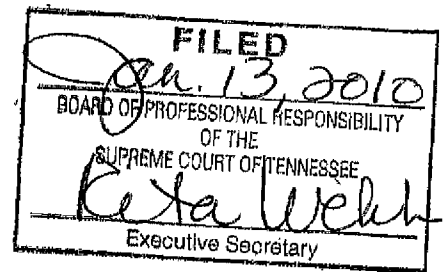


**IN DISCIPLINARY DISTRICT II  
OF THE  
BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE**



**IN RE: HERBERT S. MONCIER**  
**BPR No. 001910, Respondent**  
**An Attorney, Licensed to Practice Law**  
**in Tennessee**  
**(Knox County)**

**DOCKET NO. 2008-1766-2-SG**

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**JUDGMENT OF THE HEARING PANEL**

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Pursuant to Rule 9 §8.2 of the Rules of the Supreme Court of Tennessee, this cause came on to be heard by the Hearing Panel assigned by the Board of Professional Responsibility of the Supreme Court of Tennessee on December 7, 2009, and adjourned on December 14, 2009, after which the hearing was concluded upon the filing by both parties of Proposed Findings of Fact and Conclusions of Law on December 30, 2009. The Hearing Panel comprised of attorneys Timothy C. Houser (chair), Weldon E. Patterson and Steve Erdely, IV makes the following findings of fact and conclusions of law, and submits its judgment in this cause as follows:

**I. STATEMENT OF THE CASE**

1. A Petition for Discipline was filed on July 30, 2008, charging the Respondent with violation of Disciplinary Rules in File No. 29701-2(K)-SG and 30280-2(K) SG.
2. Respondent was duly served with the Petition and on August 12, 2008, Respondent answered the Petition.
3. On September 28, 2009, a Supplemental Petition for Discipline was filed, charging Respondent with violation of Disciplinary Rules in File No. 32110-2-SG.

4. On November 13, 2009, the Board of Professional Responsibility filed a Motion to Shorten Time, referencing previously served written discovery.

5. On November 20, 2009, the response of Herbert Moncier to the Supplemental Petition for Discipline was filed.

6. After appropriate notice to the parties, this matter was set for hearing to begin on December 7, 2009. A pre-trial hearing took place on December 4, 2009 pertaining to multiple motions and a Stipulation. Specifically, a Stipulation was filed on December 4, 2009, indicating that an audio recording made by the court reporter at a November 17, 2006 hearing no longer exists. A Motion to Exclude the testimony of Thomas Farrow, or in the alternative continue the hearing, was filed by the Respondent on December 3, 2009. The Board filed a response to the Motion to exclude testimony or continue the hearing, on December 4, 2009. The Board filed a Motion in limine regarding expert witnesses on December 4, 2009. The Board filed a Motion in limine regarding character witnesses on December 4, 2009. All such Motions were dealt with either during the December 4, 2009 conference or during the hearing which began on December 7, 2009. The hearing commenced on December 7, 2009 as scheduled, with proof presented to the Panel completed on December 14, 2009. Thereafter, hearing was adjourned until December 30, 2009 to allow the parties to submit proposed findings of fact and conclusions of law. On December 30, 2009, both parties submitted their respective proposed findings of fact and conclusions of law.

## **II. FACTS**

1. The Respondent has been licensed to practice law in Tennessee since 1970.

2. The Respondent represented Michael Vassar in United States v. Vassar, Case No 2:05-CR-75.

3. A superseding indictment added Michael Gunter as a co-defendant and co-conspirator in United States v. Vassar, Case No. 2:05-CR-75.

4. Michael Gunter and other co-defendants were charged in a second criminal case, USA v. Banks, No. 2:06-CR-0005.

5. On March 3, 2006, the Respondent entered a Notice of Attorney Appearance in USA v. Banks, No. 2:06-CR-0005, as attorney of record for Harold Grooms and Michael Gunter.

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 into 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 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 the 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.

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.

14. On November 17, 2006, Judge Greer cleared the courtroom except for the Respondent, Mr. Vassar, Government Agent Farrow, US Attorneys and court personnel.

15. On November 17, 2006, Respondent moved the Court for a continuance so Mr. Vassar's case could be presented to another District Judge and so an independent attorney could advise Mr. Vassar.

16. When asked by the Court on November 17, 2006, US Attorney Smith stated that the government had no interest in debriefing Mr. Vassar because of the Court's prior finding that Mr. Vassar engaged in the subordination of perjury and made false statements to probation officers.

17. On November 17, 2006, Judge Greer denied Respondent's motions for another District Judge and appointment of independent counsel.

18. On November 17, 2006, after the Court denied Respondent's Motions for another District Judge and independent counsel, Respondent moved to withdraw.

19. The following exchange occurred between the Respondent and Judge Greer at the hearing on November 17, 2006:

THE COURT: You telling me you're not 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.

THE COURT: Let me hear what Mr. Smith has to say about this.

20. The Respondent stated the following to the Court on November 17, 2006:

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.

21. On November 17, 2006, the Court asked the Respondent:

THE COURT: Mr. Vassar – Mr. Moncier, this is the, I believe, the fifth time in two weeks that you've attempted to get this sentencing hearing continued. What's really going on? What's going on?

MR. MONCIER: I just got through telling you that I was a little bit concerned that you would feel that way, and that's why I suggested put Mr. Shults' hearing off. 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...

22. The following exchange occurred between the Respondent and Judge Greer on November 17, 2006:

MR. MONCIER: Your Honor, for me to be able to deal with this, I've got to talk to Mr. Vassar.

THE COURT: Oh, I understand, Mr. Moncier, that you've created a situation where you're going to get the continuance you want; and I'm going to be frank with you, as I was at the bench, all of this is highly suspicious in view of the fact that this is the fifth effort in two weeks that you've made to get this hearing continued; but, nevertheless, my obligation and the government's obligation is to see that Michael Vassar has conflict free representation. I don't think this is just a potential conflict, I think there's an actual conflict here based on the statement made at the bench.

23. Judge Greer made the following statement to the Respondent on November 17, 2006:

THE COURT: 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. You know very well that I did not approve of comments you made about the Magistrate Judge in this Court in the pleadings you filed before this Court. 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. That happened in Mr. Vassar's other case where I sustained an objection and you turned around and made the same argument again. That has absolutely nothing -- none of that has absolutely anything at all to do with what Mike Vassar's sentence ought to be in this case.

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 here. Every client -- I've bent over backwards in this case from the

very beginning 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 in this case, a record that I'm sure will be revealed – or 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 towards these agents or attorneys, and yet you used words like you did on Wednesday, torture, extort; or you use words like you did at the bench, they concocted. I know what “concocted” means, everybody knows what “concocted” means. You made an accusation that they made up, and it – 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, certainly, of you aggressively representing your clients, that's what you ought to do; that's what you've done with Mr. Vassar; That's what he hired you to do; that's what you've had an obligation to do.

