

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

FILED

2010 SEP 10 P 2:39
Catherine F. Quist
Circuit Court Clerk

Herbert S. Moncier,

Petitioner,

v.

No. 3-133-10

Board of Professional Responsibility
of the Supreme Court of Tennessee,

Respondent.

MEMORANDUM AND ORDER

I. INTRODUCTION

Attorney Herbert Moncier filed this petition for judicial review on March 15, 2010. He seeks review of an eleven-month, twenty-nine-day suspension from the practice of law (in which only 45 days was active suspension) and other requirements ordered by a Hearing Panel of the Board of Professional Responsibility ("BPR") in a 44-page opinion dated January 12, 2010.¹ The undersigned was assigned this case by Order of the Chief Justice dated March 31, 2010.

The Court held a pretrial conference, ruled on certain pre-hearing motions, and entered a Scheduling Order. The administrative record and transcript of proceedings before the Hearing Panel were certified to the Court, and on August 16, 2010, the Court heard lengthy argument of counsel with reference to the record before the panel. The Court took the case under advisement. Both the

¹ Before the Hearing Panel, Mr. Moncier was represented by attorney Ralph Harwell. Before this Court, Mr. Moncier appears *pro se*.

petitioner and respondent filed extensive pretrial briefs.²

Review before this Court is governed by Tennessee Supreme Court Rule 9 § 1.3 which states:

1.3 The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by Tenn. Code Ann. § 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Supreme Court where the cause shall be heard upon the transcript of the record from circuit or chancery court, which shall include the transcript of evidence before the hearing panel.

A reviewing court in an administrative law case must be careful to remember its role and not to substitute its judgment as to the weight of the evidence on questions of fact.

The Hearing Panel based its decision on disciplinary complaints involving Mr. Moncier's representation of Michael Vassar in the case *United States v. Vasser* in November 2007, and his

² At the hearing, Mr. Moncier requested ten (10) additional days to file several additional exhibits. The motion was granted, an Order entered, but no additional exhibits were filed.

conduct in the Knox County civil case of *Daniels v. Grmac* in April 2009. The complaints were initiated by the respective trial judges. See Exhibit 11 (complaint by Judge Greer), and Exhibit 32 (complaint by Judge Workman).

The BPR first filed a petition for discipline against Mr. Moncier on July 30, 2008 based on his misconduct in *United States v. Vassar*. On September 28, 2009, BPR filed a supplemental petition for discipline based on a complaint against Mr. Moncier for his misconduct in the *Daniels* case. The hearing before the Panel was conducted over five days, December 7 through December 14, 2009.

The Hearing Panel made decisions regarding what appear to be ten(10) specific allegations of misconduct and found that five of these charges were not sustained.³ The Panel found for the BPR as to five allegations. It found the petitioner guilty of having an impermissible conflict of interest in the federal proceeding; guilty of direct disobedience of an oral Order of the federal judge; and guilty of conduct intended to disrupt the proceeding. As to the trial in state court, the Hearing Panel found the petitioner guilty of intentional failure to follow an *in limine* ruling of the trial judge and also guilty of contentious behavior during the same trial.

The Panel then concluded:

Following the hearing in this matter and the proof presented, the Panel therefore concludes that by the preponderance of the evidence during the case of *USA v. Vassar* the Respondent knowingly violated Rule 1.7, Rule 3.4© and Rule 3.5(e); and that during the case of *Daniels v. Grmac* the Respondent repeatedly violated Rule 3.4 ©, 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct.

³ Computing the number of allegations is somewhat difficult as several of these "charges" contain multiple parts.

Having found the violations, the Panel then imposed discipline as follows:

1. That the Respondent, Herbert S. Moncier, be suspended from the practice of law for a period of eleven (11) months and twenty-nine (29) days.

2. That the first forty-five (45) days of Respondent's suspension be an active suspension pursuant to Rule 9 § 4.2 of the Rules of the Supreme Court of Tennessee.

3. That pursuant to Rule 9 § 8.5 of the Rules of the Supreme Court of Tennessee, Respondent's remaining suspension, after the first forty-five (45) days, be stayed in conjunction with a period of ten and one-half (½) months of probation.

4. That the following conditions are imposed upon the Respondent's probation:

- (a) That Respondent be required to complete an additional twelve (12) hours of ethics continuing legal education over and above the required three (3) hours of ethics CLE during his period of probation; and

- (b) That a practice monitor be assigned by the Board of Professional Responsibility to monitor Mr. Moncier's practice and court appearances for the duration of his probation and report immediately to the Board of Professional Responsibility any behavior in violation of the Rules of Professional Conduct.

Mr. Moncier filed several post-hearing motions with the Panel, but the Panel concluded that the issues raised in the motions were more appropriately raised on the appeal to this Court.

Mr. Moncier has raised a number of issues in the case, some are procedural and others relate to his assertion that the facts do not support the alleged violations.

A. ALLEGED PROCEDURAL VIOLATIONS

1. Disqualification

It is alleged that one of the Panel members had an actual disqualifying conflict of interest. It is further alleged that since the Panel members practiced before the complaining judges that they should all have been disqualified.

2. Continuance

It is alleged that Mr. Moncier was prejudiced when the Panel denied his request for a short continuance because disciplinary counsel had a late-added new witness.

3. Harwell complaint

It is alleged that Mr. Moncier was prejudiced when his lawyer Ralph Harwell was notified by the Panel during the proceedings that they [the Panel] were filing a disciplinary complaint against Mr. Harwell. Supposedly this was because Mr. Harwell had been involved representing a co-defendant in the *Vassar* case, and the Panel members thought his representation of Mr. Moncier may well violate a disciplinary rule.

4. Notice

It is alleged that Mr. Moncier was found guilty of misconduct that was not pled or alleged in the petition for discipline and/or the supplemental petition.

5. Failure to rule on post-hearing motions

Mr. Moncier contends that he was prejudiced by the failure of the Panel to rule on his post-hearing motions.

6. Statement of Judges as hearsay

Mr. Moncier alleges that statements of the complaining judges contained in transcripts and court opinions were admitted against him in violation of his constitutional rights and evidence rules.

7. FBI agent testifying

The petitioner contends that he was deprived of his right to full cross-examination when a testifying FBI agent was restricted in the subject matter of his testimony.

8. Deprived of witnesses

It is asserted that Mr. Moncier was deprived of two (2) necessary witnesses when the Panel quashed the subpoenas for these witnesses.

