UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNDER SEAL

In re:
HERBERT S. MONCIER
BPR NO. 1910

Collier/Lee

MEMORANDUM AND ORDER

On February 13, 2008, this Court issued an Order and Notice of Hearing that: 1) required Attorney Herbert S. Moncier ("Respondent") to provide an appropriate written response to the Court's January 17, 2008 Show Cause Order, and 2) set a hearing, unless declined by the Respondent or determined by the undersigned to be unnecessary, for the purpose of allowing Respondent to respond to the Court's Show Cause Order. On February 21, 2008, Respondent filed an initial response requesting a hearing, which was accompanied by several motions/requests. These motions/requests were denied in an order issued on February 22, 2008. On February 24, 2008, Respondent filed: (1) a response to the January 17, 2008, Show Cause Order pursuant to E.D. TN. LR 83.7(d); (2) a motion for a pretrial conference pursuant to Fed. R. Civ. P. 16; (3) a motion to disqualify any court officer subordinate to the complainant, Chief District Judge Curtis L. Collier, from conducting the hearing pursuant to the Show Cause Order of January 17, 2008 and/or making a report and recommendation concerning the same to Chief Judge Collier; (4) a motion that the Court abstain from holding a hearing and/or ruling on the January 17, 2008 Show Cause Order until after the resolution of the appeal in *United States v. Herbert Moncier*, No. 07-6052, which is currently

pending before the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"); (5) Respondent's motion to revise this Court's Orders of February 11, 2008 and February 13, 2008, and to remove the limitations on the Show Cause hearing; and (6) Respondent's demand for a jury trial pursuant to the Sixth and Seventh Amendments and Fed. R. Civ. P. 38. Subsequently, on February 25, 2008, Respondent filed an alternative response to the limited issues raised in the Court's Show Cause Order.

For the reasons set forth below, Respondent's motions are **DENIED**. First, Respondent's motion for a pretrial conference pursuant to Fed. R. Civ. P. 16 is **DENIED**. The issues which are to be addressed at the March 5, 2008 hearing and in the report and recommendation to be issued by the undersigned are clearly specified in the Court's Show Cause Order of January 17, 2008, and have been repeatedly confirmed in the Court's Orders dated February 11, 13, and 22, 2008. Thus, a pretrial conference under Rule 16 is neither necessary nor required by the applicable local rules.

Second, Respondent's motion that the Court abstain from holding a hearing and/or ruling on the Court's January 17, 2008 Show Cause Order until after his appeal in *United States v. Herbert Moncier*, No. 07-6052, is resolved by the Sixth Circuit is also **DENIED**. As the Court noted in its January 17, 2008 Show Cause Order:

> Based upon his conduct during the hearing, Respondent was charged with and convicted of criminal contempt, both for misbehavior intended to obstruct justice, pursuant to 18 U.S.C. § 401(1), and disobedience to a direct order of the court, pursuant to 18 U.S.C. § 401(3). *United States v. Moncier*, 2007 WL 1577718 (E.D. Tenn. May 30, 2007). *This show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Respondent are based upon his* ***conduct*** *during the November 17, 2006 hearing, and are in no way predicated on his having been convicted of criminal contempt.*

[Show Cause Order at 3, n.1] (emphasis added). Neither the outcome of bar proceedings or the appeal address this Court's application of its local rules or its inherent authority with respect to attorney disciplinary issues. In addition, in his order of February 11, 2008, Chief Judge Collier has already denied a similar request to stay or delay these proceedings.

Third, as it relates to any proceedings within the scope of the reference to the undersigned, Respondent's motion to disqualify Chief Judge Collier and the undersigned is **DENIED**. It appears Respondent seeks to disqualify the undersigned based upon the fact that she is a magistrate judge. Respondent also seeks to disqualify Chief Judge Collier, apparently because he initiated the formal disciplinary proceedings against Respondent based upon Respondent's reported conduct in proceedings before District Judge Ronnie Greer.[1] The Court's January 17, 2008 Show Cause Order was issued by Chief Judge Collier pursuant to E.D. TN. LR 83.7(b) which provides that "[f]ormal disciplinary proceedings shall be initiated by the issuance of an order to show cause signed by the Chief Judge." The Court's Show Cause Order is predicated upon E.D. TN. LR 83.7(a), which provides, in pertinent part:

> The court may impose discipline on any member of its bar who has violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, or has engaged in unethical conduct tending to bring the court or the bar into disrepute. . . . Discipline which may be imposed includes disbarment, suspension, reprimand, or such other further disciplinary action as the court may deem appropriate and just.

Respondent has made no specific allegation of bias. "[A] judge must recuse himself when there is even the appearance of judicial bias." *Deuer Mfg., Inc. v. Kent Products, Inc.*, 760 F. Supp.

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[1] A discussion of the factual and procedural background of this matter is set forth in *United States v. Moncier*, No. 2:07-CR-40, 2007 WL 1577718, * 1-2 (E.D. Tenn. May 30, 2007), and a transcript of the proceeding is available in the record.