Nor have I suggested that you were wrong this morning in calling this matter to my attention and suggesting a Rule 44(c) inquiry. Most of that has absolutely nothing to do with the issue before the Court. The issue before the Court is whether or not there is an actual or potential conflict of interest such that I'm required to take some sort of action; that's the only issue right now.

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 of Mr. Vassar; 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.

24. The following exchange occurred between the Respondent and Judge Greer on November 17, 2006:

THE COURT: I'm going to hear you in open Court on sentencing.

MR. MONCIER: The point is, your Honor, is you're getting limited information; and what the setup is now is they say, well, we don't want to talk to him because of this false statement that he made concerning quarter glasses for blazers, when they've always known that that's not even what their own person said and that he testified falsely at the trial.

THE COURT: I'll hear it later.

MR. MONCIER: But the point is –

THE COURT: No, the point is that I told you I'll hear it later in open court.

MR. MONCIER: Yes, sir.

THE COURT: And that's another example of why you and I get crossways because you simply will not follow my directions.

MR. MONCIER: It's a pretext.

THE COURT: I don't care what it is at this point, we'll hear it when we get to the sentencing hearing.

MR. MONCIER: With regard to the sentencing hearing, they say now go forward with the sentencing hearing. Once again, I want to point out to the Court that I need to talk with my client, and I'm asking the Court to appoint an impartial person to talk with my client.

THE COURT: I am not going to appoint an impartial person to do that. You've told me there is no conflict of interest. There is no reason to do it.

25. On November 17, 2006, the following exchange occurred between the Court and Mr. Vassar:

MR. VASSAR: Well. I don't understand. Mr. Moncier has already represented me at my trial. I mean, is this just for the sentencing hearing?



THE COURT: For the remainder of these proceedings.

MR. VASSAR: I don't understand. I, I don't, I don't, don't understand. I, I thought he would have to represent me in my sentencing because he knows all about the case. How could somebody fairly represent me without going through my trial and without understanding everything that's happened, how could somebody else represent me fairly?

THE COURT: Well, I'd have to give them time to familiarize themselves with it.

MR. VASSAR: I'll have to go that way then because I feel like -- I want to feel like I'm going to be fairly represented. If he was going to represent Harold Grooms --

THE COURT: You've known since March that he represented Harold Grooms; haven't you?

MR. VASSAR: Yes, sir, I did.

THE COURT: You know that means we won't go forward with your sentencing hearing this afternoon; don't you?

MR. VASSAR: Yes, sir.

26. On November 17, 2006, the following exchange occurred between the Court and the

Respondent while the Court was questioning Mr. Vassar:

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 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.

27. During the hearing before this Panel, the Respondent testified that he desired additional time, in the Vassar matter, to develop a legal argument pertaining to disparity in sentences. The following exchange occurred between Respondent and Judge Greer on November 17, 2006:

MR. MONCIER: That presents another problem though, Your Honor, as to what do I present today if we were to go forward in a sentencing hearing with regard to positions and information that we have had in the past. Before I go forward today and present my case as it had been presented and prepared prior to this time, I think Mr. Vassar needs independent counsel. I mean, I've been sitting here thrown into a situation. If that's why the government disclosed that to me yesterday, fine. I mean, I'm, I'm obviously – I mean, the point of the matter is, keep in mind since we said it was Mark Thornton, I had subpoenaed Mark Thornton and he was prepared to testify, or I was going to call him to testify at the October 28<sup>th</sup> hearing. They didn't provide this to me. The October 28<sup>th</sup> hearing was literally continued the night before the hearing, late in the night. The government hasn't said anything about it. They knew I was going to call Mark Thornton at that time. What were they going to do, cross examine Mark Thornton after he testified about a completely unrelated matter about my client and harpoon it into the case? Who knows. I don't know; but the point of the matter is I now know for what they say Mark Thornton- - and I've done my due diligence, and I haven't talked to Mr. Vassar and I haven't done that for the reasons I've stated, and so that places me in a difficult position as to how to go forward today.

And I guess the elephant sitting in the middle of the courtroom here is why are we talking about a 7 day – and if

it's, if it's so Mr. Vassar goes before Chris Shults, then, you know, reschedule Mr. Shults' until after Mr. Vassar, if there's some suspicion that I'm doing this so that Mr. Vassar will have the benefit in this record of the, for the fairness determinations and the other determinations that I've submitted in the record, well, just put those – put Mr. Shults after Mr. Vassar.

Now, I'm told by Mr. Bell, another thing, I received a motion by Mr. Bell last night, he called me and he told me that Chris Shults was going to take the fifth amendment. That's what why Mr. Bell is here this morning. That's one more reason that if Mr. Shults is going to take the fifth amendment to my questions to Mr. Shults before his sentencing, then that's one more reason that Mr. Vassar's case should be after Mr. Shults' so that Mr. Shults would not have that fifth amendment issue; but, you know, one again, I want to make it as clear as I can, if the issue, and the only issue that's the elephant in the middle of the courtroom is that this, Mr. Vassar's sentencing is going to be after Mr. Shults, then reset Mr. Shults until after Mr. Vassar.

THE COURT: And reset Mr. Phillips after Mr. Vassar and reset –

MR. MONCIER: I don't know. Mr. Phillips is in January, I believe, January the 8<sup>th</sup>, as I recall.

THE COURT: Well, I said that wrong. If we set Mr. Vassar after Mr. Phillips, so Mr. Phillips can't take the fifth too.

MR. MONCIER: No, I'm not going that far. Mr. Leibbrook, I talked to yesterday, didn't indicate to me that Mr. Phillips was going to take the fifth; but Mr. Phillips' sentencing anyway is January the 8<sup>th</sup>, as I recall.

Once again, I rest on all of the grounds that I've said previously for us having the benefit of their sentencing; however, on this particular issue, specifically, if that's the only impediment to Mr. Vassar having independent advice -

28. Retired FBI agent Thomas Farrow testified that the Respondent was loud and aggressive in Federal Court on November 17, 2006.

29. By Memorandum Opinion and Order filed May 30, 2007, Judge Greer found the Respondent “guilty beyond a reasonable doubt” of criminal contempt. The Respondent was sentenced to one year probation; fined \$5,000; 150 hours of community service; 3 hours CLE; an anger management class and \$10 assessment for his criminal contempt.

30. Judge Greer reported the Respondent to the Board of Professional Responsibility.

31. Judge Collier’s Memorandum and Order In re: Herbert S. Moncier ordered the Respondent suspended from the practice of law in the US District Court for the Eastern District of Tennessee for a period of seven (7) years, with a maximum of five (5) years being active suspension and the remaining probation, and with the possibility of early reinstatement with probation.

32. The US Court of Appeals for the Sixth Circuit affirmed Judge Collier’s April 29, 2008 Memorandum and Order by Opinion and Judgment filed July 8, 2009.

33. Respondent represented the Plaintiffs, in Stidham v. Hutchinson, in US District Court, Eastern Division.

34. On July 25, 2005, US District Judge Jordan entered an Order in Stidham stating:

“the Plaintiff’s pleadings contain scurrilous attacks on judicial officers of the court and then rulings. These attacks are contemptible and in this court’s opinion, constitute conduct unbecoming an attorney permitted to practice before this court.”