9. Open Meeting Act

It is alleged that the Open Meeting Act applies to the disciplinary proceedings.

B. ALLEGED MISCONDUCT NOT SUPPORTED BY THE EVIDENCE

As to the contentions of disciplinary violations, Mr. Moncier states that the evidence simply does not support the allegations.

II. BACKGROUND - FEDERAL COURT PROCEEDINGS

The Court believes that in approaching this state disciplinary proceeding, it might be helpful as background to digress and look at the prior federal proceedings related to Mr. Moncier's conduct in the *Vassar* case on November 17, 2006. The petition for review before this Court relates to allegations of disruption of proceedings and disobedience of the order of the federal judge during an aborted sentencing hearing in the *Vassar* case on November 17, 2006. The exchange between Mr. Moncier and Judge Greer is lengthy, and it relates to Mr. Moncier's request for a continuance and Judge Greer's concern that Mr. Moncier may have a conflict of interest. It all culminates as Judge Greer questions Mr. Vassar about the conflict:

The Court (to Mr. Vassar): 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 may be quiet.

Mr. Moncier: May I approach the bench?

The Court: You may stand there and do what I tell 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.

The entire exchange between Judge Greer and Mr. Moncier on November 17, 2006, led to Mr. Moncier's seven-year suspension from the practice of law in federal court and his being found in criminal contempt (which has since been reversed).

The disciplinary proceedings and the seven-year suspension are memorialized in a lengthy decision by Judge Collier issued on April 29, 2008. *In re Moncier*, 550 F.Supp.2d 768 (E.D. Tenn. 2008). Mr. Moncier was charged as follows:

. . . "[Respondent Moncier] repeatedly interrupted or spoke over the presiding judge," "accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials," "threatened to 'sit there and remain moot,' (footnote omitted), i.e., not provide a defense for his client due to a potential conflict Respondent perceived," "contradict[ed] the court's admonishment," and disobeyed a direct order from the court that he stop interrupting

and not say another word (citation omitted).

The Show Cause Order informed Respondent that based upon those factual allegations, it appeared "Respondent's actions constitute 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" (citation omitted).⁴

550 F.Supp.2d at 770-771. In its decision, the district court considered these charges and sustained all of them. The federal court of appeals affirmed and remarked that "Mr. Moncier's conduct, in short, was precisely as Chief Judge Collier described it to be." *In re Herbert Moncier*, 2009 WL 1949128, at *1 (6th Cir. July 8, 2009). A further decision explained the specific limitations placed on Mr. Moncier by the suspension. *In re Moncier*, 569 F.Supp.2d 725 (E.D. Tenn. 2008).

Mr. Moncier's conduct also resulted in a contempt proceeding. He was convicted of criminal contempt for his conduct on November 17, 2006. *United States v. Moncier*, 2007 WL 1577718 (E.D. Tenn. May 30, 2007). However, this conviction was reversed. The appellate court concluded that while the proof was sufficient to convict,⁵ the case should not have been tried before Judge Greer. The contempt proceeding was sent back to the district court for trial before a different district court judge. *United States v. Moncier*, 571 F.3d 593 (6th Cir. 2009). The contempt proceeding was assigned to another judge and must be proceeding toward a second trial. *See United States v. Moncier*, 2010 WL 1904957 (E.D. Tenn. May 10, 2010) and 2010 WL 2571984 (E.D. Tenn. June 18, 2010).

⁴ Mr. Moncier was not charged in federal court with any violation of the ethical rules governing conflict of interest.

⁵ The court described Mr. Moncier as having "indisputably misbehaved" and clearly disobeyed Judge Greer's order not to say another word. *United States v. Moncier*, 571 F.3d 593, 598-99 (6th Cir. 2009).

III. RULINGS ON PROCEDURAL OBJECTIONS

A. DISQUALIFICATION

Mr. Moncier contends that Hearing Panel member Mr. Patterson should have been disqualified because a lawyer in his firm represented a party in a contentious case and also because Mr. Patterson's firm had a personal relationship with a public official sued by Mr. Moncier.⁶ The matter was raised by Mr. Harwell. Mr. Patterson stated that he had communicated to his law firm partners and associates that they were not to communicate with him about any case in which Mr. Moncier was involved. Mr. Harwell was satisfied and said he was not asking for a recusal. The matter simply rests at that point. There was never a motion to recuse.

Mr. Moncier next makes a generic objection that all lawyers who might practice before the complaining judge should recuse. The Court cannot find a reference in the record to such a motion, nor is any law cited for such a proposition. Furthermore, if the Hearing Panel was intimidated, it was a poor job of intimidation, since they dismissed five of the charges and imposed discipline significantly less than the federal court. This issue is without merit.

B. CONTINUANCE

There is a complaint about the late addition of witnesses by the BPR and subsequent failure to grant a continuance. No prejudice in the trial preparation was shown in the record. Continuances

⁶ The transcript incorrectly identifies the subject of the inquiry as Mr. Houser, when it was actually Mr. Patterson.

rest within the discretion of the Hearing Panel and very seldom result in reversal, absent extraordinary prejudicial circumstances. *See, e.g., State v. Teel*, 793 S.W.2d 236, 245 (Tenn. 1990); *State v. Blair*, 145 S.W.3d 633, 640 (Tenn. Crim. App. 2004). There was no error in failing to grant a continuance.

C. HARWELL COMPLAINT

It is alleged that Mr. Moncier was prejudiced when his lawyer Ralph Harwell was notified by the Hearing Panel during the proceedings that they [the Panel] were asserting a disciplinary complaint against Harwell. This action was taken because Mr. Harwell had represented a co-defendant during the *Vassar* case, and the Panel said it was concerned that Mr. Harwell may have a conflict of interest and/or deprived Mr. Moncier of his testimony.

As the testimony was presented about Mr. Moncier's possible conflicts in the *Vassar* case, it became apparent that Mr. Moncier had referred one of his clients, a Mr. Gunter, who had a possible conflict, to Mr. Harwell to confer about the conflict. The Chairman then stated that it was problematic that Mr. Harwell be representing Mr. Moncier, as Mr. Harwell may well be in violation of RPC 3.7 and 1.7 (conflict rule and lawyer withdrawing if he is potential witness). The Panel then recessed until the next hearing day.

