

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA)	
)	
)	No. 07-6053
v.)	FILED UNDER SEAL
)	IN COMPLIANCE
)	WITH THE
)	ORDER OF
)	THE DISTRICT COURT
HERBERT S. MONCIER)	

**F.R.A.P. 8(a)(2) Petition Of Appellant Herbert S. Moncier For A
Stay Of A Show Cause Hearing Scheduled For March 5, 2008
On The Subject Matter Of This Appeal**

Nature of Petition

This Petition is made pursuant to F.R.A.P. 8(a)(2) to the presiding Sixth Circuit Court of Appeals Judge designated for the Eastern District of Tennessee to stay a hearing set for March 5, 2008 before Magistrate-Judge Susan K. Lee on a Show Cause Order issued on January 17, 2008, received by Appellant on January 19, 2008, by Eastern District of Tennessee Chief District Judge Curtis L. Collier as to why Appellant should not be disciplined for Appellant's conduct that is the subject matter of this appeal and is pending before the Tennessee Board of Professional Responsibility Disciplinary Counsel.

Petition Filed Under Seal and In Confidence

This Petition relates to matters Ordered by Chief Judge Collier on January 17, 2008 to be under seal and in confidence.

Petitioner moved that the proceedings be removed from being under seal and made a part of the public record but as of the filing of this Petition that motion has not be ruled on by the Court below.

Petitioner files this Petition under seal in this Court in obedience to Order of Chief Judge Collier.

Petitioner does not object to this Court Ordering this Petition be filed in the public record.

F.R.A.P. 8(a) Compliance

Appellant on February 1, 2008 moved Chief District Judge Collier stay conducting a hearing on discipline while the matter was pending before the Tennessee BOPR. That motion was denied by Chief Judge Collier on February 11, 2008.

Magistrate-Judge Lee did not rule Appellant was entitled to a hearing on the Show Cause Order until her order of February 27, 2008 received by Counsel until the afternoon of February 29, 2008.¹

Pursuant to F.R.A.P. 8(a)(1) on February 24, 2008 Petitioner moved that the Court abstain from acting on the Show Cause Order until after this appeal. That Motion was denied by

¹ Memorandum Orders or Opinions are mailed to Respondent. Respondent requested fax and/or email copies be sent, however, that has not occurred. It takes between 2 - 5 days for Respondent to receive orders from the Court.

the Magistrate-Judge by order entered on February 27, 2008 received by Counsel during the afternoon of February 29, 2008.

Pursuant to F.R.A.P. 8(a)(2)(A)(i), for the reasons stated and stated hereafter, any further motions to Magistrate-Judge Lee or Senior District Judge Collier are impracticable.

Pursuant to F.R.A.P. 8(a)(2)(A)(ii) Magistrate-Judge Lee or Senior District Judge Collier have failed to grant Appellant relief requested.

Pursuant to F.R.A.P. 8(b)(i) the reasons for granting the relief requested are that:

(1) the issues in the separate Show Cause proceedings pertain to matters that are pending before this court in this appeal;

(2) there exist a potential of inconsistent rulings made in the separate Show Cause proceedings with decisions that will made in this appeal which would require multiple appeals, delay, and unnecessary expense;

(3) there exist a potential of inconsistent determinations of the requirements of the Tennessee Rules of Professional Conduct by the Tennessee Board of Professional Conduct and any findings made at the internal Show Cause proceedings; and

(4) there exist a potential of irreparable injury to Appellant's clients and to opposing parties in pending cases

that will occur if the separate proceeding goes forward prior to this Court considering the issues presented in this appeal.

Pursuant to F.R.A.P. 8(B)(ii) a declaration of Disciplinary Counsel for the Tennessee Board of Professional Responsibility is attached.

Pursuant to F.R.A.P. 8(B)(iii) the Orders, Memorandum Orders and pleadings pertaining to the January 17, 2008 Show Cause Order are attached.

Pursuant to F.R.A.P. 8(C) a copy of this Petition has been faxed and emailed to Chief Judge Collier and to Magistrate Judge Lee. There are no other parties.

November 17, 2006 Proceeding

Attachment 1 to this Petition is a transcript of the November 17, 2006 proceedings before District Judge J. Ronnie Greer that is the subject of this appeal; that is before the Tennessee Board of Professional Responsibility; and is the subject of the Show Cause hearing scheduled for March 5, 2008.

The Tennessee Board Of Professional Responsibility

Attachment 2 is the declaration of Disciplinary Counsel for the Tennessee Board of Professional Responsibility concerning the conduct of Appellant that is the subject matter of this appeal.

After receipt and consideration of all of the information pertaining to the conduct of Appellant on November 17, 2006, Tennessee's BOPR Disciplinary Counsel decided to permit Appellant to continue to practice law and not take any action until after the Sixth Circuit renders its opinion in this appeal.

January 17, 2008 Show Cause Order

Attachment 3 is the Show Cause Order entered by Chief Judge Curtis Collier on January 17, 2008.²

Relevant Record

Attachment 4, in chronological order, are the pleadings, orders and opinions filed in the Show Cause proceedings since the January 17, 2008 Show Cause Order.

Chief District Judge Collier's Opinion Counsel's Conduct on November 17, 2006 Constituted Disrespect Requires A Reversal In This Appeal

In the Show Cause Order, [Attachment 3] Chief Judge Collier opines and charges that Appellant's conduct on November 27, 2008 constituted disrespect to District Judge J. Ronnie Greer.

