

**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

**Respondent's Motion To Dismiss The Show Cause Order For
Failure To Comply With EDTN LR 83.7(b) Or, In The
Alternative, Motion In Limine To Exclude Evidence Under
Fed. R. Evid. 104**

Respondent received this Court's February 22, 2008 Memorandum Order on the afternoon of February 26, 2008. While this Order was entered prior to the Court having Respondents' Response and motions, the February 22, 2008 Order raises additional issues as to the sufficiency of the Show Cause Order under EDTN LR 83.7(b); Counsel's right to procedural due process of law under the Fifth Amendment to the United States Constitution; and the nature of "evidence" the Court may consider at a hearing on March 5, 2008.

Memorandum

Motion To Dismiss For Insufficiency Of The Show Cause Order

In the Court's February 13, 2008 Order the Court stated:

The hearing shall be limited to a showing by respondent that the allegations in the show cause order are inaccurate, or if accurate, are not subject to disciplinary action.

In its February 22, 2008 Order the Court states "judges speak through their opinions . . . their mental processes are not subject to examination." Regarding the application of this concept, Respondent has denied and will offer proof that Chief Judge Collier's opinions and conclusions are not accurate.

Respondent re-read the January 17, 2008 Show Cause Order in an effort to evaluate the evidentiary value the Court may, applying the Court's February 22, 2008 veneration of a Judge's "opinions", place in the opinions and conclusions of Chief Judge Curtis Collier which constitute the charges in that document. This review revealed the Show Cause Order is insufficient and must be dismissed.

EDTN LR 83.7(b) provides:

(b) Initiation of Disciplinary Proceedings. Formal disciplinary proceedings shall be initiated by the issuance of an order to show cause signed by the Chief Judge. An order to show cause may be issued by the Chief Judge on his or her own initiative or upon a complaint filed by any counsel of record or party to an action in this court. When such order is issued on the court's initiative, no separate complaint need be filed. All complaints relating to disciplinary matters under this rule shall be filed under seal with the clerk. All records pertaining to attorney 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.

(1) All complaints of attorney misconduct shall include:

(i) The name, address, and telephone number of the complainant;

(ii) The specific facts that require discipline, including the date, place and nature of the alleged misconduct, and the names of all persons and witnesses involved;

(iii) Copies of all available documents or other evidence that support the factual allegations, including a copy of any rule or order of the court that is alleged to have been violated; and

(iv) At the end of the complaint, a statement signed by the complainant under penalty of perjury that the complainant has read the complaint and the factual allegations contained therein are correct to the best of the complainant's knowledge.

Respondent asserts that Chief Judge Collier must provide the information required. Either Judge Collier is the Complainant or someone else is the Complainant. If there is no one else, then Chief Judge Collier becomes the Complainant within the meaning of the rule for purposes of procedural due process; sufficiency of the complaint; and burden of proof.

Respondent asserts that the Show Cause Order must to comply with procedural due process provide the information that would otherwise be from a third-party Complainant including the names of "all persons and witnesses" involved.

No "witnesses" were identified in the Show Cause Order.

Although the show cause order mentions Judge Greer, the Show Cause Order does not identify Judge Greer as a "witness." This Court on February 22, 2008 has now denied Respondent a subpoena to Judge Greer. Further, this Court by its February 22, 2008 Order appears to suggest Judge Greer's November 17, 2008 statements may be sufficient to adjudicate issues that are denied by Respondent although Judge Greer is not a witness.

If Judge Greer is identified by Judge Collier as a witness then EDTN LR 83.7(h)(3) provides Respondent the procedural due process right to cross-examine Judge Greer. If Judge Greer's conclusions on November 17, 2006 are admissible as testimonial "evidence" then Respondent has a procedural due process right of cross-examination as to that testimonial evidence. If Judge Greer is the complainant then Judge Greer was required to sign the complaint under oath as required by EDTN LR 83.7(b)(1)(iv).