On Monday morning, Mr. Harwell reported this to the panel:

Mr. Harwell: . . . Friday, I worked to get this lined up to try to continue and finish this hearing. Friday evening, 5:16 p.m. I get an email from the Board of Professional Responsibility, a lady named Rita Webb, I believe her name is, which says that the report of the Panel, and somewhere I think I can quoted it exactly, the Hearing Panel's statement on the record on December 10 will be referred to the investigating section of the Board of Professional Responsibility

for handling in the ordinary course and then make their suggestions about this hearing.

With the Court's permission, I would like to make a copy of that email also an exhibit to my remark.

Chairman Houser: Yes, sir.

Court Reporter: Exhibit 50.

Mr. Harwell: I don't think that I am a particular alarmist, but I will have to admit when I have a specific report by a Hearing Panel of the BPR - I have had a very able deputy disciplinary counsel in charge of the litigation unit informed the Hearing Panel that she is concerned, that she has consulted at length with ethics counsel and with the disciplinary counsel and now that I hear that I'm being referred - - or this matter, in which my name has become of issue, is being investigated by the investigatory unit of the BPR. Then I have to - - have to be concerned.

Exhibit 50 is set out below:

From: Rita Webb [Rwebb@tbpr.org]
Sent: December 11, 2009 5:15 PM
To: timhouser@comcast.net; wep@sfrlaw.com; serdely@dmcpclaw.com; Kay Bacot
Cc: Sandy Garrett
Subject: IN RE: Herbert Moncier - 2008-1766-2-SG
Importance: High

Dear Panel Members,
Pursuant to Section 8.1 of Rule 9, the Hearing Panel's statement on the record on December 10, 2009 will be referred to the Investigative section of the BPR for handling in the ordinary course. It is this office's position that Mr. Moncier's hearing should proceed to conclusion on Monday, December 14.

Rita Webb
Executive Secretary
Board of Professional Responsibility
Of the Supreme Court of Tennessee
1101 Kermit Drive, Suite 730
Nashville, TN 37217
Phone - 615-361-7501

Fax - 615-367-2480

Mr. Harwell then moved to continue the hearing until the disciplinary matter against him was resolved and/or to withdraw. These motions were denied, and the hearing proceeded.

Just why the Hearing Panel thought it necessary to inject a disciplinary complaint, on these facts, against Mr. Moncier's lawyer in the middle of this proceeding escapes this Court. And why the Executive Secretary of the Board emailed the lawyer that it was investigating the complaint - also while the hearing was still in progress - seems an even greater exercise of poor judgment. The fact that the BPR would announce to the lawyer that it was initiating an investigation of a lawyer then engaged in a hearing involving the BPR certainly raises the appearance of intimidation by the BPR and due process concerns for this Court.

The Court admonishes the BPR for communicating its intent to investigate a lawyer who is then engaged in an active hearing with lawyers from the BPR. The Court, however, finds no prejudice. Mr. Harwell is a veteran lawyer, and the Court can discern no change in his advocacy for Mr. Moncier, nor has there been an offer of proof to indicate such.

Mr. Moncier further alleges that the Panel wrongfully denied Mr. Harwell's mid-hearing motion to continue the hearing because of the disciplinary complaint lodged against Mr. Harwell. Mr. Moncier cites and complains about an ex parte communication from the Executive Secretary of the BPR. Mr. Moncier refers to page 860 of the transcript as proof of this ex parte communication. The Chairman stated: "I will repeat that there has been a motion made to withdraw. That has been denied, and we have been instructed to proceed." One can observe that the email stated that it is the "office's" position that the hearing "should" proceed. The Chairman then stated that the hearing would proceed as "we have been instructed to proceed."

This incident is disquieting. The Hearing Panel is expected to act independently as to the issues before it. Just why the Executive Secretary of the BPR would expect to be able to communicate her views as to a motion to continue which was pending before the Panel was never explained. She has no authority to issue "instructions" to the Panel.

In the future, the Court would expect the Executive Secretary of the Board to not communicate to the Hearing Panel his/her views as to motions or other matters pending before the Hearing Panel. The BPR was ably represented by a Deputy Disciplinary Counsel, and she was the appropriate advocate before the Hearing Panel.

Ultimately, here again, the Court can find no prejudice. As will become apparent, the conflict of interest issue will be resolved in favor of Mr. Moncier, and that is the issue that might have required Mr. Harwell's testimony and was of concern to the Panel members.

D. NOTICE

Mr. Moncier contends that notice of the charges against him, as to some of the allegations, violates due process requirements, and, more specifically, Supreme Court Rule 8, §8.2, which requires that charges be brought by petition "which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct."

The *Vassar* complaint was initiated by a letter from Judge Greer, which stated in relevant part: Relevant to the charges for which the Hearing Panel sustained, the charges are the following:

Among the most serious of Mr. Moncier's apparent violations of the Rules of Professional Conduct appear to be violations of RPC 1.7 and RPC 4.2. During the pendency of Mr. Vassar's cases, Mr. Moncier attempted to represent two indicted and one unindicted members of a drug conspiracy simultaneously. This Court entered an order

disqualifying Mr. Moncier from representation of one of the two indicted co-conspirators. Most troubling about Mr. Moncier's simultaneous representation of these defendants was his division of loyalties as illustrated by his employment contract with these defendants. The Court's concern in that respect is more fully set out in footnote seven of the memorandum opinion and order entered by the Court. A copy of that order is enclosed for your review and Mr. Moncier's employment contracts are filed with the Court and maintained under seal. These employment contracts may be provided to you if necessary for your review of this matter.

In addition, Mr. Moncier has, throughout these proceedings and in other proceedings pending before this Court, called into question through his remarks or through matters inserted in his pleadings the integrity of various judges of this Court. Mr. Moncier has repeatedly accused various judges of this Court of bias and prejudice toward him and his clients. A sample of these pleadings is enclosed herewith. Mr. Moncier has also exhibited a lack of candor toward this Court, has engaged in insulting and unprofessional conduct toward the adversary counsel and has generally engaged in conduct that is prejudicial to the administration of justice, all of which appears to me to be in violation of RPC 3.3, 3.5, 8.2 and 8.4.

On July 30, 2008, the BPR filed its Petition for Discipline based on Judge Greer's complaint.

