

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

In re: )  
HERBERT S. MONCIER ) No. 1:08-mc-09  
BPR NO. 1910 )

**Respondent's Exceptions To The Recommendation**

Pursuant to EDTN LR 83.7(i)(2) Respondent takes the following exceptions<sup>1</sup> to the Recommendation filed April 7, 2008. [Doc. 60]

**EXCEPTIONS TO RECOMMENDATION RULINGS**

**I. Respondent Takes Exception That Judicial Officer Lee Susan Lee And Chief District Judge Curtis L. Collier Are Disqualified After Becoming Embroiled In Controversy Over The Confidential Proceedings Against Respondent.<sup>2</sup>**

1. A public controversy has been created after the March 5 - 6, 2008 hearings and before Judicial Officer Lee's recommendations by the Chief District Judge Collier's January 17, 2008 Show Cause Order exercising his discretion under EDTN LR 83.7(b) to Order proceedings against Respondent be kept confidential.

2. Respondent references news articles prompted by the Orders of Chief Judge Collier and Judicial Officer Lee in Respondent's case.

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<sup>1</sup> The term "exceptions" has been abolished in more modern rules. Because, however, "exceptions" is used in the Local Rule; the recommendation; and the renewed use of "exceptions" in the recent case of *United States v. Vonner*, *United States v. Vonner*, 516 F.3d 382, (C.A.6 2008); Fed. R.Crim. P. 51(b), Fed.R.Evid. 103, and Fed. R.App. P. 36(a), Respondent has filed "exceptions" to pre-hearing rulings as well as the rulings in the recommendation.

<sup>2</sup> Respondent filed prehearing motions to disqualify the Judicial Officer. [Doc. ] Exceptions to the Judicial Officer's ruling and recommendation on that motion are addressed later in these exceptions.

3. Respondent references two letters written by the President of the Tennessee Bar Association in defense of Chief Judge Collier and Judicial Officer Lee's actions in Respondent's case.<sup>3</sup>

4. Judges are disqualified when they become embroiled in controversies. *see Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)

5. Judges are disqualified pursuant to 28 U.S.C. § 455(a) when a controversy "might reasonably question [their] impartiality."

6. Judicial Officer Lee acknowledged the controversy by making erroneous<sup>4</sup> findings in footnote 2 of the recommendation.

7. Judicial Officer Lee delaying ordering a hearing until February 29, 2008 and Judicial Officer Lee's rush to a hearing on March 5, 2008 caused this controversy.

8. Had Respondent been provided his EDTN LR 83.7(h)(1) right to twenty days after February 29, 2008 for the hearing the controversy that embroiled the Court and Judicial Officer would not have occurred.

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<sup>3</sup> Respondent is a member of the Tennessee Bar Association. The TBA did not contact Respondent, or Respondent's attorney, prior to having its attorney conduct a private conference with the newspaper on March 21, 2008 attempting to defend Chief Judge Collier and the Judicial Officer. Nor was there any contact prior to the President of the TBA writing and publically publishing a letter statewide to judges and attorneys defending Chief Judge Collier and the Judicial Officer. To Respondent's knowledge no investigation was made by any committee of the TBA prior to the actions of its lawyer and President defending Chief Judge Collier and the Judicial Officer. The TBA was badly misinformed, or chose not to read, Respondent's motions for relief from the confidentiality order and the Orders entered by Chief Judge Collier and the Judicial Officer. The TBA also misread EDTN LR 83.7(b) and (h) to "require" confidentiality when the plain words of those rules placed discretion with Chief Judge Collier as to whether to order confidentiality.

<sup>4</sup> Exceptions to Judicial Officer Lee's findings in footnote 8 are made *infra*.

9. Judicial Officer Lee's unfounded attempt in footnote 2 to blame Respondent for the controversy that was created by the Orders of Chief District Judge Collier and Judicial Officer Lee provides reason that "might reasonably question the impartiality" of Judicial Officer Lee requiring disqualification pursuant to 28 U.S.C. § 455(a).

10. Judicial Officer Lee making findings of the purpose of Chief Judge Collier's January 17, 2008 Order for confidentiality makes Chief Judge Collier a material witness disqualifying Chief Judge Collier pursuant to 28 U.S.C. 455(iv)(5).

11. Respondent take exception that Chief District Judge Collier and Judicial Officer Lee are disqualified by the controversy they created pursuant to *Mayberry*; 28 U.S.C. § 455(a); and the Code of Conduct for United States Judges.

