UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

In Re: HERBERT S. MONCIER	)	1:08-mc-09
	)	*Collier / Lee*

RECOMMENDATION PURSUANT TO LOCAL RULE 83.7

I. Introduction

This disciplinary proceeding involves the alleged professional misconduct of Herbert S. Moncier ("Respondent"), an attorney admitted to the bar of United States District Court for the Eastern District of Tennessee. This matter has been referred for a recommendation concerning the allegations of, and response to, the January 17, 2008 Order to Show Cause (the "Show Cause Order") issued to Respondent by the Honorable Curtis L. Collier, Chief Judge for the Eastern District of Tennessee, under E.D. TN. LR 83.7 ("Local Rule 83.7"). For the reasons set forth herein, I **RECOMMEND** the court impose appropriate discipline on Respondent for his conduct during the November 17, 2006, hearing.

II. Procedural History

The Show Cause Order was issued to Respondent on January 17, 2008 [Doc. 1]. On February 4, 2008, Respondent filed a motion for extension [Doc. 2]; a motion for relief from the notification provision of the Show Cause Order [Doc. 3]; a motion for disclosures [Doc. 4]; and a motion to dismiss or stay the Show Cause Order [Doc. 5]. The court issued an order denying each of these motions on February 11, 2008 [Doc. 6]. On the same day, the order referring this matter

for a report and recommendation pursuant to E.D. TN. LR 83.7 was issued [Doc. 7].[1]

On February 13, 2008, an order and notice of hearing was issued [Doc. 8]. The order required Respondent to appropriately respond to the Show Cause Order with a response--instead of motions--containing all of the information listed in E.D. TN. LR 83.7(d)(1) - (5), because he had thus far failed to do so. In addition, the notice set a hearing on March 5, 2008, unless a hearing was deemed unnecessary upon receipt of an appropriate response by Respondent. On February 21, 2008, Respondent filed a motion for a hearing and requested authority to issue subpoenas to, or depose, some eight state court judges, two federal court judges, and disciplinary counsel for the Board of Professional Responsibility of the Supreme Court of Tennessee ("BPR"), and also filed motions for writs of *habeas corpus ad testificandum* for two federal prisoners, James Thornton ("Thornton") and Michael Vassar ("Vassar") [Doc. 9, 10 & 11]. These motions were denied the next day, February 22, 2008 [Doc. 12].

On February 25, 2008, Respondent filed a response to the Show Cause Order [Doc. 13]; a motion for a pretrial conference pursuant to Fed. R. Civ. P. 16 [Doc. 15]; a motion and demand for a jury trial [Doc. 16]; an objection and motion to revise the February 11 and 13 orders limiting the scope of the hearing [Doc. 17]; a motion that the court abstain from holding a hearing and/or ruling on the Show Cause Order until after the resolution of the appeal of his criminal conviction [Doc.

[1] Contrary to Respondent's assertions [*e.g.*, Doc. 34], this matter was *not* referred pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72 and the court never indicated such was the case. This matter was referred pursuant to Local Rule 83.7(g), which provides "the Chief Judge may appoint a judge or other judicial officer from within the Eastern District of Tennessee to investigate the allegations of the complaint and the response. The judicial officer shall review all sealed documents related to the disciplinary charges, conduct hearings if necessary, and issue a written recommendation." Local Rule 83.7(i) & (j) establishes the procedures for Respondent to assert any exceptions to the recommendation before a final order of disposition is entered.

18]; an objection and motion to disqualify any court officer subordinate to the Chief Judge from conducting the hearing and/or making a report and recommendation concerning the same [Doc. 21]; and an "alternative response" to the Show Cause Order [Doc. 22]. On February 27, 2008, all of Respondent's February 25 motions were denied [Doc. 23].

On March 3, 2008, Respondent filed a motion to dismiss the Show Cause Order on the ground it did not comply with Local Rule 83.7(b), or in the alternative, a motion *in limine* to exclude evidence from the March 5 hearing [Doc. 24]; another motion to reconsider and for additional findings [Doc. 25]; a motion for a public hearing and public record [Doc. 26]; a motion for a continuance (*i.e.*, minimum of 20 days from February 27) [Doc. 27]; and a motion to establish certain procedures [Doc. 28]. These motions were addressed in an order issued on the same day, March 3, 2008 [Doc. 29].[2]

[2] In conformance with Local Rule 83.7, these proceedings were instituted in confidence to protect the Respondent. 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. As soon as Respondent provided the waiver, the proceedings were made public. The purposes underlying confidentiality are obvious. Foremost, the rule serves to protect the attorney involved and any complainant while an investigation is conducted. As set forth herein, there is no complainant in this matter; the Show Cause Order was initiated by the court on its own initiative and thus there was no need for complainant confidentiality. Respondent's motion to make these proceedings public was conditionally granted (with the order also e-mailed to Respondent) on the very same day the motion was filed. The motion was granted subject only to Respondent's provision of a simple form--a written waiver of any objection/appeal based on the public nature of such a record and hearing. Asserting he did not receive the order, Respondent did not provide the waiver until the start of the hearing [Doc. 31]. Upon receipt of the waiver, the hearing and record were immediately ordered open, the hearing proceeded in open court, and the already voluminous record was placed on the public docket.

A hearing in this matter was held on March 5-6, 2008.[3] Present at the hearing were attorney Ralph E. Harwell, who entered an appearance for Respondent only on the morning of the hearing, and Respondent.

III. Background

A. The Show Cause Order

The conduct at issue occurred in connection with sentencing proceedings in *United States v. Vassar*, Case No. 2:05-CR-75-3 (E.D. Tenn. Feb. 28, 2007), assigned to United States District Judge J. Ronnie Greer. Respondent's conduct is specified in the Show Cause Order as follows:

> As counsel in a proceeding before United States District Judge J. Ronnie Greer, Herbert S. Moncier 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. Such conduct by a member of the bar of this court raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this Court. Specifically:
>
> On November 17, 2006, Herbert S. Moncier represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-75-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (*see, e.g.* Case No. 2:05-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98). Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (*see id.*, pp. 39-40, 49-50, 87-88, 91, 96).
>
> At one point during the hearing, Respondent threatened to "sit

[3] Respondent's appeal of the criminal conviction is styled *United States v. Herbert Moncier*, No. 07-6053, and is currently pending before the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). On the morning of March 5, 2008, Respondent filed a motion in that appeal to stay the disciplinary proceedings, which was denied by the Sixth Circuit on that same day. *see United States v. Moncier*, No. 07-6053.

there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar (*id.*, pp. 41-42). Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator (*id.*, p. 43). Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar (*id.*, p. 88).

The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor (*id.*, pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96).

Ultimately, the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict (*id.*, pp. 101-102). After Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern, then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting, continued to do so, as follows:

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE. DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR -

THE COURT: MR. MONCIER -

MR. MONCIER: HE MAKES -

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

> MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -
>
> THE COURT: MR MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.
>
> MR. MONCIER: MAY I SPEAK TO MY -
>
> THE COURT: OFFICERS, TAKE HIM INTO CUSTODY.
>
> WE'LL BE IN RECESS.

[Doc. 1 at 1-3].

The Respondent was directed to file a response to the allegations set forth in the Show Cause Order, including a specific admission or denial of each of the factual allegations, specifically: "(a) that Respondent engaged in a pattern of disruptive behavior during the sentencing hearing on November 17, 2006; and (b) that Respondent disobeyed the direct order of the court during the sentencing hearing on November 17, 2006; and (c) that Respondent acted in an unprofessional and unethical manner; . . ." [*Id.* at 5].

B. Respondent's Conduct

The procedural and factual background concerning the Respondent's conduct at the November 17, 2006, sentencing hearing is set forth in *United States v. Moncier*, No. 2:07-CR-40, 2007 WL 1577718, * 1 (E.D. Tenn. May 30, 2007), as follows:

> On November 17, 2006, Michael Vassar was scheduled to be sentenced by this Court after his conviction by a jury in case No. 2:05-CR-75 of a conspiracy to distribute and to possess with the intent to distribute cocaine. At the beginning of the hearing, Moncier, after informing chambers of an emergency matter to be taken up, stated that he had been supplied with a letter from the United States on the prior day "purporting to be a *Brady* disclosure." Representing to the court that the letter raised a possible issue pursuant to Rule 44(c), Moncier asked "to address the Court with the government present on the record in chambers . . ."

After the Court cleared the courtroom of all present except for Moncier and Vassar, the government agent and the Assistant United States Attorney representing the United States and certain court personnel, Moncier moved for a continuance of the sentencing hearing and that the matter be presented to another district judge and an independent attorney be appointed to advise Vassar concerning the Rule 44 matter. After considerable argument, these requests were denied.

Moncier then made various further attempts to postpone the sentencing hearing, including a motion to withdraw as counsel for Vassar and then to withdraw conditionally. These motions were then essentially withdrawn after Moncier informed the Court that his client wished to go forward with the hearing with Moncier representing him and that Vassar wished to address the Court. At the end of a lengthy hearing, during the Court's questioning of Vassar, the following occurred:

THE COURT: MR. VASSAR, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THIS COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR-OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?

MR. VASSAR: YES, SIR.

THE COURT: I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU-

MR. VASSAR: THAT'S WHAT I WANT.

THE COURT: NOW, YOU UNDERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

MR. VASSAR: I UNDERSTAND.

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE

REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR-

THE COURT: MR. MONCIER-

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THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING-

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY-

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

Id. at * 1-2 (footnote and citation to the docket omitted).

With regard to Respondent's conduct at the November 17, 2006, hearing, the court held:

> the decision whether a criminal defense lawyer's actions are contemptuous requires this Court to balance two very important considerations-the lawyer's duty to represent a criminal defendant vigorously and zealously and the court's duty to administer justice in an orderly and efficient fashion without contumacious interference by a misbehaving attorney. This balancing of policy considerations becomes even more difficult when dealing with a lawyer like Moncier, an attorney who by his own admission "pushes the envelope" and who is described by his own attorney as a lawyer who will pursue every issue "to the line."
>
> Also important to this Court in determining the issues raised by this matter is the context in which the incident of November 17, 2006, occurred. It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an isolated one. It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word. In addition, this case must also be considered in

the context of Moncier's long experience in the defense of criminal cases in the federal courts. Moncier has practiced law for 38 years and his actions of November 17, 2006, cannot be viewed as the innocent mistake of a young, inexperienced lawyer or as an aberrant act. Although Moncier's actions on November 17 were decided in a "split second", his decisions were made in the context of a long career of trying cases and dealing with judges and courts under circumstances where decisions and judgments often must be made immediately and without the luxury of extensive forethought.