The facts are set out in paragraphs 7-17 of the petition as follows:

7. On November 17, 2006, the Respondent represented Michael Vassar at a sentencing hearing before Judge Ronnie Greer in *United States v. Vassar*, Docket No. 2:05-CR-75-3.
8. At the November 17, 2006 Hearing, the Respondent threatened to "sit there and remain moot" and not provide a defense for his client.
9. Throughout the November 17, 2006 Hearing, the Respondent interrupted the Court no fewer than fourteen (14) times before the Court ordered Respondent to say "not one more word."

10. At the November 17, 2006 Hearing, the Respondent disobeyed the direct instruction/order of Judge Greer to remain quiet.

11. At the November 17, 2006 Hearing, the Respondent accused the prosecution of "coming after me" and "trying to set me up" to prevent the Respondent from trying cases due to the Respondent's success in previous trials.

12. On November 17, 2006, the Respondent represented Harold Grooms.

13. At the November 17, 2006 Hearing, the Respondent represented to the Court that his client, Michael Vassar, could not speak candidly or fully with the Respondent because of the Respondent's representation of an uncharged co-conspirator, Harold Grooms.

14. At the November 17, 2006 Hearing, the Respondent moved for a continuance to allow the matter to be referred to another district judge and have independent counsel appointed to advise Michael Vassar about Respondent's possible conflict in representing Michael Vassar and Harold Grooms.

15. Despite the Respondent's representations to the Court of a conflict, the Respondent later advised the Court at the November 17, 2006 Hearing that he had "absolutely" no reason to believe he had a conflict in representing Mr. Vassar.

16. At the November 17, 2006 Hearing, the Respondent advised the Court that Michael Vassar did not want the Respondent to be disqualified and further advised that Vassar wanted to address the Court.

17. The following exchange occurred at the November 17, 2006 Hearing: [already set out in paragraph 7, *infra*.]

The petition then makes reference to several of the federal court decisions related to Mr. Moncier and further recites in toto the Disciplinary Rules he is said to have violated as follows:

Rule 1.1
COMPETENCE

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Rule 1.7

CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents in writing after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents in writing after the consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

- (c) A lawyer shall not represent more than one client in the same criminal case, unless
 - (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
 - (2) each client consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved.

Rule 3.1

MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could

result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.4

FAIRNESS TO THE OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or
- (b) falsify evidence, counsel or assist a witness to offer false or misleading testimony;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or
- (e) in trial,
 - (1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
 - (2) assert personal knowledge of facts in issue except when testifying as a witness; or
 - (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or
- (g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

- (h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness.

Rule 3.5

IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, a member of the jury pool, or other official by means prohibited by law;
- (b) communicate ex parte with a judge, juror, or a member of the jury pool, prior to or during a proceeding, except as permitted by law;
- (c) communicate with a juror after completion of the juror's term of service if the communication is prohibited by law, or is calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service;
- (d) conduct a vexatious or harassing investigation of a juror or member of the jury pool; or
- (e) engage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a tribunal.

Rule 4.4

RESPECT FOR THE RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not:

- (a) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or
- (b) threaten to present criminal charge, or to offer or agree to refrain from filing such a charge, for the

purpose of obtaining an advantage in a civil matter.

**Rule 8.4
MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

The *Daniels* complaint was initiated by Judge Workman by letter dated April 23, 2009. It was direct and to the point, and only involved one incident:

Enclosed is an order I recently entered concerning Herbert S. Moncier, Esquire. The enclosed order explains the factual situation.

I submit the information to the board to take any action deemed appropriate.

The attachment reads as follows:

CITATION FOR CONTEMPT

Mr. Herbert S. Moncier met with the court on a pretrial conference on April 17, 2009. At that conference Mr. Moncier asked the court what he could ask the jurors about insurance. Following the discussion with the court and counsel the court told Mr. Moncier the only questions appropriate to be asked were if they did any work dealing with evaluation and settlement of claims. Although the court thought that the better way was to ask without reference to insurance, the court could not say asking if they dealt with claims for an insurance company was inappropriate.

On Monday, April 20, 2009 Mr. Moncier asked a juror questions different from the instructions by the court, see attached transcript, Exhibit A.

This matter shall be set on the court's motion docket on June 12, 2009 at 9:00 a.m. for a hearing as to whether Mr. Moncier is in

contempt and an appropriate punishment.

ENTER this 23rd day of April 2009[.]

The BPR followed this up with a Supplemental Petition for Discipline filed on September 28, 2009. The facts set forth in the supplemental petition are as follows:

3. The Respondent represented Joshua Todd Daniels in Daniels v. Grima in the Circuit Court for Knox County.
4. A jury awarded the Respondent's client, Mr. Daniels \$750,000.00.
5. At a pretrial conference on April 17, 2009, Judge Workman and the Respondent's associate, David Wigler and Judge Workman [*sic*] had the following exchange:

Mr. Wiggler: "Yes, Herb needs clarification in voir dire about permissible questions concerning insurance."

Judge: "I prefer it not be used at all."
6. On April 20, 2009, Mr. Moncier asked a juror during voir dire if she was familiar with insurance that pays if someone is hurt on your property.
7. On April 20, 2009, the Court found the Respondent in contempt and ordered a mistrial.
8. By Order filed June 12, 2009, Judge Workman found the Respondent in contempt and stated in part:

What punishment should the [C]ourt enter? What punishment would make Mr. Moncier stop disregarding the [C]ourt's rulings? What punishment would stop Mr. Moncier from becoming contentious, combative and unconcerned when any person in authority deals with him? The [C]ourt has decided nothing it can do a[t] this point will make him change or listen or consider his client or his professional or even his own best interest. Mr. Moncier has not

indicated any understanding that anything he did was wrong, unprofessional or even a result from his own actions. If losing the ability to practice the profession in Federal Court will not change his attitude and actions nor would the potential to loose [lose] the license to practice nor the potential harm to the client then what ever the [C]ourt does means nothing and would accomplish nothing.

Mr. Moncier, you were wrong and intentionally ask[ed] a juror about insurance when instructed not to do so by the [C]ourt. You were found in contempt and if that will not make you stop and think there is nothing I do can [can do]. The [C]ourt finds no punishment for the contempt would be effective and therefore enters none.