12. Respondent takes exception that the recommendation should be set aside and this matter referred to the Sixth Circuit Court of Appeals or to the United States Administration of the Courts for the designation of a *pro temp* Chief District Judge from outside the Eastern District to consider Respondent's conduct.

**II. Respondent Takes Exception To Judicial Officer Lee's Findings In Footnote 2 Regarding The Confidentiality Controversy.**

13. Respondent takes exception to the findings of Judicial Officer Lee in footnote 2 regarding the confidentiality controversy as being erroneous, unsupported by evidence, self-serving and *obiter dicta*.

**Footnote 2 Finding (1):** "These proceedings were instituted in confidence to protect the Respondent."

(a) There is nothing in the record to support any finding as to why Chief District Judge Collier exercised his discretion pursuant to EDTN LR 83.7(b) to Order the proceeding against Respondent confidential on his January 17, 2008.

(b) If Chief District Judge Collier told Judicial Officer Lee he exercised his discretion to make the proceedings confidential to "protect the Respondent" his communication was *ex parte*, and having been considered by Judicial Officer Lee who should disqualify herself pursuant to 28 U.S.C. § 455(b)(1) as having received communication constituting "personal knowledge."

(c) The "finding" of Judicial Officer Lee that Chief District Judge Collier's Order of confidentiality was to "protect the Respondent" is in conflict with Judicial Officer Lee's Order refusing to grant Respondent relief from January 17, 2008 Order of confidentiality.

(d) Judicial Officer Lee's "finding" that Chief District Judge Collier's order of confidentiality was "to protect respondent" simply "parrots" those who chose to "defend" Judicial Officer Lee and Chief Judge Collier, i.e., the Tennessee Bar Association and other uninformed attorneys.

**Footnote 2 Finding (3):** "The proceedings remained confidential until the first day of the hearing because the Respondent failed to provide a waiver allowing the proceedings to be made public."

(a) Under the provisions of EDTN LR 83.7(h)(2), Judicial Officer Lee did not have authority to make the hearing public after Chief District Judge Collier's January 17, 2008 Order of confidentiality until Judicial Officer Lee determined a hearing was necessary and her decision that a hearing was necessary was not received by Respondent until Friday, February 29, 2008.

(b) EDTN LR 83.7 did not require Respondent "provide a waiver to allow the proceeding to be made public" but instead EDTN LR 83.7(h)(2) placed discretion whether to open the hearing to the public with Judicial Officer Lee and

Judicial Officer Lee did not do so in her Order granting a hearing received by Respondent on Friday, February 29, 2008.

(c) Judicial Officer Lee's requirement of a "waiver" only served to delay granting Respondent's March 3, 2008 motion to make the March 5, 2008 hearing public.

(d) Judicial Officer Lee's finding Respondent "failed to provide a waiver" is unfounded and misleading where a waiver was not an option to Respondent in Judicial Officer Lee's Order of February 29, 2008.

(e) Respondent had not "failed to provide a waiver" but instead immediately signed the waiver upon learning of the requirement on March 5, 2008.

(f) Judicial Officer Lee "parrots" the finding blaming Respondent for "failing to sign a waiver" from those who have chosen to defend Chief Judge Collier and Judicial Officer Lee.

**Footnote 2 Finding (4):** "The purpose underlying confidentiality are obvious."

(a) The suggestion that confidentiality was required "while an investigation is conducted" is disingenuous where Chief District Judge Collier had presumptively already conducted an investigation to make his opinions and conclusions stated in his Show Cause Order and Chief District Judge only ordered Judicial Officer Lee investigate Respondent for "other" misconduct of Respondent.

(b) Chief District Judge Collier's confidentiality order required Respondent to *ex parte* notify all judges in the Eastern District of the disciplinary proceeding "so they could consider scheduling matters" thereby removing any need for confidentiality.

(c) District Judge Collier notified judges in the Eastern District of the proceedings further removing any need for confidentiality.

(d) Respondent excepts that, contrary to footnote 2, the actual purpose and practical results of Chief District Judge Collier's January 17, 2008 confidentiality Order was confidential prejudice to Respondent with the judges in the Eastern District with Respondent being prohibited from commenting on the proceedings, defending himself, or preparing a defense.

**III. Respondent Takes Exception To The Recommendation Declining To Bar Discipline Under The Former Jeopardy Clause Of The Fifth Amendment When Respondent Had Already Been Tried And Punished For The Same Conduct.**

14. In *United States v. Ursery*, 518 U.S. 267 (1996) the Supreme Court examined subsequent proceedings for the same conduct under the Fifth Amendment prohibition against former jeopardy pursuant to a standard of whether the subsequent proceeding was "remedial" or "punitive". *see also, United States v. Bajakajian*, 524 U.S. 321 (1999).

