IN THE SUPREME COURT OF MISSOURI
EN BANC

IN RE:	)	
	)	
JOSUE D. HERNANDEZ	)	SUPREME COURT NO.: SC98176
P.O. Box 838	)	
Denver, CO 80201-0838	)	
	)	
Missouri Bar No. 61215	)	
	)	
Respondent.	)	

RESPONDENT'S AMENDED BRIEF

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STATEMENT OF FACTS PURSUANT TO RULE 84.04(f)

Respondent Josue David Hernandez was admitted to the Missouri bar in 2008. R. 101:21-23; A160:21-23.. Respondent is also admitted to the Colorado and New York bars. R. 99:13-18; A158:13-18. He has no prior Missouri disciplinary history. *Id.*; R. 28 ¶ 4.

Respondent's partner in a law firm filed a case in the Colorado federal district court in June of 2014. R. 104:12-22; A163:12-22. The case was styled *Snyder v. ACORD,* 1:14-cv-01736-JLK. *Id.*; R. 154-297; A3-A146. The case was a civil suit alleging antitrust and RICO violations against more than one hundred insurance companies and sought damages on behalf of approximately 20 plaintiffs for the denial of claims made under homeowners' insurance policies in that context. R. 105:4-19:5; A164:4-A165:5. Respondent entered his appearance in the case on October 17, 2014. R. 104:12-18; A163:12-18.

It is uncontroverted that the *Snyder v. ACORD* litigation was complex, involving more than 500 defense attorneys, and that the defense in that case filed more pleadings, and in greater volume, than the plaintiffs. R. 99:19-20; R. 100:4-10; A158:19-20; A159:4-10.

On January 29, 2015, after the defendants submitted over 670 pages of motions to dismiss in an admittedly coordinated effort, a status conference was held during which the district court reminded all counsel of their obligation to facilitate the efficient and expeditious resolution of the case and warning that the court would strike "prolix, redundant, meandering pleadings." R. 304; A202; R. 3650-3656; RESPONDENT'S EX. VVVV (R. 2313). The motions to dismiss were not stricken. *See id.* It is also

uncontroverted that there was dishonesty in the defense's filings. R. 347-348; A213-A214.

After plaintiffs filed opposition to the motions, which was hundreds of pages *less* in volume than the defendants' filings, the defendants submitted over 150 [160] pages of coordinated reply briefings. R. 503:17-24; R. 3952-3953; A273 (T. 76:17-24).

In January of 2016, the district court granted the defendants' motion to dismiss *Snyder v. ACORD Corp.* for failure to state a claim. R. 106:10-21. As part of the uncontroverted irregularities alleged, Respondent submits that the district court went against 100 rules of precedent in its determination. R. 304; *cf.* RESPONDENT'S EX. IIIII (R. 3631-3636); RESPONDENT'S EX. AAAAA (R. 2475-2479). In February of 2016, Respondent's partnership, which initially filed the case, withdrew from the case and his partnership at the law firm ended after the *Snyder* case was dismissed. R. 103:17-20; R. 106:18-21. Respondent stayed in the case as the sole attorney representing the plaintiffs. R. 106:22-107:1.

Respondent subsequently filed a 105-page post judgment motion, which included 741 pages of evidentiary exhibits, identifying over 100 precedents contradicted by the district court, evidence showing that the district court's characterizations of allegations as conclusory were actually impermissible findings of fact, and demonstrations the defendants had lied to the tribunal. R. 304; A202; *cf.* RESPONDENT'S EX. IIIII (R. 3631-3636); RESPONDENT'S EX. AAAAA (R. 2475-2479). It was stricken by the district court, and plaintiffs were given only 10 pages to present both evidence and legal argument in their post-judgment motion. R. 304; A202. The district court also referred to a direct

admission by ACORD'S CEO—*that ACORD participants should communicate to other stakeholders in the insurance industry that ACORD would shut them down if they did not adopt ACORD'S private standards*—as vague statements about standards. R. 1973; R. 2580-2581; R. 2477.

By comparison, the defendants filed a motion with roughly 2,000 pages of exhibits in the case, which was not stricken or penalized in any way. *See* R. 3962-3964; RESPONDENT'S EX. HHHHH (R. 3628-3630). No criteria separating the treatment that the defendants' filings received from the treatment that the plaintiffs' filings received is evident on the record. Respondent's account of these irregularities in the district court proceedings is uncontroverted. R. 93:5-10; A152:5-10; INFORMANT'S EX. D (R. 308-310); A228-A230. It is also uncontroverted that the district court judge's procedural rules specifically noted that there were no page or word limits for filings in his court. *See* footnote 9, *infra*. The rule in question specifically recognizes that it is "impossible" to quantify such limits beforehand, especially without reference to the issues and content that a filing actually concerned. *See id*. It is uncontroverted that the parties received disparate treatment. *See id*. As a matter of record, the district court judge was represented in a concurrent matter by counsel for one of the most significant defendants in the litigation. R. 4061.

It is uncontroverted that, pursuant to C.R.S. § 13-17-201, defendants in Colorado are awarded attorneys' fees in strict liability when a case is dismissed. R. 507:12-508:10; A274 (T. 80-12-81:10). Respondent, thus, filed a notice of appeal from the dismissal order. R. 107:2-8, R. 494:2-5. It is also uncontroverted that the rules require a notice of

appeal to be filed in the district court, as opposed to the Tenth Circuit. R. 503:8-9; R. 93:22-25. Respondent attached a 72-page appendix to the notice of appeal. R. 494:2-8. It is uncontroverted that the district court did not strike the 72-page appendix. R. 503:8-9; A273 (T. 76:8-9).

The defendants-appellees filed a motion to strike the appendix in the Tenth Circuit, and it is uncontroverted that the Tenth Circuit considered Respondent's legal and factual bases for the 72-page appendix on two occasions prior to May of 2017 without ever treating the filing as warranting discipline. R. 115:12-20; R. 117:10-36-12; A174:12-20; A176:10-A182:12. Notably, one of these instances was a final determination. *See id*. Referencing Supreme Court precedent and Congressional authority, Respondent noted that such a filing was permitted and even contemplated by the rules. *See id*.; RESPONDENT'S EX. HHH (R. 1293-1309). Among other points, Respondent noted that the filing was useful to the Court as an efficient means to preserve the ability to address the merits on the record—*especially in the event that Respondent were not be able to perfect the plaintiffs-appellants' appeal*—while practically ensuring that any principal brief ultimately filed in the case could easily be kept to a typical length. *See id*.

It is also uncontroverted that defendants-appellees lied on the record in their joint brief on appeal. R. 347-348; A213-A214. Respondent filed a motion for sanctions to address the dishonesty, which—*after an initial review by a panel of the Tenth Circuit*—was referred to panel determining the merits of the appeal. *Id*.; RESPONDENT'S EX. MMM (R. 1403-1424); RESPONDENT'S EX. QQQQ (R. 1932).