. . .

Throughout the course of Moncier's appearances before this Court, this Court has admonished Moncier for a wide range of misconduct, has lectured him concerning the Court's expectations as to professionalism and civility and has threatened him with a finding of contempt on prior occasions, all to no avail. This case, ultimately speaking, presents a very simple issue of whether the presiding judicial official will control the course of the proceedings in the courtroom or whether contumacious lawyers will be permitted to take control.

. . .

Moncier's conduct in this case, however,- *i.e.* repeatedly interrupting the court after a warning not to do so and in disobedience to the court's directive commanding his silence-is a clear case of misbehavior as contemplated by the statute and is well within "the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority" punishable as criminal contempt.

. . .

Although Moncier argues that he lacked the intent to obstruct justice (discussed below), he has not seriously disputed that his actions on November 17, 2006, had a disruptive effect on the proceedings and resulted in a delay of those proceedings. One point raised by Moncier, however, does bear some discussion here. Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. that Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking the questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

As the transcript of the November 17, 2006, proceeding reflects, it was Moncier himself who suggested to the Court that there existed "an issue that pertains to Rule 44(c)." [Doc. 688, page 2]. The issue

had arisen, according to Moncier, because the United States had provided him, on the day before the sentencing hearing, information relating to a statement made by a co-conspirator attributing to Vassar a potentially incriminating statement about another of Moncier's clients, an unindicted co-conspriator [sic]. Moncier then attempted to convince the Court to refer the matter to another district judge for hearing and have independent counsel appointed to advise Vassar about Moncier's possible conflict of interest. Moncier asserted, during the hearing, that his client, Vassar, wasn't going to tell him (Moncier) if he had made the statement because of his representation of the other client. [Doc. 683, page 43]. Moncier wanted Vassar to have the benefit of independent counsel's advice on whether to cooperate with the government concerning the contents of the alleged statement in order to seek a motion for downward departure for his assistance. After the government indicated that it had no interest in debriefing Vassar, the Court denied both requests.

After further attempts to delay the sentencing hearing, Moncier informed the Court that Vassar had told him during a recess that Vassar did not want him [Moncier] to be disqualified [Doc. 683, p. 78], that he [Moncier] did not "have a conflict", [*Id.*, p. 88] and that Vassar wanted to address the Court. [*Id.*, pp. 88, 89] Moncier specifically represented that if he could have the lunch hour to work with his client, he would be ready to proceed with the sentencing hearing at 1:30 p.m. The United States announced that it did not oppose the proceeding going forward with Moncier representing Vassar "if Mr. Vassar represents ... to the Court that he wishes Moncier to continue as his counsel for this sentencing hearing." [*Id.*, pp. 93-94]. Just minutes later, the Court asked Vassar to step to the podium and began to question him with regard to whether he wanted Moncier to continue as his attorney. It was shortly after that questioning began that the above exchange took place, leading to this proceeding.

Moncier's insistence that Rule 44 did not permit the Court to question Vassar or that he did not know what the Court was doing is patently absurd and simply not credible in view of the events of November 17. Rule 44 in fact required the Court ("the court must promptly inquire ...") to question Vassar about the possible conflict of interest called to the attention of the Court by his attorney . . . .

Also, in light of Moncier's repeated requests to the Court to question Vassar or to allow Vassar to address the Court, as well as the government's assertion just minutes before that the Court should

> determine if Vassar wanted Moncier to continue as his attorney, Moncier's assertion that he did not have any idea why Vassar had been called to the podium lacks any credibility.
>
> Moncier's claim that he knew Vassar wanted to speak to him is likewise incredible. For one thing, Moncier testified that he made his observation upon Vassar being called to the podium; yet, he made no request to consult with his client during a lengthy exchange between the Court and Vassar (taking up eight pages of the transcript (pages 99-106) and including efforts by Moncier to persuade the Court to rephrase its questions), all of which occurred *after* Vassar was called to the podium. Secondly, Moncier's testimony that it was obvious during the proceeding at the podium that Vassar wanted to talk with him conflicts with both the transcript and with the Court's own observations. At no time during these proceedings did Vassar ever request time to consult with Moncier. During the entire proceeding at the podium, Vassar listened intently to the Court's questions and made direct eye contact with the Court. Vassar never exhibited confusion but rather affirmatively acknowledged the Court's inquiry and his understanding of the inquiry.
>
> . . .
>
> Moncier's trial testimony also appears to contradict his pre-trial affidavit where he seems to suggest that his true motivation was that he did not want Vassar to answer the Court's question because "clients in criminal cases should never answer questions prior to being advised as to what questions they are going to be asked and them being advised as to the purpose for the question and whether my client should respond." [Doc. 10-3, para. 18]. Moncier cites no authority for such a view of the bounds of proper advocacy. A criminal defense attorney has no absolute right to interrupt proceedings whether conducted by adversary counsel during cross examination or by the court to advise a client how or whether to answer a question.

Id. at * 3-6 (internal case citations and footnotes omitted).

In *Moncier*, the court addressed whether Respondent's conduct was criminal contempt pursuant to 18 U.S.C. §§ 401(1) & 401(3) for 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. *Id.* After finding

Respondent's conduct was criminal contempt, the court addressed its two options to address such criminal contempt, a fine or imprisonment; the court did not address attorney discipline under Local Rule 83.7 in any fashion. *Id.* at * 10. Subsequently, Respondent was sentenced, and a final judgment of conviction was entered.[4]

C. Respondent's Response

On February 25, 2008, Respondent responded to the Show Cause Order (the "Show Cause Response") by quoting portions of the Show Cause Order followed by a "response." The Show Cause Response is paraphrased as noted below.

The Show Cause Order states:

> As counsel in a proceeding before United States District Judge J. Ronnie Greer, Herbert S. Moncier ("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. . . .

In response, Respondent: (1) admits he appeared in a proceeding before Judge Greer; (2) admits Judge Greer found he violated an order of the court; and (3) admits Judge Greer found his actions were contemptuous toward the court [Doc. 13 at 3]. Respondent contends, however:

> the findings of [Judge Greer] are on appeal to the Sixth Circuit Court of Appeals and this Court should abstain from ruling in this case because of the potential effect that appeal will have on *res judicata*; collateral estoppel; or double jeopardy pertaining to Judge Greer's findings.

[*Id.*]. Respondent denies that: (1) he intentionally violated the court's order; (2) he intended any

[4] It is this final judgment of criminal contempt that Respondent has appealed to the Sixth Circuit. The court in *Moncier* also denied in part and granted in part Respondent's motion to stay the sentence pending appeal [Case No. 2:07-CR-40. Doc. 75].

disrespect for the court; or (3) his conduct constituted disrespect for the court [*id.* at 3-16].

The Show Cause Order states:

> Such conduct by a member of the bar of this court raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this Court.

In response, Respondent denies that his conduct shows that he is unfit to practice before this court, particularly when it is considered within the context in which it occurred [Doc. 13 at 16-17].

The Show Cause Order states:

> On November 17, 2006, Herbert S. Moncier represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-75-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (*see, e.g.* Case No. 2:05-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98).

The transcript of the November 17, 2006 hearing (the "transcript" or "Tr.")[5] reflects the following:

> The Court: And reset Mr. Phillips after Mr. Vassar and reset --
>
> Mr. Moncier: I don't know. . . .

(Tr. 29).

> The Court: Until the next thing comes up that you didn't know about and you raise this

[5] The transcript appears in *United States v. Vassar*, No. 2:05-CR-75-3 at Doc. 683. In addition, at the March 5-6 hearing, Respondent introduced a copy of the transcript that includes an additional proceeding after he was taken into custody where Attorney John T. Rogers ("Attorney Rogers") made a special appearance with Respondent. Respondent's transcript is marked as exhibit one in Respondent's Exhibit ("Exh.") 1 admitted during the March 5-6 hearing. A copy of the portion of the proceedings which occurred after Respondent was taken into custody and represented by Attorney Rogers was also admitted as Exh. 3 during the March 5-6 hearing.

issue again. I mean, you --

Mr. Moncier: Judge --

(Tr. 46).

The Court: You know, it's possible he could do both, he could hide his assets --

Mr. Moncier: Only if they told the Court.

(Tr. 53).

The Court: This is a theory defense not already indicated in all these pleadings you've filed? I mean, the theory of your defense clearly in these pleadings is that Mr. Vassar's case --

Mr. Moncier: Oh, this is --

(Tr. 65).

The Court: I hope you did it when you undertook the joint representation --

Mr. Moncier: I did.

The Court: -- of Harold Grooms and Michael Vassar.

(Tr. 70-71).

The Court: . . . I may have inquired --

Mr. Moncier: And during that inquiry we had a lengthy hearing that the court needs to review. . . .

(Tr. 71).

The Court: Mr. Moncier, you don't have to justify your conduct. I told you --

Mr. Moncier: Well, no --

The Court: I told you what I don't like about it.

(Tr. 95).[6]

In response, Respondent admits he was present at the hearing representing Vassar, but denies he conducted himself throughout the hearing in an unprofessional manner [Doc. 13 at 17-18]. Respondent also states "the transcript reflect[s] uncompleted sentences by both the District Judge and Respondent." [*Id.* at 17].

The Show Cause Order states:

> Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (*see id.*, [Case No. 2:05-CR-75-3, Court File No. 683], pp. 39-40, 49-50, 87-88, 91, 96).

The transcript reflects the following:

> Mr. Moncier: I believe they sandwiched it between some very exculpatory information simply to see what I would do, and I did what I had to do. . . . These people don't like me . . . . I have no personal animosity toward them, but they don't want people to hire me to try jury trials. It's - - you shake your head at that.
>
> The Court: I do. That's ridiculous, Mr. Moncier.
>
> Mr. Moncier: Okay. Well, nevertheless, it's not ridiculous when you hear the things that I hear from people that they're

[6] The Show Cause Order indicates interruptions by Respondent are also reflected at pages 9 and 98 of the transcript. While pages 9 and 98 of the transcript do not indicate interruptions, the transcript at page 7 does. In any event, in *Moncier* the court held Respondent interrupted him some 14 times. 2007 WL 1577718 at * 3.

talking to about cooperation . . . .

(Tr. 39-40).

> Mr. Moncier: I just got through telling you that I was a little bit concerned that you would feel that way . . . . What's going on here is that I think that the government is trying to set me up. . . . So what's really going on here, I think, is that because I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me. That's what I think is going on. . . .

