation of Rules of Professional Conduct 1.7, 3.1 and 8.4.

6. Rule 1.7 provides, in part, that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after consultation.

7. Mr. Cody violated Rule 1.7 in his representation of both Ms. Braxton and Pee Wee.

8. The two parties were directly adverse to one another.

9. Ms. Braxton pled guilty to stealing from Pee Wee, and Pee Wee pursued, through its receiver, and obtained a \$296,190.50 judgment against Ms. Braxton.

10. Mr. Cody's representation of these clients was materially limited by his responsibility to his other client in light of the adversary position of Ms. Braxton and Pee Wee.

11. Mr. Cody ignored the obvious conflict of interest between Ms. Braxton and Pee Wee by failing to investigate the conflict or Ms. Braxton's indictment, meeting with both clients together and failing to discuss the differing interests of the parties.

12. In his cross-examination of Mr. Dinkelspiel, Mr. Cody attempted to show that the Receiver inappropriately withheld rent due to Ms. Braxton and her husband. This position highlights the conflict that Mr. Cody was faced with in attempting to represent both Pee Wee and Ms. Braxton.

13. Ms. Braxton, who pled guilty to theft of property from Pee Wee, was demanding,



through Mr. Cody, monies to be returned to her which would have been returned to the detriment of Mr. Cody's other client, Pee Wee.

14. Mr. Cody's violation of 1.7 is underscored by the ruling of both the Chancery Court and the Court of Appeals disqualifying him from representation.

15. Mr. Cody's actions also violated Rule of Professional Conduct 3.1. Rule 3.1 states that:

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

16. Mr. Cody violated Rule 3.1 by his continued representation of Pee Wee and Ms. Braxton in the face of the clear orders of the Court of Appeals and the Chancery Court.

17. In light of the plain language of Rule 1.7, Mr. Cody could make no non-frivolous argument for continuing the representation even prior to the Orders.

18. However, after the orders were entered, Mr. Cody simply ignored the orders of the courts and continued to pursue the representation and file pleadings.

19. Mr. Cody was not engaging in a "good faith argument for an extension, modification or reversal of existing law" nor was he appealing the decision that he be disqualified.

20. Both Mr. Cody and Mr. Dinkelspiel testified that Mr. Cody continued representation of Pee Wee and Ms. Braxton after the Orders had become final by virtue of no appeal being taken or the appeals being exhausted.

21. Mr. Cody's actions also violated Rule 8.4 which provides, in pertinent part, that:

It is professional misconduct for a lawyer to:

- (a) 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;
- (d) engage in conduct that is prejudicial to the administration of justice;

22. Mr. Cody violated Rule 8.4(a) by violating Rule 1.7 and by violating or attempting to violate Rule 3.1.

23. Mr. Cody's continued refusal to acknowledge the conflict of interest under Rule 1.7 and the clear orders of the Court violated Rule 8.4(d) in that they were prejudicial to the administration of justice.

24. Comment 8 to Rule 8.4(d) clearly states that knowingly failing to obey a court order demonstrates a disrespect for the law that is prejudicial to the administration of justice.

25. Comment 8, however, also states that failing to obey a court order is not prejudicial to the administration of justice if the attorney is "unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning or application of the order.

26. This very limited exception is not applicable in Mr. Cody's case because Mr. Cody was able to obey the order and was not seeking a determination as to the scope, meaning or application of the three orders disqualifying him from representation of Pee Wee and Ms. Braxton.

27. Even if the Orders were void, Mr. Cody's intention was to violate 8.4(d).

28. The Supreme Court has adopted for use by its Hearing Panels the ABA Center for Professional Responsibility Standards for Imposing Lawyer Sanctions (ABA Standards).

29. Based upon the facts and conclusions set forth, the following ABA Standards are applicable in this case:

Section 4.33 of the ABA Standards states:

Reprimand [Public Censure] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Section 6.23 of the ABA Standards states:

Reprimand [Public Censure] is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

30. Section 9.2 of the ABA Standards sets forth aggravating factors that may act to increase the level of discipline imposed.

31. Mr. Cody has substantial experience in the practice of law, having been licensed to practice law since 1984, which is an aggravating factor.

32. Mr. Cody has refused to acknowledge the wrongfulness of his conduct; testifying at the hearing that he continues to represent Ms. Braxton and Pee Wee, which is an aggravating factor.

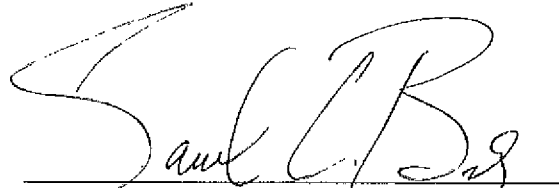
33. Section 9.3 of the ABA Standards sets forth several mitigating factors that may act to decrease the level of discipline imposed.


34. Mr. Cody has no prior disciplinary history, which is a mitigating factor.

35. The Panel appreciates Mr. Cody's zeal in the representation of parties whom he understood to be his clients but cannot ignore the breaches of the Rules of Professional Conduct resulting from his choices in this matter.

**JUDGMENT**

Accordingly, it is the decision of the Hearing Panel that based upon the foregoing findings of fact and conclusions of law, Respondent should be publicly censured.

  
Saul Belz, Panel Chair

  
Nathan Bicks, Panel Member

  
Marjorie Baker, Panel Member

**NOTICE**

Pursuant to Tenn. S. Ct. Rule 9, Section 8.3, this judgment may be appealed pursuant to Section 1.3 of said Rule by filing a petition for writ of certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the writ. See Tenn. Code Ann. §§ 27-8-104(a) and 27-8-106.