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U.S. DISTRICT COURT
EASTERN DIST. TENN.

BY DEPT. CLERK

In re:
HERBERT S. MONCIER
BPR NO. 1910

Collier/Lee

On February 13, 2008, this Court issued an Order and Notice of Hearing requiring Attorney Herbert S. Moncier (“Respondent”) to respond to the Court’s January 17, 2008 Show Cause Order by filing a response to the Court’s Show Cause Order containing all of the information listed in E.D. TN. LR. 83.7(d)(1) - (5) on or before Monday, February 25, 2008. The February 13, 2008 Order also stated that, unless declined by the Respondent or determined by the undersigned to be unnecessary, a hearing for the purpose of allowing Respondent to respond to the Court’s Show Cause Order pursuant to E.D. TN. LR 83.7(h) would be held on March 5, 2008.

On February 21, 2008, Respondent filed a response indicating he would file a further response to the Court's January 17, 2008 Show Cause Order on or before February 25, 2008. Respondent also requested a hearing on the Show Cause Order be held on March 5, 2008. Respondent's response also contained or was accompanied by motions: (1) requesting authorization to issue subpoenas pursuant to Fed. R. Civ. P. 45(a)(1)(C) to inspect and copy the Court Reporter's

audio recording of the November 17, 2006 hearing and the written or recorded statement of Mark Thornton allegedly made in October 2005; (2) requesting authorization to issue subpoenas under Fed. R. Civ. P. 45(a)(2) for the following witnesses to appear at the March 5, 2008 hearing or, in the alternative to take the depositions of: District Court Judge J. Ronnie Greer; Knox County Circuit Court Judge Wheeler Rosenbaum; Knox County Criminal Court Judge Richard Baumgartner; Knox County Criminal Court Judge Mary Beth Leibowitz; Monroe County Criminal Court Judge Carroll R. Ross; Knox County Circuit Court Judge Harold Wimberly, Jr; Knox County Chancellor Daryle R. Fansler; Knox County Circuit Court Judge Dale Workman; District Court Judge Thomas Varlan; Knox County Criminal Court Judge Kenneth Irvine; and counsel for the Tennessee Board of Professional Responsibility; (3) requesting a petition for a writ of *habeas corpus ad testificandum* for Michael Vassar, a federal prisoner at the Federal Correctional Institution Elkton, Lisbon, Ohio, to appear and testify at the March 5, 2008 hearing; and (4) requesting a petition for a writ of *habeas corpus ad testificandum* for James Mark Thornton, a federal prisoner at the Federal Correctional Institution in Manchester, Kentucky to appear and testify at the March 5, 2008 hearing. For the reasons set forth below, Respondent's motions are **DENIED**.

First, Respondent's motion for authority to issue a subpoena pursuant to Fed. R. Civ. P. 45(a)(1)(C) to inspect and copy any audio recording of the November 17, 2006 hearing is **DENIED** as **MOOT**. The chambers of the undersigned contacted the court reporter who prepared the transcript of the November 17, 2006 hearing and was informed no audio recording of the November 17, 2006 hearing exists.

Second, Respondent's motion for authority to issue a subpoena pursuant to Fed. R. Civ. P. 45(a)(1)(C) to inspect and copy the written or recorded statement of Mark Thornton allegedly made

in October 2005, is **DENIED**. The content of any written or recorded statement allegedly made by Mark Thornton in October 2005 is not at issue in the March 5, 2008 hearing. As the Court noted in its Show Cause Order of January 17, 2008, the issue for the March 5, 2008 hearing is Respondent's conduct at the November 17, 2006 hearing, not his belief he may have had an actual or potential conflict of interest in representing Mr. Vasser at the hearing. As the Court noted in its January 17, 2008 Show Cause Order, the factual allegations are that Respondent conducted himself in a manner constituting a violation of an order of the Court, abuse of the Court, disrespect for the Court, contemptuous behavior directed at the Court, interference and needless prolongation of the proceeding before the Court, and obstructive behavior during the November 17, 2006 hearing by engaging in a pattern of disruptive behavior, by disobeying a direct order, and by acting in an unprofessional and unethical manner. The content of Mr. Thornton's alleged statement of October 2005, does not concern Respondent's conduct during the November 17, 2006 hearing, which is the issue to be addressed at any hearing held March 5, 2008.

Third, Respondent's motions for a petition for a writ of *habeas corpus ad testificandum* for Michael Vassar and for James Mark Thornton are **DENIED**. Respondent seeks to have Mr. Vassar and Mr. Thornton present at the March 5, 2008 hearing to testify concerning matters which occurred outside of the November 17, 2006 hearing; namely, a November 16, 2006 letter which Neil Smith provided to Respondent. Based upon the representations made in Respondent's applications for the writs, such testimony also concerns Respondent's beliefs about a potential conflict of interest in representing Michael Vasser during the November 17, 2006 hearing. Again, the existence or non-existence of a conflict of interest at the November 17 hearing is not an issue which will be decided during the March 5, 2008 hearing, if deemed necessary.

Fourth, Respondent's motion to issue subpoenas under Fed. R. Civ. P. 45(a)(2) for District Court Judge J. Ronnie Greer; Knox County Circuit Court Judge Wheeler Rosenbaum; Knox County Criminal Court Judge Richard Baumgartner; Knox County Criminal Court Judge Mary Beth Leibowitz; Monroe County Criminal Court Judge Carroll R. Ross; Knox County Circuit Court Judge Harold Wimberly, Jr; Knox County Chancellor Daryle R. Fansler; Knox County Circuit Court Judge Dale Workman; District Court Judge Thomas Varlan; Knox County Criminal Court Judge Kenneth Irvine; and counsel for the Tennessee Board of Professional Responsibility to appear at the March 5, 2008 hearing or, in the alternative, to take their depositions is **DENIED**. In his motion, Respondent indicates the judicial officers he seeks to subpoena or depose will testify as to his demeanor and conduct at trials and proceedings other than the November 17, 2006 hearing. With respect to the judicial officers, Respondent has not established they have any relevant information regarding his conduct at issue in the Show Cause Order. To the extent deemed relevant, Respondent can present his own testimony as to his conduct at other proceedings. Moreover, with respect to District Judge Greer, the undersigned will have a transcript of the November 17, 2006 hearing and it is well established that "judges speak through their opinions[;] . . . their mental processes are not subject to examination." *Crenshaw v. Dywan*, 34 F.Supp.2d 707, 710 (N.D.Ind.,1999) (citing *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904)).

Fifth, Respondent also indicates that counsel for the Tennessee Board of Professional Responsibility will testify that there have been no prior complaints concerning Respondent to the Board concerning conduct similar to that cited in the Court's January 18, 2008 Show Cause Order. Again, to the extent deemed relevant, Respondent can present his own testimony as to the number and nature of complaints, if any, concerning him to the Tennessee Board of Professional

Responsibility.

Finally, a determination has not yet been made that a hearing will be necessary. To date, Respondent has not complied with E.D.TN. LR. 83.7(d) by filing a response under seal with the clerk containing all of the information listed in E.D.TN. LR. 83.7(d)(1)-(5) concerning the Court's January 17, 2008 Show Cause Order. While Respondent has now requested a hearing, he has not yet indicated whether he admits or denies the allegations contained in the Show Cause Order. As previously noted, Respondent will be informed as to whether a hearing is deemed necessary upon review of the response due February 25, 2008.

SO ORDERED.

ENTER:

s/ Susan K. Lee

SUSAN K. LEE

UNITED STATES MAGISTRATE JUDGE