(Tr. 49-50).

> Mr. Moncier: The point of the matter is that the government set this up. They know that you don't like the, you don't like the way I've presented my client's case at sentencing. I know that the Court has been irritated with me in this trial and other trial. I know that the Court does not like the style by which I represent my clients before juries that I -- that, that has resulted in the series of fairly successful results. . . .

(Tr. 87).

> Mr. Moncier: I do plead things that I believe need to be pled, and I don't say them in the bars or on the streets -- bars is a bad choice of words. I don't say them outside the court room. When I have information that I need to bring to the attention of the Court, I do it. Now, the, the issue is though that the

> government . . . is they don't want to have me have any success because what happens is people who want to go to trial are going to come and hire me, and it's going to be the same thing in those cases; and so when the government goes out and they talk to these people about cooperation and such like that, they also have a vested interest in, in whether that attorney is going to aggressively defend the case or not.

(Tr. 96).

Respondent denies the above statements establish he is unfit to practice before this court, but admits he made the statements [Doc. 13 at 18-19].

The Show Cause Order states:

> At one point during the hearing, Respondent threatened to "sit there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 41-42).

The statement at issue appears in the following portion of the transcript:

> Mr. Moncier: Well, if, if what has to be done has to be done, you know, that's fine. I simply cannot -- I'm not going to walk into this trap. I'm not going to do it. I'm not going to put the -- I had a --
>
> The Court: You telling me you're just going to walk out of here this morning whether I let you withdraw or not?
>
> Mr. Moncier: Of course not.
>
> The Court: What do you mean, I'm not walking into this trap?
>
> Mr. Moncier: I mean if I have to sit there and remain

moot, I will sit there and remain moot.

The Court: In other words, you wouldn't provide him a defense?

Mr. Moncier: I can't provide him a defense. It would be an ineffective assistance of counsel to do so. Everybody is walking into a 2255 in this situation.

The Court: It appears to me that you're setting that up.

Mr. Moncier: I'm not setting this up.

(Tr. 41-42).

Respondent admits making the above statement, but denies the statement[7] violated the "Code of Professional Responsibility"[8] or that the statement establishes that he is unfit to practice or remain a member of this court [Doc. 13 at 20-21]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator ([Case No. 2:05-CR-75-3, Court File No. 683], p. 43)

[7] Although not raised by Respondent, the word "moot" in the transcript may refer to remaining "mute," but in any event Respondent's comment was clarified by Judge Greer who specifically asked Respondent if he meant he would not provide a defense as indicated in the Show Cause Order.

[8] The Show Cause Order references the Rules of Professional Conduct, but Respondent refers to the "Code of Professional Responsibility." Respondent's references to the "Code of Professional Responsibility" will be construed as referring to the Rules of Professional Conduct, Tenn. Sup. Ct. R. 8, which set forth the ethical standards relating to the practice of law and to the administration of justice in the courts of the State of Tennessee, effective March 1, 2003.

The representation at issue is set forth in the transcript as:

> Mr. Moncier: Now, if my client has known something, as remote as it might be, that pertains to Harold Grooms, that is that Harold Grooms offered to give him some drugs, if he knows that, and if he understands that that is within these things that the government was wanting, that he needs to know that. He isn't going to tell me if Harold Grooms said that because he knows I represent Harold Grooms.

(Tr. 43).

Again, Respondent admits making the statement, but denies the statement violated the Code of Professional Responsibility and denies the statement establishes he is unfit to practice or remain a member of this court [Doc. 13 at 21-22]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar ([Case No. 2:05-CR-75-3, Court File No. 683], p. 88).

The transcript at the referenced pages reflects the following:

> Mr. Moncier: I knew it was coming when I filed my notice. The whole reason I filed my notice when I did is to let everybody know that this person that they threw all the publicity out against is out there; and if they have some reason to believe that I have a conflict, let's air it out.
>
> I had absolutely and I have today no reason to believe that I have

> actual conflict of interest between Harold Grooms and Michael Vassar, none, and I don't. However, I'm painfully aware, painfully aware of the burdens on the courts on 2255 petitions, and that's exactly why I brought it to the attention of the Court because in my opinion what the government was doing, they don't care about Mike Vassar, they were trying to come up and at a later time suggest that I had a conflict of interest without ever telling anybody about it. If I didn't do it. There is no conflict of interest. Mr. Vassar wants to address the court, and this is a setup to deny Mr. Vassar the counsel of his choice in this case.

(Tr. 87-88).

Respondent asserts the context of the statement will show that he represented he had only a potential conflict of interest [Doc. 13 at 23]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96)**.**

The dialogue at issue is:

> The Court: Before I hear from the government, Mr. Moncier, you just made some statements about what you know about this Court's attitudes about you and the way you do things. There have been a number of occasions when I have complimented you in the

open courtroom on the success you've had in defending criminal defendants in this Court. Contrary to what you might see as some disappointment on my part when you get an acquittal, that's not the case. I've never been disappointed or upset when you've gotten an acquittal in this court, nor have I expressed an overall dislike to the way you present your cases.

What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or before a witness; that I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professionals who oppose you, nor do I like the aspersions you cast upon the Court at times . . . I do not like the fact that you'll make an argument before the jury that I sustained an objection to or, or instructed you not to make . . . .

You think the government is out to get you because you have success. You think the Court is against you because you have success. Aside and apart from the egotistical implications that that statement contains, they're just simply wrong. I don't resent you the success you've had . . . I've bent over backwards . . . to make sure that Mr. Vassar got the counsel of his choice in this case.

I, I say that only because you state for the record . . . a record that I'm sure will be . . . reviewed by an

> appellate court statements like that as if they are fact. Much of this comes from your choice of words, as I pointed out to you on Wednesday. You say you have no personal animosity toward the government, you cast no personal aspersions . . . and yet you used words like . . . torture, extort; or you use words like . . . they concocted. . . . I don't know whether you just, it's just a poor choice of words or whether you intentionally use those words; but that's what I disapprove of.
>
> I don't disapprove . . of you aggressively representing your clients, that's what you ought to do . . . that's what you've had an obligation to do.
> . . .
> It does, however, bother me in addition that you've told me in a side-bar conference this morning that if this hearing goes forward today, you intend to sit there at counsel table mute and render ineffective assistance of counsel . . . and now you tell me that you're prepared to go forward, Mr. Vassar wants you to go forward. Those are the kinds of things, Mr. Moncier, that give me heartburn about your conduct. You can't have it both ways. I mean, either you're prepared to go forward and do what you need to do to represent him or you're not.

(Tr. 90-93). Respondent's response was:

> Mr. Moncier: First, I would like to briefly respond to what the court said. I have raised issues as to how the government prosecutes these cases, not only in this case, but previous cases . . . . I have received information from people that

I've talked to, agents of the government, and the proffer that I filed from the very jailhouse person Monday of this week is typical of the type of information that I have received with regard to witnesses that I have interviewed, the process in which witnesses are interviewed here; so I stand on the basis of the records that I have produced to the Court in this case as a reasonable basis for me to raise these issues.

Now, if the Court, for example, were to find that what the government is doing to get people to cooperate and testify is as is indicated by the records that I've placed before the Court, then I believe that the term "torture" to a person, while it was a harsh term, it is in fact a term that unless you do this, you're going to spend the rest of your life in prison, I don't know what other than that that is.

The Court: Mr. Moncier, you don't have to justify your conduct. I told you --

Mr. Moncier: Well, no --

The Court: I told you what I don't like about it.

Mr. Moncier: Okay.

The Court: Whether you agree with that or not is irrelevant. If you think the words that you used are justified, that's fine.

Mr. Moncier: And with regard, your honor, with regard to the fact, the fact that I do plead things that I believe need to be pled . . . I don't say them outside the court room. When I have information that I need to bring to the attention of

> the Court, I do it. Now, the, issue is though that the government . . . they don't want to talk to my client . . . and the reason is, is they don't want to have me have any success because what happens is people who want to go to trial are going to come and hire me, and it's going to be the same thing in those cases; and so when the government goes out and they talk to these people about cooperation and such like that, they also have a vested interest in, in whether that attorney is going to aggressively defend the case or not.

(Tr. 94-96).

Respondent "admits the transcript of November 17, 2006" and also admits "the transcript speaks for itself" [Doc. 13 at 24]. Respondent denies contradicting the court's admonishment and also denies his response constitutes a violation of the Code of Professional Responsibility or establishes that he is unfit to practice before this court [*id.*].

The Show Cause Order states:

> Ultimately, the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 101-102). After Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern; then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting, continued to do so, ...

The transcript reflects the court spoke directly to Vassar as follows, in pertinent part:

> The Court: You understand that as a result of this sentencing hearing we're about to have that I could sentence you to 30 years in federal prison?

Mr. Vassar: Yes, sir.

The Court: Even if Mr. Moncier's ultimate loyalty is to Harold Grooms, you still want him to represent you?

Mr. Vassar: I don't understand what you mean by "representing me", representing me how? He came to court.

The Court: Well, I mean, if there came a decision that had to be made, do I look out for Michael Vassar's interest or do I look out for my other client Harold Grooms's interest?

. . .

Mr. Vassar: No. I want him to represent me like he's supposed to represent me. I wouldn't want him not to represent me on account of Harold Grooms . . . .

(Tr. 100-101).

As the court was having a discussion with defendant Vassar about whether he wished to be represented by Respondent, Respondent interjected:

Mr. Moncier: Your Honor, I would request that the Court speak with Mr. Vassar in private as to the . . . to where I would have my loyalties to Harold Grooms different from his.

The Court: I can't possibly anticipate that.

Mr. Moncier: Well, you know this one.

The Court: I'm sorry?

Mr. Moncier: You certainly know this one, and you certainly know what we talked about at the previous hearing. The government can bring to your

attention any other information that they may suggest. That's why I always suggested that we have another judge hear this.

We could say the same thing about anybody else . . . . But we've got to find out whether there is any -- we've got to find out whether there's anything to it, at least as far as he knows what we're talking about; and, and since we're -- we've gone this far, the question that I think the Court needs to talk to him about is whether there's any truth whatsoever to what was presented to him this morning or whether that's just somebody trying to tell the government something to get something and whether he thinks that anything in this sentencing hearing would make me -- I'm not quite sure what loyalties I would have . . . to Harold Grooms with regard to that.

The Court: You've got an absolute loyalty duty to Harold Grooms just like you do to Michael Vassar. Don't stand there and tell me you don't know what loyalty you've got to him.

Mr. Moncier: Well, wait a minute. No. How am I going to do something different in his trial today?