It is uncontroverted that Respondent subsequently discovered that judges on the merits panel had relationships connecting them to some of the defendants-appellees, including that the judges had received campaign contributions from, and worked as lobbyists for, parties concerned in the litigation. R. 342; R. 353-354; A208; A219-A220; R. 328; RESPONDENT'S EX. JJJJ (R. 539-556); RESPONDENT'S EX. CCCC (R. 1646-1682); RESPONDENT'S EX. XX (R. 1016-1026); RESPONDENT'S EX. LLL (R. 1378-1402). It is also uncontroverted that these relationships were discovered shortly after the merits panel denied the motion for sanctions without any explanation. *Id*.; R. 341-342 n.1; A207-A208. Respondent submitted that it is against clear governing precedent to deny such a motion without an explanation of specific findings, and Informant has not controverted this issue. *Id*. Respondent, thereafter, filed a motion for the panel judges to recuse themselves. R. 353-354. As required by governing substantive law, the motion was based on evidentiary exhibits meeting the criteria of the Federal Rules of Evidence. *Id*. Respondent also filed subsequent motions for sanctions on a distinct rule of law, referencing the merit panel's failure to provide any explanation for the denial and to comply with other clear precedent. *Id*. It is uncontroverted that those motions were also denied without explanation. *Id*.

It is uncontroverted that Respondent filed a complaint against the panel judges on May 4, 2019. R. 354 n.7; A220. It is also uncontroverted that Respondent later filed documents specifically permitted by the rules of procedure, which were then stricken by the panel on grounds that: do not appear in the actually procedural rules; that conflict with the procedural rules; and that also lack identifiable objective criteria. *See id*.; R. 347

n.4; A213. It is uncontroverted that the stricken documents contained clear and convincing evidence of misconduct and dishonesty by the defendants-appellees with whom the panel judges had relationships. R. 359 n.13; A225; R. 123:1-2.

In striking these filings, the panel purportedly "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. R. 305; A203. It is uncontroverted that the panel also threatened Respondent at that time with disbarment and sanctions under a number of rules, such as Fed.R.Civ.P. 11 and 10th Cir. R. 45, which were not even conceivably implicated. R. 358; A207.

Respondent did not file any documents following this purported caution. R. 355-356, and 359 n.13.

On May 26, 2017, the merits panel, nonetheless, issued a *sua sponte* order requiring Respondent to show cause why he should not be sanctioned on the charge of unreasonably increasing the cost of litigation. INFORMANT'S EX. C (R. 303-307).

Although the panel specifically noted in the charging document that "the underlying district court proceedings [would] not form the basis for any sanctions or discipline imposed by" the Tenth Circuit,[1] it noted the following, with regard to the district court proceedings, before addressing the issues that would come within the scope of the order to show cause: (**1**) the January 29, 2015 status conference where the district court warned all counsel that prolix or voluminous pleadings would be stricken; (**2**) that,

[1] R. 304 n.1; A202 n.1.

subsequently (more than a year later), Respondent filed a 105-page post judgment motion that was stricken by the district court, which the Tenth Circuit represented as including 840 pages of evidentiary exhibits (Respondent has actually provided evidence that the evidentiary exhibits were less than the amount listed); (**3**) that, less than a month after the post judgment motion was stricken, Respondent attached the appendix to the notice of appeal, which the Tenth Circuit characterized as "an unauthorized 72-page brief"; and (**4**) the Tenth Circuit characterized Respondent's references to the "merits" as "all of the issues Appellants wish to raise in these appeals," with regard to the appendix to the notice of appeal. R. 304-305; A202-A203.

As to the issues that would actually be determined as charges on the order,[2] *i.e.*, alleged "instances of Mr. Hernandez unreasonably increasing the cost of litigation and/or failing to abide by the rules and directives of the court in these appeals," the Tenth Circuit panel cited the following six issues:

First, that Respondent filed a motion for sanctions pursuant to 10th Cir. R. 46.5(D) on November 21, 2016, in which he made "extensive substantive argument regarding the issues raised in the defendant-appellees' answer brief." R. 305; A203.

Second, that, after the panel denied the motion for sanctions in April 6, 2017, Respondent filed a "substantially similar motion" pursuant to 28 U.S.C. § 1927, which the court denied. R. 305; A203.

[2] It should be noted that, as a charging document, the order to show cause is, categorically, not a final determination of any facts alleged therein.

Third, that "[u]ndeterred," Respondent filed "yet another motion for sanctions" after that denial, and that the panel thereafter purportedly "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. R. 305; A203.

Fourth, that Respondent had filed two "notice of errata" after the Clerk notified him of the proper procedure to follow in requesting permission to correct typographical errors in appellate *briefs*, *i.e.*, a motion for leave to file a corrected *brief*, as opposed to a notice of errata.

Fifth, that Respondent filed a petition for rehearing *en banc* that included nearly 400 pages of exhibits that he had already submitted to the panel as attachments to the previously filed motion requesting that the panel judges recuse themselves. R. 305; A203.

Sixth, that Respondent filed what the panel identified as an unauthorized sur-reply to a motion for appellate fees, and which the court previously ordered stricken. R. 305-307; A203-A205.

Respondent Hernandez filed a response to the show cause order in which it is uncontroverted that he provided colorable and valid bases for each of the points identified above. INFORMANT'S EX. H (R. 340-360; A206-A227); R. 95:21-23. Respondent also noted that the panel was governed by precedent defining what was “unnecessary” in this specific context, and that the governing standard did not allow for sanctions on the charged offenses—particularly as the panel had not identified any rule requiring specific procedural permission for generally permitted filings, such as motions, or requiring leave when a rule does not specifically state that leave is required. R. 346; A212. It is

uncontroverted that Respondent identified where the panel's actions conflicted with governing law or other authority in its charges that the points identified above were actually violations of court rules or obligations, including treating notices of errata as prohibited even though the Clerk had directed Respondent to file notices of errata in circumstances not involving *briefs* and treating a particular reply that is specifically permitted by Fed.R.App.P. 27(a)(3)(B) as a sur-reply. R. 347-354; RESPONDENT'S EX. JJJ (R. 1316-1373). Respondent also identified, and presented, a presumption of retaliation that arose because the panel did not treat Respondent's actions with punitive animus until he moved for recusal and identified the panel's failure to apply clear law. R. 354-359; A220-A225. Furthermore, Respondent raised due process defenses based on the appearance bias and the presumption of retaliation that followed an exercise of speech and petition that was clearly protected under the First Amendment. R. 341-342; A207-A208. Similarly, Respondent noted that the panel's failure to provide any rule or criteria for its exercise of punitive animus, particularly in circumstances where the position the panel advocated—*without a stated legal authority*—contravened the plain language of precedent. R. . 341-342 n.1; A207-A208 n. 1.

