

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

FILED UNDER SEAL

In re:
HERBERT S. MONCIER
BPR NO. 1910

**Motion For Relief From
Notification Provision Of January 17, 2008 Show Cause Order**

Respondent moves for relief from the notification provision of the Show Cause Order that respondent have *ex parte* or communication in "confidence" with all judicial officers of this district before whom Respondent may have pending cases so that the judicial officers may take appropriate action with respect to the schedules or scheduling of their cases involving Respondent.

Memorandum

Respondent adopts Respondent's February 1, 2008 Motion to Dismiss without prejudice or stay action on Court's January 17, 2008 Show Cause Order.

Respectfully, this Court's Notification provision appears to conflict with EDTN Local Rule 83.6 adopting the Tennessee Rules of Professional Conduct. Tenn. Sup. Ct. Rule 8, RCP 3.5(b) appears to prohibit Respondent from taking the action pursuant to this notification provision to have *ex parte* or

communications in "confidence" with judicial officers before whom Respondent has pending cases.

Receipt by the judicial officer of the *ex parte* or communication in "confidence" in pending cases would also appear to be improper pursuant to the Federal Code of Judicial Conduct¹ Canon 3(A)(4).

Respondent is at liberty to state that he sought directions as to his compliance with Court's *ex parte* notification provisions. Dr. William T. Hunt, whose job is to render Ethics Opinions for the Tennessee BOPR has stated that although he cannot, under their rules, render an opinion because this is a matter presently under litigation, he did submit that ethically, Respondent should move for this Court's reconsideration of its notification order before complying with this requirement to take actions which, but for that order, Respondent would be subject to censure for undertaking.

Respondent currently has twenty (20) proceedings pending before seven different judicial officers in this District. Of these proceedings, four (4) are the defense of persons charged with criminal offenses whose statutory and constitutional rights would be impacted by this Court's notification provision.

¹ www.uscourts.gov/guide/vol2/ch1.html#N_1_

Regarding Respondents sixteen (16) pending civil cases, *ex parte* or in "confidence", communications with judicial officers in those cases impact the civil rights of not only Respondent's clients but also the rights of other attorneys and parties to those actions.

The stated purpose of the notification provision is so "judicial officers may take appropriate action with respect to the schedules or scheduling of their cases involving Respondent."

Respectively, judicial officers in this district should not take any action based on *ex parte* or in "confidence" information without providing due process of law² to opposing parties by their being informed and given notice and a meaningful opportunity to be heard."

As a practical matter, judicial officers who were notified only of the show cause disciplinary complaint, would appear to have the ability to determine the "appropriate action with respect to the schedules or scheduling of their cases

² "[C]ore requirements" of due process are "adequate notice ... and a genuine opportunity to explain"). The notice provided must be "reasonably certain to inform those affected," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and the opportunity to be heard must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

involving Respondent" unless they are being asked to pre-judge the outcome of any proceeding with regard to the Show Cause.

Practically, This notification process would appear to cause more questions and confusion than it could resolve.

EDTN Local Rule 83.7 does not contain a provision for this pre-hearing notification in a Show Cause order. It would appear that the notification provision by this District's Chief Judge is the equivalent of the publication to these Districts judicial officers of the proceedings contrary to the confidentiality provisions of EDTN Local Rule 83.7.

Nor is there any need for immediate action to protect the public, clients or the judicial system. Even if Respondent's conduct charged in the Show Cause is ultimately determined to subject Counsel to discipline, there is no suggestion that Counsel's present representation of clients creates a present harm to the public or Counsel's clients. A complaint with relating to this very conduct has been dealt with in other forums and is alleged to have taken place more than one year ago. Any conduct of Respondent in any pending litigation can be dealt with effectively by the judicial officers before whom that litigation is pending.

Finally, Respondent expresses concern the notification directive not only prejudices that the charged conduct will be found to impose discipline that may impact Respondents

obligations to his clients in pending cases but with the publication to this group of interest parties, may tend to become a "self-fulfilling prophecy" contrary to any due process rights or hearings which may be ultimately afforded Respondent.

WHEREFORE, Respondent moves this Court to reconsider and remove the notification provision (page 4 last full paragraph) of its Show Cause order of January 17, 2008.

This the _____ day of February 2008.

HERBERT S. MONCIER
Respondent

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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