

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

FILED

2008 FEB 11 P 2:26

U.S. DISTRICT COURT
EASTERN DIST. TENN.

BY _____ DEPT. CLERK

UNDER SEAL

In re:
HERBERT S. MONCIER, ESQ.
BPR No. 1910

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Chief Judge Curtis L. Collier

MEMORANDUM & ORDER

On January 17, 2008, this Court issued a Show Cause Order requiring Attorney Herbert S. Moncier (“Respondent”) to show cause why he should not be disciplined. Instead of responding as required by the Show Cause Order, Respondent has filed four motions relating to the Show Cause Order entered by the Court on January 17, 2008, as follows: Motion to Dismiss Without Prejudice the Show Cause Order or, In the Alternative to Stay the Proceedings Pursuant to the Show Cause Order Pending Determination of the Same Complaints Before the Tennessee Board of Professional Responsibility; Motion for Relief From Notification Provision of January 17, 2008 Show Cause Order; Motion for Extension; and Motion for Disclosures. These motions do not comply with nor are they responsive to the Show Cause Order issued by this Court. Moreover, they have no basis in fact or law. The Court **DENIES** Respondent’s motions, as follows:

First, Respondent filed a “Motion to Dismiss Without Prejudice the Show Cause Order or, In the Alternative to Stay the Proceedings Pursuant to the Show Cause Order Pending Determination of the Same Complaints Before the Tennessee Board of Professional Responsibility.” Respondent

argues, because Eastern District of Tennessee Local Rule (“E.D. TN. LR”) 83.6 adopts the Tennessee Rules of Professional Conduct and the Tennessee Board of Professional Responsibility is already investigating his conduct under those rules, this Court is bound by the ultimate decision of that tribunal. Respondent misunderstands the court’s local rules and the significance of this action. First, Local Rule 83.6 adopts the *rules* of professional conduct as adopted by the Supreme Court of Tennessee. This Court has not delegated and would never delegate its authority to determine for itself the fitness of attorneys practicing in the Eastern District of Tennessee. It does not adopt the application of those rules in specific instances. The Court has the sole responsibility in initiating and imposing disciplinary actions on attorneys practicing in the Eastern District of Tennessee, separately and independently of any disciplinary actions instituted by other tribunals.¹ *See* E.D. TN. LR 83.7(a). Second, the Show Cause Order initiates disciplinary proceedings for potential violations both of the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, and because Respondent may have engaged “in unethical conduct tending to bring the court or the bar into disrepute.” *See id.* Whether Respondent violated the Tennessee Rules of Professional Conduct while practicing law in a federal court in the Eastern District of Tennessee, and whether his conduct brought the federal court into disrepute are concerns of the utmost importance to *this* Court.² As

¹Although the Court may mirror the disciplinary actions of another tribunal when taken against a member of its bar, *see* E.D. TN. LR 83.7(a), 83.7(f), the Court is not precluded from independently determining a need for discipline, particularly when the conduct in question occurred in a federal court in this district.

²Respondent’s allusions to the Federal Abstention Doctrine are inapposite. The question before this Court is whether Respondent should be disciplined, including “disbarment, suspension [or] reprimand” in the federal courts of the Eastern District of Tennessee. This is a distinct and independent issue from whether the Tennessee Board of Professional Responsibility determines Respondent may be disciplined, presumably including disbarment, suspension, or reprimand, in the Tennessee courts. A determination in either case need not necessarily dictate

such, the Court **DENIES** Respondent's motion for dismissal and for a stay of the proceedings.

