

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

FILED UNDER SEAL

In re:
HERBERT S. MONCIER
BOPR NO. 1910

**Motion To Dismiss Without Prejudice The Show Cause Order or, In
the Alternative To Stay Proceedings Pursuant To The Show Cause
Order Pending Determination Of The Same Complaints Before The
Tennessee Board of Professional Responsibility**

Respondent moves this Court dismiss its show cause order entered on January 17, 2008 without prejudice or, in the alternative stay proceedings of the Show Cause Order pending determinations of the same complaints pending in the Tennessee Board of Professional Responsibility.

Memorandum

Local Rules of the Eastern District of Tennessee

LR 83.6 Rules of Professional Conduct

The Rules of Professional Conduct adopted by the Supreme Court of Tennessee are hereby adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this court.

LR 85.5 Bar Admission

(a)(4) Hearings.

[paragraph one omitted]

Admission will be based (to the extent applicable) upon standards contained in the Rules of Professional Conduct and Rules of the Supreme Court of Tennessee. However, this court will not be bound by any decision of the Tennessee courts, the Board of Professional Responsibility, of the

committee, regarding an applicant for admission or reinstatement before this court.

. . .
(a)(6) Effect. This admission shall entitle an attorney to practice in this court while and so long as he or she remains entitled to practice in the court of the state, territory or District of Columbia identified on the attorney's application for admission.

*Tennessee Board of Professional Responsibility
Number 29701-2(K-IC)*

Respondent is authorized by Disciplinary Counsel for the Tennessee Supreme Court to inform this Court that Respondent self-reported the occurrences of November 17, 2006 reflected in this Court's Show Cause Order to the Tennessee Board of Professional Responsibility (BOPR) on November 22, 2006 - within two working days of the events of November 17, 2006. Based on Respondents' self-report of the November 17, 2006, incident, the BOPR opened a board complaint bearing number 29701-2(K-IC).

Since November 22, 2006, Respondent has self-reported to the Tennessee BOPR each occurrence and provided the BOPR full transcripts of all proceedings relating to the events of November 17, 2006, as each was prepared. Respondent has filed personal responses and additional materials to the BOPR as requested.

*Tennessee Board of Professional Responsibility
Number 30280-2(K-SG)*

Respondent is further authorized by the BOPR to inform this Court that on June 14, 2007, District Judge J. Ronnie Greer

filed with the BOPR a complaint against Respondent that includes the very conduct that is the subject of this Court's Show Cause Order. That complaint has been assigned number 30280-2(K-SG). Respondent has timely filed a detailed response to District Judge Greer's complaint June 14, 2006 complaint.

It is Respondent's understanding that Respondent's response has been provided to District Judge Greer for any further response he may chose to make. To date, Respondent does not know whether District Judge Greer has responded to Respondent's response.

Report of This Court's Show Cause Order

Respondent has now self-reported that this Court has issued a Show Cause Order but because of the confidential portion of this Court's Show Cause Order, Counsel has not provided the BOPR a copy of that Order.

Same Conduct

This Court's Show Cause Order is based on the same conduct as Respondent's self-report to the BOPR 29701-2(K-IC) as well as that contained in District Judge Greer's complaint to the BOPR in 30280-2(K-SG).

Eastern District Local Rules

This Court adopted the Tennessee Rules of Professional Conduct in EDTN Local Rule 86.6. The entirety of this Court's Show Cause Order charges Respondent with conduct which is

alleged to be violations of the Tennessee Rules of Professional Conduct.

Although as stated in EDTN Local Rule 83.5(a)(4), this Court has specifically not deferred to or agreed to be bound by any decision of the Tennessee courts nor of the BOPR "regarding an applicant for admission or reinstatement before this Court." Once admitted, however, it is not so clear concerning the difference to be given to the Tennessee courts or the BOPR concerning continuing practice in the court, particularly when the clear wording of EDTN Local Rule 83.5(a)(6) is considered:

This admission shall entitle an attorney to practice in this court while and so long as he or she remains entitled to practice in the court of the state, territory or District of Columbia identified on the attorney's application for admission.