35. Judge Jordan in Stidham further found:

“counsel for the Plaintiff’s is hereby put on Notice that any further despairing written or oral statements impugning the motives and character of judges of the court, in this case or any other case, will result in a finding of contempt and a report of the behavior to the Tennessee Board of Professional Responsibility.”

36. The Respondent represented Joshua Todd Daniels in Circuit Court for Knox County in Daniels v. Grimaldi.

37. Counsel for Defendant Grimaldi filed a Motion in Limine in Daniels v. Grimaldi to exclude proof regarding a citation issued after Mr. Daniels' accident.

38. The Court granted the Motion in Limine by Order filed April 20, 2009, in Daniels v. Grimaldi.

39. A pre-trial conference was held in Daniels v. Grimaldi on April 17, 2009.

40. The Respondent tape recorded the Daniels v. Grimaldi April 17, 2009 pre-trial conference.

41. After the Respondent left the pre-trial conference, attorneys David Wigler and Adam Moncier stayed at the pre-trial conference on behalf of the plaintiffs.

42. The Respondent specifically asked David Wigler to ask Judge Workman during the April 17, 2009 pre-trial conference for instructions regarding questions about insurance.

43. At the April 17, 2009 pre-trial conference, David Wigler asked Judge Workman about questions pertaining to insurance.

44. At the April 17, 2009 pre-trial conference, Mr. Wigler asked:

MR. WIGLER: Yes, Herb needs clarification in voir dire about permissible questions concerning insurance.

THE COURT: I prefer it not be used at all.

MR. WIGLER: Owning stock in insurance companies.

THE COURT: They have nothing to do with it.

MR. WIGLER: Working as a claim adjuster.

THE COURT: If an objections made I would sustain an objection to all of those, except that last one. Have any of you ever worked to

adjust claims. Have any of you ever by your employment been employed where for an insurance company or for the government or something, you handle claims made or you company, that's the issue whether they handle or familiar with handling claims, not whether they work for an insurance company. (Emphasis added).

MR. WIGLER: Or own stock in one.

THE COURT: Has nothing to do with it.

MR. WIGLER: It could create a belief that [sic] have a personal interest.

THE COURT: Why? You don't know who the insurance company is. They couldn't possibly know whether --

MR. COLEY: --or whether there is one, Your Honor --

THE COURT: It will affect there stock or not. Or whether there's even insurance.

MR. WIGLER: Oh. I'm not saying in argument, or in evidence.

THE COURT: No. I'm talking about asking the question how's--the question is the qualification of the jurors in voir dire, and what about the fact that a juror owns some stock in an insurance company how will that tell us whether the juror [sic] qualified or unqualified.

MR. WIGLER: Well qualification is not the standards, do we want that juror presiding on the case.

THE COURT: How could that tell you --- prejudice against because there's no insurance company in this cases David.

MR. WIGLER: Well there is.

THE COURT: No there isn't. There is no insurance company as part of this case.

MR. WIGLER: Oh, this case okay.

THE COURT: They--they won't know and will never be told there is one. So if they own stock how are they going to be prejudice against somebody if they don't know there's one in it.

MR. WIGLER: You know jurors thinks [sic] there's insurance.

THE COURT: Horse hockey. Your blowing smoke. Not but about claims that's a whole different issue. But I think the whole thing about insurance is totally that's not appropriate unless it relates to their qualifications of a juror and if you as saying that anybody that has insurance is bias and prejudice then that's everybody on the jury. Cause everybody out there owns an interest [sic] insurance company they pay premiums.

MR. WIGLER: Owning stock in insurance companies.

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THE COURT: If an objections made I would sustain an objection to all of those, except that last one. Have any of you ever worked to adjust claims. Have any of you ever by your employment been employed where for an insurance company or for the government or something, you handle claims made or you company, that's the issue whether they handle or familiar with handling claims, not whether they work for an insurance company. (Emphasis added).

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THE COURT: Horse hockey. Your blowing smoke. Not but about claims that's a whole different issue. But I think the whole thing about insurance is totally that's not appropriate unless it relates to their qualifications of a juror and if you as saying that anybody that has insurance is bias and prejudice then that's everybody on the jury. Cause everybody out there owns an interest [sic] insurance company they pay premiums.

45. After Respondent asked Mr. Wigler to ask Judge Workman for instructions regarding questions about insurance, Respondent testified he did not talk with either Mr. Wigler or Adam Moncier about Judge Workman's response prior to voir dire on April 20, 2009.

46. On June 17, 2009, attorney Adam Moncier prepared and signed an affidavit filed in Daniels v. Grimaldi which stated Adam Moncier did not discuss Judge Workman's instructions with the Respondent regarding insurance prior to April 20, 2009.

47. On December 9, 2009, attorney Adam Moncier testified before the Panel that he did discuss Judge Workman's instructions with the Respondent regarding insurance prior to April 20, 2009.



48. On December 9, 2009, Adam Moncier testified before the Panel that his December 9, 2009 testimony was true and his June 17, 2009 affidavit was not accurate.

49. On December 10, 2009, Adam Moncier testified that upon further reflection he had not discussed Judge Workman's instructions regarding insurance with the Respondent prior to April 20, 2009.

50. On April 20, 2009, Respondent asked a juror the following:

MR. MONCIER: Does anyone work for an insurance company? You are Ms. –

JUROR: Linda Borne.

MR. MONCIER: What insurance company do you work for?

JUROR: I work at Travelers, just personal loans, auto and home.

MR. MONCIER: Do you have any premise insurance, like somebody injured in a home?

JUROR: I just sell insurance over the phone when they call in, for auto and home.

MR. MONCIER: When a person says that somebody is injured in my home –

THE COURT: Counsel, approach the bench.

51. On April 20, 2009, in Daniels v. Grimac, Judge Workman stated the Respondent would receive a citation for contempt for violating the Court's Order.

52. On April 23, 2009, in Daniels v. Grimac, the Respondent advised the Court, "I would like to have the Notice of Charges filed immediately."

53. On April 23, 2009, in Daniels v. Grima, the following exchange occurred between

Respondent and the Court:

MR. MONCIER: When are you going to put down the notice of charge, your Honor?

THE COURT: Mr. Moncier, I suggest for your own benefit that you wait until after the charge.

MR. MONCIER: I would like to have the notice of charge filed immediately, your Honor.

THE COURT: Ms. Flynn, draw up a citation for contempt as follows - - do you have something to write on? That Mr. Herbert S. Moncier met with the Court in a pre-trial conference on last Friday, which was the 17<sup>th</sup> of April. That during that conference Mr. Moncier inquired of the Court as to what question he could ask your potential jurors about insurance.

Following discussion with the Court and counsel, the Court told Mr. Moncier that the only questions the Court found were appropriate were questions where if he asked if a person had any work dealing with evaluations and claims, and that there were people who did that that were not connected with the insurance company.