15. EDTN LR 83.7 provides:

**Conduct Subject to Discipline.** 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 to bring the court or bar into dispute.

16. The Encarta Dictionary lists in its thesaurus the noun "punishment" for "discipline".

17. Judicial Officer Lee's determination at pages 47-50 that issues in the criminal contempt prosecution and the issues in the disciplinary hearing are "identical" *ipso facto* establishes former jeopardy where both have as their purpose punishment.

18. EDTN LR 83.7 provision that disciplinary proceedings do not bar contempt of court prosecutions is no longer good law pursuant to the test of *Usury*.

19. Respondent takes exception to Judicial Officer Lee's rulings that District Judge Greer did not have authority to prohibit Respondent to practice in the federal courts for he Eastern District.

20. District Judge Greer did have authority to make as a condition of Respondent's probation that Respondent not practice before the federal courts during the period of Respondent's probation.<sup>5</sup>

21. Respondent takes exception to the recommendation and asserts that disciplinary proceedings against Respondent are barred by the former jeopardy provisions of the Fifth Amendment.

**IV. The Recommendation Violates, Exceeds And Is At Variance With The Show Cause Order That A Decision To Discipline Is Not To Be Predicated On Criminal Contempt Conviction Findings.**

22. The January 17, 2008 Show Cause Order provided:

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 him having been convicted of criminal contempt. [Show Cause Order, p.3, fn1]

23. Judicial Officer Lee recited findings from the criminal contempt conviction at length at pages 6 - 11 of the recommendations.

24. Having recited as "facts" the findings for criminal contempt at pages 6 - 11 Judicial Officer Lee's recommendation states at page 47:

The issue . . . is what effect does the judgment of criminal contempt have in these disciplinary proceedings pending appeal.

25. Judicial Officer Lee makes the conclusion of law at page 49:

As applicable to criminal contempt, in *S.E.C. v. Namer*, No. 97 Civ.2085 (PKC), 2004 WL 2199471 (S.D.N.Y. Sept. 30, 2004), the court held "[f]ederal criminal convictions have a collateral estoppel effect in federal civil actions under a four-part test (1) the issues in both proceedings must be

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<sup>5</sup> Conditions of probation that persons not work in certain types of employment or restrict a persons ability to practice a profession have been upheld.

identical be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.”

26. Judicial Officer Lee at page 50 concludes:

Local Rule 83.7(h)(4) states a judgment of conviction for a criminal offense entered in federal court shall be considered clear and convincing evidence which also indicates the judgment has preclusive effect in this disciplinary proceeding under the applicable local rule.

...

I conclude the decision in *Moncier*, 2007 WL 1577718,<sup>6</sup> retains its preclusive effect pending appeal and that preclusion is appropriate for those issues raised and litigated in the prior contempt proceeding. . . . The purpose of this disciplinary proceeding is not to relitigate the merits of the criminal contempt charge; that has already been litigated. Thus, it is proper to invoke the doctrine of preclusion as it relates to this matter with respect to the issues determined in the criminal contempt proceeding.

27. Respondent takes exception that Judicial Officer Lee's recommendations ignored the restriction contained in footnote 1 of the Show Cause Order and were *ultra vires*.

28. Respondent takes exception that Judicial Officer Lee's recommendations were without authority under the Show Cause Order, footnote 1, and were *ultra vires*.

29. Respondent takes exception that Judicial Officer Lee's recommendations predicated on the criminal contempt conviction created a material variance from the Show Cause Order.

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<sup>6</sup> This is a citation to Mr. Moncier's criminal contempt conviction.



30. Respondent takes exception to the recommendation predicated on respondents criminal contempt and on issue preclusion from that conviction and request the recommendation be set aside and Respondent be granted a new hearing.

**V. Respondent Was Denied Fifth Amendment Procedural Due Process By Judicial Officer Lee Predicating Recommendations For Discipline On District Judge Greer's Criminal Contempt Conviction Findings.**

31. "[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).

32. The Show Cause Order did not plead or place Respondent on notice that Judicial Officer Lee would apply issue preclusion; collateral estoppel or *res judicata* to the findings of District Judge Greer in the criminal contempt proceedings.

33. The Show Cause Order led Respondent to believe that the criminal contempt conviction would not be considered.

34. Issue preclusion; collateral estoppel or *res judicata* to the findings of District Judge Greer in the criminal contempt proceedings were not discussed during Respondent's hearing.