9. The Court further found its June 12, 2009 Order and Findings:

What we do in the court system is not about the lawyers or even the judge. We are attempting to provide justice to citizens called clients. Any lawyer owes a duty to zealously use their knowledge, skills and abilities to further their client's interest if they can do so ethically and within the law. When a lawyer forgets about the client, the system has failed the citizen. Unless something changes, the [C]ourt finds Mr. Moncier is practicing legal anarchy and as this case demonstrates, the clients['] best interest or the need for fairness and not acting outside the law to opposing citizens are concepts for some unexplained reason has been lost by Mr. Moncier. A copy of the Court's June 12, 2009, Order and Findings is attached as Collective Exhibit B.

Then the petition alleged, based on the above, that Mr. Moncier violated the following:

Rule 3.4

FAIRNESS TO THE OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (e) in trial,
 - (1) allude to any matter that the lawyer does not

- reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness; or
- (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .

Rule 3.5

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.

Rule 8.4

MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (d) engage in conduct that is prejudicial to the administration of justice;

As near as the Court can determine, Mr. Moncier's objection regarding notice is threefold. First, he contends that he was never charged in the petition for discipline with a broad-based conflict of interest other than the potential *Vassar - Grooms* conflict that became apparent a day or two before the November 17, 2006 hearing before Judge Greer.

Second, he contends that he was never charged with the interjection of insurance and ordinance violations in the penalty phase of the *Daniels* case, but rather was charged with misconduct during the voir dire.

Third, he contends that he was never charged with contentious and combative behavior with Judge Workman after the voir dire incident in *Daniels*.

Disciplinary Counsel seems to concede that some of the specific allegations may not have been properly pled, but she argues that the issues not pled were tried by implied consent and should therefore be considered. Tenn. R. Civ. P. 15.02. She also cites *Nevin v. BPR*, 271 S.W.3d 648 (Tenn. 2008) which applied the “implied consent” principle to lawyer disciplinary proceedings. *Id.* at 656.

As to the conflict of interest issue in the *Vassar* matter, the Court agrees with the BPR. If the petition is somewhat lacking, Judge Greer’s letter sets out the broad-based allegation. Furthermore, Mr. Moncier testified at length regarding his relationship with Vassar, Gunter and Grooms and the potential conflicts. Furthermore, Mr. Harwell mentioned at length the conflict of interest issue in his opening statement, and this was in reference to both Grooms and Gunter and how they related to Moncier’s representation of Vassar. The issue was clearly appropriate for consideration by the Panel.

The Court is further of the opinion that the allegation of “contentious” behavior toward Judge Workman was fairly pled and/or heard by the Panel. The matter was addressed by Mr. Moncier and his counsel; tapes of the proceeding were heard by the Panel; and three witnesses testified as to Mr. Moncier’s conduct. This conduct was directly related to the voir dire insurance dispute which was clearly alleged in the petition.

As will become apparent, the Panel did not find Mr. Moncier guilty of asking a question about insurance in voir dire, but it did find Mr. Moncier guilty of asking questions about insurance later in the trial. Was the insurance issue subsequent to voir dire fairly charged? The Court finds that while the supplemental petition for discipline could have been clearer, it is apparent that Mr.

Moncier understood that his interjection of questions about insurance was at issue in the hearing and that the issue was addressed at the hearing.

The Court, however, agrees with Mr. Moncier regarding the allegation which resulted in the mistrial in *Daniels*. The mistrial was based on an alleged violation of an Order related to violation of a municipal ordinance not insurance. That incident was not the subject of Judge Workman's disciplinary complaint nor was it mentioned in the Supplemental Petition. While the Court needs to apply common sense and principles of implied consent to the notice requirement, Disciplinary Counsel cannot completely ignore the "sufficiently clear and specific" requirement of SCR 8, § 8.2. The pled allegation, after all, was violation of a ban on insurance questions during voir dire, not ordinance violation questions during the punitive damage phase of the trial.

E. FAILURE TO RULE ON POST-HEARING MOTIONS

After the Panel released its decision, Mr. Moncier filed a number of motions asking the Panel to consider his asserted factual and legal errors. The Panel determined it had no jurisdiction over most motions attempting to alter and amend its decision. It further denied the motions that it alter its factual findings. *See Panel Order* of February 12, 2010. The Panel was correct. Those issues are more properly raised on appeal.

F. STATEMENTS OF JUDGES AS HEARSAY

Mr. Moncier alleges that the statements of complaining judges contained in transcripts or court opinion should not have been considered, as they were inadmissible hearsay and/or denied his right to confront witnesses. The complaints of the two (2) judges both involved violations of court

orders which were either issued orally (with transcript and/or recording placed in evidence) or in writing. The decision of the Panel did not rely on the opinion of the judges or their personal observations. In fact, the decision of the Panel was based mostly on Mr. Moncier's words and/or actions. This objection is without merit.

G. LIMITATION PLACED ON FBI AGENT'S TESTIMONY

The Panel sustained the limitation placed on the testimony of retired FBI agent Farrow. Farrow was a witness to the exchange between Judge Greer and Mr. Moncier on November 17, 2006. He testified as to the contentious nature of the exchange and was cross-examined as to his testimony. Farrow's testimony was limited by the U.S. Attorney pursuant to 28 C.F.R. 16.28. The invocation of this limitation could be problematic under some factual circumstances, and the U.S. Attorney cannot be allowed to deprive a litigant in state court (criminal or civil) of a fair trial and an effective cross-examination.

Here, the findings of the Panel were based on the transcript of proceedings. The Court concludes that the testimony of the FBI agent did not contribute, at all, to the adverse findings in the *Vassar* case. Furthermore, the FBI agent's testimony was so restricted that the Court can find no prejudice in the limitations placed on his cross examination.

H. DEPRIVED OF WITNESSES

Mr. Moncier never did issue a subpoena for Assistant U.S. Attorney Smith, so the Panel did not deprive him of this witness. Furthermore, when Mr. Moncier attempted to subpoena Mr. Smith

in his federal contempt proceeding, it was ruled that Smith had no relevant information. *United States v. Moncier*, 2010 WL 2571984 (E.D. Tenn. June 18, 2010) (Judge Mays).

Mr. Moncier issued a subpoena for Thomas Scott, Chairman of the BPR. Mr. Scott had recused himself from the Moncier case, and the Panel committed no error in quashing the subpoena for him. There was no offer of proof before this Court as to how Mr. Scott may have contributed to Mr. Moncier's case.