The Court: I don't know, but I can think of one.

Mr. Vassar, Mr. Moncier has now been placed in a position where he's got to be make a decision this afternoon; and that decision is, do I call Mark Thornton to the witness stand in view of the fact that it now appears that Mark Thornton is potentially going to give some

testimony that implicates Harold Grooms. He's got to make a decision, do I call Mark Thornton and run the risk that he says something here in this open courtroom that gets reported in the newspaper that implicates my client Harold Grooms?

Mr. Moncier: I'm sorry, your honor, I'd like for you to also present to him what I was more concerned with.

The Court: I understand what you're concerned with.

Mr. Moncier: My concern is, my concern is whether I call Mark Thornton to testify to the things that I intended to have him testify to knowing that he had potentially made this other statement to the government that my client knows something that my client said he didn't know; that's the problem, is do I call Mark Thornton for the good parts of what Mark Thornton adds to this matter, but Mark Thornton knowing that the government is going to lay back and they're going to cross examine him and you're going to let them go beyond the scope of direct . . . If you do, let them go . . . into this additional information that the Court now knows about that has the potential of flying into the face of positions that were previously taken; and are we going to get into a mini trial as to all of those things that were said . . . is that going to open up that transcript of that hearing we had before. . . . I mean, we went through all of that.

(Tr. 103-05).

The court then again addressed Vassar:

> The Court: Mr. Vassar, here's the Court's concern. When we have this sentencing hearing I want your lawyer to ask whatever questions are necessary to ask to adequately present your case to this Court. I don't want you represented by a lawyer who is reluctant to ask questions for -- out of concern about what the answers might be as they relate to Harold Grooms. I don't want your lawyer to be in a position to where he is reluctant to call a witness for fear that the government might ask about Harold Grooms and he doesn't know what the witness is going to say. You understand what I'm saying?
>
> Mr. Vassar: Yes, sir.
>
> The Court: I want your lawyer's loyalty to be to you --
>
> Mr. Vassar: That's what I want, your Honor.
>
> The Court: -- And nobody else.
>
> Mr. Vassar: That's what I want.
>
> The Court: Now, you understand how those conflicts can arise in the context of this case with Mr. Moncier representing Harold Grooms and representing you at the same time?
>
> Mr. Vassar: I understand.

(Tr. 106). Whereupon the culminating exchange excerpted in the Show Cause Order occurred. *See* (Tr. 106-07).

Respondent again "admits the transcript of November 17, 2006" and also admits that "the

transcript speaks for itself" [Doc. 13 at 25]. Respondent denies his conduct constitutes a violation of the Code of Professional Responsibility or establishes that he is unfit to practice before, or remain a member of, this court [*id.*].

Respondent also "affirmatively asserts" this court should abstain from proceeding with the disciplinary matter pending his appeal of his criminal contempt conviction and claims further action by the court is barred by "prior jeopardy" and that *res judicata* and collateral estoppel apply to prevent "further discipline as the court has already imposed a sentence in the criminal contempt proceeding." [*Id.* at 25]. Respondent also asserts his conduct was "goaded by the wrongful conduct of the prosecution team." [*Id.* at 25-26].

Respondent's "alternative response" incorporates the above and contends, in essence, that his conduct at the November 2006 hearing does not support the conclusions drawn in the Show Cause Order and his conduct in not subject to disciplinary action [Doc. 22].

IV. The March 5-6, 2008 Hearing

A. Respondent's Testimony

Respondent was the sole witness at the March 5-6, 2008 hearing. In summary, Respondent testified concerning his educational background, his service in the Army in the Judge Advocate General's Corps, his 38 years of legal practice, which includes a two-year stint as an assistant district attorney general in Knox County prior to engaging in private practice, his family life, including his care for a disabled adult son, and his volunteer duties at his church in Knoxville. Respondent also described his membership in, affiliation with, awards from, and participation in professional associations, including the Tennessee Association of Criminal Defense Lawyers ("TACDL"). Respondent is a former president and board member of TACDL. His testimony included

information about his support of, participation in, or teaching of continuing legal education seminars in criminal law and ethics topics under the auspices of some of the professional organizations of which he is a member. Respondent is a member of the bar of this court and other district courts, the Sixth Circuit and other appellate courts, and the Supreme Court. Based upon his membership in good standing in this court, Respondent has been admitted *pro hac vice* in several other federal courts. Respondent was one of the first attorneys to receive certification from the Tennessee Supreme Court in the area of "Criminal Trial" and he enjoys an "AV" peer review rating in Martindale-Hubbell.

Respondent described particular legal actions he had been involved in as counsel. In particular, Respondent gave extensive testimony concerning cases he handled in this court, with particular emphasis on criminal cases he handled before Judge Greer. Respondent testified he had known Judge Greer for a long time and occasionally represented clients in matters where Judge Greer represented other parties prior to Judge Greer's appointment to the federal court bench.

Respondent testified regarding various actions that occurred in a series of cases in the court that he contends contributed to, or resulted in, the disciplinary actions against him by this court and his criminal contempt judgment. For instance, prior to the November 17, 2006 hearing, he brought a motion for Judge Greer to recuse or disqualify himself in *United States v. Michael Snipes* [Case No. 2:03-CR-70, Doc. 40, 41]. Respondent contends that after he filed the motion to recuse, his relationship with Judge Greer became more "formal." Respondent also said his relationship with the United States Attorney's office in Greeneville is formal and strained as a result of his zealous advocacy on behalf of his clients. Respondent's counsel states it is not Respondent's position that Judge Greer retaliated against or has a personal bias against Respondent. However, Respondent

testified his actions on November 17, 2006, were viewed differently because of the strain and formal nature of his relationships, and he contends another attorney with a more amicable relationship with the court and/or the United States Attorney's office would not have been placed in jail or been the subject of the Show Cause Order.

With respect to all of the allegations in the Show Cause Order, Respondent, in summary, testified his actions on November 17, 2006, were justified because he allegedly was meeting his ethical duty to his client. Respondent testified he did not intend to interfere with, prolong, or obstruct the proceedings or be disrespectful to the court. Respondent stated neither his tone nor his attitude at any time during the hearing was disrespectful. He said his tone was not unusual, sassy, mocking, deviant, belligerent or challenging.

Respondent stated he never used the word "conspiracy," but did convey to the court that there had been a "concerted effort" by the United States Attorney's office to convince criminal defendants not to hire him.[9] While Respondent admitted he made the statement he would remain "moot," he stated he was not actually threatening to abrogate his responsibility to represent his client and that he was prepared to go forward with the sentencing hearing. Respondent testified his statement was a "hypothetical" and merely a poor selection of words. Respondent stated he believed that if the court decided to go forward with Vassar's sentencing in the face of a potential conflict of interest, he could ask for permission to remain "moot" rather than doing any harm to the client. Respondent admitted his colloquy with the court occurred and reiterated his position with respect

[9] Respondent stated he had not been hired, with one exception, by any criminal defendant charged in the Greeneville division since 2004 or 2005. He also stated that as the result of the November 2006 hearing, his federal criminal trial practice had virtually stopped. Based on his pending federal court cases, Respondent claims over one million dollars in fees could be jeopardized by this disciplinary action.

to representing Vassar. Respondent denied responding to the court's admonition with a contradiction saying his response was a statement of his position with regard to the issues raised by the court, not a contradiction.

With respect to the culminating portion of the transcript, Respondent admits he heard the court tell him not to say another word. He denies, however, he intended to violate an order of the court, prolong the proceedings, disrupt the proceedings, or to show disrespect for the court by speaking after the order. Respondent stated the court "misperceived" his actions. Respondent acknowledged he did not have the authority to simply disobey the court's order and that the court did not ask him to do anything unethical during the November 17, 2006, hearing. Respondent stated his client was attempting to talk to him and that he spoke, despite the admonitions first to be silent and then not to say another word, because he was attempting to clarify the order. Respondent testified that when the court told him not to say another word, he did not believe that the court intended for him not to be able to speak to his client. Respondent insisted he spoke after the order not to speak only to obtain clarification as to whether he could speak to his client.

With regard to his fitness to practice law, Respondent stated he has never been the subject of any form of discipline by any court or Board of Professional Responsibility, other than a reprimand he received from this court in 2005.[10] With respect to that reprimand, Respondent said he requested a hearing under Local Rule 83.7, but no hearing was held.

Respondent testified about the events which occurred after he was taken into custody and since November 2006. Respondent stated he was first placed in a holding cell, then taken to the

[10] Subsequently, Respondent submitted a list of "other instances" involving apparent conflict with judges that he does not consider to be discipline, but that he thought might come to the court's attention in its investigation [Doc. 56 & 60].

grand jury witness room where he called his law office and also talked to Attorney Rogers and asked him to convey his apology and remorse to the court. Respondent stated he asked Attorney Rogers to tell the court he was deeply sorry he had conducted himself in a manner resulting in his being taken into custody and wished to apologize for his actions because he never intended to do anything improper or disrespectful (and does not believe he did) at the November hearing. Respondent stated his apology was true then and now. The transcript reflects that on the afternoon of November 17, 2006, Attorney Rogers appeared before the court on behalf of and with Respondent and stated:

> Before I go on, you honor, though I want to make it clear to you that Mr. Moncier has expressed to me in the brief time that I spent with him the fact that he was only trying to make an objection; that he intended no disrespect to the Court at that time and that he is very sorry that by, by, by attempting to utter his statement that he violated this Court's order when he felt he was compelled to do so.

(Exh. 1 at Tab 1 at 110-11; Exh. 3 at 110-11).

At both the beginning and end of his testimony, Respondent stated he has deep regret about the November 2006 hearing and he offered an apology. He stated he realized this situation had been a difficult period for everyone involved. He repeatedly stated he did not intend to be disrespectful or to delay or disrupt the proceedings. He maintained his actions were based on his seeking to represent the best interests of Vassar within the limits of the ethics rules. He further stated he did not intend to violate the court's order, but was merely asking for clarification as to whether he could speak with his client. He contends his actions were "viewed through a different lens" because of the "strained relationships" which he has with the United States Attorney's office and the court

allegedly due to his zealous representation of clients.[11] Respondent contends another attorney with a better relationship with the court would not face the same disciplinary proceedings for similar conduct.