35. District Judge Greer's findings in the criminal contempt proceedings were not introduced into evidence at Respondent's hearing.

36. Respondent was “blindsided” by Judicial Officer Lee's recommendation applying preclusive effect to the findings of District Judge Greer in the criminal contempt proceedings.

37. Respondent if provided due process notice and an opportunity to be heard, would have opposed issue preclusion being considered by Judicial Officer Lee and would have offered evidence, arguments and authorities that findings of District Judge Greer were a product of procedural and constitutional trial errors and constitutional structural defects that denied Respondent a full and fair hearing making issue preclusion inapplicable.<sup>7</sup>

38. Respondent take exception that the recommendation should be set aside and Respondent be granted a new hearing wherein Respondent is allowed to present evidence and arguments that the rules of preclusion; *res judicata* or collateral estoppel do not apply in this proceeding to the findings of District Judge Greer in the criminal contempt proceeding.

**VI. Respondent Takes Exception That He Was Denied Fed.R.Evid. 201(C) Notice Judicial Officer Lee Intended To Take Judicial Notice Of District Judge Greer's Findings.<sup>8</sup>**

39. Judicial Officer Lee recommendation does not state judicial notice was being taken of District Judge Greer's findings in the criminal contempt conviction.

40. EDTN LR 83.7(h)(3) requires findings be by clear and convincing "evidence."

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<sup>7</sup> Respondent states additional exceptions to issue preclusion/collateral estoppel *infra*.

<sup>8</sup> At page 42 the Judicial Officer also considered another opinion of District Judge Greer "*Moncier Disqualification Ruling*" for which there was no Fed.R.Evid. 201(c) notice.

41. Fed.R.Evid. 201(b) and (c) provide Judicial Officer Lee authority to consider evidence by taking judicial notice.

42. District Judge Greer's findings in the criminal contempt conviction were not introduced into evidence at the hearing.

43. Judicial Officer Lee did not state that the criminal contempt findings of District Judge Greer would be judicially noticed.

44. Assuming Judicial Officer Lee intended to take Fed.R.Evid. 201 judicial notice of the criminal conviction findings, Fed.R.Evid 201(d) required notice to respondent and an opportunity for Respondent to be heard as to the propriety to taking judicial notice and the tenor of the matter noticed.

45. Nowhere in the recommendation does Judicial Officer Lee provide notice that judicial notice was being taken of the findings of District Judge Greer.

46. Fed.R.Evid. 210(e) provides for an after-the-fact request to be heard as to the propriety of Judicial Officer Lee taking judicial notice and the tenor of the matter noticed.

47. Respondent takes exception that the recommendation should be set aside and Respondent be granted a new hearing to permit Respondent an opportunity to be heard as to the propriety of Judicial Officer Lee taking judicial notice of the findings of District Judge Greer and the tenor of the matter noticed, i.e., findings of District Judge Greer, should not be considered because none of the four reasons stated in *Smith v. SEC*, 129 F.3d. 356, 362 (6th Cir. 1997) apply.

**VII. Respondent Takes Exception That He Was Denied His Right Provided By EDTN LR 83.7(h)(3) To Confront And Cross-Examine District Judge Greer On His Findings In His Criminal Contempt Proceedings.**

48. At page 42, footnote 16, Judicial Officer Lee states "Respondent has not supported his request to cross examine either judge with any authority."

49. Respondent relied on EDTN LR 83.7(h)(3) that provides:

**(3) Rights of the Complainant and the Respondent.**  
During the hearing, the respondent shall be entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine any adverse witnesses. The judicial officer may permit the complainant to participate in the proceedings through counsel.

50. This section permits the complainant to participate in the proceedings through counsel, but does not preclude them also being a witness.

51. District Judge Greer was an adverse witness where Judicial Officer Lee's recommendation gave preclusive effect to District Judge Greer's opinions and conclusions in his conviction of Respondent for criminal contempt.

52. Judicial Officer Lee denied Respondent's pretrial motion to have District Judge Greer present to cross-examine District Judge Greer by holding the transcript was sufficient for Judicial Officer Lee to make its recommendation.

53. Respondent was denied administrative due process of law pursuant to EDTN LR 83.7(h)(3) by the recommendation considering the facts related by District Judge Greer for which Respondent was denied his right to confront or cross-examine District Judge Greer.

54. Respondent takes exception to the recommendation based on a hearing wherein Respondent was denied his EDTN LR 83.7(h)(3) right to confront and

cross-examine District Judge Greer and requests the recommendation be set aside and Respondent be granted a new hearing.