I. OPEN MEETING ACT

Mr. Moncier contends that the Open Meeting Act applies to the Hearing Panel. This issue previously came before the Court related to a pre-hearing discovery dispute. The Court ruled as follows:

Therefore, it is ORDERED that Petitioner's Motion to Consider the Sufficiency of Objections to Requests for Admissions and Compel Answers to Petitioner's Interrogatories and Request to Produce is not well taken and should be DENIED. Further, in reaching this ruling regarding the Petitioner's Motion, the Court finds the Open Meeting Act does not apply to a Hearing Panel of the BPR. The Court relies on *Hastings v. South Central Human Resources*, 829 S.W.2d 679 (Tenn. Ct. App. 1991) and reasons stated on the record incorporated herein.

Order of July 14, 2010. A Hearing Panel of the BPR is not a "governing body," and therefore is not governed by the Open Meeting Act. See Tenn. Code Ann. § 8-44-102 and *Hastings*, 829 S.W.2d at 686.

IV. SUFFICIENCY OF THE EVIDENCE

A. VASSAR CASE

The Panel addressed five allegations related to the *Vassar* case. It found:

1. Mr. Moncier violated RPC 1.7 (conflict) as “The Respondent did not fulfill his obligations . . . with regards to Vassar.”
2. The Panel did not sustain the allegation that Mr. Moncier “filed frivolous motions and documents in *United States v. Vassar* and *In re Herbert S. Moncier*.”
3. The Panel did find Mr. Moncier guilty of disobeying Judge Greer’s Orders on November 17, 2006 and guilty of “intending to disrupt the proceeding before and under the authority of the court for purposes of delaying Vassar’s sentencing hearing.” The Panel found this violated RPC 3.4 (c) and 3.5(e).
4. The Panel did not sustain the allegation that Mr. Moncier’s statement that he would “sit and remain mute” violated disciplinary rules.
5. The Panel also did not sustain the allegations that Mr. Moncier violated disciplinary rules by interrupting Judge Greer on November 17, 2006.

The Court now addresses the two (2) sustained charges.

1. Conflict of interest

The relationship between Vassar, Gunter and Grooms is muddled. They all appear to have known each other in Sevier County. Vassar and Gunter would become co-defendants in one case. Grooms, who would never be indicted, was the target of a federal drug investigation and was thought

by the government to be associated in drug trafficking in Sevier County. All three were related to what the press called the "Rose Thorn" investigation.

The Panel made these factual findings related to the conflict of interest:

2. The Respondent represented Michael Vassar in *United States v. Vassar*, Case No. 2:05-CR-75.
3. A superceding indictment added Michael Gunter as a co-defendant and co-conspirator in *United States v. Banks*, No. 2:06-CR-75.
4. Michael Gunter and other co-defendants were charged in a second criminal case, *United States v. Banks*, No. 2:06-CR-0005.
5. On March 3, 2006, the Respondent entered a Notice of Attorney Appearance in *United States v. Banks*, No. 2:06-CR-0005, as attorney of record for Harold Grooms and Michael Gunter.⁷
6. After the Respondent filed his Notice of Appearance for Mr. Gunter and Mr. Grooms, Magistrate Judge Inman issued an Order setting a hearing to inquire into the Respondent's potential conflict of interest.
7. The Respondent's employment agreement with Michael Gunter reflects Mr. Gunter paid attorney Ralph Harwell a non-refundable retainer to provide Mr. Gunter with independent advice regarding Mr. Gunter's entering a conflict of interest waiver and agreement of limited representation by the Respondent.
8. The Respondent's employment agreement with Mr. Gunter reflected the Respondent's limited representation of Michael Gunter in case No. 2:06-CR-0005, "to prepare the case for trial and for trial before a jury."
9. In Respondent's conflict of interest waiver and agreement of limited representation with Michael Gunter, Mr. Gunter agreed that, in the event Mr. Gunter was called by the Government to testify against any client of Mr. Moncier, Mr. Moncier would then be

⁷ Grooms was not a co-defendant in that case, but it appears that Mr. Moncier brought the fact that he represented Grooms to the attention of the Court.

permitted to cross examine Mr. Gunter on any information obtained by Mr. Moncier during the representation of Mr. Gunter.

10. The Respondent testified he had a potential conflict in his simultaneous representation of Mr. Vassar, Mr. Gunter and Mr. Grooms because:

- a) All cases were from Cocke County;
- b) All the people knew each other; and
- c) All the people were involved in the Government's Rose Thorn investigation.

11. The District Court conducted a *sua sponte* hearing on March 17, 2006, and found the Respondent's simultaneous representation of Mr. Gunter and Mr. Vassar created a conflict of interest.⁸

12. By Memorandum Opinion and Order, Judge Greer disqualified the Respondent from further representation of Michael Gunter.

13. On November 17, 2006, at the beginning of Mr. Vassar's sentencing hearing, Respondent asked to address the Court in chambers on the record with the government present.

The Panel did not mention that the day before the November 17, 2006 hearing, the government had given Mr. Moncier a letter which reported from a third person a drug transaction between Mr. Grooms and Mr. Vassar. This was the first specific contention of an illegal transaction involving Vassar and Grooms. Vassar contended it had never happened, but that letter was the immediate concern of an actual conflict that faced Judge Greer on November 17, 2006.

The conclusion of the Panel was that:

Respondent testified that at the time he undertook the representation of Gunter and Grooms, they were not indicted in the criminal case with Vassar, who he already represented. However, there was at a minimum a perception of a possible conflict by the Respondent as reflected in the "Conflict of Interest and Waiver and Agreement of Limited Representation" executed by both Gunter and

⁸ Mr. Moncier never represented Gunter when Gunter was a codefendant of Vassar.

Grooms, Respondent's Exhibits 46 and 48 respectfully. Further, as a condition to his employment, Respondent required Gunter to consult with attorney Ralph Harwell independently for advice as to the "Conflict of Interest and Waiver and Agreement of Limited Representation" referenced above in his "Employment Agreement" introduced as Respondent's Exhibit 45. When the conflict did arise following the indictment of Gunter, there was no similar written agreement with Vassar produced as required by Rule 1.7(b)(2). Respondent's "Employment Agreement" with Vassar introduced as Exhibit 44 states in pertinent part: "This fee is earned upon Attorney accepting said representation, and shall be considered an advance earned fee designed to compensate this firm for being available to represent Client and to compensate this firm for committing time to his representation, *for precluding acceptance of other employment, for this firm being precluded from taking an adversary position or interest, for this firm being associated with these proceedings, and for this firm having received privileged information.*" [emphasis in original.]