On July 3, 2017, without addressing the points of law and fact Respondent raised as to the issues charged, and without ruling on any facts concerning the presumption of retaliation or the due process and First Amendment defenses, the panel issued a sanctions order stating "that the manner in which [Respondent] has prosecuted these appeals, as detailed in the order [INFORMANT'S EX. C (R. 303-307; A201-A205)], is inconsistent with the standards of practice required of attorneys admitted to appear before this court." R.

309. The sanctions order, however, specifically sanctioned Respondent for filing the appendix to the notice of appeal. *Id*. It is uncontroverted that the panel's determination was unpublished and that the panel did not provide any legal authority for its determination. INFORMANT'S EX. D (R. 308-310; A228-A230); *cf*. INFORMANT'S EX. H (R. 340-360; A206-A227). The sanctions order also included a specific directive for the Clerk to notify all the jurisdictions in which Respondent was licensed of the sanctions order. R. 310; A230. Finally, the sanctions order prohibited the parties from filing any further documents in the case, cutting off immediate review of the panel's determination through ordinary channels. *Id*.; R. 552 ¶ 55.

Respondent thereafter filed a petition for writ of certiorari in the United States Supreme Court from the Tenth Circuit's affirmance of the dismissal and from the sanctions order. INFORMANT'S EX. E (R. 311-321); R. 494. In the petition for a writ of certiorari, Respondent raised the issues raised in the Tenth Circuit. R. 494:9-495:2. The writ was not granted. *Id*.

Subsequently, a reciprocal disciplinary action was initiated in Colorado on the Tenth Circuit's order admonishing Respondent. R. 322. Colorado disciplinary counsel filed a motion for summary judgment in the case, arguing that the Tenth Circuit's order constituted a final adjudication of misconduct and that there were, as such, no disputed issues of material fact that could prevent discipline. R. 322. Respondent participated in the Colorado disciplinary case by filing pleadings and opposition to the motion for summary judgment. *Id*.; R. 112-113; *see, e.g*., RESPONDENT'S EX. JJJJ (R. 539-556).

In this, Respondent provided evidence of the points he had raised before the Tenth Circuit merits panel and also included expert testimony from two forensic psychologists concerning bias to address the psychological standard of bias recognized in the governing precedent. R. 326-327; *see, e.g.*, R. 541 ¶ 18, and 542; RESPONDENT'S EX. CCCC (R. 1646-1682). Despite these evidentiary submissions, the motion for summary judgment was granted and Respondent was, as a consequence, publicly censured in reciprocal discipline on the finding that said discipline was the closest Colorado analog to the Tenth Circuit's discipline. R. 335; R. 113:2-10. All of the facts raised were treated as true on the motion and the Presiding Disciplinary Judge did not find that the materials offered by Respondent failed to satisfy the Colorado Rules of Evidence. R. 323, 326-327; R. 541-542. The Presiding Disciplinary Judge failed to mention or rule on Respondent's expert testimony. INFORMANT'S EX. F (R. 322-336); *cf.* R. 541 ¶ 18, and 542. Respondent appealed the order granting summary judgment to the Colorado Supreme Court. R. 124. The order was affirmed without opinion. *Id*.

Subsequently, Missouri's Office of Chief Disciplinary Counsel sent Respondent a letter of admonition, dated January 10, 2019, alleging that Respondent violated Rule 4-3.4(c) in the *Snyder v. ACORD* litigation by attaching the 72-page appendix to the notice of appeal filed in the district court, doing so with the intent to violate the rules governing the length of appellate briefs. INFORMANT'S EX. G (R. 337-339). Respondent rejected the admonition. R. 114:12-14. An Information was thereafter filed charging Respondent with violation of Rule 4-3.4(c). R. 29 ¶ 10. Respondent submitted an Answer, which was later amended, and the parties agreed in scheduling the hearing that Respondent's exhibits of

foreign court filings would be treated as authentic, though other objections, such as relevance, would be preserved. R. 439-466; R. 51-80; R. 85; R. 4158-4167.

An evidentiary hearing that was conducted over two separate days followed. R. 88:8-21; R. 482:8-21.

On the first day of the hearing, Informant presented its case and Respondent was given opportunity to begin presenting his defense, which mirrored the points raised before, but which were not treated by, the Tenth Circuit panel, as noted above. R. 92:14-134:11. During the presentation of Respondent's defense, an issue arose regarding the scope of the proceeding and the relevance of EXHIBITS A through KKKKK. R. 127:25-134:19. The parties were then ordered to brief their respective positions on the scope of the proceedings. R. 134:20-140:25. On the parties' submissions, the Disciplinary Hearing Panel determined that the scope was governed by *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997). R. 484:15-17; R. 488:7-12; R. 480-481.

At the second day of the hearing, the Disciplinary Hearing Panel denied admission of Respondent's exhibits, but allowed him to make an offer of proof regarding their admissibility and to later address the relevance of the materials, which Respondent did. R. 484:18-488:12; R. 4083-4097. The parties then presented the rest of their testimony and argument at the hearing. R. 488:22-515:10.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD NOT REPRIMAND RESPONDENT BECAUSE HE—*AS A MATTER OF LAW*—CANNOT BE FOUND TO HAVE KNOWINGLY DISOBEYED THE FILING RULES OF THE FEDERAL COURTS BY ATTACHING A 72-PAGE APPENDIX TO A NOTICE OF APPEAL AND OTHER PURPORTED UNAUTHORIZED PLEADINGS BECAUSE: (1) THE DOCTRINE OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL ACTUALLY PREVENTS MISSOURI DISCIPLINE GIVEN THAT THE SANCTIONING COURT MADE A FINDING OF FACT THAT EXCLUDES RESPONDENT FROM HAVING THE REQUISITE MENTAL STATE FOR THE OFFENSE WITH WHICH HE HAS BEEN CHARGED; (2) THE APPLICATION OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL CAN ONLY BE MADE AFTER FIRST CONDUCTING THE REQUISITE FAIRNESS DETERMINATION, WHICH HAS NOT OCCURRED, AND RESPONDENT HAS PROFFERED EVIDENCE AND A RECORD RAISING AN ISSUE OF FACT AS TO VIOLATIONS OF HIS RIGHT TO DUE PROCESS THAT HAVE NOT BEEN ADDRESSED AS PER THE GOVERNING PRECEDENT; (3) AS A MATTER OF LAW THE APPLICATION OF DISCIPLINE FOR THE ACTIVITIES WITH WHICH RESPONDENT HAS BEEN ACCUSED VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND OTHER RELATED PROTECTIONS; (4) THERE WAS NO RULE PROHIBITING THE FILING OF THE DOCUMENT IN QUESTION WITH A NOTICE OF APPEAL, BUT THERE IS ACTUALLY UNITED STATES SUPREME COURT PRECEDENT AND CONGRESSIONAL AUTHORITY SUPPORTING EVEN THE FILING OF BRIEF AS A NOTICE OF APPEAL; (5) RESPONDENT HAD NEVER BEEN WARNED THAT FILING SUCH A NOTICE OF APPEAL—*WHICH IS GOVERNED BY THE RULES OF THE FEDERAL LOWER COURT*—WOULD BE CONSIDERED A VIOLATION OF THE RULE GOVERNING THE LENGTH OF BRIEFS ON APPEAL; (6) THERE WAS NO RULE IN THE DISTRICT COURT PROHIBITING THE LENGTH OF THE DOCUMENT CONCERNED; AND (7) RESPONDENT HAS ONLY BEEN CHARGED, IN THE MISSOURI INFORMATION, WITH FILING THE 72-PAGE APPENDIX TO THE NOTICE OF APPEAL IN QUESTION.

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

Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963).

Protect Our Mtn. Env't, Inc. v. District Court, 677 P.2d 1361, 1369 (Colo.1984).

Sterling Energy, Ltd. v. Friendly Nat. Bank, 744 F.2d 1433, 1435 (10th Cir.1984).

ARGUMENT

I.

THE SUPREME COURT SHOULD NOT REPRIMAND RESPONDENT BECAUSE HE—*AS A MATTER OF LAW*—CANNOT BE FOUND TO HAVE KNOWINGLY DISOBEYED THE FILING RULES OF THE FEDERAL COURTS BY ATTACHING A 72-PAGE APPENDIX TO A NOTICE OF APPEAL AND OTHER PURPORTED UNAUTHORIZED PLEADINGS BECAUSE: (1) THE DOCTRINE OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL ACTUALLY PREVENTS MISSOURI DISCIPLINE GIVEN THAT THE SANCTIONING COURT MADE A FINDING OF FACT THAT EXCLUDES RESPONDENT FROM HAVING THE REQUISITE MENTAL STATE FOR THE OFFENSE WITH WHICH HE HAS BEEN CHARGED; (2) THE APPLICATION OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL CAN ONLY BE MADE AFTER FIRST CONDUCTING THE REQUISITE FAIRNESS DETERMINATION, WHICH HAS NOT OCCURRED, AND RESPONDENT HAS PROFFERED EVIDENCE AND A RECORD RAISING AN ISSUE OF FACT AS TO VIOLATIONS OF HIS RIGHT TO DUE PROCESS THAT HAVE NOT BEEN ADDRESSED AS PER THE GOVERNING PRECEDENT; (3) AS A MATTER OF LAW THE APPLICATION OF DISCIPLINE FOR THE ACTIVITIES WITH WHICH RESPONDENT HAS BEEN ACCUSED VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND OTHER RELATED PROTECTIONS; (4) THERE WAS NO RULE PROHIBITING THE FILING OF THE DOCUMENT IN QUESTION WITH A NOTICE OF APPEAL, BUT THERE IS ACTUALLY UNITED STATES SUPREME COURT PRECEDENT AND CONGRESSIONAL AUTHORITY SUPPORTING EVEN THE FILING OF BRIEF AS A NOTICE OF APPEAL; (5) RESPONDENT HAD NEVER BEEN WARNED THAT FILING SUCH A NOTICE OF APPEAL—*WHICH IS GOVERNED BY THE RULES OF THE FEDERAL LOWER COURT*—WOULD BE CONSIDERED A VIOLATION OF THE RULE GOVERNING THE LENGTH OF BRIEFS ON APPEAL; (6) THERE WAS NO RULE IN THE DISTRICT COURT PROHIBITING THE LENGTH OF THE DOCUMENT CONCERNED; AND (7) RESPONDENT HAS ONLY BEEN CHARGED, IN THE MISSOURI INFORMATION, WITH FILING THE 72-PAGE APPENDIX TO THE NOTICE OF APPEAL IN QUESTION.

A. Informant's Argument for Discipline Exceeds the Scope of Reciprocal Discipline Determinations in Missouri.

Informant argues that the doctrine of non-mutual collateral estoppel should be applied in this case, yet does so without any reference to the requisite, preliminary

fairness inquiry that Respondent raised before the Disciplinary Hearing Board, and which must precede the application of the doctrine. INFORMANT'S BR., pp. 12-13.

In Re Caranchini holds that reciprocal attorney discipline cases are governed by offensive non-mutual collateral estoppel, *i.e.*, issue preclusion. *In re Caranchini*, 956 S.W.2d at 912-13. However, as that case notes, when a "prior judgment was on the merits" and when "the party against whom collateral estoppel is asserted was ... a party to the prior adjudication," we are bound by a foreign court's "valid judgment" of an "ultimate fact" *unless* there is not actually "identity of the issues involved" or the prior adjudication failed to meet "the requirement of fairness." *In re Caranchini*, 956 S.W.2d at 912–13 (citations omitted). In this, the "requirement of fairness is especially significant" and "should be considered" when a "Respondent contends that ... the requirements of the doctrine were not met." *In re Caranchini*, 956 S.W.2d at 913.

After it is determined that there is collateral estoppel of a particular ultimate fact, the Court is then tasked to "determine if violations of the Missouri Rules follow from the federal court findings." *In re Caranchini*, 956 S.W.2d at 915.

Issue preclusion, however, is not the same as claim preclusion. *Shores v. Express Lending Servs., Inc.*, 998 S.W.2d 122, 126 (Mo.App. E.D.1999) ("Unlike res judicata or claim preclusion, ... [i]ssue preclusion does not prevent a party from litigating issues that were never argued or decided as essential to the judgment in the previous proceeding."); R. 489:3-4. To determine what the factual findings of a foreign tribunal actually were, and which particular issues of fact will be precluded, Missouri follows the guidance of

the Restatement.[3] (As such, it will be shown, *infra*, that Informant fails to account for both the preliminary fairness inquiry and the rule that the actual findings of fact are what govern in a subsequent proceeding under the doctrine.)

B. APPLYING ISSUE PRECLUSION IN THE PRESENT CASE LEADS TO THE CONCLUSION THAT DISCIPLINE IS NOT APPROPRIATE.

As noted below, applying issue preclusion in this case actually leads to the conclusion that discipline is not warranted. Otherwise, the requisite determination of "the fairness requirement" with regard to the underlying proceedings—*which the Court would otherwise have to determine before applying issue preclusion*—would require the treatment of the numerous issues of fact that have been raised by the Respondent, including a ruling as to what constitutes due process, a ruling on the due process balancing test that would presumptively be applied to all of the circumstances concerned, and whether Informant pled collateral estoppel in the Information. *See In re Caranchini*, 956 S.W.2d at 912–13; R. 401 n.2 (citing *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (setting forth the requisite due process analysis)), R. 402-404; *cf.* R. 128:21-24 (arguing that notice and a hearing exhausts the due process analysis).

Thus, in light of the governing rules, it is apparent that—*if it can be determined more easily from the outset that the application of issue preclusion rules would actually*

[3] "[T]he law holds that the doctrine of collateral estoppel does not apply if the burden of proof is greater in a later proceeding." *State v. Salazar*, 236 S.W.3d 644, 648 (Mo. 2007) (MOONEY, Sp. J., concurring) (citing Restatement (Second) of Judgments section 28 at 273 (1982)); *see, e.g., Nigro v. Ashley*, 690 S.W.2d 410, 419 (Mo.App. W.D.1984) ("In Restatement (Second) of Judgments § 27 comment e, states that an issue is not actually litigated where the issue is raised in an allegation by one party and admitted by the opposing party.").

not allow for discipline—the case should be dismissed without engaging in the more involved analyses that precede a determination that the requirements for issue preclusion have been met. *See In re Caranchini*, 956 S.W.2d at 912–13. (As noted, however, the opposite is not the case: a determination that the doctrine should be applied cannot be made without first addressing the fairness inquiry.)

C. APPLYING OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL TO THE CHARGE.

The Information charges Respondent with transgressing Rule 4-3.4(c) "in that he knowingly violated Tenth Circuit Court of Appeals rules in an attempt to circumvent that court's type-volume limitations for appellate briefs." R. 29 ¶ 10. Informant argues that the Court can *infer* Respondent knowingly intended to circumvent a procedural rule governing the page count of appellate briefs if he intended to append 72-page appendix to the notice of appeal.[4] Informant also argues that simply conceding to filing the documents concerned is determinative of the case. R. 93:5-10; R. 129:20-130:1.

As noted below, however, Informant's approach conflicts in a number of ways with the rule in *In Re Caranchini*, which holds us to the *ultimate facts* actually determined by the foreign court. *In re Caranchini*, 956 S.W.2d at 912–14; *see also Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 329 (Mo. banc 1987). As per this governing standard, Informant's approach directly conflicts with the Tenth Circuit's

[4] "The lawyer's mental state that Mr. Hernandez has referred to, of course, the Missouri Supreme Court is entirely within its purview to infer from the evidence what the mental state was regardless of what other courts may have said about it." R. 501:10-14.

specific finding as to Respondent's mental state, which is a necessary element in the chain Informant must prove:[5]

> Mr. Hernandez either does not understand or refuses to acknowledge that the presentation of merits arguments outside of the briefing expressly permitted by the applicable rules, and without leave of court, constitutes a violation of those rules.

R. 309; A229.

As per *In re Caranchini*, Missouri courts are bound by such an identical finding on an issue of ultimate fact, if it is from a valid adjudication. *In re Caranchini*, 956 S.W.2d at 913. Thus, all that a court can thereafter determine is whether the finding establishes a violation of Rule 4-3.4(c) in the way charged in the Information. *In re Caranchini*, 956 S.W.2d at 915 ("determine if violations of the Missouri Rules follow from the federal court findings"); *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence.").

Given these rules, the Tenth Circuit specifically determined that there were two options as to Respondent's mental state: (**1**) that Respondent did not know that filing the appendix was a violation of the rules governing the length of appellate briefs; or (**2**) that Respondent refused to acknowledge, based on the grounds provided to the Tenth Circuit, that attaching an appendix to a notice of appeal in the district court violated the rules limiting the length of appellate briefs. R. 309; A229. Although, the Tenth Circuit went on

[5] Collateral estoppel "means that when a fact is appropriately determined in one legal proceeding, it is given effect in another lawsuit in cases where such fact or facts are a *vital part of the evidentiary chain necessary to be established*...." *Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 329 (Mo. banc 1987) (emphasis added and citation omitted).

to conclude—*for unstated reasons*—that either of the two mental states it identified in its sanctions order would constitute a basis for discipline, the same cannot be said with regard to in Missouri law. *See* Rule 4-8.4 Comment [5]; Rule 4-1.0(f). *In re Caranchini* requires us to see if discipline would follow from the actual findings: issue preclusion does not, however, allow us to speculate as to what any unstated findings would have to be to justify discipline. *In re Caranchini*, 956 S.W.2d at 913 ("Collateral estoppel is being applied to the *factual findings* of the federal courts and *not* to the actual federal court sanctions.") (emphasis added). Discipline, at a minimum, requires a preponderance of the evidence—although most recent constitutional authority and the ABA *Standards for Imposing Lawyer Sanctions* point to clear and convincing evidence or higher in cases such as the present matter—whereas such speculation fails to adhere to either *issue preclusion* or standard of proof precedents.[6] This is particularly true in cases implicating

[6] *See In re Caranchini*, 956 S.W.2d at 913; ABA *Standards for Imposing Lawyer Sanctions* 1.3 (clear and convincing evidence); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (in the context concerned "a court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof."); *In re Weiner*, 547 S.W.2d 459, 461 (Mo. 1977) (anything less than a preponderance is unacceptable); *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322, 323 (Mo.App. W.D.1998) (a preponderance requires "substantial evidence of probative force and to remove the case from the realm of speculation, conjecture and surmise.") (citation omitted); *Matter of Barnard*, 484 S.W.3d 833, 838 (Mo.App. E.D.2016) ("For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition...." (citing *In re Marriage of A.S.A.,* 931 S.W.2d 218, 222 (Mo.App.S.D.1996)); *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) ("[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."); *Addington v. Texas*, 441 U.S. 418, 423 (1979).

the First Amendment, *i.e.*, sanctions of an attorney for the method in which they speak or present a case.[7]

In Missouri, the two mental states concerned fall within explicit exceptions to misconduct, establishing that Respondent did not knowingly violate the rule of a tribunal. *See* Rule 4-8.4 Comment [5]; Rule 4-1.0(f) ("actual knowledge of the fact in question" or an inference thereof). As noted, *infra*, an inference is not possible given the specific finding. Furthermore, in light of the very specific finding as to Respondent's mental state—*which was a final determination on this issue of everything that came before*—there is no evidence on the record with the capacity to tip the scales against the Tenth Circuit's finding that Respondent did not have the requisite mental state to violate Rule 4-3.4(c), *even if* the determination were not bound by this identical finding. *See Matter of Barnard*, 484 S.W.3d 833, 838 (Mo.App. E.D.2016).

Informant's argument also presumes that the action actually violates a rule, which is a legal determination outside the scope of issue preclusion,[8] which, instead, concerns

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[7] *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963); *Protect Our Mtn. Env't, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colo.1984) (standard analogous to "colorability" is required to protect First Amendment rights); *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.2d 1433, 1435 (10th Cir.1984) ("[o]therwise those with colorable, albeit novel, legal claims would be deterred from testing those claims in a federal court." (citation omitted))

[8] It is uncontroverted that the determination was an unpublished determination on an issue of first instance and that the panel cited no authority for its legal conclusion. R. 98:8-20. It is also uncontroverted that the length, caption, and font size requirements for the filing were directly governed by district court rules, as opposed to appellate rules. R. 93:22-25. Without any rule actually identified by the Tenth Circuit panel, there is nothing to go against the specific finding regarding mental state—even if it were the case that we

itself with ultimate facts. *In re Caranchini*, 956 S.W.2d at 912-13; *Bresnahan*, 726 S.W.2d at 329; R. 129:11-15; R. 129:20-130:1; R. 495:8-14; R. 132:14-19; *cf.* INFORMANT'S BR., pp. 12-13. Furthermore, Informant conflates the intent to do something with the knowledge that thing itself is not permitted: something that the applicable rules actually separate as materially distinct. *See id.*; *cf.* Rule 4-8.4 Comment [5]; Rule 4-1.0(f).

Informant also argues that Respondent violated counsel's obligation to facilitate the efficient and expeditious resolution of *Snyder v. ACORD*, arguing that Respondent had been "warned" by the federal district court against filing lengthy pleadings before attaching a 72-page appendix to a notice of appeal. R. 501:1-14; INFORMANT'S BR., pp. 11 and 13. There are, however, a number of significant problems with Informant's argument. First, Informant's argument actually sets forth a different offense from the charge provided in the Information, *i.e.*, that Respondent knowingly violated a rule governing the length of appellate briefs in the appellate court by attaching an appendix to the notice of appeal that was filed in the district court. *See* R. 29 ¶ 10. As such, this new charge cannot serve as an appropriate basis for a finding of the misconduct charged in the present case. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence."). Secondly, the Tenth Circuit never actually found

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were not actually required to follow the specific finding. *Cf.* INFORMANT'S EX. D (R. 308-310).

that the *length* of the 72-page appendix violated any rule.[9] Instead, the issue specifically addressed in the Tenth Circuit's determination was that the merits were treated outside of an appellate brief and that, somehow, that violated the rule setting the length of appellate briefs—regardless of length. R. 309; A229. Thus, the issues are not identical. *See State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986). There can, therefore, be no collateral estoppel under the governing precedent. *In re Caranchini*, 956 S.W.2d at 912-13. Thirdly, the Tenth Circuit panel specifically stated in its charging document that it would *not* be considering any of the issues referenced from the federal district court in its final determination of discipline. R. 304 n.1; A202 n. 1. The issue is, thus, neither identical to—*nor is it necessarily a part of*—what was actually adjudicated.[10] A court cannot, therefore, rightly consider that issue precluded.

In addition to the more significant problems identified above, any attempt to *infer* that Respondent was placed on notice by what Respondent has alleged to be the district court judge's vague, undefined and inconsistently applied criteria about what constitutes

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[9] *See* R. 309; R. 229. It is inappropriate to make such inferences when "there was no written finding" to that effect in the final determination concerned. *State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986). Furthermore, it is uncontroverted that the district court judge's rules specifically noted there were no page limitations and that the judge did not strike the document in question, as he had threatened to do with documents he saw as prolix. R. 93:22-25; R. 100:5-6; R. 1847 ("[i]t is not possible to predetermine the length of a good brief. Accordingly, I do not adhere to any prescribed page limits for briefs."); R. 4086 ¶ 9.

[10] *Brown v. Felsen,* 442 U.S. 127, 139 n.10 (1979) ("Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit."); Restatement (Second) of Judgments § 27 cmt. e; *see also* Restatement (Second) of Judgments § 27 cmt. d.

too "prolix" of a pleading would require a court to apply a different analysis than issue preclusion, going outside the language of the specific finding.[11] It would also require a court to find that there is actually a rule against "prolix" pleadings and that the charge in the Information concerns "prolix" pleadings, instead of what both the Information and the Tenth Circuit actually state. *Cf.* R. 29 ¶ 10; R. 309. Thus, despite its references to the doctrine of offensive non-mutual collateral estoppel, Informant actually invites the Court to decide an issue of fact on its own instead of keeping within the scope of *In re Caranachini*. *In re Caranchini*, 956 S.W.2d at 912-13; *cf.* R. 501:10-14. Such an inference, however, can never reach the level of clarity stated in the Tenth Circuit's specific finding—*even if that were permitted, which it is not*—given that the foreign tribunal's specific finding goes directly to the issue of mental state in those proceedings. R. 309. As such, Informant argues for an unwarranted inference. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 427 (Mo. 1958) (unwarranted inferences are "inexcusable" and violate essentially tenant of justice and order); *Berger v. Huser*, 498 S.W.2d 536, 540 (Mo. 1973) ("unwarranted inferences"). Consequently, by arguing for an inference of knowledge, Informant invites the Court to make a determination that actually conflicts

[11] It is inappropriate to make such inferences when "there was no written finding" to that effect in the final determination concerned. *State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986); *cf.* R. 503:4-504:15; footnote 9, *supra*.

with the permissible range of options.[12] Informant's position cannot, therefore, be treated as a legitimate interpretation of the order.[13]

Nonetheless, such an inferred notice argument errs in failing to note that it would concern different issues. *State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986). Notice of the issues actually treated in the Tenth Circuit's final order, however, would require a different state of affairs, *i.e.*, that the district court had warned counsel that filing a document in the district court—*regardless of length*—would constitute a violation of the rules governing the length of appellate briefs in the appellate court. R. 309; A229. As per the record, such a warning never happened, and no such determination was made in the sanctions order. *See id*. As such, these allegations were never adjudicated, necessarily or otherwise, in the Tenth Circuit's sanctions order. *Brown v. Felsen,* 442 U.S. 127, 139 n.10 (1979); Restatement (Second) of Judgments § 27 cmt. e; Restatement (Second) of Judgments § 27 cmt. d. Any attempt to treat those issues as if they had been determined by the Tenth Circuit—*after it had specifically sated that it would not be considering those issues*—calls the fairness of the proceedings into

[12] *State v. Taborn*, 412 S.W.3d 466, 475 (Mo.App. W.D.2013) ("permissible range"); *Arl v. St. Louis Pub. Serv. Co.*, 243 S.W.2d 797, 800 (Mo.App. E.D.1951) ("permissible range").

[13] *Saunders v. Bowersox*, 179 S.W.3d 288, 293 (Mo.App. S.D.2005) ("[O]ther parts of a record, such as oral statements by the trial judge, cannot be used to contradict an unambiguous judgment." (citing *State v. Haney,* 277 S.W.2d 632, 635–36 (Mo.1955); *Estate of Rogers v. Battista,* 125 S.W.3d 334, 341 (Mo.App. E.D.2004)).

question,[14] necessitating treatment of Respondent's fairness challenges. *In re Caranchini*, 956 S.W.2d at 912-13.

Likewise, although Informant argues that Respondent *apparently* admitted to filing the appendix as a part of "efforts to have the merits considered while keeping the length of the Principal Brief to a modest or ordinary limit," this also impermissibly involves speculation and inference that wars against the scope provided in *In re Caranachini*, given that the Tenth Circuit's determination came categorically short of a finding that Respondent knowingly intended to violate a rule.[15] Given the rule in *In re Caranachini*, a court cannot rightly infer an admission where a foreign court clearly and overtly came short of determining such an admission, especially when that inference would actually conflict with the range of options specifically identified in the determination.

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[14] Supreme Court precedent also makes it clear that due process would be violated. *Selling v. Radford*, 243 U.S. 46, 50–51 (1917); *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence.").

[15] The sanctions order did not determine that an admission to presenting merits arguments outside of the briefings was an admission that one knew one was violating the briefing rules. R. 309; A229. As per its factual conclusion, the sanctions order did not even determine that Respondent actually admitted to intentionally circumventing appellate court briefing rules when he filed the appendix in the district court. *Id*. Instead, the Tenth Circuit specifically based its determination on something different: a specific finding regarding Respondent's mental state. *Id*. Significantly, the Tenth Circuit did not determine that the bases Respondent provided were lacking. *Id*.; *cf.* INFORMANT'S EX. H (R. 340-360); A206-A227. It is, therefore, unquestionable that the Tenth Circuit—*for whatever reason*—refrained from making such findings of intent under circumstances where authoritative bases for the document filed were presented, as that is the record. *See id*. Because Informant's suggestion would conflict with the actual finding, *i.e*., how the panel specifically resolved the mental state behind an appearance that concerned it, it is improper for us to speculate beyond the clear language provided. *See State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986).

Additionally, Informant argues that the mental state identified by the Tenth Circuit can be inferred to constitute negligence. R. 501:10-15; INFORMANT'S BR., p. 13. As a variant of Informant's preceding argument, it is plagued by all of the problems noted previously. Furthermore, negligence is not the offense with which Respondent was charged in the Information: it cannot, therefore, serve as a basis for discipline in the present case. *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence.").

Similarly, a finding of negligence with regard to the requirements of a rule depends upon an interpretation of law,[16] given that it ultimately requires a determination that the rule in question does not colorably permit what the Respondent believed it did: the factual inquiry cannot, therefore, fairly be reached before this legal inquiry is made.[17] Issue preclusion does not govern the legal determination, particularly as the supreme law of the land provides the governing rules. *In re Caranchini*, 956 S.W.2d at 912; footnote 16, *supra*. Because Informant has failed to show that none of the bases Respondent has

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[16] *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963); *Protect Our Mtn. Env't, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colo.1984) (standard analogous to "colorability" is required to protect First Amendment rights); *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.2d 1433, 1435 (10th Cir.1984) ("[o]therwise those with colorable, albeit novel, legal claims would be deterred from testing those claims in a federal court." (citation omitted)); *Hutchinson v. Pfeil*, 208 F.3d 1180, 1187 n.9 (10th Cir.2000); *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 337 (2d Cir.1999) ("a claim is colorable 'when it has some legal and factual support'" (citation omitted)).

[17] *See Robinson v. Gaines*, 331 S.W.2d 653, 655 (Mo. 1960); *see also Alfano v. AAIM Mgmt. Ass'n*, 770 S.W.2d 743, 745 n.1 (Mo.App. E.D.1989) ("Section 509.220.2, RSMo.1986, requires our courts to take judicial notice of the law of another [jurisdiction] when pled."); R. 439-466; R. 4083-4097; R. 119:11; R. 120:24-123:12.

provided lack color or validity, Informant has failed to establish by any applicable standard of proof that Respondent negligently violated a rule of the court. *See* footnote 16, *supra*; R. 129:20-130:1; *see also Grider v. Keystone Health Plan Cent*., 580 F.3d 191, 193 (3d Cir.2009). As noted, the Tenth Circuit refrained from ruling that Respondent lacked either a colorable or valid bases for the actions taken on behalf of his clients, so that determination is outside the scope of issue preclusion. *See* footnote 15, *supra*. As such, the determination of negligence is—*for all these additional reasons*—significantly outside the scope set by *In re Caranachini*.

Given the governing precedent referenced above, there is insufficient basis to find, especially by anything approaching clear and convincing evidence, that Respondent committed the misconduct with which he has been charged in the Information, *i.e*., a violation of Rule 4-3.4(c).

D. CONCERNING INFORMANT'S REFERENCES TO THE COLORADO PROCEEDINGS.

Although Informant references Colorado's reciprocal discipline proceedings as a basis for reciprocal discipline in Missouri on the charge provided, there are numerous reasons those proceedings cannot disturb the conclusions necessitated by the Tenth Circuit's mental state determination. *Cf.* R. 29 ¶ 6; R. 502:12-15; R. 503:25-504:2; INFORMANT'S BR., pp. 7-8. First, the proceedings concerned summary judgment, where all the facts raised by Respondent were accepted as true for purposes of the motion. R. 323, 326-327; R. 541-542. As such, there was no final determination of any "ultimate fact," as required by *In re Cananachini*. It concerned legal determinations, which are

outside the prevue of offensive non-mutual collateral estoppel.[18] Secondly, the case was a reciprocal discipline case with a more limited scope than that which is applied in Missouri. R. 323-324; A243-A244. The law is clear that collateral estoppel is inappropriate in such cases.[19] As a rule, Missouri conducts its own independent discipline determination, and that is at odds with simply imposing reciprocal discipline because another state imposed reciprocal disciple, which—*given the record and rules concerned*—is ultimately the extent of the charge identified in the Information. *In re Weiner*, 530 S.W.2d 222, 224 (Mo. 1975), *supplemented,* 547 S.W.2d 459 (Mo. 1977); *In re Caranchini*, 956 S.W.2d at 913 ("Collateral estoppel is being applied to the *factual findings* of the federal courts and *not* to the actual federal court sanctions."); *cf.* R. 29 ¶ 6. No ultimate facts have been identified from which a court can determine a violation of a Missouri rule. *See id*.

Finally, even if the legal determinations of the Colorado proceedings were to be treated as determinations of an ultimate fact—*instead of legal conclusions that can only be applied when there is no issue of fact, as is the case in the summary judgment*

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[18] "Now, the important distinction here is the court *In Re Caranchini* went out of its way to explain this to us all. It's the findings of fact that are binding on us, not the conclusions of whether ultimately discipline should attach to that conduct." R. 129:11-15.

[19] "[T]he law holds that the doctrine of collateral estoppel does not apply if the burden of proof is greater in a later proceeding." *State v. Salazar*, 236 S.W.3d 644, 648 (Mo. 2007) (MOONEY, Sp. J., concurring) (citing Restatement (Second) of Judgments section 28 at 273 (1982)). "The Restatement (second) of Judgments (1982) provides an exception to the general rule of collateral estoppel when there are 'differences in the quality or extensiveness of the procedures followed in the two courts....' § 28(3)." *State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo.App. S.D.1986).

context—the rules governing collateral estoppel specifically provide that there cannot be issue preclusion, given that: (**1**) the Colorado Presiding Disciplinary Judge determined multiple and alternative issues;[20] and (**2**) the appeal of the Presiding Disciplinary Judge's grant of summary judgment was affirmed without any opinion.[21] Thus, the Colorado proceedings cannot serve as a basis for issue preclusion and, likewise, lack the power to prevent a Missouri tribunal from reaching the conclusions that we must reach because of the ultimate facts the Tenth Circuit determined with regard to Respondent's mental state.

It should also be noted, here, that Informant's suggestion that we can find that Respondent committed misconduct within the Colorado Disciplinary Proceedings lacks a basis in the record and is well outside the purview of collateral estoppel. R. 502:12-15. There was no finding by that tribunal that Respondent ever violated any rule as to the permitted length of its filings. *See* INFORMANT'S EX. F (R. 322-336). Informant's

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[20] "Comment i provides that, if a trial court bases its judgment on two or more issues, each of which would be independently sufficient to support the result, then issue preclusion does not apply to any of those issues, and they may be re-litigated in future proceedings." *Stanton v. Schultz*, 222 P.3d 303, 305 (Colo. 2010) (citing Restatement (Second) of Judgments, § 27 cmt. i (1982)). Although Informant has argued that the Tenth Circuit concluded that the way in which Respondent prosecuted the appeals, as listed in the order to show cause, was inconsistent with its standards, that argument also fails under this particular issue preclusion precedent. *See* footnote, 19, *supra*; R. 501:2-7:24; *cf.* Furthermore, the Information did not list those "bases" as the charge; thus, these "bases" fall short of identifying a specific rule that was violated. *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence."). None of these issues is, therefore, identical to the issue in the present case.

[21] "In other words, comment *o* provides that only the grounds actually considered and upheld by the appellate court may be given preclusive effect." *Stanton v. Schultz*, 222 P.3d 303, 309 (Colo. 2010) (citing Restatement (Second) of Judgments, § 27 cmt. o (1982)).

accusation, during the proceedings, that a filing is prolix does not *de facto* constitute that the filing violated any rule, especially when the tribunal in question never made such a determination. Even when a federal district court judge complains about something repeatedly, that does not mean that it actually a violation of a rule, particularly when considered in light of the governing constitutional criteria. *Grider v. Keystone Health Plan Cent*., 580 F.3d 191, 143 (3d Cir.2009); *Vill. at Deer Creek Homeowners Ass'n, Inc. v. Mid-Continent Cas. Co.*, 432 S.W.3d 231, 245 (Mo.App. W.D.2014) ("Unpublished federal district court decisions are neither binding nor persuasive precedent in Missouri courts.'"). The Information never charged Respondent with committing misconduct in the Colorado proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("[t]he charge must be known before the proceedings commence."). In the present context, there is nothing that can raise such uncharged, undefined, and undetermined allegations to the level needed to establish misconduct. *Cf.* R. 503:25-504:15.

E. THE FOREGOING CONCLUSIONS OF LAW ARE DISPOSITIVE.

Therefore, although Respondent has both argued and presented an offer of proof as to the lack of due process and fairness that he alleges to have experienced in the Tenth Circuit and Colorado state proceedings, it is unnecessary to consider those issues given that collateral estoppel would, nonetheless, if applied, require the Court to conclude that Respondent lacked the requisite mental state to commit the misconduct with which he has been charged. *In re Caranchini*, 956 S.W.2d at 913; R. 29 ¶ 10; R. 484:18-488:12. As noted above, however, the opposite is not the case, given that a finding of discipline based on issue preclusion could only be reached after first addressing the issues of due

process, the rule of law, the standard of proof and the First Amendment protections that are all encapsulated in the preliminary fairness inquiry.

CONCLUSION

In light of the Tenth Circuit's specific findings, Respondent lacked the requisite mental state to commit the charged offense. R. 309; A229. As such, the State of Missouri cannot, while maintaining to its constitutional duties, impose discipline. *See Selling v. Radford*, 243 U.S. 46, 50–51 (1917). Because there is, therefore, no sufficient basis to support discipline, the requisite analysis ends, and it would be both unnecessary and unwarranted for the Court to consider the other factors that must be considered when imposing discipline.[22] Nonetheless, if such a determination were to be made, *i.e.*, one

[22] *See* ABA *Standards for Imposing Lawyer Sanctions* 3.0. If discipline were warranted, Respondent's proffered evidence would be relevant for determining mitigating factors, because—as noted in the findings of facts, *supra*—it purportedly details difficult efforts to address judicial misconduct and the misconduct of opposing counsel in the litigation concerned while zealously advocating his clients' interests. Thus, it cannot merely be ignored. It would also, therefore, be relevant to determining any issue with regard injury and mitigating factors. As an example: Informant has alluded to events subsequent to the sanctions order—February 2, 2019—wherein the Colorado federal district court ordered attorney fees pursuant to C.R.S. § 13-17-201 in excess of one million dollars be paid to defendants by Respondent clients, the plaintiffs in *Snyder v. ACORD*. As Respondent has noted, however, C.R.S. § 13-17-201 is a strict liability statute providing that defendants in Colorado are automatically awarded their reasonable attorneys' fees when a case is dismissed. *See* R. 508:1-14; R. 107:9-22; R. 108:9-21; R. 94-98. Informant's charge against Respondent, however, concerns allegations as to Respondent's efforts after the dismissal, *i.e.*, after liability had already been incurred. There is, thus, no evidence supporting causation between the alleged injury and the C.R.S. § 13-17-201 fees. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017). Respondent's evidence would address each of these issues and demonstrate whether his efforts were to do everything he could for clients that were already in harm, as C.R.S. § 13-17-201 suggests, or what the Informant proposes, which includes a degree of speculation. Nonetheless, it should be noted that these allegations of injury are evidently outside of the scope set forth in the Information given that the Tenth Circuit, which specifically limited its determination to appellate

based on issue preclusion, the requisite fairness inquiry that must precede any such application of the doctrine would prevent the application of issue preclusion as a basis for discipline.

Respondent, therefore, respectfully requests dismissal of the Information that has been filed against him and for such other determinations as are just under the circumstances.

Respectfully submitted,

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proceedings, previously threatened 28 U.S.C. § 1927 fees against Respondent, yet declined to impose such fees following his response to the order to show cause, and limited its sanction to $500, a completely different amount. INFORMANT'S EX. D (R. 308-310); A228-A230. As a matter of law, it is impossible for there to be a causal relationship between the sanction order and the referenced fees given that the *Snyder v. ACORD* defendants would have had to file a motion for such sanctions in the Tenth Circuit to reach the conduct charged in the Information: something it does not appear that the defendants did, given the last sentence of the sanctions order. R. 310; A230; *Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1179 (10th Cir. 2010) ("[A]district court generally lacks jurisdiction to consider the propriety of appeal-related fees if the prevailing party does not first seek such fees on appeal." (citation omitted)).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via Missouri Supreme Court e-filing system, serving a copy hereof upon opposing counsel on this 2nd day of January of 2020, being addressed to:

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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 Informant through the Missouri electronic filing system pursuant to Rule 103.08;

3. Complies with the limitations contained in Rule 84.06(b);

4. Contains 10,142 words, according to Microsoft Word, which is the word processing system used to prepare this Brief.

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