Chief Judge Collier's Show Cause Order is based on his opinions and conclusions. Respondent has denied that Chief Judge Collier's opinions and conclusions regarding the exchange between Respondent and Judge Greer are accurate or that they establish by clear and convincing evidence that Respondent violated the Code of Professional Conduct or is subject to discipline. Nor is it shown or established which provision of the Code of Professional Conduct is at issue or charged, nor why the alleged violation should be the subject of disciplinary action.

If Chief Judge Collier is to be a witness then it was required that the Show Cause Order name him as a witness. If Judge Collier is the complainant, then Judge Collier is required to sign the complaint under oath as required by EDTN LR 83.7(b)(1)(iv). Because the Show Cause Order does neither the Show Cause Order is legally insufficient and should be dismissed.

The Show Cause Order does not attach "a copy of any rule or order of the court that is alleged to have been violated." Again, this is important. Chief Judge Collier and this Court have articulated a number of opinions and conclusions as to Respondent's Conduct. The Show Cause Order, however, fails to comply with EDTN LR 83.7(d)(ii) by attaching the "rule or order of the court" that is alleged

to be violated except for the last exchange between the Court and Respondent where Respondent asked the Court "May I speak to my . . . [client]." The failure to comply with EDTN LR 83.7(d)(1)(iii) requires that the Show Cause Order be dismissed.

Conclusions

1. The failure of the factual complaints contained in the Show Cause Order to be under oath as required by EDTN LR 83.7(b)(1)(iv) is fatal and requires the Show Cause Order be dismissed.

2. The failure of the Show Cause Order to identify the witnesses as required by EDTN LR 83.7(b)(1)(ii) is fatal and requires that the Show Cause Order be dismissed.

3. The failure of the Show Cause Order to attach a copy of the "rule or order" of the Court that was violated as required by EDTN LR 83.7(b)(1)(iii) is fatal and requires that the Show Cause Order be dismissed.

Motions In Limine

1. Respondent moves *in limine* and pursuant to EDTN LR 83.7(b)(1)(ii) that no evidence be offered or admitted that is not charged in the Show Cause Order;

2. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(2) that all witnesses testify as to facts,

opinions or conclusions under oath and subject to the penalties of perjury;

3. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(2) that Respondent be permitted to confront all witnesses against Respondent;

4. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(2) that Respondent be permitted to cross-examine all witnesses against Respondent;

5. Respondent moves *in limine* to any documents not attached to the Show Cause Order as required by EDTN LR 83.7(b)(1)(iii).

6. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(4) that each violation of the Rules of Professional Conduct be proven by clear and convincing evidence;

7. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(4) that particularly the allegation that Respondent is unfit to practice before the Court be proven by clear and convincing evidence;

8. Respondent moves *in limine* and pursuant to EDTN LR 83.7(h)(4) that the allegation that Respondent is unfit to continue to be a member of the bar of the court be proven by clear and convincing evidence;

9. Respondent moves *in limine* and pursuant to

Fed. R. Evid. 104 to exclude any "witness" at the hearing on March 5, 2008 for failure of the Show Cause to list any "witness" as required by EDTN LR 83.7(b)(1)(iii);

10. Respondent moves *in limine* and pursuant to Fed. R. Evid. 104 to exclude any document not attached to the Show Cause Order as required by EDTN LR 83.7(b)(iii);

11. Respondent moves *in limine* and pursuant to Fed. R. Evid. 104 to exclude any "evidence" that is not admissible under the Fed. R. Evidence including, but not limited to, any opinions and conclusions not admissible as expert testimony pursuant to Fed. R. Evid. 702, 703 or 705.

This _____ day of February 2008.

Herbert S. Moncier
Respondent

Herbert S. Moncier
Attorney at Law
Suite 775 Bank of America Center
550 Main Street
Knoxville, Tennessee 37902
(865)546-7746
BPR # 1910

Certificate

The undersigned certifies that on February __, 2008, pursuant to the Court's directive, the foregoing 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