So the Court thought the better way to do it was to ask, does anybody have any - do anything with insurance - no, excuse me, anything to do with adjustment or evaluations of claims. But the Court could not say it was inappropriate to ask in regard to doing that for an insurance company. But that was the only extent that jurors could be inquired about their work for an insurance company.

That attached to this citation, during the voir dire on the following Monday, not only did he ask a juror questions different from the instruction of the Court, but more specifically asked a potential juror on June (sic) 20, quote, do you have some premises insurance, like somebody injured in a home?

MR. MONCIER: It's do you sell, your Honor.

THE COURT: Mr. Moncier.

MR. MONCIER: Yes, sir.

THE COURT: When respond - - that question was responded to, proceeded to ask, when a person says that someone is injured in my home. At that point, the Court called Mr. Moncier to the bench and cited him for contempt. This is his formal notice that he did that action in direct violation of an Order of the Court, and that is contempt. That this matter would be set for hearing on June 12 on the Court's motion docket. Beginning at 9:00 a.m. And put my signature on it.

With that, address a letter to the Board of Professional Responsibility and to the chairman of that Board, say the Court hereby is forwarding to you a copy of a citation for contempt against a member of the local bar by the Court. Draft those for me, please.

Anything else, Mr. Moncier?

MR. MONCIER: Your Honor, was that Order given to me directly?

THE COURT: Yes, sir.

MR. MONCIER: While I was in the room?

THE COURT: Yes, sir.

MR. MONCIER: Okay. Secondly - -

THE COURT: Mr. Moncier, this isn't the time for you to question anything. Sit down. You've got the citation. You're going to get it. It's exactly like you asked me to do., even though I requested you not to make me do it.

54. On April 23, 2009, Judge Workman advised the Respondent the following:

THE COURT: Monday I told you I was going to cite you for contempt, and I told you I would give you notice and so on. At that point you began to tell me how I was not your friend, and you began to tell me how I had to have a prosecutor, and you began to tell how everything was going to be done if I wanted to go to the mat with this, was one of the phrases.

On Tuesday --Wednesday, excuse me--Tuesday -- Wednesday -- I can't remember now, I came back and explained to you the reason I said I was going to give you a notice and go (sic) to a hearing was not necessary, because what happened would constitute summary contempt. But the reason I did it was because of concern for you, you knowing

where that -- just an order by the Court citing you for contempt would cause you problems with other situations pending. And for that reason, I didn't do that, and you told me you wanted me to do that. You wanted me to go ahead.

In fact, you told me this morning the same thing, and I told you, please Mr. Moncier, beg you please wait until this afternoon and we had a chance to talk with Mr. Harwell here. I begged you not to do that. And you said you wanted it. So here is your Citation for Contempt, Mr. Moncier. Here is your Citation for Contempt, and let me make sure which one is the original and which one is the copy. Here is your Citation for Contempt, and here is a copy of the letter where I forwarded that to the Board of Professional Responsibility.

Further, in pertinent part, Judge Workman stated:

THE COURT:

The Court has noticed that your conduct has become more and more anti social. Your challenging of the Court, your actions have become more and more serious. The only reason I want to have this is for one reason, I begged you to make sure it's not because of anything that you can't control. I beg you not as -- okay, I'm not your friend, but as someone that is concerned about you. Not to find you did something wrong or not to punish you, but because I am concerned about you as a good member, a good lawyer. Your conduct is becoming more and more anti social, more and more, for instance, in this trial say -- having documents that you haven't read, citing the criminal rules as a cause for objections in a civil case. The diagram that Mr. Wigler introduced in the defendants Grimacs' deposition, referring to it as a diagram they supplied, just more and more things that indicate not the quality of the fine skilled attorney that you have been. And I am basically, fairly concerned about you. I know you don't consider me your friend, but please, I beg of you, consider trying to make sure if not for any other reason, and that's the only reason I wanted Mr. Harwell here. I didn't want him to represent you, but I wanted somebody else in the room that maybe can convince you, I don't -- think about this. Because you're talking about exhibits that don't apply, objecting because your client says they didn't know them when a person has given a discovery deposition that your office took.

55. The jury in Daniels v. Grimac returned a verdict for \$750,000 and a positive finding of punitive damages in favor of Respondent's client, Mr. Daniels.

56. A bifurcated hearing was held on punitive damages in Daniels v. Grimac.

57. On April 24, 2009, during the bifurcated punitive damages hearing in Daniels v. Grimal, defense counsel moved for a mistrial on the basis of Respondent asking questions regarding insurance and payment for compensatory medical bills.

58. The Court in Daniels v. Grimal overruled the defendant's motion for mistrial but stated:

THE COURT: I am warning you, okay, if it continues and you do not offer proof on these issues, his expenses, a question about it, but I'm warning you, you continue to go into these other fields, the Court will grant the Motion, okay?

59. On April 24, 2009, defense counsel in Daniels v. Grimal, renewed their motion for mistrial based upon Respondent's "interjection of insurance" . . . and "description of a letter that speaks to an investigation that your honor previously ruled was inadmissible."

60. In response to defense counsel's renewed motion for mistrial, the Court in Daniels v. Grimal, stated:

THE COURT: Again, Mr. Moncier, for the second time, your leash is out of the chain totally at this point, okay. Bring the jury back in.

61. Later in the April 24, 2009 hearing in Daniels v. Grimal, Respondent asked defendant Grimal the following question:

MR. MONCIER: Was the roof that you - in the condition it was on the day prior to June 24, 2006, in violation of the Knox County Code?

62. After Respondent's question to Mr. Grimal on April 24, 2009 in Daniels v. Grimal, Defense counsel moved for a mistrial and the Court granted a mistrial.

63. William Coley, an attorney licensed to practice law since 1985, testified the Respondent's conduct in Daniels v. Grimaldi was aggressive and was, "the most contentious behavior exhibited by an attorney."

64. Harry Ogden, an attorney licensed to practice law since 1976, testified that in Daniels v. Grimaldi, the Respondent was "aggressive and antagonistic" and "on occasions it seemed like Mr. Moncier tried to talk over Judge Workman."

65. William Banks, an attorney licensed to practice law since 1958, testified that the Respondent in Daniels v. Grimaldi was "angry, very loud, out of control, disrespectful and way off base."

66. William Banks also testified that during the trial he told Mr. Moncier that Mr. Moncier had "crossed the line" with the Judge.

67. The Court entered an Order and Findings in Daniels v. Grimaldi that the Respondent was in contempt.

68. In the Daniels Court's Findings, the Court found that the Respondent was correct that the Respondent had left chambers at the time the Court was asked about insurance at the April 17, 2009 pre-trial conference.

69. The Daniels Court further found:

THE COURT: It makes no difference if he [the Respondent] was present he has a duty to follow any direct decision by the Court about this subject.

70. The Court in Daniels v. Grima, found:

THE COURT: The Court finds no punishment for the contempt would be effective and therefore enters none. But that does not end the Court's concerns.