609, 610-611 (E.D. Mich.1989) (citing *Anderson v. Sheppard*, 856 F.2d 741, 746 (6th Cir. 1988)). "The alleged bias or prejudice on the part of the judge must be personal, that is, directed against a party." *Id.* at 611 (citing *In re Cooper*, 821 F.2d 833 (1st Cir.1987); *United States v. Kelley*, 712 F.2d 884 (1st Cir.1982)). If a motion to disqualify is brought, "the standard is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality toward a party might reasonably be questioned." *Id.* (citing *Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141 (9th Cir.1983); *United States v. Greenough*, 782 F.2d 1556 (11th Cir.1986)). "Further . . . there is as much obligation for the judge not to recuse himself when the circumstances demonstrate that there is no occasion to do so as there is for him to recuse himself when there is reason to do so." *Id.* (citing *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir.1968)). Respondent's allegations that Chief Judge Collier should be disqualified merely because he initiated the formal disciplinary proceedings against Respondent in conformity with and pursuant to E.D. TN. LR 83.7(b) and against the undersigned because she is acting in this matter pursuant to Judge Collier's order of reference do not rise to the level of personal bias against Respondent on the part of either Judge Collier or of the undersigned and there has been no showing that would even come close to requiring disqualification or recusal.

Fourth, Respondent's motion to revise this Court's Orders and to remove what he apparently perceives as unwarranted limitations to the Show Cause Order is also **DENIED**. The parameters of this matter were established pursuant to E.D. TN. LR 83.7(b) in the Court's Show Cause Order.[2]

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[2] While the undersigned is authorized to investigate any other instances of misconduct, unethical or unprofessional behavior, or any pattern of such behavior on the part of Respondent if evidence of such behavior is encountered during the course of this investigation, including Respondent's conduct related to the investigation, to date the undersigned has not sought enlargement of the grounds stated in the Show Cause Order to address any such other instances.

The February 11, 2008 Order appointing the undersigned to investigate the allegations of the Show Cause Order, in pertinent part, states:

> Magistrate Judge Lee shall determine whether a hearing is warranted. *If a hearing is warranted the hearing shall be limited to a demonstration by Respondent that the allegations in the Show Cause Order are inaccurate, or if accurate, that disciplinary action is not warranted.*

[February 11, 2009 Order at 2] (emphasis added). After a review of Respondent's responses, it remains unclear whether a factual dispute exists with respect to the actual conduct at issue that would make a hearing *necessary*. It does appear, however, that Respondent has requested that he be given an opportunity to address the allegations of that conduct to some degree. In the interest of providing Respondent every opportunity to address the referred matters, a hearing limited to a demonstration by Respondent that the allegations in the Show Cause Order are either inaccurate or, if accurate, do not warrant disciplinary action will be held on March 5, 2008 at 10:00 a.m. in the chambers of the undersigned as previously scheduled.

Fifth, Respondent's motion for a civil jury trial of this matter is **DENIED**. This attorney disciplinary proceeding does not require a jury trial pursuant to the applicable local rules and Orders. Respondent is entitled to notice and an opportunity to be heard, and he is being provided that opportunity. The rights of an attorney in a disciplinary proceeding do not extend so far as to guarantee a jury. *See e.g., In re Smith*, 123 F. Supp. 2d 351, 354 (N.D. Tex. 2000); *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 564 (9th Cir.1990) ("normal protections afforded a criminal defendant do not apply" to lawyer disciplinary proceeding); *In re Ruffalo*, 390 U.S. 544, 550 (1968) (an attorney subject to disbarment is entitled to fair notice and an opportunity

to be heard); *In re Palmisano*, 70 F.3d 483, 486 (7th Cir.1995) (holding "*Ruffalo* does not require courts to employ the procedures of the criminal law in disbarment matters"); *Mildner v. Gulotta*, 405 F.Supp. 182, 195 (E.D.N.Y. 1975) ("a disciplinary proceeding is not a full-blown trial but [an] inquest–a gathering of facts concerning the conduct of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else."). To the extent Respondent is questioning the authority of the Court to conduct the hearing without a jury, it is clear the Court may conduct the hearing under both the local rules and its inherent authority. *See In re Lewellen*, 56 F. App'x 663 (6th Cir. 2003); *Stilley v. Bell*, 155 F. App'x 217 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 348 (2006); *see also* 28 U.S.C.A. § 2071; Fed.R.Civ.P. 83(a)(1).

Respondent is on notice that any disciplinary action may take the form of Respondent's temporary or indefinite suspension or disbarment from the practice of law in the United States District Court for the Eastern District of Tennessee. Although Respondent continues to represent himself, and has indicated he may continue to do so at the hearing, he is again encouraged to obtain counsel and to notify the Court if he does so prior to the hearing.

SO ORDERED.

ENTER:

s/ Susan K. Lee
SUSAN K. LEE
UNITED STATES MAGISTRATE JUDGE