**VIII. Respondent Takes Exception That He Was Denied His Right Provided By EDTN LR 83.7(h)(3) To Confront And Cross-Examine Chief District Judge Collier On His Opinions And Conclusions Stated In His Show Cause Order That Respondent Was Required By Chief District Judge Collier To Demonstrate Were "Inaccurate."**

55. At page 42 footnote 16 Judicial Officer Lee states "Respondent has not supported his request to cross examine either judge with any authority."

56. Respondent relies on EDTN LR 83.7(h)(3) that provides as set forth in Section 49 above.

57. Chief District Judge Collier was an adverse witness when Respondent was required to demonstrate his opinions and conclusions stated in his Show Cause Order were "inaccurate."

58. Judicial Officer Lee denied Respondent's pretrial motion to have Chief District Judge Collier present to cross-examine by holding the transcript was sufficient for Judicial Officer Lee to make its recommendation.

59. Respondent renewed his request to exercise his right under EDTN LR 83.7(H)(3) to confront and cross-examine Chief District Judge Collier during the March 5-6 hearing but again was denied that right.

60. Respondent takes exception that Judicial Officer Lee denied Respondent's motion and ruling during the hearing to be permitted to exercise Respondent's EDTN LR 83.7(H)(3) right to cross-examine Chief District Judge Collier.

61. Respondent takes exception to the recommendation based on a hearing wherein Respondent was denied his EDTN LR 83.7(h)(3) right to confront and

cross-examine Chief District Judge Collier on his opinions and conclusions and request the recommendation be set aside and Respondent be granted a new hearing.

**IX. Respondent Take Exception That Findings Of District Judge Greer Were Not Offered Into Evidence And Were Improperly Considered By Judicial Officer Lee In The Recommendation.**

62. EDTN LR 83.7(i)(4) establishes the burden of proof to be by clear and convincing evidence of a violation of the Tennessee CRP, a rule or order of the court.

63. Chief District Judge Collier initiated the Show Cause Order without a complaint pursuant to EDTN LR 83.7(b).

64. Chief District Judge Collier had the burden of establishing a violation of the CPR, a rule or an order by clear and convincing evidence under EDTN LR 83.7(H)(4).

65. Under EDTN LR 83.7(h)(2) Judicial Officer Lee's recommendation could not consider information not admitted into evidence.

66. The findings of District Judge Greer were not admitted into evidence.

67. Respondent takes exception to the recommendation that was based on District Judge Greer's findings that were not introduced into evidence and requests the recommendation be set aside and Respondent be granted a new hearing.

**X. Respondent Takes Exception To Issue Preclusion, Collateral Estoppel Or Res Judicata Do Not Apply Under The Requirements Of *Smith v. SEC*, 129 F.3d 356, 362 (6th. Cir. 1997)**

68. *Smith v. SEC*, 129 F.3d 356, 362 (6th. Cir. 1997) provides that four (4) requirements must be exist before issue preclusion or collateral estoppel apply to the findings

69. Respondent takes exception to the recommendation applying issue preclusion/collateral estoppel because *Smith* requirements (1), (2) and (4) do not apply for the following reasons:

**Requirement (1):** "The precise issue raised in [the disciplinary proceeding was not] raised and actually litigated in the [criminal contempt proceeding]." This requirement is defeated by:

(1) The Sixth Circuit rule of the case established in its order of March 5, 2008 that "The disciplinary proceeding now pending before the district court are distinct from this appeal from a criminal conviction."

(2) District Judge Greer's Fed.R.Crim.P. 42(a) notice that limited the criminal contempt charge to the event on page 107 of the transcript of November 17, 2006.

(3) District Judge Greer's description of the criminal contempt charge against Mr. Moncier as a violation of "a direct, unequivocal command for silence." [R.44 2:05-cr-40,J.A.24].

(4) District Judge Greer's finding that the criminal contempt charge did not involve disrespect within the meaning of Fed.R.Crim.P. 42(c) that required his disqualification.

(5) Judicial Officer Lee's finding at page 11 is completely inconsistent with Judicial Officer Lee's finding of issue preclusal or collateral estoppel h at page 50 of the recommendation:

In *Moncier*,<sup>9</sup> the court addressed whether Respondent's conduct was criminal contempt pursuant to 18 U.S.C. §§ 401(1) & 401(3) for

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<sup>9</sup> "*Moncier*" refers to District Judge Greer's criminal contempt conviction.

obstruction of justice and disobedience of a court order—not whether the conduct also constituted a violation of the Rules of Professional Conduct or brought disrepute upon the bar or the court in violation of Local Rule 83.7.

**Requirement (2):** "Determination of the issue must have been necessary to the outcome of the prior proceeding;2(a) notice that controlled the criminal contempt proceeding."

(1) This requirement is defeated because findings of District Judge Greer beyond those required to establish a violation on page 107 of "a direct, unequivocal command for silence" are *obiter dictum*.

**Requirement (4):** The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." This requirement is defeated because:

(1) District Judge Greer was not impartial thereby creating a constitutional structural defect in the criminal proceeding. *Tumey v. Ohio*, 273 U.S. 510 (1987); *Gray v. Mississippi*, 481 U.S. 648 (1987).

(2) District Judge Greer had become "embroiled" in the controversy with Mr. Moncier. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

(3) District Judge Greer was disqualified by Fed.R.Crim.P. 42(c) where the charge "involved" disrespect.

(4) District Judge Greer was disqualified pursuant to 28 U.S.C. § 455 because:

- a. His "impartiality might reasonably be questioned;
- b. District Judge Greer had "personal knowledge" about disputed facts;
- c. District Judge Greer had a "bias" against Mr. Moncier;
- d. District Judge Greer had expressed "opinions" about Mr. Moncier;



e. District Judge Greer had opinions about Mr. Moncier's clients Vassar and Grooms;

f. District Judge Greer was a witness to material facts;

(5) Mr. Moncier was denied his constitutional right to a jury trial to determine facts that were necessary for Judge Greer to sentence Mr. Moncier. *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely V. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

70. Respondent takes exception to the recommendation wherein issue preclusion and collateral estoppel were erroneously applied to District Judge Greer's criminal contempt of court findings and requests the recommendation be set aside and Respondent be granted a new hearing.

**XI. Respondent Was Denied His EDTN LR 83.7(H)(i) Right To Twenty Days Notice Of A Hearing.**

71. EDTN LR 83.7(h)(1) provides:

(1) **Hearing Procedures.** When it has been determined that a hearing is necessary, Judicial Officer Lee shall provide the member with written notice of the hearing a minimum of twenty days before its scheduled date.

72. Between Judicial Officer Lee entering the case by Order on February 13, 2008 and February 29, 2008 Respondent was reminded by every Order that Judicial Officer Lee had not yet determined that a hearing was necessary.

73. It was not until an Order received by Respondent on February 29, 2008 that Judicial Officer Lee "determined that a hearing is necessary."

74. Upon receipt of the Order that a hearing was necessary Respondent immediately requested twenty days to prepare for the hearing as was Respondent's right pursuant to EDTN LR 83.7(h)(i).

75. The clear, unambiguous rule provided Respondent twenty days after it was "determined that a hearing is necessary."

76. Judicial Officer Lee denied Respondent his EDTN LR 83.7(h)(1) right to twenty-days after the hearing was determined necessary.

77. The right to twenty-days under the facts of Respondent's case was critical and the denial of that right was prejudicial.

78. EDTN LR 83.7(b) provided the proceedings "shall be confidential and kept under seal" unless "otherwise ordered by the Court."

79. Chief District Judge Collier on January 17, 2008 exercised his discretion to Order the proceedings were to be "confidential and kept under seal."

80. On February 21, 2008 Respondent requested a pretrial conference with Judicial Officer Lee to resolve how respondent could interview and subpoena witnesses without violating Chief District Judge Collier's January 17, 2008 order.

81. Judicial Officer Lee denied that request without addressing how Respondent was to prepare for a hearing without violating Chief District Judge Collier's January 17, 2008 Order.

82. EDTN LR 83.7(h)(2) provided Judicial Officer Lee authority after it was determined a hearing was necessary to conduct "Such hearings, at the discretion of [Judicial Officer Lee], shall be confidential and shall be recorded. The record of the hearing shall be kept on file in the clerk's office, under seal."

83. After receiving notice a hearing would be held on Friday afternoon February 29, 2008<sup>10</sup> Respondent immediately requested that hearing be open.

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<sup>10</sup> The return receipt reflecting Respondent's receipt of the notice of the necessity of a hearing should be in the file.

84. On Monday, March 3, 2008 Judicial Officer Lee entered an order on Respondent's motion to open the proceeding, however, Respondent had not received that Order prior to appearing for the hearing on March 5, 2008.<sup>11</sup>

85. Regardless, under Chief District Judge Collier's Order of January 17, 2008 Respondent could not discuss or subpoena witnesses.

86. Pursuant to EDTN LR 83.7(h)(2) it was not until a hearing was determined necessary on Friday, February 29, 2008, that Judicial Officer Lee had authority to open up the hearing.

87. Respondent had only one day to prepare for the hearing assuming Judicial Officer Lee's March 3, 2008 Order had been received by Respondent on March 3rd and Respondent got the required waiver prepared and filed in Chattanooga on March 3rd.

88. Respondent takes exception that he was denied a meaningful opportunity to exercise his right pursuant to EDTN LR 83.7(h)(3) right "to present witnesses and other evidence" by the confluence of:

(1) Chief Judge Collier's EDTN LR 83.7(b) January 17, 2008 Order for the proceedings to be confidential and under seal;

(2) EDTN LR 83.7(h)(2) making Chief Judge Collier's Order of confidentiality binding on Judicial Officer Lee until a hearing was determined necessary; and

(3) Judicial Officer Lee denying Respondent his EDTN LR 83.7(h) right to twenty days after it was determined a hearing was necessary.

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<sup>11</sup> The Judicial Officer provided Respondent with a email transmittal showing the Order was emailed on Monday March 3, 2008 however Respondent did not receive that email. Respondent was having problems receiving emails from the United States Attorney's office in Knoxville during that time and possibly that problem also was the cause of non-receipt of the Judicial Officer's email.

89. Respondent takes exception to the recommendation based on a hearing held less than the twenty day requirement of EDTN 83.7(h)(1) and requests the recommendation be set aside and that Respondent be granted a new hearing a minimum of twenty-days after the new hearing is granted.

**XII. Respondent Takes Exceptions To The Recommendation Not Considering *In Re Snyder* As To The Correct Standard For Imposition Of Discipline By A Court.**

90. In *In re Snyder*, 472 U.S. 634, 645 (1985) the Court held:

Read in light of the traditional duties imposed on an attorney, it is clear that “conduct unbecoming a member of the bar” is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and “the lore of the profession,” as embodied in codes of professional conduct.

91. Respondent cited to Judicial Officer Lee *In re Snyder* as the standard for a Court to impose discipline on an attorney.

92. Respondent asserted his conduct was pursuant to his duties provided for by the Tennessee Code of Professional Responsibility.

93. Judicial Officer Lee failed to apply the correct Supreme Court standard in *Snyder* in her recommendation that Respondent was subject to discipline under the general provisions of the Tennessee Code of Professional Responsibility similar to the general provisions cited in *Snyder* as "conduct unbecoming a member of the bar".

94. Respondent takes exception to the recommendation that is based on a standard other than that approved by the Supreme Court *Snyder* and request the recommendation be set aside and that Respondent be granted a new hearing.

**XIII. Respondent Takes Exception To The Recommendation Findings That Respondent's Apologies Were Insufficient.**

95. In *re Snyder* the Supreme Court held that an attorney declining to apologize was not sufficient for a Court to impose discipline for the conduct of the lawyer.

96. The January 17, 2008 Show Cause Order did not charge Respondent with failing to apologize or for an making an insufficient apology.

97. Judicial Officer Lee's consideration of the sufficiency of Respondent's apologies was uncharged Rule 404(b) evidence that was inadmissible.

98. Respondent takes exception that the recommendation should be set aside and a new hearing granted wherein the sufficiency of Respondents apologies is not considered.

**XIV. Respondent Excepts To The Judicial Officer Not Hearing Evidence Or Witnesses Material To Discipline Or Making Recommendations As to Discipline**

99. EDTN LR 83.7 provides the Judicial Officer is to make recommendations as to discipline.

100. The Judicial Officer declined to consider evidence or witnesses as to discipline but ruled that would be reserved to Chief Judge Collier.

101. There is no procedure in EDTN LR 83.7 to separate issues that a Judicial Officer hears.

102. Respondent is entitled by EDTN LR 83.7(h)(3) to offer evidence and witnesses as to the issue of discipline.

103. Respondent takes exception to the Judicial Officer declining to consider or make recommendations as to discipline.

104. Pursuant to EDTN 83.7(h) Respondent requests a hearing as to any discipline considered before whomever is going to consider discipline in the event the recommendation is not set aside,

#### **ADOPTED AND RENEWED EXCEPTIONS TO PRE-HEARING RULINGS**

##### **XV. Respondent Adopts And Renews His Exceptions that A Magistrate-Judge Does Not Have Jurisdiction Under 28 U.S.C. § 631 To Make A Recommendation For A Discipline.**

105. Respondent adopts and renews his objections to the jurisdiction of a Magistrate-judge to make disciplinary recommendations as a EDTN LR 83.7 Judicial Officer.

##### **XVI. Respondent Adopts And Renews His Exceptions That Judicial Officer Lee Was Disqualified Pursuant To 28 U.S.C. § 455.**

106. Respondent adopts and renews his motions to that Judicial Officer Lee was disqualified pursuant to 28 U.S.C. § 455 and the Code of Conduct for United States Judges because of her relationship to Chief District Judge Collier and for the reasons stated prehearing.<sup>12</sup>

##### **XVII. Respondent Adopts And Renews His Exceptions That Chief District Judge Collier's Referring Order Was Unlawful By Shifting The EDTN LR 83.7(h)(3) Burden Of Proof To Respondent To Demonstrate Chief District Judge Collier's**

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<sup>12</sup> Respondent continues to request the Judicial Officer and Chief District Judge Collier disclose any communications before or after the recommendation with each other, their staff or any other person about these proceedings as required by the Code of Conduct for United States Judges.

**Opinions And Conclusions In His Show Cause Order Are "Inaccurate".**

107. Chief District Judge Collier's order appointing a Judicial Officer provided Judicial Officer Lee was to:

*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.*

[Doc. 7, emphasis placed by Judicial Officer Lee in the recommendation at page 41]

108. Judicial Officer Lee's recommendation acknowledged this limitation at page 41 but did not address Respondents assertion that Chief District Judge's Collier's limitation is contrary to the requirements of the rule.

109. It remains unknown what authority Chief District Judge Collier relied on to change the burden of proof and standard for discipline under the Local Rule 83.7(h)(3).

110. Respondent takes exception to the incorrect burden of proof placed on Judicial Officer Lee by Chief District Judge Collier in the referral order. [Doc. 7]

111. Respondent takes exception to the incorrect standard of proof placed on Judicial Officer Lee by Chief District Judge Collier in the referral order. [Doc. 7]

112. Respondent takes exception that Chief District Judge Collier's Show Cause Order applying an incorrect EDTN LR 83.7(h)(3) burden of proof and standard and moves it be dismissed.

113. Respondent takes exception that the Recommendation should be set aside and that Respondent should be granted a new hearing wherein the correct EDTN LR 83.7(h)(3) burden of proof and standard of proof is applied. [Doc. 7]

**XVIII. Respondent Adopts And Renews His Exceptions That The Judicial Officer Denied Respondent His EDTN LR. 83.7(h)(3) Right "To Present Evidence And Witnesses".**

114. Respondent moved to subpoena or take depositions for proof from a number of witnesses and judges as was his right pursuant to EDTN LR 83.7(h) to present evidence and witnesses.

115. The Judicial Officer denied Respondent's motion holding that Respondent could testify to the matters that the witnesses would have testified about.

116. The right of Respondent pursuant to EDTN 83.7(h)(3) to present witnesses is not limited to only matters for which Respondent could testify as held by the Judicial Officer.

117. Respondent takes exception to the Judicial Officer's denial of Respondent's EDTN LR 83.7(h)(3) right to present evidence and call witnesses and request the recommendation be set aside and a new hearing be granted.

**XIX. Respondent Adopts And Renews His Defenses Plead In Support Of His Motion To Dismiss.**

118. Respondent adopts and renews his motions to dismiss as exceptions to the recommendation based on double jeopardy and collateral estoppel created by District Judge Greer's imposition of punishment; justification that Respondent was performing a duty required of him by law; necessity required to protect the interest of Respondent's client; coercion by his duty to protect the interest of Respondent's client; and entrapment by AUSA M. Neil Smith's letter of November 16, 2008.

**XX. Respondent Adopts And Renews Exceptions To The Orders Denying A Stay Pending The Sixth Circuit Opinion On The Appeal From District Judge Greer's Findings Relied On By The Judicial Officer.**



119. Respondent requested by motion that the disciplinary hearing be stayed pending Respondent's appeal to the Sixth Circuit or the Tennessee Board of Professional Responsibility acted.

120. Respondent's motion was denied.

121. Judicial Officer Lee then relied on the findings of District Judge Greer to recommend discipline of Respondent although those findings are on appeal.

122. Judicial Officer Lee made no findings that discipline, which she recommended be based on District Judge Greer's findings, was necessary for any reason prior to determination of the appeal.

123. Respondent makes objections to the denial of his motion that disciplinary proceedings be stayed and requests that these proceedings be stayed pending the issuance of a final order by the Sixth Circuit.

This 18<sup>th</sup> day of April 2008.

*S/Ralph E. Harwell*

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