71. The Court in Daniels v. Grima further found:

THE COURT: Mr. Moncier repeatedly asked and tried to introduce and put in front of the jury the fact that a citation had been issued as to Mr. and Mrs. Grima because of the condition of the property. The citation was issued after the events in question. The Court granted the defendant Grima's Motion in Limine to exclude proof. There is direct authority that holds that not only is a citation not admissible, but even a guilty plea to the citation is not admissible as relevant evidence in a tort case. Mr. Moncier had no reasonable basis to continue to try to introduce the citation and his actions indicate his willingness to blatantly disregard the rulings of the Court. Mr. Moncier had been warned twice, when prior motions for mistrial were made and denied, that if he attempted to introduce the fact that this citation existed again it would result in his client having a compensatory damage award of \$750,000 being voided. At page 1087 of the transcript Mr. Moncier asked the question again resulting in the mistrial.

72. Judge Workman reported the Respondent to the Board of Professional Responsibility.

73. On at least two occasions during the hearing before the panel, when referring to his actions before Judge Greer and Judge Workman, Mr. Moncier testified that he had underestimated the size of the dog on the end of the chain that he had pulled.

74. The Petitioner did not call Judge Greer or Judge Workman to testify.

75. Judge Harold Wimberly of Knox County Circuit Court Division II, was called as a witness by the Respondent. Judge Wimberly testified that he was familiar with Mr. Moncier in the Courtroom. Judge Wimberly testified that he did not have any problems with Mr. Moncier's conduct and/or level of professionalism. Further, Judge Wimberly testified that he had reviewed

the transcript of the voir dire questions asked by Mr. Moncier, during the trial before Judge Workman. Judge Wimberly testified that he believed that the questions asked by Mr. Moncier during voir dire, pertaining to insurance, were appropriate. Judge Wimberly testified that Mr. Moncier, when appearing in Judge Wimberly's Court, is very prepared, has very good legal knowledge, does not file unmeritorious motions, and shows the "highest degree of professionalism."

76. Michael Vassar testified by video taped deposition. He testified that he was pleased with the legal defense that Herb Moncier gave him.

77. Mr. Vassar testified that he could not understand why if there were some conflicts with Grooms why Judge Greer would direct the Respondent to withdraw from representing Grooms.

78. John T. Milburn Rogers, a practicing attorney, was called to testify by the Respondent.

79. Mr. Rogers testified that he went to the U.S. Marshall's office after learning Respondent had been taken into custody.

80. Rogers testified to Respondents reputation for hard work and preparation; Respondent's dedication to his disabled son; Respondents outstanding knowledge of the law; Respondent's accomplishments in the law; Respondent's commitment to the law; and Respondent's excellence as a trial attorney.

81. Wade Davies, a practicing attorney, was called to testify by the Respondent.

82. Mr. Davies represented Michael Gunter in the trial in which Respondent represented Mr. Vassar.



83. Mr. Davies referred to Respondent as a legend among the criminal defense bar; praised Respondent for his thorough trial preparation; and explained that Respondent, through his unique motion practice would and did uncover information that other attorneys would simply not uncover.

84. Mr. Davies described Respondent's knowledge of the law as outstanding.

85. Randall Reagan, a practicing attorney, was called upon to testify by the Respondent.

86. Mr. Reagan testified that he had represented on appeal a co-conspirator of one of Respondent's clients, one Reginal Sudderth.

87. Mr. Reagan described Respondent's knowledge of the law to be great and that it appeared as if he possessed a photographic memory.

88. Mr. Reagan testified to the admiration Respondent had among the criminal defense bar in Tennessee and that Respondent was one of only four attorneys statewide that had received the Lifetime Achievement Award given in the name of the late Joe Jones by the Tennessee Association of Criminal Defense Attorneys.

89. Ann C. Short-Bowers, a practicing attorney, was called to testify by the Respondent.

90. Ms. Short-Bowers worked for Respondent for 17 years before leaving his employment to become a senior law clerk for Criminal Court of Appeals Judge Curwood Witt, which position she held for several years; and presently she is a practicing attorney with another firm.

91. Ms. Short-Bowers praised Respondent's work ethic and commitment to his clients.

92. Ms. Short-Bowers testified that Respondent is "the best trial attorney I have ever known."

93. Ms. Short-Bowers testified that on occasion Respondent has raised his voice in proceedings but Ms. Short-Bowers knows that Respondent has a hearing impairment.

94. Michael Whalen, a practicing attorney, was called to testify by the Respondent.

95. Mr. Whalen testified that during his own first murder trial he asked Respondent for help and Respondent took an entire Saturday to work with him in preparing for trial of Mr. Whalen's case.

96. Mr. Whalen testified that Respondent always made himself available to other attorneys for advice as to the law or to help in their practice.

97. Mr. Whalen testified that Respondent's work ethic, preparation and commitment to his clients is outstanding.

98. Greg Isaacs, a practicing attorney, was called to testify by the Respondent.

99. Mr. Isaacs was co-counsel with Mr. Moncier in a complex multiple serial murder charge between 1993 until the present.

100. Mr. Isaacs described Respondent's dedication to and knowledge of the law as being outstanding.

101. Mr. Isaacs described Respondents motion practice as being extensive and successful.

102. Mr. Isaacs related that a judge had removed Respondent for filing too many motions and an appellate court reinstated Respondent.

103. After Respondent was reinstated, one of the motions Respondent was removed for filing was reconsidered and resulted in four capital serial murder charges being dismissed.

### **III. CONCLUSIONS OF LAW**

1. The Board avers that “The Respondent’s simultaneous representation of Michael Vassar, Michael Gunter and Harold Grooms violates Rule 1.7 of the Rules of Professional Conduct.”

**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 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.

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 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 added*).

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 a 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.

2. The Board next contends that "the Respondent filing frivolous Motions and documents in USA v. Vassar and In re: Herbert S. Moncier violates Rule 3.1 of the Rules of Professional Conduct."

**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.

With regard to USA v. Vassar, there is proof that motions were filed after Respondent had been ordered not to do so by the court. However, there is also proof that the motion in question had been granted in response to another attorney's representation of a client in an unrelated matter, and accordingly cannot be considered frivolous. As for the other motions in both matters, the Panel does not find competent proof upon which to find that the Board has proved by the preponderance of the evidence that Respondent violated Rule 3.1.

3. The Board avers that "The Respondent's disobeying Judge Greer's Orders on November 17, 2006, in USA v. Vassar, violates Rule 3.4(c)) and 3.5(e) of the Rules of Professional Conduct.

**Rule 3.4. Fairness to the Opposing Party and Counsel.** - A lawyer shall not:

(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

**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.

Respondent had attempted to gain a continuance of Vassar's sentencing hearing on November 17, 2006 but had been denied by the court. Respondent's testimony was that the purpose for a continuance was so that he could further develop sentencing disparity between criminally accused who cooperated with the government and those who did not. Under these circumstances, Respondent was forced to proceed with Vassar's sentencing hearing at which time he raised the possibility of a conflict of interest and the desire that Vassar receive independent counsel, inconsistent with what had previously been presented to the court. After some exchange between the Respondent and the court, the court instructed Respondent to remain quiet and undertook to question Vassar about potential conflict directly in open court with an FBI agent in

charge of the investigation in the courtroom, to which Respondent objected and was ultimately held in contempt of court.