By this Local Rule, the Court may be said to have deferred to the Tennessee Supreme Court to discipline by suspension from practice before federal courts of this district at least for activities which would constitute violations of the Tennessee Rules of Professional Conduct.

Respondent does not suggest that EDTN Local Rule 83.7 is necessarily always limited to the Tennessee Rules of Professional Conduct. Certain conduct of an attorney may be such that separate action under EDTN Local Rule 83.7 is appropriate. However, where is charged with having "violated the Professional Conduct as adopted by the Supreme Court of Tennessee . . .," as in this Court's Show Cause Order, the

Tennessee Supreme Court, through its BOPR would to be the final arbiter of the application of its rules.

Certainly, deference to the findings of the BOPR appears to be the rule in the converse situation where the BOPR has actually completed its work. Not only as reflected by EDTN Local Rule 83.7(a), as quoted by the Court in its Order to Show Cause, but also in EDTN 83.7(f) the rules provide for conformity with state discipline.

Conformity with State Discipline.

When the Respondent has been disbarred or suspended from the practice of law by a state in which the member practices, and the respondent admits the action complained of, or does not respond to the order to show cause, the Chief Judge may enter a final order of the Court imposing similar discipline.

In fact, under the same Local Rule in 83.7(c)(3) one of the options available to the Chief Judge upon considering a complaint is:

Initial Action On The Complaint.

Alternatively, the Chief Judge may refer the matter to a state disciplinary board for such action as it determines is appropriate.

In this cause, in addition to his actions on November 17, 2006, of charging and, thereafter, ultimately convicting Respondent with regard to exactly the same conduct (which is presently on appeal to the United States Court of Appeals for the Sixth Circuit) District Judge Greer chose to file his complaint to these same occurrences against Respondent with the

Tennessee BOPR. While Respondent realizes that District Judge Greer is not the "Chief Judge," he would appear to be the initiator of the complaints in both the BOPR and the present Show Cause Order and perhaps to have thus prematurely preempted the discretion of the Chief Judge in this regard.

Prior Case Pending and Federal Abstention Doctrine

As is always the problem where there is a finding of prior action pending, the Show Cause Order in this Court causes Respondent to respond in two separate proceedings in two separate forums for the same conduct. Further, two separate proceedings before separate forums charging the same violations of the Tennessee Rules of Professional Conduct create a risk of inconsistent findings. Obviously, judicial economy is not served by both the Tennessee Supreme Court through its BOPR and this Court using their judicial resources to adjudicate the same issues at the same time.

Applying the doctrine of federal abstention¹ and because of the Tennessee BOPR is designed and well suited to resolve issues pertaining to the violations the Tennessee Rules of Professional Conduct charged in the Show Cause Order, this Court should dismiss the Show Cause Order.

WHEREFORE, for the reasons stated Respondent moves that this Court's Show Cause Order be dismissed without prejudice or, in the alternative, that this Court's Show Cause

¹ See *Texas v. Pullman Co.*, 212 U.S. 496 (1941); *Buford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) *Detroit Edison Co. v. East China Tp. School Dist. No. 3*, 378 F.2d 225, 230 (CA6, 1967)

Order be stayed pending resolution of the Tennessee BOPR complaints.

This the _____ day of February 2008.

HERBERT S. MONCIER
Respondent

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BOPR # 1910

Certificate

The undersigned certifies that on February 1, 2008, pursuant to the Court's directive, the foregoing Motion for Relief has been served only upon Geneva Ashby, Division Manager, 209 Joel. W. Solomon Federal Building and United States Courthouse, 900 Georgia Avenue, Chattanooga, TN 37402, by United States Mail, with proper postage thereon, to e filed under seal.

HERBERT S. MONCIER
Respondent