Fed. R. Crim. P. 42(a)(3) provides "If the criminal contempt involves disrespect toward or criticism of a judge,

² Appellant has not been informed as to what prompted Chief District Judge Collier to enter this Show Cause Order 15 months after the events of November 17, 2006.

that judge is disqualified from presiding over the contempt trial or hearing unless the defendant consents."

Appellant in his brief due March 11, 2008 will argue on appeal, as he did at trial, that Appellant's conduct on November 17, 2006 did not constitute criminal contempt of Court.

Appellant will present additional issues District Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(a)(3) from presiding at Appellant's contempt trial; Appellant filed motions to disqualify District Judge Greer from presiding that were denied; and Appellant sought a jury trial to avoid a bench trial before Distinct Judge Greer.

Chief Judge Collier's January 17, 2008 Show Cause Order requires Magistrate-Judge Lee at a hearing on March 5, 2008 to decide this issue that is pending before this Court as to whether Appellant's conduct involved disrespect to District Judge Greer. Appellant asserts that it is improper for the same issue to be instituted by Show Cause Order after this issue was presented in a prior proceeding which is pending appellate review.

Eastern District of Tennessee Local Rules

Attachment 5 is a copy of the Local Rules for the Eastern District of Tennessee that pertain to discipline and motions, orders and opinions attached in the Show Cause proceedings provided under Attachment 4.

EDTN LR 83.7(h)(4) provides:

(4) **Burden of Proof.** The respondent's violation of the Rules of Professional Conduct or rule or orders of the court shall be proven by clear and convincing evidence. A certified copy of a final order of disbarment or judgment of conviction for a criminal offense, entered in any state or federal court, shall be considered clear and convincing evidence.

For reasons Appellant cannot explain, the Order of Chief District Judge Collier dated February 11, 2008 [Attachment 2] and the Order of Magistrate-Judge Lee dated February 13, 2008 contained [Attachment 4] provide:

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

Appellant by motion on February 22, 2008 requested relief from this limitation. Magistrate-Judge Lee by Order entered February 27, 2008 received by Respondent February 29, 2008 denied the revision of this limitation.

Appellant asserts Chief Judge Collier exceeded his jurisdiction by limiting the EDTN 83.7(h)(4) burden of proof provided of clear and convincing evidence of a violation of the Tennessee Code of Professional Conduct at the March 5, 2008 to require Respondent establish that Chief Judge Colliers opinions and conclusions are "inaccurate".

Appellant's Right To Present A Defense

Appellant Motion filed February 20, 2008³ was denied by Magistrate-Judge Lee on February 27, 2008⁴ requesting access to witnesses to the November 17, 2006 proceedings; records pertaining thereto; and evidence from eleven Judges before which Appellant has tried major litigation since November 17, 2006 on the stated premise that the events charged in the Show Cause Order did not occur before those judges in those cases.

Appellant on February 21, 2008 moved for a pre-hearing conference to establish procedures for relief from the case being under seal and relief from the confidential order so that he be able to interview witnesses and prepare a defense. On February 29, 2008 Respondent received Magistrate-Judge Lee's February 27, 2008 Order denying a motion for prehearing conference that did not address the issues presented.

Respondent filed a subsequent motion on March 2, 2008 for relief from the under seal and confidential provisions of the Show Cause Order but, at the time of filing this Petition, has not heard from the Court.

³ Attachment 4.

⁴ Attachment 4.

Respondent cannot prepare his defense without violating the under seal and confidentiality orders that pertain to the proceedings that are set to begin March 5, 2008 before Magistrate-Judge Lee.

Pending Cases

Appellant has 21 civil and criminal cases pending in the federal courts for the Eastern District of Tennessee and in excess of one million dollars in attorney fee contracts that are or may be affected by the hearing on March 5, 2008. In addition Appellant is Counsel for William Gallion *pro hac vice* in the Eastern District of Kentucky in the case of *United States v. Gallion* District Court No. 2:07-cr-39, before Senior District Judge William O. Bertelsman set for trial May 12, 2008. To appear *pro hac vice* Appellant must be a member in good standing of the bar of the Eastern District of Tennessee that is at issue at the March 5, 2008 hearing.

Conclusion

It is uncertain why Chief District Judge Collier entered the Show Cause Order on January 17, 2008 - 15 months after the November 17, 2006 proceeding that is the subject of the Show Cause Order; it is uncertain why Chief Judge Collier has limited or reversed the burden of proof for discipline under EDTN LR 83.7(h)(4); and it is uncertain why Chief Judge Collier has elected to proceed internally, with a hearing before a

Magistrate-Judge who works at his pleasure and under his supervision, rather than await the decision of the Tennessee Board of Professional Responsibility and the opinion of this Court on exactly the same conduct and issues.

What is certain is that Appellant has been placed on a fast track to a hearing on matters that are pending before this Court in this appeal and which have been pending, by Appellant's self-report and the later complaint of District Judge Greer to the Tennessee Board of Professional Responsibility which has determined to take no action against Appellant until after this Court considers these issues in this appeal.

Appellant petitions this Court to stay the proceedings before Magistrate-Judge Lee on March 5, 2008 pending this Court's determination of this appeal.

Submitted this _____ of March 2008.

Ralph E. Harwell
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided by email, facsimile and by overnight mail to United States Chief District Court Judge Curtis L. Collier and Magistrate Judge Susan K. Lee this the 4th day of March 2008

Ralph E. Harwell
Attorney for Appellant