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.

Respondent knowingly disobeyed the orders of the court to remain quiet while the court questioned Vassar with regard to the conflict of Respondent representing both Vassar and Grooms by repeatedly addressing the court after being instructed to not interfere. Further, Respondent engaged in conduct intended to disrupt the proceeding before and under the authority of the court for the purpose of delaying Vassar's sentencing hearing to further pursue issues of sentencing disparity. Accordingly, Respondent's conduct on November 17, 2006 violated Rule 3.4(e) and 3.5(e) of the Rules of Professional Conduct.

4. The Board contends that "The Respondent's statement to Judge Greer on November 17, 2006, in USA v. Vassar, that the Respondent would sit and remain mute violates Rule 3.4 (c); 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct." Rule 3.4(e) and Rule 3.5(e) are set forth and in the preceding Paragraph 3.

**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;

Despite the exchange cited by the Board, Respondent did not in fact engage in the referenced conduct described such as to create an ineffective counsel defense to Vassar. Key to the exchange is the following:

THE COURT:           You telling me you're not just going to walk out of here this morning whether I let you withdraw or not?

MR. MONCIER:       Of course not.

The panel does not find proof beyond the preponderance of the evidence on this issue.

5. The Board contends that "The Respondent's interruptions of Judge Greer on November 17, 2006, in USA v. Vassar, violates Rule 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct." Both rules are stated in the immediately preceding paragraphs of this section.

For this issue, the Panel has reviewed and considered the transcript of the referenced court proceeding and the testimony of the Respondent, but did not have the benefit of proof in testimony from Judge Greer or an audio tape of the proceeding. Although there are instances in the transcript which could be indicative of interruptions of the court, with the proof presented, the Panel cannot conclude that Respondent violated the Rules of Professional Conduct by the preponderance of the evidence.

6. The Board contends that "The Respondent's pleadings attacking judicial officers in Stidham v. Hutchinson, violates Rule 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct." Both rules are stated in the immediately preceding paragraphs of this section.

At the hearing in this matter, the Panel was not presented with competent proof upon which to conclude by the preponderance of the evidence that the Respondent violated the rules as averred by the Board.

7. The Board avers that “The Respondent’s disobeying Judge Workman’s oral and written Orders in Daniels v. Grimac, violates Rule 3.4(c), 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct.” The cited rules are stated in the preceding paragraphs of this section.

There was a pretrial conference in the case of Daniels v. Grimac on April 17, 2009 during which the issue of asking questions pertaining to insurance during *voir dire* of the jury was specifically addressed. From the transcript of that proceeding introduced by Respondent as Exhibit 23 and uncontroverted testimony by the Respondent and other attorneys present during the hearing, the issue of questions pertaining to insurance to the jury was discussed at that pretrial hearing after the Respondent had departed, but according to the transcript and testimony of his associate David Wigler, Esquire, at Respondent’s specific instructions. The following exchange took place at the pretrial hearing:

MR. WIGLER: Yes, Herb needs clarification in voir dire about permissible questions concerning insurance.

THE COURT: I prefer it not be used at all.

MR. WIGLER: Owning stock in insurance companies.

THE COURT: They have nothing to do with it.

MR. WIGLER: Working as a claim adjuster.

THE COURT: If an objections made I would sustain an objection to all of those, except that last one. Have any of you ever worked to adjust claims. Have any of you ever by your employment been employed where for an insurance company or for the government or something, you handle claims made or you company, that’s the issue whether they handle or familiar with handling claims, not whether they work for an insurance company. (Emphasis added).

MR. WIGLER: Or own stock in one.

THE COURT: Has nothing to do with it.



MR. WIGLER: It could create a belief that [sic] have a personal interest.

THE COURT: Why? You don't know who the insurance company is. They couldn't possibly know whether --

MR. COLEY: --or whether there is one, Your Honor --

THE COURT: It will affect there stock or not. Or whether there's even insurance.

MR. WIGLER: Oh. I'm not saying in argument, or in evidence.

THE COURT: No. I'm talking about asking the question how's--the question is the qualification of the jurors in voir dire, and what about the fact that a juror owns some stock in an insurance company how will that tell us whether the juror [sic] qualified or unqualified.

MR. WIGLER: Well qualification is not the standards, do we want that juror presiding on the case.

THE COURT: How could that tell you --- prejudice against because there's no insurance company in this cases David.

MR. WIGLER: Well there is.

THE COURT: No there isn't. There is no insurance company as part of this case.

MR. WIGLER: Oh, this case okay.

THE COURT: They--they won't know and will never be told there is one. So if they own stock how they are going to be prejudiced against somebody if they don't know there's one in it.

MR. WIGLER: You know jurors thinks [sic] there's insurance.

THE COURT: Horse hockey. Your blowing smoke. Not but about claims that's a whole different issue. But I think the whole thing about insurance is totally that's not appropriate unless it relates to their qualifications of a juror and if you as saying that anybody that has insurance is bias and prejudice then that's everybody on the jury. Cause everybody out there owns an interest [sic] insurance company they pay premiums.

MR. WIGLER: Owning stock in insurance companies.

THE COURT: They have nothing to do with it.

MR. WIGLER: Working as a claim adjuster.

THE COURT: If an objections made I would sustain an objection to all of those, except that last one. Have any of you ever worked to adjust claims. Have any of you ever by your employment been employed where for an insurance company or for the government or something, you handle claims made or you company, that's the issue whether they handle or familiar with handling claims, not whether they work for an insurance company. (Emphasis added).

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MR. COLEY: --or whether there is one, Your Honor --

THE COURT: It will affect there stock or not. Or whether there's even insurance.

MR. WIGLER: Oh. I'm not saying in argument, or in evidence.

THE COURT: No. I'm talking about asking the question how's--the question is the qualification of the jurors in voir dire, and what about the fact that a juror owns some stock in an insurance company how will that tell us whether the juror [sic] qualified or unqualified.

Thereafter, at the trial in Daniels v. Grimac, the Respondent had the following exchange with a juror during *voir dire*:

MR. MONCIER: Does anyone work for an insurance company? You are Ms. --

JUROR: Linda Borne.

MR. MONCIER: What insurance company do you work for?

JUROR: I work at Travelers, just personal loans, auto and home.

MR. MONCIER: Do you have any premise insurance, like somebody injured in a home?

JUROR: I just sell insurance over the phone when they call in, for auto and home.

MR. MONCIER: When a person says that somebody is injured in my home –

The Respondent testified that despite his instruction to Mr. Wigler to inquire at the pretrial conference about insurance questions presented to the jury, and his tape recording of the proceeding in his absence, Respondent did not know what Judge Workman had instructed on the issue. Regardless of technical difficulties with the tape recording, Respondent was obligated to inquire and his lack of knowledge about any instruction from the court during his absence from the hearing was inexcusable neglect at best.

However, from the transcript of the pretrial conference it is unclear whether the court in fact had issued an oral order which the Respondent violated. The questions asked of the juror by the Respondent are further mitigated by consideration of the testimony before the Panel of Judge Harold Wimberly of Knox County Circuit Court Division II. Judge Wimberly testified that he had reviewed the transcript of the *voir dire* questions asked by Mr. Moncier, and that he believed that the questions asked by Mr. Moncier during *voir dire*, pertaining to insurance, were appropriate.

Accordingly, the Panel does not find by the preponderance of the evidence that the Respondent's action during *voir dire* alone violated the Rules of Professional Conduct.

The trial in Daniels v. Grimac resulted in a jury verdict for Respondent's client in the amount of \$750,000 for compensatory damages, and was bifurcated on the issue of punitive damages. On April 24, 2009, during the bifurcated punitive damages hearing in Daniels v. Grimac, defense counsel moved for a mistrial on the basis of Respondent asking questions

regarding insurance and payment for compensatory medical bills. The Court in Daniels v. Grimal overruled the defendant's motion for mistrial but stated:

THE COURT: I am warning you, okay, if it continues and you do not offer proof on these issues, his expenses, a question about it, but I'm warning you, you continue to go into these other fields , the Court will grant the Motion, okay?

On April 24, 2009, defense counsel in Daniels v. Grimal, renewed their motion for mistrial based upon Respondent's "interjection of insurance" . . . and "description of a letter that speaks to an investigation that your honor previously ruled was inadmissible." In response to defense counsel's renewed motion for mistrial, the Court in Daniels v. Grimal, stated:

THE COURT: Again, Mr. Moncier, for the second time, your leash is out of the chain totally at this point, okay. Bring the jury back in.

The Panel concludes by the preponderance of the evidence that the Respondent's repeated interjection of insurance issues into the proceedings during the punitive damages phase of the trial in Daniels v. Grimal violated Rule 3.4(c), 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct. Unlike the instance during *voir dire*, at this point during the trial 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.

Prior to trial, the court granted a Motion in Limine in Daniels v. Grimal to exclude proof regarding a citation for codes violation issued after Mr. Daniels' subject accident. After being repeatedly warned by the court about insurance questions, during the April 24, 2009 punitive damages phase of the trial in Daniels v. Grimal, the Respondent asked the following question of a witness:

MR. MONCIER: Was the roof that you - - in the condition it was on the day prior to June 24, 2006, in violation of the Knox County Code?

After Respondent's question, opposing counsel moved for a mistrial which the Court granted, and accordingly the jury verdict in favor of Respondent's client in the amount of \$750,000 for compensatory damages was voided.

Again, the Panel concludes by the preponderance of the evidence that the Respondent's conduct by asking questions knowingly disobeying the court's order violated Rule 3.4(c), 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct a second time during the trial in Daniels v. Grimal, and that Respondent's conduct directly resulted in the loss of a significant verdict for compensatory damages in favor of the Respondent's client.

8. The Board avers that "The Respondent's contentious and combative interactions with Judge Workman in Daniels v. Grimal, violates Rule 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct." The cited rules are stated in the preceding paragraphs of this section.

Unlike the interactions with Judge Greer during the sentencing hearing in USA v. Vassar, in the case of Daniels v. Grimal the Panel was presented proof in the form of an audio recording of the proceedings from which the demeanor and tone of the participants could be considered. Evidence in support of the Board's averments is most persuasive during the proceeding related to the criminal contempt charge by the court against the Respondent following the insurance questioning during *voir dire* detailed in the preceding paragraph of this section.

After Respondent's contempt citation in Daniels v. Grimal, the following exchange occurred between the Respondent and the Court during proceedings on April 23, 2009:

MR. MONCIER: When are you going to put down the notice of charge, your Honor?

THE COURT: Mr. Moncier, I suggest for your own benefit that you wait until after the charge.

MR. MONCIER: I would like to have the notice of charge filed immediately, your Honor.

THE COURT:

Ms. Flynn, draw up a citation for contempt as follows - - do you have something to write on? That Mr. Herbert S. Moncier met with the Court in a pre-trial conference on last Friday, which was the 17<sup>th</sup> of April. That during that conference Mr. Moncier inquired of the Court as to what question he could ask your potential jurors about insurance.

Following discussion with the Court and counsel, the Court told Mr. Moncier that the only questions the Court found were appropriate were questions where if he asked if a person had any work dealing with evaluations and claims, and that there were people who did that that were not connected with the insurance company.

So the Court thought the better way to do it was to ask, does anybody have any - - do anything with insurance - - no, excuse me, anything to do with adjustment or evaluations of claims. But the Court could not say it was inappropriate to ask in regard to doing that for an insurance company. But that was the only extent that jurors could be inquired about their work for an insurance company.

That attached to this citation, during the voir dire on the following Monday, not only did he ask a juror questions different from the instruction of the Court, but more specifically asked a potential juror on June (sic) 20, quote, do you have some premises insurance, like somebody injured in a home?

MR. MONCIER: It's do you sell, your Honor.

THE COURT: Mr. Moncier.

MR. MONCIER: Yes, sir.

THE COURT: When respond - - that question was responded to, proceeded to ask, when a person says that someone is injured in my home. At that point, the Court called Mr. Moncier to the bench and cited him for contempt. This is his formal notice that he did that action in direct violation of an Order of the Court, and that is contempt. That this matter would be set for hearing on June 12 on the Court's motion docket. Beginning at 9:00 a.m. And put my signature on it.

With that, address a letter to the Board of Professional Responsibility and to the chairman of that Board; say the Court hereby is forwarding to you a copy of a citation for

contempt against a member of the local bar by the Court.  
Draft those for me, please.

Anything else, Mr. Moncier?

MR. MONCIER: Your Honor, was that Order given to me directly?

THE COURT: Yes, sir.

MR. MONCIER: While I was in the room?

THE COURT: Yes, sir.

MR. MONCIER: Okay. Secondly - -

THE COURT: Mr. Moncier, this isn't the time for you to question anything.  
Sit down. You've got the citation. You're going to get it. It's  
exactly like you asked me to do., even though I requested  
you not to make me do it.

After the forgoing had transpired on April 23, 2009, Judge Workman later advised the  
Respondent the following:

THE COURT: Monday I told you I was going to cite you for contempt, and  
I told you I would give you notice and so on. At that point  
you began to tell me how I was not your friend, and you  
began to tell me how I had to have a prosecutor, and you  
began to tell how everything was going to be done if I  
wanted to go to the mat with this, was one of the phrases.

On Tuesday--Wednesday, excuse me--Tuesday--Wednesday  
--I can't remember now, I came back and explained to you  
the reason I said I was going to give you a notice and go (sic)  
to a hearing was not necessary, because what happened  
would constitute summary contempt. But the reason I did it  
was because of concern for you, you knowing where that--  
just an order by the Court citing you for contempt would  
cause you problems with other situations pending. And for  
that reason, I didn't do that, and you told me you wanted me  
to do that. You wanted me to go ahead.

In fact, you told me this morning the same thing and I told  
you, please Mr. Moncier, beg you please wait until this  
afternoon and we had a chance to talk with Mr. Harwell here.  
I begged you not to do that. And you said you wanted it. So  
here is your Citation for Contempt, Mr. Moncier. Here is

your Citation for Contempt, and let me make sure which one is the original and which one is the copy. Here is your Citation for Contempt, and here is a copy of the letter where I forwarded that to the Board of Professional Responsibility.

Further, in pertinent part, Judge Workman stated:

THE COURT:

The Court has noticed that your conduct has become more and more anti social. Your challenging of the Court, your actions have become more and more serious. The only reason I want to have this is for one reason, I begged you to make sure it's not because of anything that you can't control. I beg you not as -- okay, I'm not your friend, but as someone that is concerned about you. Not to find you did something wrong or not to punish you, but because I am concerned about you as a good member, a good lawyer. Your conduct is becoming more and more anti social, more and more, for instance, in this trial say -- having documents that you haven't read, citing the criminal rules as a cause for objections in a civil case. The diagram that Mr. Wigler introduced in the defendants Grimacs' deposition, referring to it as a diagram they supplied, just more and more things that indicate not the quality of the fine skilled attorney that you have been. And I am basically, fairly concerned about you. I know you don't consider me your friend, but please, I beg of you, consider trying to make sure if not for any other reason, and that's the only reason I wanted Mr. Harwell here. I didn't want him to represent you, but I wanted somebody else in the room that maybe can convince you, I don't -- think about this. Because you're talking about exhibits that don't apply, objecting because your client says they didn't know them when a person has given a discovery deposition that your office took.

The Court entered an Order and Findings in Daniels v. Grimal that the Respondent was in contempt. The Court found that the Respondent was correct in his assertions that the Respondent had left the April 17, 2009 pretrial conference before the Court was asked about insurance. The Court further found:

THE COURT:

Mr. Moncier repeatedly asked and tried to introduce and put in front of the jury the fact that a citation had been issued as to Mr. and Mrs. Grimal because of the condition of the property. The citation was issued after the events in question.



The Court granted the defendant Grimaac's Motion in Limine to exclude proof. There is direct authority that holds that not only is a citation not admissible, but even a guilty plea to the citation is not admissible as relevant evidence in a tort case. Mr. Moncier had no reasonable basis to continue to try to introduce the citation and his actions indicate his willingness to blatantly disregard the rulings of the Court. Mr. Moncier had been warned twice, when prior motions for mistrial were made and denied, that if he attempted to introduce the fact that this citation existed again it would result in his client having a compensatory damage award of \$750,000 being voided. At page 1087 of the transcript Mr. Moncier asked the question again resulting in the mistrial.

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. Grimaac 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. Grimaac, the Respondent was "aggressive and antagonistic" and "on occasions 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. Grimaac 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 Panel finds that the evidence preponderates in favor of a finding that the Respondent's conduct during the trial of Daniels v. Grimaac 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.

9. 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(c) and Rule 3.5(e); and that during the case of Daniels v. Grimaldi the Respondent repeatedly violated Rule 3.4(c), 3.5(e) and 8.4(a)(d) of the Rules of Professional Conduct.

Further, the Panel finds that the Respondent's violations resulted in injury or potential injury to his clients and interfered with the related legal proceedings.

#### **IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

1. The Hearing Panel finds that the Respondent's dishonest or selfish motive in representing multiple clients, Michael Vassar, Michael Gunter, and Harold Grooms, is an aggravating circumstance.

2. The Hearing Panel finds that the Respondent's pattern of misconduct and multiple offenses, as evidenced by his behavior during United States v. Vassar and Daniels v. Grimaldi to be aggravating circumstances.

3. The Hearing Panel finds that the Respondent's refusal to acknowledge the wrongful nature of his conduct to be an aggravating circumstance. During the hearing before this Hearing Panel, the Respondent testified that he had no conflict of interest in representing multiple clients, Michael Vassar, Michael Gunter, and Harold Grooms. Further, the Respondent testified before this Hearing Panel that he "still believes" that he had a duty to represent his client, Michael Vassar, and a duty to clarify Judge Greer's November 17, 2006 Order to him of "Mr. Moncier, one more word and you're going to jail."

4. The Hearing Panel finds that the Respondent's substantial experience in the practice of law of nearly thirty (30) years to be an aggravating circumstance.

5. The Hearing Panel finds that the absence of a prior disciplinary record for the Respondent to be a mitigating circumstance.

6. The Hearing Panel finds that the Respondent's full and free disclosure to the Disciplinary Board and cooperative attitude toward the Disciplinary Board and the Hearing Panel to be a mitigating circumstances.

7. The Hearing Panel finds that the imposition of other penalties or sanctions in the form of Judge Collier's Memorandum and Order In re: Herbert S. Moncier which suspended Respondent from the practice of law in the United States District Court for the Eastern District of Tennessee for a period of seven (7) years, with a maximum of five (5) years being active suspension and the remaining probation, including the possibility of early reinstatement, to be a mitigating circumstance.

#### **V. SPECIFICATION OF DISCIPLINE**

Pursuant to Rule 9 §8.4 of the Rules of the Supreme Court of Tennessee, having found one or more grounds for discipline of the Respondent, the Hearing Panel specifies the following discipline as appropriate:

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.

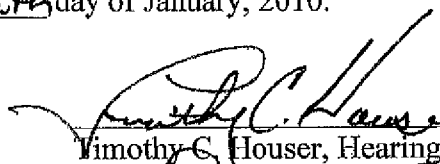
3. That pursuant to Rule 9 § 8.5 of Rules of the Supreme Court of Tennessee, Respondent's remaining suspension, after the first forty five (45) days, be stayed in conjunction with a period of ten and one half (10 ½) months of probation.

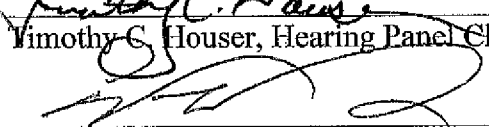
4. That the following conditions are imposed upon the Respondent's probation:

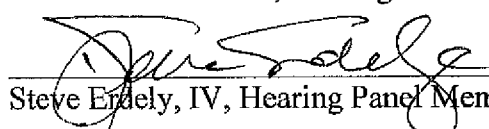
(a) That Respondent be required to complete an additional twelve (12) hours of ethics continuing legal education over and above the required three (3) hours of ethics CLE during his period of probation; and

(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.

Respectfully submitted this 12<sup>th</sup> day of January, 2010.

  
Timothy C. Houser, Hearing Panel Chair

  
Weldon E. Patterson, Hearing Panel Member

  
Steve Erdely, IV, Hearing Panel Member