B. Documents Presented

At the March 5-6, 2008 hearing, Respondent presented the following evidence in addition to his testimony:

> A copy of the November 17, 2006, transcript and certain pleadings filed in this matter – Exh. 1;
>
> A copy of the order addressing Respondent's motions of March 3, 2008 – Exh. 2;
>
> An excerpt of the transcript of the afternoon proceedings on November 17, 2006 – Exh. 3;
>
> Respondent's analysis of the transcript – Exh. 4;[12]
>
> An *amicus curiae* brief filed by TACDL in the criminal contempt proceeding – Exh. 5;
>
> The letter of AUSA M. Neil Smith, dated November 16, 2006, concerning the case of *United States v. Vassar* – Exh. 6;
>
> The affidavit of Vassar, dated April 3, 2007 – Exh. 7; and,
>
> A summary of cases currently pending in federal court in which Respondent is counsel of record (and which could be affected by any disciplinary action) – Exh. 8.

Included in Respondent's Exh. 1 is a declaration from attorney William W. (Tripp) Hunt, III,

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[11] Respondent expressed a belief that his style of advocacy results in a lack of acceptance. This apparently is a longstanding belief going back to his days in the Army where he contends he was not accepted "by the powers that be" as a result of his "everything he has" style of advocacy.

[12] In large part, the analysis is Respondent's recollection of what transpired at various points in the hearing where the transcript includes the court reporter's use of dashes.

dated March 4, 2008 [Exh. 1 at Tab 2]. Attorney Hunt has served as disciplinary counsel for the BPR since 1981[*id.* at 1, ¶ 3], and his declaration states in relevant part:

> 5. With regard to this complaint, I am told that on November 21, 2006, Mr. Moncier orally reported to then Chief Disciplinary Counsel Lance Bracy events that had occurred in the courtroom of United States District Judge J. Ronnie Greer on November 17, 2006. I am in receipt of Mr. Moncier's detailed written report dated December 8, 2006, of those same events. Since that time, Mr. Moncier has provided information to Disciplinary Counsel of the proceedings with regard to the charges against himself by U.S. District Judge Greer including providing transcripts when and as they became available . . . .
>
> 6. On June 14, 2007, by written complaint addressed to the present Chief Disciplinary Counsel Nancy S. Jones, U.S. District Judge J. Ronnie Greer filed a complaint . . . against . . . Moncier which in pertinent part included the events previously reported by Mr. Moncier as having taken place in November 17, 2006. In particular, U.S. District Judge Greer reported that as a result of the actions of Mr. Moncier, he . . . had found Mr. Moncier guilty of criminal contempt . . . . . .
>
> 9. Disciplinary Counsel has been advised by Mr. Moncier that an appeal to the United States Court of Appeals for the Sixth Circuit has been timely filed . . . and that the appeal is presently pending . . . .
>
> 10. Based upon all of the above . . . Disciplinary Counsel has not filed a Petition for Discipline nor has Disciplinary Counsel filed a Petition for Temporary Suspension of Mr. Moncier from the practice of law in the State of Tennessee. Rather, Disciplinary Counsel has decided to await the opinion of the Sixth Circuit Court of Appeals with regard to the findings of U.S. District Judge Greer relative to Mr. Moncier before proceeding further with regard to the

complaint presently pending before the [BPR].

11. Disciplinary Counsel is not prepared to render an opinion as to whether Mr. Moncier has violated the Tennessee Rules of Professional Conduct nor whether discipline would be appropriate until after the Sixth Circuit . . . has determined and reported their decision.

12. The records of the Disciplinary Counsel reflect that Mr. Moncier has not been previously disciplined for violating the Tennessee Rules of Professional Conduct and, except for his self report and the complaint of U.S. District Judge Greer, is, otherwise, in good standing with the [BPR].

[*Id.* at 1-3].

Respondent claimed the original confidential nature of the disciplinary proceedings prevented him from communicating with potential witnesses. In the interest of giving Respondent every opportunity to present evidence, he was allowed additional time to submit declarations from said witnesses after the hearing.[13] Respondent's post-hearing submissions, including his "late" submissions, have been accepted and fully considered.

Respondent submitted notices of declarations [Doc. 35 & 59] with the declarations of the following: an English professor who also holds a J.D. degree and is alleged to be a linguistic expert,

[13] Allowing Respondent an opportunity to submit additional information, does not indicate Respondent was hampered by the initial confidentiality of the proceeding. As Respondent was informed, he could by agreement or through cooperation obtain affidavits or attendance from any necessary and material witness [Doc. 29 at 5]. Respondent did provide at the hearing a declaration of Hunt after his request to depose disciplinary counsel was denied. In addition, when Respondent initially relied upon the confidentiality provision of Local Rule 83.7 to claim he could not obey the court's order to notify judicial officers of this court of his disciplinary proceeding [Doc. 3], the court clearly responded that Local Rule 83.7 does not dictate confidentiality of the basic existence of the proceedings [Doc. 6 at 4 n.4]. As previously noted, Respondent provided the waiver required to open the confidential proceedings on the first day of the hearing--after Respondent's attempts to continue, delay and/or stay the proceedings failed.

Bethany Dumas ("Dumas") [Doc. 36]; an attorney formerly engaged in the practice of law with Respondent who is alleged to be an expert on the Rules of Professional Conduct, Ann Short-Bowers ("Short-Bowers") [Doc. 37]; and several attorneys who were not present at the November 2006 hearing but read the transcript, including Wade Davies ("Davies") [Doc. 38], Henry Martin ("Martin") [Doc. 39], Caryll Alpert ("Alpert") [Doc. 40], Donald Dawson ("Dawson") [Doc. 41 (unsigned) & Doc. 64 (signed)], Randall Reagan ("Reagan") [Doc. 42],William Massey ("Massey") [Doc. 43], Mark Stephens ("Stephens") [Doc. 44], Jim Owen ("Owen") [Doc. 45], Julia Auer ("Auer") [Doc. 46], Nathaniel Evans ("Evans") [Doc. 47], John Halstead ("Halstead") [Doc. 48], Jhasta Moore ("Moore") [Doc. 49], David Skidmore ("Skidmore") [Doc. 50], Mike Whalen ("Whalen") [Doc. 51], David Wigler ("Wigler") [Doc. 52], Ursula Bailey ("Bailey") [Doc. 53], Stephen Burroughs ("Burroughs") [Doc. 54], F. D. Gibson III ("Gibson") [Doc. 55], Gregory Isaacs ("Isaacs") [Doc. 62], and Stephen Johnson ("Johnson")[Doc. 63] (collectively the "declarations" or "declarants")[14]. Based upon their review of the November 2006 transcript and various pleadings and

[14] Attorneys Johnson, Reagan, Alpert, and Davies participated in the filing of the amicus brief in the contempt proceedings in which the TACDL argued Respondent's conduct was a good faith effort to represent his client and comported with the constitutional and ethical mandates of a criminal defense lawyer in an adversarial system of justice and urged the court not to hold Respondent in contempt. Attorneys Martin, the Federal Defender for the Middle District of Tennessee, and Alpert, an assistant federal defender in that office, are also active in the TACDL. Attorney Dawson in the Post-Conviction Defender for the State of Tennessee and a member of TACDL. Attorneys Stephens is the District Public Defender for the Sixth Judicial Circuit (Knox County) and active in the TACDL and attorneys Owen, Auer, Evans, Halstead, Moore, and Skidmoore are assistant public defenders in that office. Attorneys Whalen, Burroughs, Isaacs, and Gibson have known Respondent and/or followed his career for years and at least Gibson, Whalen, and Isaacs are active in TACDL. Attorneys Short-Bowers, Wigler, and Bailey were formerly or are currently associated with Respondent's self-described "one-man" criminal law practice and Short-Bowers is also another former president of TACDL. Along with Respondent, some of the attorneys are also active members of the Tennessee Bar Association's criminal law section and/or other organizations such as the National Association of Criminal Defense Attorneys.

upon their varying degrees of work with and knowledge of Respondent, each declarant, in spite of the criminal contempt conviction to the contrary, generally and consistently with TACDL's position, advocates that Respondent did not violate any rules of conduct or ethical obligations and instead merely engaged in zealous representation. Some declarants add that if the court holds otherwise, then they believe Respondent did not intentionally engage in inappropriate conduct and was solely motivated by his duty to engage in zealous representation. None of these declarants was at the November 2006 hearing; as noted, they base their declarations on a review of the transcript and various pleadings in this matter along with their knowledge and observation of Respondent over the years and, in some cases, since the events of November 2006.

In addition, Respondent submitted his own declarations of "other instances" [Doc. 56 & 60], of apologies [Doc. 57], and of anticipation of Vassar's response [Doc. 58]. In his written apology, Respondent sates:

> I reiterate what I said from the time I was taken into custody and that is, I deeply regret and apologize that my actions were considered by District Judge Greer to be a violation of his orders and that now, my actions have been considered by Senior [sic] District Judge Collier to be violations of the Rules of Professional Conduct.

[Doc. 57 at 3, ¶ 7].

All of the Respondent's evidence and arguments have been carefully reviewed and fully considered.

V. Analysis

Federal Rule of Civil Procedure 83 provides each district court may make and amend local rules governing its practice. Pursuant to the provisions of Rule 83, this court has promulgated Local Rule 83.7, which allows the court to impose discipline on any member of its bar who has violated

the Rules of Professional Conduct or has engaged in unethical conduct tending to bring the court or the bar into disrepute.

As noted herein, the Show Cause Order was issued pursuant to Local Rule 83.7(a), which provides, in pertinent part:

> [t]he 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 who 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. Nothing in this rule shall be construed as limiting in any way the exercise by the court of its inherent contempt power or its authority to impose other sanctions provided under federal law and the *Federal Rules of Civil Procedure*.

E.D. TN. LR 83.7(a).

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Supreme Court stated:

> It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.
>
> Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.

Id. at 43 (internal quotation marks and citations omitted). *See also In re Lewellen*, 56 F. App'x 663 (6th Cir. 2003) (application of local rule of district court to censure attorney upheld).

Thus, it is well established a court "has inherent power and responsibility to supervise the

conduct of attorneys who are admitted to practice before it." *Matter of Searer*, 950 F. Supp. 811, 813 (W.D. Mich 1996) (McKeague, J.). The Sixth Circuit has acknowledged courts must have the power to impose submission to their lawful mandates, and respect and decorum in their presence. *See In re Smothers*, 322 F.3d 438, 442 (6th Cir. 2003) (suggests disciplinary action and penalties, other than criminal contempt, for certain conduct of attorneys that falls below the expected standards of members of the bar). The nature and purpose of disciplinary proceedings were succinctly set forth in *Searer* as follows:

> The nature of a disciplinary proceeding is neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent. The purpose of a disciplinary proceeding is not to punish, but rather to determine whether misconduct implicates fitness to continue to function as an officer of the Court. The real question at issue is the public interest and an attorney's right to continue to practice a profession imbued with public trust. The Court must thus consider both the fitness of one of its officers and the need to protect the public from an unqualified or unscrupulous practitioner. Because "deterioration in civility" is of epidemic proportions in the legal profession, the Court must be vigilant to safeguard public trust in the judicial system.
>
> In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment. At a minimum, however, an attorney subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard. The district courts have various sanctions they can impose for unethical behavior, including monetary sanctions, contempt, disqualification of counsel, suspension, and disbarment.