Rule 1.7(c)(2) also would require that Vassar consent in writing after consultation concerning the implications of common representation, only after Respondent's showing to the court that good cause existed to believe that no conflict of interest existed or was likely to exist, a showing which was not made in this case. Considering Respondent's testimony in a way most favorable to him that no conflict or potential conflict existed between his representation of Vassar and the subsequent representation of Gunter and Grooms at the time he was retained, *the Panel finds that the Respondent did not fulfill his obligations under Rule 1.7 with regards to Vassar* (emphasis added).

Hearing Panel decision, pages 27-28.

The Panel would explain several pages later that:

As discussed in Paragraph 1 of this section, Respondent had an ethical obligation to Vassar and the court prior to the date of the sentencing hearing to consult with him about the possible conflict of interest and to obtain a written waiver from Vassar. Further, Respondent had an ethical obligation to demonstrate to the court that good cause existed to believe that no conflict of interest prohibited under the rules presently existed or was likely to exist in his continued representation of Vassar once he had been retained by

Gunter and Grooms. This not being accomplished prior to the sentencing hearing, Respondent placed the court in the position of making inquiry directly of Vassar.

Hearing Panel decision, page 30.

The Panel's decision appears to be limited to Mr. Moncier's obligation to Vassar. Vassar had signed a waiver of conflict related to Gunter in March 2006. That same waiver form stated that Moncier represented Grooms, who had been the subject of a search warrant. The immediate Grooms-Vassar conflict contained in the letter had not been revealed to Mr. Moncier until he received a letter from the Assistant U.S. Attorney the day before the November 17, 2006 hearing.

Mr. Moncier's attempts to skate through the so-called "Rose Thorn investigation" while representing multiple defendants or targets of the federal investigation shows perhaps an insensitivity to the reality of issues of conflict of interest. Both Judge Inman and Judge Greer had to draw a line short of Mr. Moncier's reach.

The immediate issue, however, is the narrow holding of the Panel based on the finding that Mr. Moncier did not fulfill his obligation to Vassar. Mr. Moncier had a waiver from Vassar related to Mr. Moncier's representation of Gunter. That waiver seems to have been overlooked by the Panel.⁹ Further, there is no evidence that prior to the letter of November 16, 2010, there was any information supporting a conflict between Grooms and Vassar. Up until the receipt of that letter,

⁹ The signed waiver informs Vassar that Mr. Moncier represents Michael Gunter in 2:05-CR-75. It also states that "client assured Attorney that client had no conflict with Michael Gunter." "Client agrees that Attorney can represent Mike Gunter and waives any potential conflict of interest that may exist by that representation." The waiver also informed Vassar that Moncier represented Grooms, but there was no waiver related to Grooms. However, Vassar always claimed that while he knew Grooms slightly, he had nothing to do with Grooms, and there was no information indicating otherwise (until the letter of November 16, 2006).

there was no specific information that there was any criminal relationship between Vassar and Grooms. It was the information in that letter that was of concern to both Judge Greer and Mr. Moncier in their exchange on November 17, 2006.

The Grooms-Vassar conflict was being addressed before the Court on November 17, 2006, and this Court does not believe that Mr. Moncier's failure to withdraw immediately from representing Vassar based on the information received the day before would violate RPC 1.7. Mr. Moncier was addressing the conflict with Judge Greer (albeit inappropriately), but he was readily addressing the conflict divulged only the day before (November 16, 2006).

The Court finds that the specific conflict of interest finding of the Hearing Panel is simply not supported by substantial material evidence.

2. Disobeying Order and disruption of proceedings

In the *Vassar* case, the Panel found Mr. Moncier guilty of disobeying Judge Greer's Order and guilty of disruption of the proceeding. The evidence clearly supports the Panel's findings. Mr. Moncier argues that he was merely attempting to protect his client's rights and that he meant no disrespect when he spoke after being told to remain quiet. Again, here is part of the exchange:

The Court: Mr. Moncier, you may be quiet.

Mr. Moncier: May I approach the bench?

The Court: You may stand there and do what I tell 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.

The Court agrees with the following analysis by the Sixth Circuit:

Mr. Moncier essentially admits [his obstruction and disobedience] but contends he had a good reason for the obstruction—namely, as he testified at trial and now argues to this court, that he had an *ethical duty* to obstruct Judge Greer's questioning of his client.

But the contention warrants comment in its own right. Mr. Moncier's contention, specifically, is that his "duty to confer and advise Vassar necessarily include[d] potential obstruction of Judge Greer questioning Vassar in the presence of the prosecutors and FBI[.]" *Moncier Br.* at 5 (emphasis added). The Tennessee Association of Criminal Defense Lawyers makes much the same contention in its *amicus* brief supporting Mr. Moncier. The idea appears to be that, had Mr. Moncier not thrown himself across the tracks on November 17, Mr. Vassar's constitutional rights would have been violated. And thus, we are told, it was appropriate, and even necessary, for Mr. Moncier, rather than Judge Greer, to take control of the courtroom.

To all of which there is a simple answer: There is no right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. "Lawyers are required to obey even incorrect orders; the remedy is on appeal." *In re Dellinger*, 502 F.2d 813, 816 (7th Cir. 1974). We entirely agree with Judge Greer that "someone must be in control of what happens in a courtroom[.]" and that the someone is "the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States."

United States v. Moncier, 571 F.3d 593, 598-599 (6th Cir. 2009).

Mr. Moncier cites the case of *State v. Greer*, 783 S.W.2d 548 (Tenn. 1990) in which the court reversed several contempt convictions against a lawyer for zealous advocacy. In that case, however, the lawyer had acted against the clear bias and prejudice of the judge. The Court here does not see

any conflict between the expectation that a lawyer obey a judge's order and the protection of necessary and vigorous advocacy.

This exchange between one of Mr. Moncier's witnesses, a criminal defense lawyer, and deputy disciplinary counsel is instructive:

Q. You represented Mr. Gunter - -

A. (Interposing) - - Yes, I did. Right.

Q. During your representation of Mr. Gunter, did you ever interrupt Judge Greer?

A. I hope not. I might have, but I hope I didn't.

Q. And if Judge Greer told you to be quiet, Mr. Davies, would you be quiet?

A. I think I would.

Q. And if Judge Greer told you to stand there and do as you were told, would you stand there and do as you were told?

A. I think that I would. I have never really - - I have never really been in that experience - - in that situation. I thought a lot about what I would do in those circumstances. The problem was that, you know, Mr. Vassar was being asked to make some decisions that were really important. And it is important to try to preserve his rights and try to object and make sure you don't waive anything. The answer to your question is I probably would have stood there and been quiet and that certainly would have been the safer thing to do, so I think that is what I would have done, but I am not 100 percent sure.

