IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JAMES MARSHALL CLAMPITT	)	**Supreme Court #SC95030**
	)	
Respondent.	)	

RESPONDENT'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

Background

A disciplinary hearing was conducted on January 7, 2015, in Jefferson City, Missouri, on an Information charging Respondent with violation of Rules 4-8.4(a) and 4-8.4(c). Respondent was present and represented by Douglas W. Hennon. Informant was represented by Sharon K. Weedin. Informant's witnesses were Assistant Attorney General Monty Platz and Attorney Randal Owings. Respondent testified on his own behalf, as did his son, James A. Clampitt.

The panel issued its decision on March 20, 2015, concluding Respondent violated Rule 4-8.4(a) and 4-8.4(c). The panel recommended that the Court issue a public reprimand to Respondent without conditions. Respondent accepted the panel's decision and proposed sanction recommendation in a letter dated April 10, 2015. Informant rejected the decision in a letter dated April 28, 2015. The Record was thereafter filed with the Court pursuant to Rule 5.19.

Facts Underlying Disciplinary Case

In 2007, Respondent joined the Brett, Erdel, Clampitt & Owings, P.C. law firm (hereinafter "BECO") located in Mexico, Missouri. **App. 84 (T. 219).** He worked primarily for his son, James A. Clampitt (hereinafter "JAC"), who was a firm shareholder and held the position of firm manager. **App. 84-85 (T. 220-221).**

JAC delegated most of the work of the firm manager to Respondent. **App. 71 (T. 168).**

Prior to February or March of 2010 there had been one firm credit card. **App. 85 (T. 222).** Beginning in March of 2010 a credit card was acquired for each of the four BECO shareholders (hereinafter "new cards"). **App. 70 (T. 164).** This was done by Respondent pursuant to James A. Clampitt's (hereinafter "JAC") directive. **App. 86 (T. 225).** The new cards were issued for ease of accounting purposes and accountability amongst the shareholders in relation to tracking of overhead. **App. 85 (T. 223).** The new cards each contained one of the four shareholder's names. **App. 86 (T. 228).** Each card had a different account number. **App. 87 (T. 229).** The credit line on the new cards was higher than the existing firm credit card. **App. 86 (T. 228).**

To acquire the new cards, Respondent went online to the current credit card provider. **App. 86 (T. 225-226).** He entered the names, Social Security numbers and all pertinent information for the BECO shareholders. **App. 86 (T. 226).** When this information was entered, a window would appear on the screen saying, "This credit is issued based upon the validity of the Social Security number entered and is ultimately the responsibility of that individual." **App. 86 (T. 226).** Respondent believed, at the time the new cards were issued, the new cards were the personal

responsibility of each shareholder identified on the card; not the responsibility of BECO. **App. 87 (T. 229).**

On June 13, 2010, JAC was involved in a fatal motor vehicle accident. On June 21, 2010, there was a meeting of the shareholders (Dan Erdel, Randy Owings, Bradford Brett, and JAC) and Respondent. **App. 72 (T. 170-171).** The purpose of the meeting was to discuss the ramifications of the accident. The meeting did not go well. JAC and respondent decided to leave BECO and start their own law firm. **App. 73 (T. 173).** JAC authorized the use of his new card (hereinafter "the Card") to purchase much of the property and items needed for the new firm to be established. **App. 73 (T. 174-176.)** Both JAC and Respondent intended to pay off all items charged with JAC's June and July 2010 collections. **App. 73 (T. 176).** If JAC and Respondent had collected in July what they had in each of the months April through June, it would have been more than enough to cover the items at issue which were charged in late June or July. **App. 63 (T. 135).** Both JAC and Respondent had a good faith reason to believe that June 2010's collections would be more than adequate to pay for all amounts charged. **App. 63 (T. 135)**.

There was no written standard or policy which governed use of any credit card issued to the shareholders. **App. 66 (T. 146).** The shareholders did not otherwise announce a policy of what sort of purchases were considered authorized

or unauthorized. **App. 66 (T. 146).** Purchases made on a shareholders card were allocated to the attorney making the charges, and either passed along to the clients, or otherwise borne by the attorney making the charges. **App. 71 (T. 167).**

The first charge at issue was for U.S. Legal Forms, in the amount of $49.95, and was made on June 28, 2010. **App. 267 (Respondent's Exhibit D).** It was placed into the June accounting detail, attributed to JAC, and was in fact PAID out of June collections, which were sufficient to cover overhead and for JAC to receive a paycheck. **App. 270, 290, 292 (Respondent's Exhibits D, H, and K).**

The remainder of the charges at issue were made in July. **App. 277 (Respondent's Exhibit E).** They were placed into the July accounting detail which was created the first week of August (shortly after the Clampitts left). **App. 173 (T. 124, lines 14-25); App. 277 (Respondent's Exhibit E).**

On or about July 21, 2010, JAC and Randy Owings, one of the Brett, Erdel shareholders, were talking. Mr. Owings had taken over as firm manager in early June. Mr. Owings confronted JAC about a firm check being written to Kevin Hamlett, JAC's defense counsel, in the amount of $500. JAC had intended for the amount to be taken out of his July collections, as had been done in June. **App. 44, 48-49 (T. 59-60; 76-77).** