

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

JOSUE DAVID HERNANDEZ

P.O. Box 838

Denver, CO 80201-0838

Missouri Bar No. 61215

Respondent.

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Supreme Court No. SC98176

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Respondent Josue David Hernandez was admitted to the Missouri Bar in 2008. He has no Missouri disciplinary history. Respondent is also admitted to the Colorado and New York bars.

Respondent's partner in a law firm filed a case in the Colorado federal district court in June of 2014. Respondent entered his appearance in the case on October 17, 2014. The case was styled *Snyder v. Acord Corp.*, 1:14-cv-01736-JLK. **App. 3-146.** The case was a civil suit against more than one hundred insurance companies seeking damages for denying claims made under homeowners' insurance policies. The complaint also alleged antitrust and RICO violations. **App. 164-165.**

In January of 2016, the district court granted the defendants' motion to dismiss *Snyder v. Acord Corp.* for failure to state a claim. **App. 165.** In February of 2016, Respondent's partner, who had initially filed the case, was allowed to withdraw from the case. Respondent did not move to withdraw and stayed in the case as the sole attorney representing the approximately twenty plaintiffs. **App. 165-166.** Respondent's job with the law firm ended when the *Snyder* case was dismissed. **App. 162.**

Respondent filed a notice of appeal from the dismissal order. Respondent attached a 72-page brief to the notice of appeal. **App. 271.**

In May of 2017, the Tenth Circuit Court of Appeals issued an order requiring Respondent to show cause why he should not be sanctioned for unreasonably increasing the cost of litigation. **App. 201-205.** In the order, the court cited the following as illustrative of the conduct that concerned the court: after a January 29, 2015, status

conference during which the district court reminded counsel of their obligation to facilitate the efficient and expeditious resolution of the case and warning that the court could strike “prolix, redundant, meandering pleadings,” Respondent filed a 105-page post judgment motion that included 840 pages of exhibits. Less than a month later, Respondent “attached an unauthorized 72-page brief to the notice of appeal” he filed in the *Snyder v. Acord* case. **App. 202.** In response to a motion to strike the brief, Respondent wrote that the brief was a “means to address [all of the issues Appellants wish to raise in these appeals] while keeping [Appellants’] principle [sic] brief to the typical length.” **App. 203.**

The show cause order also cited Respondent’s filing of a motion for sanctions in which he made “extensive substantive argument regarding the issues raised in the defendant-appellees’ answer brief.” The court noted it denied the motion for sanctions, after which Respondent filed a “substantially similar motion,” which the court denied. “Undeterred,” Respondent filed “yet another motion for sanctions.” The court thereafter “cautioned Mr. Hernandez that his continued filing of documents that are not expressly permitted by the applicable rules” would result in the issuance of a show cause order. **App. 203.**

The court’s show cause order recites the following as “additional instances of Mr. Hernandez unreasonably increasing the cost of litigation and/or failing to abide by the rules and directives of the court”: Respondent filed two “notice of errata” after the court notified him of the proper procedure to follow in requesting permission to correct typographical errors, i.e., a motion for leave to file a corrected brief. Respondent filed a petition for rehearing that included nearly 400 pages of exhibits that had already been submitted to the

court as attachments to a previously filed motion. Respondent filed an unauthorized sur-reply to a motion for appellate fees, which the court ordered stricken. **App. 203-204.**

Respondent Hernandez filed a response to the show cause order. **App. 206-227.**

The Tenth Circuit thereafter issued, on July 3, 2017, a sanctions order admonishing Respondent “that the manner in which he has prosecuted these appeals, as detailed in the Order, is inconsistent with the standards of practice required of attorneys admitted to appear before this court.” **App. 228-230.**

Respondent thereafter filed with the United States Supreme Court a petition for writ of certiorari from the Tenth Circuit’s admonishment. **App. 231-241.** Respondent raised the issues of Due Process, the First Amendment, and the alleged bias of Tenth Circuit judges in his petition for writ of certiorari. **App. 271 (T. 67).** The writ was not granted by the United States Supreme Court. **App. 271 (T. 67-68).**

A reciprocal disciplinary action was initiated by Colorado bar authorities following the Tenth Circuit’s public admonishment of Respondent. Colorado disciplinary authorities filed a motion for summary judgment in the case, arguing the Tenth Circuit’s order constituted a final adjudication of misconduct and there were no disputed issues of material fact. **App. 242.** Respondent participated in the Colorado disciplinary case by filing pleadings, including an answer to the complaint, an amended answer, a second verified and amended response to the motion for summary judgment, and an amended sur-reply to the motion for summary judgment. **App. 170-171.** Respondent was publicly censured by order of the Colorado Presiding Disciplinary Judge for his conduct in the Tenth Circuit.

App. 242-256. Respondent appealed the order of censure to the Colorado Supreme Court, which affirmed the decision without opinion. **App. 183.**

Missouri's Office of Chief Disciplinary Counsel sent Respondent a letter of admonition dated January 10, 2019, for violation of Rule 4-3.4(c) in that he attached a 72-page document to the notice of appeal he filed in the *Snyder v. Acord Corp.* case in an attempt to circumvent the page limitations for federal appellate briefs. **App. 259-260.** Respondent rejected the admonition. **App. 173.** An Information was thereafter filed, in accordance with Rule 5.11(b), charging Respondent with a violation of Rule 4-3.4(c).

A hearing over parts of two days followed. An issue arose regarding the scope of the proceeding and the relevance of Exhibits A through KKKKK, offered by Respondent. The parties were ordered to brief their respective positions on the scope of the proceedings in light of *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997). The disciplinary hearing panel denied admission of the exhibits but allowed Respondent to make an offer of proof regarding their admissibility.

On August 22, 2019, the disciplinary hearing panel issued its decision. **App. 261-267.** The panel concluded Respondent violated Rule 4-3.4(c) and recommended that the Court reprimand Respondent. **App. 261-267.** The panel noted in its decision that the Colorado federal district court ordered Respondent, under 28 U.S.C. § 1927, to pay the defendants' legal fees. The order, issued on January 24, 2019, also made Respondent's clients liable for the fees, which exceed one million dollars. The district judge stated that Mr. Hernandez "has without a doubt multiplied these proceedings unreasonably and vexatiously. Examples of this behavior are his refusal to acknowledge that the complaint

was deficient under Federal Rule of Civil Procedure 8, his incessant filing of absurdly lengthy and legally incorrect briefs, and his insistence on pursuing the case even after my dismissal order.” *Snyder v. Acord Corp.*, 1:14-cv-01736. **App. 277-298.** Respondent and his clients appealed the fee award to the Tenth Circuit, where the matter is currently pending.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD REPRIMAND RESPONDENT BECAUSE HE KNOWINGLY DISOBEYED THE FILING RULES OF THE FEDERAL COURTS IN THAT HE ATTACHED A 72-PAGE BRIEF TO A NOTICE OF APPEAL AND OTHER UNAUTHORIZED AND UNREASONABLY LENGTHY PLEADINGS AFTER HE HAD BEEN WARNED NOT TO DO SO.

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997)

Snyder v. Acord Corp., 1:14-cv-01736-JLK

Rule 4-3.4(c)

ARGUMENT

I.

THE SUPREME COURT SHOULD REPRIMAND RESPONDENT BECAUSE HE KNOWINGLY DISOBEYED THE FILING RULES OF THE FEDERAL COURTS IN THAT HE ATTACHED A 72-PAGE BRIEF TO A NOTICE OF APPEAL AND OTHER UNAUTHORIZED AND UNREASONABLY LENGTHY PLEADINGS AFTER HE HAD BEEN WARNED NOT TO DO SO.

In May of 2017, the United States Court of Appeals for the Tenth Circuit issued an order requiring Respondent to show cause why he should not be disciplined pursuant to Tenth Circuit rules due to Respondent's pattern of filing what had been described as prolix, redundant, and meandering pleadings, thereby unreasonably increasing the cost of litigation. The court noted that Respondent ignored the district court's repeated admonitions to keep his pleadings to a reasonable length. Significantly, the Tenth Circuit cited Respondent's conduct at the district court level not as a basis for the imposition of a sanction by the Tenth Circuit, but, rather, to document Mr. Hernandez's knowledge that his conduct was unreasonably increasing the cost of litigation in that he was failing to abide by the rules and directives of the courts.

As further examples of filings the court found objectionable, the Tenth Circuit order noted that Respondent filed three successive motions for sanctions against opposing counsel, motions that were not expressly permitted by the rules. Respondent filed "errata notices" that were not the proper procedural mechanism for correcting briefs. He filed a

petition for rehearing with four hundred pages of attached exhibits that had already been filed with the court as attachments to an earlier filed motion.

The Tenth Circuit Court of Appeals thereafter, on July 3, 2017, admonished Respondent “that the manner in which he has prosecuted these appeals, as detailed in the Order, is inconsistent with the standards of practice required of attorneys admitted to appear before this court.” The court cautioned Respondent that “further disregard for the applicable rules and directives of this court will result in the imposition of further discipline.”

There is no dispute as to the facts underlying the Tenth Circuit’s admonishment. Respondent does not and has never denied filing the pleadings described in the Tenth Circuit’s May 26 and July 3, 2017, orders. Further, the doctrine of offensive non-mutual collateral estoppel precludes Respondent Hernandez from relitigating the factual basis for the Tenth Circuit Court of Appeals’ disciplinary order. *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), *In re Carey and Danis*, 89 S.W.3d 477 (Mo. banc 2002). In both of those Missouri Supreme Court cases, the Court expressly found that the respondent attorneys were precluded from relitigating in their Missouri disciplinary proceedings the factual bases for federal sanctions imposed for the attorneys’ conduct while litigating in federal courts. That is the posture of this case – Informant is seeking discipline for conduct, already factually established, committed by Respondent while he was litigating in federal court.

Respondent acknowledged in his response to the order to show cause that he attached 72-page brief to the notice of appeal in an effort to have the merits considered while keeping the length within page limits prescribed by the rules. The court found it

“troubling” that Respondent “either does not understand or refuses to acknowledge that the presentation of merits arguments outside of the briefing expressly permitted by the applicable rules” violates those very rules. **App. 229.**

Rule 4-3.4(c) provided (in 2017) in relevant part as follows: “A lawyer shall not knowingly disobey an obligation under the rules of a tribunal.” Because Respondent had been warned repeatedly, by both the Tenth Circuit and by the district court in the underlying litigation, that his filings were well outside the boundaries of the rules and unreasonably increased the cost of the litigation, Respondent’s mental state was, at the least, negligence, if not knowing. He caused injury to the legal system by necessitating an outsized expenditure of judicial and opposing party resources not only in the federal courts, but also the Colorado and Missouri disciplinary systems. Respondent violated the rule prohibiting knowing violation of obligations under court rules. Further, there is a possibility that Respondent’s clients will be legally obligated to pay the attorney fees incurred by the insurance companies in the underlying federal litigation, depending on the outcome of their appeal of that issue. Disciplinary counsel recommends that the Court reprimand Respondent.

CONCLUSION

Perseverance is generally a virtue, but not when an attorney crosses the line of a court's filing and briefing parameters and thereby subjects not only himself but his clients to sanctions. Respondent was warned many times about his conduct but continued to file excessive pleadings contrary to court rules. He violated Rule 4-3.4(c), conduct for which he should be reprimanded.

Respectfully Submitted


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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2019, the Informant's Brief was sent to Respondent's counsel via the Missouri Supreme Court e-filing system to:


Sharon K. Weedin

CERTIFICATION OF COMPLIANCE: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. The brief was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 2,328 words, according to Microsoft Word, which is the word processing system used to prepare this brief.


Sharon K. Weedin