Q. And if Judge Greer told you, "One more word and you are going to jail," do you think you would have said one more word?

- A. I - - I again I don't really know because that has never happened to me, but I think I probably would have not gone to jail.

The evidence here is clearly sufficient to uphold the Panel's finding of a violation of RPC 3.4(c) and 3.5(e).¹⁰

B. DANIELS CASE

The *Daniels v. Grimalt* case has been discussed in the Notice section, *supra*.

1. Interjection of insurance issues and the mistrial

As to the *Daniels* case, the Panel found that the charge regarding Mr. Moncier's asking about insurance during voir dire did not, standing alone, violate the Rules of Professional Conduct. It did, however, find Mr. Moncier guilty of "repeated interjection of insurance issues into the proceedings" in violation of RPC 3.4(c), 3.5(e) and 8.4(a) and (d). The Panel commented that "unlike the instance during voir dire, at this point during the trial [the punitive damages stage], the Respondent was clearly on notice that such questions would not be tolerated by the Court, and to pursue these insurance issues were at both the peril of the Respondent and his client." The record supports the finding of the Panel.

The mistrial declared by Judge Workman was not directly the result of any question about insurance, but rather a violation of a pretrial order precluding any questions about violations of ordinances. The mistrial exchange is as follows:

¹⁰ Mr. Moncier was charged with disciplinary violations in the case of *Stidham v. Hutchinson*, but these allegations were not sustained and need no further discussion.

Mr. Moncier: Was the (inaudible) in the condition it was on the day prior to June 24, 2006 in violation of the Knox County Code?

Unidentified Speaker: Well, I had never been advised by the city that it was in violation.

Unidentified Speaker: Your honor, we would object now.

The Court: Do you have a motion?

Unidentified Speaker: I'm sorry?

The Court: Do you have a motion?

Unidentified Speaker: Motion for a mistrial.

The Court: Granted. Ladies and gentlemen of the jury, we find Mr. Moncier, as this Court told him, has previously excluded any proof about any violation of the ordinance.

In considering the *Daniels* case allegations, however, the Panel weaved together the improper insurance questions with its finding regarding the mistrial resulting from the question related to an ordinance violation. The Panel thus concluded that Mr. Moncier had violated the court's order "a second time" and that conduct "directly resulted in the loss of a significant verdict for compensatory damages in favor of the Respondent's client." This mistrial had come in the punitive damage stage of the trial after Mr. Moncier's client had been awarded \$750,000.00 in compensatory damages, and as a result of Mr. Moncier asking the question about an ordinance violation (not insurance).

While this Court sustains the findings as to the improper interjection of insurance questions in the face of the judge's ruling, it does not sustain the finding as to the ordinance violation question and resulting mistrial. The Court previously has ruled that Mr. Moncier was never properly charged with misbehavior as a result of asking the witness about an ordinance violation. *See supra* p. 24.

2. Contentious conduct

Finally, the Panel found:

The Panel finds that the evidence preponderates in favor of a finding that the Respondent's conduct during the trial of *Daniels v. Grima*c with regard to his interactions with Judge Workman further violated Rule 3.5(e) and 8.4(d) of the Rules of Professional Conduct in that the Respondent engaged in conduct intended to disrupt a proceeding before or conducted to the authority of a tribunal and engaged in conduct that was prejudicial to the administration of justice.

The Panel had reviewed the transcripts and recordings of the exchange between the judge and Mr. Moncier, and then observed:

During the foregoing proceedings reflected in the transcript above, the Respondent's behavior was witnessed by other attorneys present. William Coley, an attorney licensed to practice law since 1985, testified that the Respondent's conduct in *Daniels v. Grima*c was aggressive and was, "the most contentious behavior exhibited by an attorney" that he had seen. Harry Ogden, an attorney licensed to practice law since 1976, testified that in *Daniels v. Grima*c, the Respondent was "aggressive and antagonistic" and "on occasion it seemed like, Mr. Moncier tried to talk over Judge Workman." William Banks, an attorney licensed to practice law since 1958, testified that the Respondent in *Daniels v. Grima*c was "angry, very loud, out of control, disrespectful and way off base." Mr. Banks also testified that during the trial, he told the Respondent that he, Mr. Moncier, had "crossed the line" with the Judge.

The evidence sustains this finding.

V. CONCLUSION

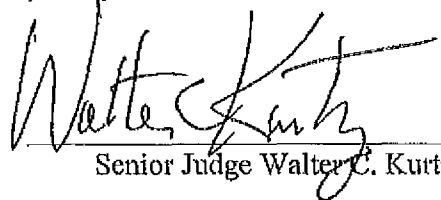
For the reasons stated above, the Court finds the following:

1. The conflict of interest violation against Mr. Moncier shall be REVERSED;
2. The charges of disobeying Judge Greer's order and disruption of proceedings shall be AFFIRMED;
3. The finding of a disciplinary violation resulting from asking insurance-related questions (other than during voir dire) in the *Dantels* case is AFFIRMED, but the finding of a disciplinary violation for the ordinance violation question and the resulting mistrial shall be REVERSED; and
4. The disciplinary violation for contentious and disruptive behavior during the *Dantels* trial is AFFIRMED.
5. The Deputy Disciplinary Counsel should communicate in full the comments of this Court on pages 10-13 of this decision to the Executive Secretary of the BPR and to the Chairperson of the BPR.

VI. REMAND

Having affirmed in part and reversed in part, this case is remanded back to the Hearing Panel for reconsideration of the imposed discipline in light of the dismissal of some of the charges.

This the 8th day of September, 2010,



Senior Judge Walter C. Kurtz

cc:

Herbert S. Moncier
Suite 775, Bank of America Center
550 Main Avenue
Knoxville, Tennessee 37902

Sandra Garrett, Deputy Chief Disciplinary Counsel - Litigation
Board of Professional Responsibility of the Supreme Court of Tennessee
1101 Kermit Drive, Suite 730
Nashville, Tennessee 37217