950 F. Supp. at 813 (internal citations omitted).

As noted above, an attorney is entitled to procedural due process in disciplinary proceedings.

Id.; *In re Ruffalo*, 390 U.S. 544, 550 (1968). Respondent received such due process, including notice and an opportunity to be heard.

A. Referred Matters

Pursuant to its inherent power and responsibility to supervise the conduct of the attorneys admitted to practice in the court, the referral order issued by the court states:

> 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 at 2] (emphasis added).

B. Are the Allegations in the Show Cause Order Inaccurate?

Per the referral of this matter pursuant to Local Rule 83.7, I have reviewed and considered all documents filed in this matter and the testimony, exhibits, and argument presented at the March 5-6 hearing. The allegations of the Show Cause Order are based upon the conduct reflected in the transcript of the November 2006 hearing. Respondent essentially argues the transcript is an insufficient basis for establishing his conduct. In support of this argument, he submits the declaration of Dumas, an alleged expert linguist, who states, in pertinent part:

> 6. Opinions such as those expressed by Judge Collier have degrees of accuracy depending on the source of the opinions expressed. The most accurate source would be the parties to the communication; next would be a person present witnessing the communication reflected in the transcript; next would be an audio-video of the communication; then an audio of the communication; then a transcript of the communication; and last a person's memory of the communication without a transcript.
> 7. It is my opinion that the persons who were participants in the communication on November 17th are in the best position to offer opinions such as those expressed by Judge Collier. In this case, it is my opinion that the opinions of District Judge Greer and Mr. Moncier should control. . . .

[Doc. 36 at 2].[15]

For decades, courts have accepted transcripts as evidence and given them the weight they are entitled to in various proceedings from motions practice to jury trials. I will likewise rely upon the transcript for this disciplinary proceeding. I have also reviewed Judge Greer's ruling regarding Respondent's conduct at the November 2006 hearing in *Moncier*, 2007 WL 1577718, and the ruling addressing Respondent's motion to disqualify in the criminal contempt proceeding, *United States v. Moncier*, 2007 WL 1206731 ("*Moncier* Disqualification Ruling").[16] As was found in the *Moncier* Disqualification Ruling, the transcript provides relevant evidence to either prove or disprove the conduct at issue. In addition, I have considered Respondent's testimony and submissions concerning his conduct.

While Respondent disputes his conduct warrants discipline, he does not dispute the accuracy of the transcript other than to indicate some of the "dashes" in the transcript may not reflect actual interruptions. Respondent also attempts to justify his interruptions and he questions the number of times he interrupted, but he does not deny he interrupted the court several times. The allegation Respondent repeatedly interrupted the court is established in the transcript. For example, just prior to being taken into custody, and despite being ordered first to be quiet and then, after another interruption, being ordered to not say another word, Respondent interrupted again.

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[15] Dumas then goes on to analyze the "cold transcript" as do all of the other declarants.

[16] Respondent's insistence that either Judge Greer or Chief Judge Collier must be a "complainant" under the local rule and must appear to testify against him subject to cross examination concerning his conduct is misplaced. Local Rule 83.7(b) provides for institution of proceedings by the court on its own initiative without the requirement of a complaint or complainant, as happened here. As previously ruled [Doc. 12 at 3-4], judges speak through their orders. Respondent has not supported his request to cross examine either judge with any authority.

The allegation that Respondent accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials is proven by the transcript. During the course of a lengthy discussion with the court, Respondent clearly stated the prosecutors "don't like me. I have no personal animosity toward them, but they don't want people to hire me to try jury trials." (Tr. 39). Respondent also stated, "what's going on here is that I think that the government is trying to set me up." (Tr. 49). Respondent continued stating, "[s]o what's really going on here, I think, is that because I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me. That's what I think is going on. . . ." (Tr. 49-50). Respondent's "explanation" at the March 5-6 hearing, that he only meant the government engaged in "concerted action" against him--not necessarily a conspiracy -- does not demonstrate the allegation is inaccurate. Nor does Respondent explain how an accusation that the government engaged in "a concerted effort" against him is significantly different from a claim that prosecutors conspired against him.

The allegation Respondent threatened to "sit there and remain moot," *i.e.*, not provide a defense for his client, due to a potential conflict Respondent perceived is again proven in the transcript (Tr. 41-42). Respondent admits making the statement and even acknowledges it was a poor choice of words. Thus, the allegation is accurate.

The allegation Respondent represented to the court Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator is also supported by any reading of the transcript (Tr. 43). Again, Respondent admits making the statement.

Likewise, the allegation that, despite the representations of a conflict, Respondent later in

the hearing represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Vassar is again demonstrated in the transcript (Tr. 87-88). Respondent asserts he was referring only to a potential conflict of interest, and he does not dispute he made the statements at issue.

The allegation Respondent responded to the court's admonishment by contradicting it is again supported by the transcript (Tr. 90-96). Respondent denies the characterization of his response as a contradiction, but he does not deny the transcript accurately reflects what he said in response to the court.

The transcript reflects that despite being ordered first to be quiet and then to not say another word and after being warned of the consequences of such action, Respondent interrupted again in direct violation of the court's order. Respondent claims he was only attempting to clarify the order to determine if he could speak to Vassar, but he admits the dialogue took place as reflected in the transcript.

While the conduct that occurred is not seriously disputed, the conclusions to be drawn from Respondent's conduct are hotly contested. Respondent continues to defend his conduct as being merely zealous and legitimate advocacy on behalf of his client or as being otherwise appropriate in the context of the hearing. In this proceeding, Respondent advocates his conduct was "goaded" by wrongful conduct of the prosecution team" [Doc. 13 at 26], at the same time he maintains his conduct was completely proper zealous representation. Respondent disputes his conduct constituted 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. He likewise argues his conduct does not raise questions about his

fitness to practice before the court or remain a member of the bar of the court. Respondent argues his conduct did not violate the Rules of Professional Conduct or tend to bring the court or bar into disrepute because he was simply meeting his ethical duty to his client.

As noted, Respondent also argues the court should refrain from making any disciplinary ruling because his appeal to the Sixth Circuit (concerning the court's final order of criminal contempt under 18 U.S.C. §§ 401(1) & 401(3) against him) has potential collateral estoppel or *res judicata* effects, which are defenses he has affirmatively asserted [Doc. 20 & 26].[17] Respondent also asserts the affirmative defenses of double jeopardy, statute of limitations, and laches, without providing legal support or argument or suggesting how such affirmative defenses impact these proceedings to Respondent's benefit.[18] The preclusive effects of Respondent's criminal contempt

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[17] "*Res judicata* has both a general and a specific meaning. I[n] its general sense, it refers to the preclusive effects of former proceedings. This broad category is divided into two more specific doctrines: *res judicata* in its narrow sense, and collateral estoppel. *Res judicata* in its narrow sense refers to claim preclusion. Collateral estoppel refers to issue preclusion." *Booker v. City of Beachwood*, No. 1:06-CV-315, 2007 WL 1039155, * 3 (N.D.Ohio Apr. 3, 2007); *accord*, *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). This Court has recognized the use of the terms "*res judicata*" and "collateral estoppel" are disfavored in federal court where the terms "issue preclusion" and "claim preclusion" are favored. Tate *v. Wenger*, No. 1:04-cv-379, 2006 WL 1582422, * 8 n.9 (E.D. Tenn. June 6, 2006) (citing *DLX*, 381 F.3d at 521 n.5).

[18] The Fifth Amendment provides that a person shall not be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy provision of the Fifth Amendment bars successive prosecutions and also bars the government from "punishing twice, or attempting a second time to punish *criminally*, for the same offense." *Herbert v. Billy*, 160 F.3d 1131, 1136 (6th Cir. 1998) (quoting *Witte v. United States*, 515 U.S. 389, 396 (1995) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)) (emphasis added). *See also Ball v. United States*, 163 U.S. 662, 669 (1896) (defendant had been tried and acquitted prior to being improperly subjected to a second trial). As noted in *Searer*, a disciplinary proceeding is not a criminal proceeding. 950 F. Supp. at 813. Respondent has made no claims regarding what statute of limitations he contends applies or how laches is at issue. As Respondent has failed to explain how double jeopardy, laches or an unspecified statute of limitations would have any bearing on this disciplinary proceeding, his conclusory invocation of these defenses will not be considered further herein.

proceedings will be addressed herein.

1. The Effect of the Criminal Contempt Judgment in *Moncier*

Title 18 U.S.C. § 401 regarding criminal contempt states in pertinent part:

> A court of the United States shall have power to punish . . . such contempt of its authority, and none other, as - -
>
> **(1)** Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> . . .
> **(3)** Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

In order to support a conviction for criminal contempt under § 401(1), the record must establish beyond a reasonable doubt the following four elements:

> First, there must be evidence that the defendant engaged in some conduct that can be considered "misbehavior." *See Vaughn v. City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985). Second, that misbehavior must amount to an "obstruction of the administration of justice," *see id.*, an obstruction that "must be ... actual, not ... theoretical...." *See id.* at 1168 (citing *In re McConnell*, 370 U.S. 230, 234, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962)). Third, the contempt must occur in the presence of the judge imposing the summary determination of criminal guilt. *See id.* at 1167. Finally, the defendant must have formed an actual intent to cause the obstruction of justice. *See Id.* Thus, the improper act must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Id.* at 1169 (quoting *TWM Manufacturing Company v. Dura Corp.*, 722 F.2d 1261, 1272 (6th Cir.1983)).

Moncier, 2007 WL 1577718 at * 2.

In order to support a conviction for criminal contempt under 18 U.S.C. § 401(3), proof beyond a reasonable doubt is required of:

> (1) resistence or disobedience to the court's "writ, process, order, rule or command," and (2) the act of resistence or disobedience must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *In re Chandler*, 906

> F.2d 248, 250 (6th Cir.1990) (quoting *TMW Manufacturing Company*, 722 F.2d at 1272). The second requirement may be "inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *U.S. v. Delahanty*, 488 F.2d 396, 398 (6th Cir.1973).