Second, Respondent filed a "Motion for Relief From Notification Provision of January 17, 2008 Show Cause Order." In the Show Cause Order, the Court ordered Respondent to inform "any and all judicial officers of this district before whom he may have pending cases that formal disciplinary action pursuant to the local rules of the court have been initiated." The Court is surprised and troubled Respondent chose to disobey the Court's order in this respect. The order was clear and was done in part as a courtesy to Respondent in the interest of allowing Respondent himself to inform the judicial officers of this district of the pendency of this matter. The Court could simply have notified all the judicial officers of this court of the initiation of this action directly, but decided to give Respondent the opportunity to do so. The Court expects all attorneys practicing in the Eastern District of Tennessee at a minimum to obey all orders of the Court. The Court expected Respondent would have complied with the Court's order immediately upon receipt of the order. Since Respondent disobeyed the order of this Court that he notify the judicial officers, the Court will see that all of the judicial officers of this court are notified of the pendency of this action.³

Respondent argues complying with the order requiring notification would (1) violate the confidentiality guarantees of the proceedings as provided for in the local rules, and (2) require him to have impermissible, ex parte communications with the judicial officers in his cases. In response to Respondent's first argument, E.D.TN. LR 83.7 dictates "all complaints relating to disciplinary matters under this rule shall be filed under seal with the clerk. All records pertaining to attorney

the same determination in the other.

³The Court will take up the matter of Respondent's disobedience of the Court's order at another time.

disciplinary proceedings, except with respect to reinstatement proceedings, shall be confidential and kept under seal in the Clerk's Office unless otherwise ordered by the court.” The judicial officers of this court are not foreign bodies, but constitute the court itself. Notifying the judicial officers does not constitute notification outside the scope of the confidentiality envisioned by the local rules. The Court’s order preserved the necessary confidentiality of Respondent’s notice by ordering it should be provided in confidence. Moreover, the Rule does not compel confidentiality, but rather sets it as the default, “unless otherwise ordered by the court.” The Court did exactly that; to the extent Respondent had concern as to what confidentiality was required, the order resolved that concern by ordering Respondent to inform “all judicial officers of this district before whom he may have pending cases.”⁴

Respondent’s second argument is specious. He argues informing the relevant judicial officers of the initiation of formal disciplinary action constitutes an impermissible ex parte communication. Informing the judicial officer does not speak to the merits of the case before that court, but rather speaks to scheduling issues which might arise. It is not uncommon or impermissible for an attorney to contact chambers concerning scheduling questions or other non-substantive issues without the presence of the other attorney. As such, the Court **DENIES** Respondent’s motion for relief.

Third, Respondent filed a “Motion for Extension.” Here, Respondent moves the Court to provide Respondent twenty days “to take any actions that may be required by Respondent” if this Court denies Respondent’s motion to dismiss or stay its Show Cause Order. The Show Cause Order

⁴Furthermore, E.D.TN. LR 83.7 establishes confidentiality as the default for the complaint and all records; the Rule does not dictate confidentiality of the basic existence of the disciplinary proceedings.

clearly ordered the only action required by Respondent - show cause "why disciplinary action should not be taken against him" based upon the conduct outlined in the Order. The language of the Show Cause Order was clear in providing Respondent twenty days to show cause. The Court **DENIES** Respondent's motion for extension.

Fourth, Respondent filed a "Motion for Disclosures," seeking discovery of "communications the Court, or the Court's staff, received other than from pleadings and proceedings on January 9, 2008 pertaining to the pending Show Cause Order in this matter or the case of *United States v. Lee Almany*." The Court **DENIES** Respondent's motion for disclosures. Respondent has been ordered to show cause why the Court should not take disciplinary action against him based upon the facts in the Show Cause Order. The facts provided in the Show Cause Order are based entirely on the transcript of the sentencing hearing of Michael Vassar on November 17, 2006 (Case No. 2:05-CR-75-3, Court File No. 683). The disclosures Respondent seeks are not relevant to his burden to show cause based upon his actions at Mr. Vassar' sentencing hearing.

Although Respondent has failed to comply with the Show Cause Order by filing a responsive pleading, the Court will construe his filings as denials of the allegations in the Show Cause Order, and as a request for a hearing. At such a hearing, Respondent should focus on demonstrating the allegations in the Show Cause Order are inaccurate, or if accurate, disciplinary action is not warranted. The Court strongly urges Respondent to obtain counsel to represent him in the hearing.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE