

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
at CHATTANOOGA

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

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Case No. 1:08-MC-9  
Chief Judge Curtis L. Collier

**MEMORANDUM & ORDER**

Respondent Herbert Moncier (“Respondent”), through his counsel Mr. Ralph Harwell, moves the Court to stay his disciplinary suspension so he can represent Ms. Julia Newman in her criminal trial in *United States v. Newman*, No. 3:07-cr-89-2 (E.D. Tenn. filed July 18, 2007) (Court File No. 70). On April 29, 2008, the Court suspended Respondent from the bar of the Eastern District of Tennessee, stating: “Permitting an attorney who refuses to accept the ethical and professional obligations of members of the bar of this court to continue as a member of this bar poses an immediate danger to the public, the bar, and this court.” (Court File No. 69, p. 77). Since the Court has not been presented with any facts or law that changes that assessment of the immediate danger to the public, the bar, and this court posed by Respondent’s membership in the bar of this court, his motion is **DENIED**.

**I. FACTUAL BACKGROUND**

In a lengthy opinion issued on April 29, 2008, this Court suspended Respondent Herbert Moncier from the bar of this Court, finding he had engaged in professional misconduct that violated the Tennessee Rules of Professional Conduct and unethical conduct that brought the court and bar

of the Eastern District of Tennessee into disrepute (Court File No. 69).

As stated in the opinion, Respondent's unprofessional conduct included making disparaging remarks about opposing counsel; threatening to abandon his client during a hearing; repeatedly interrupting the presiding judge; and, refusing to obey a direct order of the court (*id.*, pp. 55-56, 64-66). The concern raised by this misconduct was exacerbated by Respondent's unethical and unprofessional behavior throughout the disciplinary proceedings, during which Respondent filed numerous frivolous motions and objections (*see id.*, pp. 21-34, 36-55); directly disobeyed another court order (*see id.*, pp. 38-40); argued his misconduct was ethical and justified - then argued, in contradiction, it was the fault of the Assistant U.S. Attorney in "goaded" him into unethical conduct (*see id.*, pp. 32-33); and showed no remorse for or recognition of his misconduct (*see id.*, pp. 69-73).

Due, not only to the seriousness and repetition of his unethical and unprofessional conduct, but also to his complete failure to provide meaningful demonstration that he recognized his errors and would seek to avoid such conduct in the future, the Court suspended Respondent for a period of three to five years followed by a period of probation (*id.*, p. 77). The shorter time period was conditioned upon Respondent satisfying certain conditions that evidenced a clear and sincere effort on his part to demonstrate he had raised his behavior to the ethical and professional standards of the federal bar of the Eastern District of Tennessee. In other words, the possibility of early reinstatement was intended as an incentive for him to improve his conduct (*id.*, p. 78).

The Court had hoped Respondent would view the suspension as an imperative for him to improve his conduct. However, by filing the present motion it appears Respondent does not view the suspension in that light but rather sees it as something to be avoided, evaded, circumvented, and undermined.

## II. REQUIREMENTS FOR GRANTING A STAY

Respondent here is asking this Court to stay its suspension order. There are clearly established and generally known legal requirements necessary to obtain a stay. The United States Court of Appeals for the Sixth Circuit informed Respondent of these requirements when it denied his motion for a stay with that court.<sup>1</sup> The Sixth Circuit informed Respondent, to obtain a stay, he would have to demonstrate a stay was warranted based upon the following four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the matter; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *United States v. Moncier*, No. 07-6053 (6th Cir. order filed May 5, 2008) (citing *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

Apparently because Respondent recognizes he is unable to satisfy the legal requirements for a stay, he made no effort or attempt to even address them. First, he has made no effort to demonstrate he is likely to succeed on the merits. Second, Respondent has made no effort to show he will suffer any irreparable harm. Third, Respondent has made no effort to show others will not be harmed if a stay were granted - this is of particular concern since this Court suspended Respondent because his unethical and unprofessional behavior “pose[d] an immediate danger to the public, the bar, and this court” (Court File No. 69, p. 77). Fourth, due to that danger, the public interest would not be served by a stay, as more thoroughly discussed in the suspension order (*see* Court File No. 69, pp. 6-7, 13, 19, 22 n.19, 73-77). None of the factors supports staying

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<sup>1</sup>The United States Court of Appeals for the Sixth Circuit has denied two efforts by Respondent to halt or reverse the imposition of the suspension. *See United States v. Moncier*, No. 07-6053 (6th Cir. orders filed March 5, 2008; May 5, 2008).

Respondent's suspension.

As noted in the suspension order, Respondent and all other attorneys have a professional obligation to not file matters before the court devoid of a legal and/or factual basis (*see* Court File No. 69, pp. 21-34, 36-55). It is unethical and unprofessional conduct to do so. Respondent has provided the Court with no factual or legal basis for this motion and, by not even attempting to address any of the legal requirements for a stay, Respondent has filed yet another frivolous motion.

Instead of providing the Court with a basis to consider his motion for a stay, Respondent instead seeks to challenge the suspension by asserting that he is entitled to practice in this court because Ms. Newman has a right to choose a suspended attorney as her counsel (Court File No. 70). Respondent cites *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006) to support his assertion (Court File No. 70, p. 4). Not surprisingly, the United States Supreme Court in *Gonzalez-Lopez* expressly rejects Respondent's position, holding no one has a right to be represented by counsel who is not a member of the bar. 126 S.Ct. at 2565 ("Nor may a defendant insist on representation by a person who is *not a member of the bar . . .*") (emphasis added).<sup>2</sup> Respondent is suspended, and thus is no longer a member of the bar of the Eastern District of Tennessee. Ms. Newman has no right to retain him as counsel.

Respondent not only falsely asserted *Gonzalez-Lopez* supported his position, but Respondent failed to point the Court to the language in that case directly contradicting his position. Respondent

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<sup>2</sup>Furthermore, the Supreme Court recognized that this court has an "independent interest in ensuring that criminal trials are conducted within the *ethical standards* of the profession and that legal proceedings appear fair to all who observe them." *Gonzalez-Lopez*, 126 S.Ct. at 2566 (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)) (emphasis added). Allowing an attorney who has been suspended from practice for serious ethical violations to appear in the Eastern District of Tennessee would not further this court's obligation to ensure that trials are conducted according to the ethical standards of the profession.

and Respondent's attorney are ethically required to inform the Court of contrary authority. By failing to do so, Respondent was not candid with the Court and failed to comply with the ethical requirements of members of the bar of this court.

### **III. POST-SUSPENSION CONDUCT**

Relevant to the Court's consideration as to whether Respondent poses a danger to the public, the bar, and the court is his conduct subsequent to the order of suspension. In considering his conduct in attempting to intervene in *United States v. Newman*, No. 3:07-CR-89-2 (E.D. Tenn. filed July 18, 2007) and his conduct in *United States v. Gallion*, No. 2:07-CR-39 (E.D. Ky. filed June 14, 2007), the Court concludes Respondent continues to pose an unacceptable risk. This additional misconduct is relevant to consideration of whether granting a stay is in the public interest. *See Griepentrog*, 945 F.2d at 150.

#### **A. Motion to Intervene in *United States v. Newman***

From the Court's suspension order, it should have been clear Respondent was no longer a member of the bar of the Eastern District of Tennessee until such time as he demonstrates by clear and convincing evidence he has raised his behavior to that required of members of the bar of this court and his suspension is lifted. Because of the suspension, Respondent has no cases before the Eastern District of Tennessee; has no trials in the Eastern District of Tennessee; and, has no clients with cases in the Eastern District of Tennessee. Respondent is not authorized to represent anyone in this district nor is he authorized to provide legal services of any type to anyone with a matter in the Eastern District of Tennessee. In the eyes of the bench and bar of the Eastern District of Tennessee, Respondent is no longer an attorney.

For this reason, it was disappointing and bewildering Respondent had his counsel file a motion in the case of *United States v. Newman*, which sought to stay this Court's order of suspension and permit him to continue his representation of defendant Julia Newman in her criminal case (No. 3:07-CR-89-2, Court File No. 78).<sup>3</sup> Upon entry of the suspension order, Respondent no longer represented Julia Newman or anyone else with cases in this district. He was not her counsel and had no authority to provide her with legal advice regarding her case in federal court. He had no more authority to intervene in her case than a pedestrian selected off the street at random.

Respondent fails to comprehend the import of the suspension order. His motion in Newman's case was an unethical effort to circumvent the suspension order. Respondent has made no effort to demonstrate that he has any desire to raise his behavior to that required of all members of this bar. He has failed to acknowledge his misconduct, apologize for it, and commit he will not further engage in the professional misconduct that led to his suspension. Despite his suspension and his clearly deficient professional behavior, Respondent still seeks to appear before the judges of this court and participate in legal matters with members of the bar who do conform to the requirements of this bar. That is unacceptable.<sup>4</sup>

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<sup>3</sup>That motion was denied on May 6, 2008 by Magistrate Judge Bruce Guyton (No. 3:07-CR-89-2, Court File No. 79). Another attorney who was representing Ms. Newman apparently adopted Respondent's improper motion and appealed the denial (*id.*, Court File No. 80). That appeal was denied on May 13, 2008 by District Judge Thomas Phillips (*id.*, Court File No. 86).

<sup>4</sup>Rather troubling, Mr. Moncier also asserts he can reproduce the English system of law in the United States by serving as a solicitor (taking on clients and preparing all the motions and court filings), while permitting a federally-licensed attorney to act as a barrister (representing the client in person before the court at hearings and trial) (No. 3:07-cr-89-2, Court File No. 78, p. 9 n.4). This is unquestionably impermissible. Mr. Moncier is not in England, and the United States has its own system of law. A suspended attorney cannot continue to practice law in the Eastern District of Tennessee by surreptitiously litigating from the shadows. However, even if the United States had lost the Revolutionary War and this Court were bound by the English system of law, a solicitor who

**B. Misconduct in the Eastern District of Kentucky**

Since the entry of the suspension order, the Court has been informed by the Eastern District of Kentucky that Respondent engaged in serious unethical and unprofessional conduct in a case in that district, while representing defendant William J. Gallion. *United States v. Gallion*, No. 2:07-CR-39 (E.D. Ky. filed June 14, 2007). That court found that Respondent had made an unethical attack on the court in a frivolous effort to disqualify that judge from presiding over the case. The judge indicated Respondent's misconduct was so serious that it could warrant disbarment.

It is apparent from the above discussion that attorneys for defendants Cunningham and Gallion have *committed serious ethical violations* in filing these motions and supporting affidavit. The motions are substantially based on outright *misrepresentations* of the record or distortions thereof based on statements by the court taken out of context.

No. 2:07-CR-39, Court File No. 370, p. 21 (emphasis added).

Further, these motions are clearly insufficient legally because they are based on rulings of the court, most of which had already been approved by the Court of Appeals. Many of the legal assertions made were totally unsupported by authority. For instance, no authority was cited to support the assertion that the court's having been co-counsel with a witness more than 25 years ago is a ground for recusal, or that a professional relationship with the witness's wife, who is a judicial colleague, would constitute a disqualifying ground. This is especially true when the only indication that the witness is going to testify is that he is listed as a witness for the defendants.

The attention of counsel is directed to the admonition of the United States Court of Appeals for the District of Columbia Circuit: "[T]he Supreme Court has suggested that *disbarment may be appropriate* for lawyers who certify false section 144

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is suspended from the "roll" (the English equivalent of being suspended from the bar) is prohibited from giving legal advice to the public. *See Solicitors Act, 1974, c. 47, §§ 1, 20-22 (Eng.)*.

Moreover, no member of the bar of this court could ethically engage in such activity with an attorney suspended from practice. Assisting a suspended attorney in such activity would at the very least have the member of the bar committing a serious ethical violation and perhaps would even be aiding and abetting the suspended attorney in disobeying the orders of this court, which could constitute criminal contempt of court.

affidavits.” Few ethical principles are more fundamental than that which condemns filing or suborning a false affidavit or *knowingly filing frivolous motions or pleadings*.

The court would be *fully justified in immediately initiating disciplinary* or contempt proceedings or imposing the *type of sanctions* discussed in the above authorities. Counsel are warned that further unethical or contemptuous conduct will result in the *imposition of severe sanctions* of the kind described in those cases or for contempt.

*Id.*, pp. 22-23 (citation omitted) (emphasis added).

This Court is also concerned because it is apparent Respondent may not have been candid with the court in that case. Respondent owes a duty of candor to the court. In violation of this duty, Respondent did not inform the Court of the initiation of the disciplinary proceedings in this court and did not do so until after the suspension order was entered. When the issue was raised, Respondent represented he was unable to inform his co-counsel and client of the initiation of the disciplinary proceedings due to a confidentiality order of this Court (*see id.*, Court File No. 383, p. 2). This is false. As explained in the suspension order, neither the local rules nor any order of this Court prohibited Respondent from telling anyone he chose of the disciplinary proceedings; the confidentiality of disciplinary proceedings only limits the court from disclosing the disciplinary action, not the attorney (Court File No. 69, pp. 11-14). It appears Respondent was not honest with the Kentucky federal court.

The Court has not been furnished with a transcript of Respondent’s statements to the Kentucky federal court and, since the Court has no present intent of taking any action on what transpired there, the Court has made no effort to obtain a transcript at this time. However, Respondent was present and knows what transpired before the Kentucky federal court.<sup>5</sup> Following

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<sup>5</sup>Respondent, in informing the Kentucky federal court of his suspension, also misrepresented the nature of his disciplinary conduct. He did so by implying that his only misconduct was



Respondent's appearance in that court, he moved to withdraw from representing Mr. Gallion and that motion was granted (No. 2:07-CR-39, Court File Nos. 383, 386).

#### **IV. CONCLUSION**

Respondent's submission of a frivolous motion for a stay, which lacks any legal and factual basis and misrepresents legal precedent, again demonstrates Respondent's unwillingness to accept the ethical and professional standards required of members of the bar of this court.

The Court feels compelled to address one additional sentence from his motion to stay his suspension: "There is no reason for this Court to believe that Mr. Moncier will not conduct himself consistent with the legal and ethical parameters reflected in this Court's April 29, 2008, Order during Ms. Newman's trial." (Court File No. 70, p. 5). The Court disagrees. There is every reason to believe Respondent will not comply with the standards expected of members of the bar of this court. Respondent has not provided this Court with any information that he recognized that the behavior that led to his suspension was improper. He has even argued he had a duty to engage in the behavior. If he believes that, then he will engage in the behavior in the future. Moreover, his conduct in this motion, in the *Newman* case, and in the *Kentucky* case, strongly suggests that he continues to be a danger.

Accordingly, the Court **DENIES** Respondent's motion (Court File No. 70).

**SO ORDERED.**

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disobeying an order of a federal judge, and by slanting the description of that event while excluding any discussion of the circumstances leading up to it (No. 2:07-CR-39, Court File No. 383, pp. 1-2). This is misleading and violates the ethical and professional expectations of members of the Eastern District of Tennessee bar.

**ENTER:**

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**CURTIS L. COLLIER**  
**CHIEF UNITED STATES DISTRICT JUDGE**