Id. at * 3.

A "[f]inal judgment in a criminal case . . . means sentence. The sentence is the judgment." *United States v. Jolivette*, 257 F.3d 581, 583 (6th Cir. 2001) (quoting *Corey v. United States*, 375 U.S. 169, 174 (1963)); *accord*, *Massengale v. United States*, 278 F.2d 344, 345 (6th Cir. 1960). A final judgment of criminal contempt has been entered against Respondent and it is that final judgment he is now appealing.

With respect to Respondent's claim that these disciplinary proceedings should be stayed pending his appeal of his criminal contempt conviction, both the Sixth Circuit and this court have rejected his claim as previously noted herein.

The issue that remains given the denial of Respondent's various motions to delay, stay or prevent these proceedings is what effect does the judgment of criminal contempt have in these disciplinary proceedings pending appeal. As stated by a district court in a case involving an expedited direct appeal of a criminal conviction to the Sixth Circuit:

> A criminal conviction and sentence is a final judgment on the merits. *See, e.g., United States v. Jolivette*, 257 F.3d 581, 583 (6th Cir. 2001). Defendants argue that because they have an expedited appeal pending before the Sixth Circuit, this Court should either exercise its discretion not to apply estoppel or stay its decision on the SEC's Motion until after the appeals process is complete. As a preliminary matter, the Court notes that the Sixth Circuit, in placing Defendants' appeal on the expedited schedule, commented that the Defendants had not raised a substantial appellate issue. Moreover, the weight of the authority rejects Defendants' recommended approach. The majority of courts have concluded that a pending criminal appeal does not bar the court from applying principles of claim preclusion

> to the plaintiff's case. *See Smith*, 129 F.3d at 362 (noting that the pendency of an appeal does not preclude a judgment's *res judicata* effect); *Namer*, 2004 WL 2199471 at * 8 ("But the fact that [defendant's] criminal conviction is currently under consideration by the United States Court of Appeals for the Sixth Circuit does not foreclose the prior judgment from having preclusive effect."); *SEC v. Pace*, 173 F. Supp. 2d 30, 33 (D.D.C. 2001) ("The fact that Pace's appeal from his conviction is still pending does not affect the application of collateral estoppel."); *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 905 F.2d 610, 621 (2d Cir. 1990) ("The pendency of a criminal appeal generally 'does not deprive a judgment of its preclusive effect.'") (citations omitted).
>
> Allowing Defendants to avoid the preclusive effect of the Criminal Action until their appeal is finalized would halt the process of justice. Defendants have the ability to delay their criminal appeals . . .by requesting en banc hearings, petitioning the U.S. Supreme Court for certiorari . . . .

U.S. S.E.C. v. Blackwell, 477 F. Supp. 2d 891, 900-01 (S.D. Ohio 2007).

In general, where the following four elements have been satisfied, a decision of a federal court is entitled to collateral estoppel effect:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Smith v. SEC, 129 F.3d 356, 362 (6th Cir. 1997) (quoting *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987)). The Sixth Circuit in *Smith* also held a pending appeal of the judgment does not deprive the judgment of its *res judicata* effect. *Id.* at 363 n.7.

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 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.'" *Id.* at * 4 (quoting *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir.1986)).

In *May v. Oldfield*, 698 F. Supp. 124 (E.D.Ky. 1988), the court held:

> "[t]he established rule in the federal courts is that a final judgment retains all of its *res judicata* consequences pending decision of the appeal. . . ." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4433 at p. 308. This established rule applies equally well to the appeal of a prior criminal conviction. *Webb v. Voirol*, 773 F.2d 208, 211 (8th Cir.1985). "[C]ourts have repeatedly held that the pendency of an appeal does not destroy the finality of a judgment for the purpose of applying the doctrine of collateral estoppel." *Id.*

Id. at 127.

In an unpublished, and therefore nonbinding, decision,[19] the Sixth Circuit has recognized that while a judgment on appeal retains its preclusive effects pending appeal, it is subject to reversal and therefore might be difficult to rely upon, stating:

> a final judgment retains its issue-preclusive effects pending decision of the appeal. *See, e.g., Commodities Export Co. v. United States Custom Serv.*, 957 F.2d 223, 228 (6th Cir.1992); 18 Charles Alan Wright, Arthur R. Miller, And Edward H. Cooper, *Federal Practice And Procedure* § 4433, at 308 (1981). Nevertheless, we recognize the difficulty in relying upon the collateral estoppel effects of a judgment that may be reversed on appeal. *See, e.g., Erebia v. Chrysler Plastic Prods. Corp.*, 891 F.2d 1212, 1214 (6th Cir.1989) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as *res judicata* and as collateral estoppel.").

Isibor v. City of Franklin, No. 97-5729, 1998 WL 344078, * 5 (6th Cir. 1998).

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[19] *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); 6th Cir. Rule 206(c).

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[20] which also indicates the judgment has preclusive effect in this disciplinary proceeding under the applicable local rule. Of course, suspension or disbarment from the bar of the court are not measures the court may take to address criminal contempt. In criminal contempt proceedings, a judge is limited to the sanctions prescribed in 18 U.S.C. § 401, which do not include the power to strip an attorney of his ability to practice. Likewise, this court is not required or obliged to suspend, disbar, or even reprimand an attorney pursuant to Local Rule 83.7 for contempt of court. In summary, the power and decision to discipline an attorney under Local Rule 83.7 is greatly removed from the authority of a trial judge to address criminal contempt, and it is proper to apply Local Rule 83.7 with respect to determining whether disciplinary action should be undertaken in this case. Any difficulty in relying on the preclusive effect of the criminal contempt judgment pending appeal may be considered as appropriate in this disciplinary process.

I conclude the decision in *Moncier*, 2007 WL 1577718, retains its preclusive effect pending appeal and that preclusion is appropriate for those issues raised and litigated in the prior contempt proceeding, *i.e.*, obstruction of justice and violation of the court's order, under the four-part test set forth above. Determinations about Respondent's obstruction of justice and violation of the court's order were necessary to the outcome of the prior contempt proceeding and Respondent had a full

[20] Clear and convincing evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Tennessee Consol. Coal Co. v. Floyd*, 44 F. App'x 663, 667 (6th Cir. 2002) (quoting *Fruge v. Doe*, 952 S.W.2d 408, 412 n.2 (Tenn .1997)). "Clear and convincing evidence means that there can be no serious doubt about the correctness of the conclusions drawn from the evidence" *Cassidy v. Spectrum Rents*, 959 F. Supp. 823, 825 (E.D. Tenn.1997) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901, n.3. (Tenn.1992)).

and fair opportunity to litigate those issues 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.

2. Ethical and Professional Conduct Considerations

The Rules of Professional Conduct expressly do not "exhaust the moral and ethical considerations that should inform a lawyer," they "simply provide a framework for the ethical practice of law." Tenn. Sup. R. 8, Scope (2). Rules applicable to this matter include, at least, Tenn. Sup. R. 8, RPC 3.5(e) and 8.4.[21] Rule 3.5(e) states:

> **Impartiality and Decorum of the Tribunal. –** A lawyer shall not:
> (e) Engage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a tribunal. . . .

Commentary 5 to Rule 3.5 notes "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." Rule 8.4(d) states:

> **Misconduct. –** It is professional misconduct for a lawyer to:
> (d) Engage in conduct that is prejudicial to the administration of justice. . . .

Commentary 8 to Rule 8.4 states:

> [8] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates a disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is

[21] Under The Code of Conduct for United States Judges, Canon 3A(2), which governs judicial conduct and certain duties of a judge with respect to adjudications, a judge should maintain order and decorum in proceedings before the judge. *Code of Conduct for United States Judges*, 175 F.R.D. 363, 367 (1998). Under Canon 3A(3) a judge should require appropriate conduct of the attorneys. *Id.*

> unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

Guidance concerning conduct that may hold the bar or court is disrepute may be found in *In re Snyder*, 472 U.S. 634 (1985), where the Supreme Court addressed "conduct unbecoming a member of the bar" as:

> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:
>
> > "'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."
>
> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.
>
> 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.

Id. at 644-45 (internal citations omitted).

As a member of a regulated profession and as an officer of the court, Respondent "belongs

to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards." *In re Sawyer,* 360 U.S. 622, 646 (1959) (Stewart, J., concurring). Without question, Respondent did have both the right and the duty to zealously defend his client, and no less is expected or accepted by the court. Respondent, however, does not have the right to overstep his ethical bounds under the guise of zealous representation.

As stated in *Sacher v. United States,* 343 U.S. 1, 9 (1952):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation.

In *Ramsey v. Board of Professional Responsibility of Supreme Court of Tennessee,* 771 S.W.2d 116, 123 (Tenn. 1989), the Supreme Court of Tennessee found "that an attorney who fails to abide by court orders and fails to respond to questions from the court while appearing before the court, and who slams courtroom doors during hearings has not only degraded that court, but acted in a manner prejudicial to the administration of justice." The Supreme Court of Tennessee has also held, "An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Board of Professional Responsibility of Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004) (quoting *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1071 (1991)).

3. Respondent's Conduct

Although Respondent did not slam doors during the November 2006 hearing, he did fail to abide by the court's order to remain silent and he interrupted the court repeatedly. Respondent's attempts to explain and justify his conduct do not demonstrate the allegations are inaccurate. One of the most troubling aspects of Respondent's conduct is his disobedience of the court's order. Initially, Attorney Rogers represented the violation of the court's order occurred because Respondent felt compelled to make an objection.[22] Perhaps recognizing he had already objected, Respondent testified in the disciplinary proceedings that he spoke because he was seeking clarification and because he thought Vassar was attempting to communicate with him. The court in *Moncier* has already rejected Respondent's various explanations for his conduct in violating the court's order. 2007 WL 1577718 at * 6. In rejecting such claims in the criminal contempt proceedings, the court held:

> Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. that Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking the questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

[22] Attorney Rogers reported to the court that Respondent had expressed he was only trying to make an objection, he intended no disrespect, and he was sorry that by attempting to utter his statement he violated the court's order, but he felt he was compelled to do so (Exh. 1 at Tab 1 at 110-11; Exh. 3 at 110-11).

Id.[23] Likewise, Respondent's attempt to claim he was merely seeking clarification was rejected in his contempt proceedings. *Id.* at * 7, n.14.

The court in *Moncier* also thoroughly addressed Respondent's claims he merely engaged in zealous representation. *Id.* at * 3. After carefully balancing the two important considerations of counsel's duty of zealous representation with the court's duty to properly administer justice, the court found Respondent's conduct could not be excused or properly characterized as zealous representation. *Id.* at * 3-10. The court specifically found Respondent's conduct of again interrupting the court after a warning not to do so had a disruptive effect on the proceedings and resulted in a delay of those proceedings. *Id.* at * 5.

The court also specifically held Respondent's conduct could not be excused as the mistake of a young or inexperienced lawyer or an aberrant act given the Respondent's long history of trying cases where decisions were made quickly and without the opportunity for extensive forethought. *Id.* at * 3. The court noted that it had admonished Respondent for a wide range of misconduct, had lectured him concerning professionalism and civility, and had threatened him with a finding of contempt on prior occasions. *Id.* at * 4. The court concluded in *Moncier* that Respondent's conduct should be viewed as the calculated and deliberate acts of a wily veteran. *Id.* at * 7. In adjudging Respondent to be guilty of criminal contempt under 18 U.S.C. §§ 401(1) & 401(3), the court found that Respondent intentionally committed misconduct in the presence of the court, which constituted an obstruction of justice, and also intentionally disobeyed an order of the court. In the *Moncier*

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[23] Respondent in this proceeding also relies upon a claim by Vassar that Vassar was "looking at [Respondent] trying to get [Respondent] to speak with [him] about what Judge Greer was . . . trying to do" [Exh. 7 at 2, ¶ 34]. In the criminal contempt proceedings, however, the court specifically found Vassar made no request to speak with Respondent. *Moncier*, 2007 WL 1577718 at * 6 n.8.

Disqualification Ruling, the court also noted Respondent's behavior was disrespectful to the court as an institution, although disrespect for the judge was not a basis for the contempt proceedings. 2007 WL 1206731 * 1-2.

Many of Respondent's efforts in this disciplinary proceeding amount to an attempt to relitigate the merits of his criminal contempt adjudication. A significant portion of the declarations reiterate the position contained in TACDL's amicus brief in the contempt proceedings.[24] While Respondent is not entitled to revisit his adjudicated guilt in this disciplinary proceeding, his evidence has been considered as it relates to an explanation or mitigation of his actions.

I find, by clear and convincing evidence, Respondent's conduct, particularly in disobeying the direct commands to be quiet and to not speak another word under the circumstances of the November 2006 hearing, constitutes an abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference with and needless prolongation of the proceeding before the court, and obstructive behavior. I also conclude Respondent violated the aforementioned Rules of Professional Conduct during the hearing. In addition, the conduct was unbecoming an officer of the court and brought the court and bar into disrepute by, at a minimum, interrupting and being prejudicial to the orderly administration of justice.

Respondent has not demonstrated that the allegations of the Show Cause Order that he engaged in: (a) disruptive behavior during the November 2006 hearing; (b) disobedience of a direct order of the court during the hearing; and (c) unprofessional and unethical behavior that violates the Rules of Professional Conduct or brings the court or bar into disrepute during the hearing, are inaccurate. Therefore, in light of the clear and convincing evidence, I **RECOMMEND** that the

[24] The court rejected TACDL's position in the criminal contempt proceedings. *Moncier*, 2007 WL 1577718 at * 7-8 & n.15.

court find Respondent has engaged in conduct subject to attorney discipline under Local Rule 83.7.

C. Is Discipline Warranted?

Conduct constituting criminal contempt during a hearing certainly raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this court, but the conviction it is not determinative of this matter. Respondent was given great leeway to introduce evidence of the circumstances surrounding his conduct at the November 2006 hearing because it is proper to consider such evidence to determine an appropriate response to unprofessional conduct.

Respondent--like most, if not all, of the declarants--strenuously argues Respondent merely engaged in zealous advocacy, not professional misconduct. Respondent continues to contend his behavior was within the bounds of proper and zealous representation of a client, absent a few poorly chosen words. This may explain why Respondent has only apologized for the *results* of his conduct or for the way his conduct was *perceived*–but not for engaging in the conduct. Attorney Rogers' statement reflects that Respondent felt compelled to again object in spite of the court's directive that he remain silent and even though he had already noted his objection. Such behavior is entirely consistent with some of the declarants' observations about Respondent[25] and Respondent's

[25] While the declarants claim any discipline could "chill" zealous advocacy among the criminal defense bar, some also assert opinions such as: "I recognize that Mr. Moncier found it unsettling to accept the court's position and continued to argue his case, ..." [Doc. 49 at 2, ¶5]; "He can certainly be relentless, which at times may appear to a court to be disrespectful, . . ." [Doc. 48 at 2, ¶ 6]; "For someone whose reputation for bombast and ferocity provokes so much disapproval among the men and women of the bench, I submit to those esteemed judges that they only know a small part of Mr. Moncier's persona." [Doc. 46 at 3]; "There is no question that Mr. Moncier is relentless, uncompromising and persistent . . . ." [Doc. 44 at 4, ¶ 9]; "[Zeal] should be encouraged. I recognize, however, that such a passion can be a two-edged sword. When coupled with the zeal demanded from the defense counsel in the justice system, it can sometimes drive a lawyer to the line–to the point of being over-zealous, to the point of making an error in judgment. The risk of such an error is at its peak when counsel is in the heat of the moment. The unfortunate circumstance in which Mr. Moncier now finds himself has the earmark of just such an error in judgment." [Doc. 43 at 2, ¶¶ 5-6].

statements about himself.[26] Perhaps Judge Greer said it best at the sentencing for Respondent's criminal contempt when he noted Respondent was simply unable to admit he made a mistake with respect to his conduct in court in November 2006 [*see* Doc. 57 and transcript referenced therein].

There is little precedent or guidance in the case law for attorney discipline, especially for conduct improperly claimed to be merely zealous. Judge McKeague, as a district court judge in an attorney disciplinary proceeding, held that the attorney's continuing insistence she should not be disciplined because she engaged in zealous representation of her client and did not intend to violate an ethics rule "bespeaks a stubborn, even cavalier, disregard of the surrounding circumstances and important purposes served by the rule." *Searer*, 950 F. Supp. at 815. Similarly, Respondent's testimony denotes a stubborn and cavalier attitude without any acceptance that his conduct was in violation of the court's order, was unbecoming an officer of the court, or was in any way improper under Local Rule 83.7. As held in *Moncier*, "[z]ealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law." 2007 WL 1577718 at * 8 (quoting *In re Ellenbogen*, 72 F.3d 153 (D.C. Cir. 1995)).

As stated in *Searer* with respect to the purpose of the disciplinary proceedings:

> The purpose, again, is not to punish, but to seriously alert respondent to the importance of the public trust with which the practice of law is imbued, and the duty to discharge the privileges conferred thereby with conscientious care. We all make mistakes; virtue may be found

[26] Respondent's testimony, including his perceived reasons for his "strained relationships," indicates a certain pride in what was described as a style of advocacy that "pushes the envelope" in the contempt proceedings. Even the conflict of interest waiver form between Respondent and Vassar declares Respondent "has demonstrated he is not intimidated by the federal government, courts, or United States Attorneys" [Doc. 58-3 at 1].

in the manner in which we respond to them.

950 F. Supp. at 816. To date, Respondent does not recognize the inappropriateness of his conduct - conduct one declarant called a possible "error in judgment" and the court held was criminal contempt. Thus far, Respondent has failed to accept responsibility for more than a few poorly chosen words and perhaps an inability to effectively communicate during the November 2006 hearing. His refusal to recognize his conduct was inappropriate, unprofessional, unethical, and unbecoming an officer of the court calls into question whether Respondent is likely to correct his improper conduct without some form of meaningful discipline under Local Rule 83.7. Therefore, I **RECOMMEND** the court find Respondent has failed to show discipline is not warranted.

Although not specifically requested to make a recommendation regarding the type or nature of any discipline imposed by the court, I note that certain evidence presented in these proceedings pertains to the court's consideration of appropriate discipline in this case. This evidence may assist the court with respect to its consideration of appropriate discipline to alert Respondent "to the importance of the public trust with which the practice of law is imbued, and [his] duty to discharge the privileges conferred with conscientious care." *Id.*

Respondent has expressed remorse regarding the way his conduct was perceived and has stated he wishes, in retrospect, that he could have communicated better at the November 2006 hearing. While he advocates his conduct was not improper, he also states he is not proud of the way he believes he is viewed by Judge Greer and that he has attempted to learn to communicate with the court better.

Perhaps indicating an ability to learn from this experience, Respondent's testimony and submissions also indicate he has appeared in several court proceedings without incident since November 2006, including appearances in this court. Respondent also conducted himself in an

acceptable manner during the disciplinary hearing. The declarations submitted on behalf of Respondent also indicate he has governed himself in an appropriate manner while engaging in zealous representation in various court proceedings since the November 2006 hearing.[27] This evidence indicates Respondent is *capable* of conducting himself within the applicable ethical precepts and of engaging in zealous representations at the same time.

The declarations also indicate Respondent has been a willing mentor, trainer, and supporter to others engaged in criminal defense work. The declarants greatly admire Respondent's legal work and indicate Respondent is a hard working advocate who is willing to take on difficult cases and engage in *pro bono* work. The declarants also opine Respondent is a competent and able advocate as reflected in the results achieved for various clients in civil and criminal clients. Respondent also indicates his clients are dependent upon him for continuing zealous representation.[28]

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[27] Respondent has had conflict over the years with various courts [*see e.g.*, Doc. 56 & *Moncier*], however, Respondent presented evidence he has not, at least thus far, been subjected to discipline by any court or Board of Professional Responsibility, other than a written reprimand from this court. With respect to the prior reprimand he received from this court, however, Respondent's testimony indicates he considers the reprimand somehow diminished because he did not receive a hearing with respect to the reprimand.

[28] While not directly related to his fitness to practice before the court, Respondent does provide for at least one disabled son and he depends on his ability to practice law to do so. Based upon the summary of pending federal cases presented by Respondent during the hearing, Respondent represents clients in some 14 cases in this district and in six federal courts elsewhere [Exh. 8]. Respondent estimates he has a monetary interest in his contracts of employment with clients in these federal court cases in excess of one million dollars [Doc. 16 at 1].

VI. Conclusion

For the reasons set for above, and based upon my investigation of the allegations in the Show Cause Order and the Show Cause Response, I **RECOMMEND** the court impose appropriate discipline for Respondent's conduct during the November 2006 hearing.

Any exceptions to this report and recommendation must be served and filed within ten (10) days from the date of service of this recommended disposition. Such exceptions must conform to the requirements of Local Rule 83.7(i)(2).

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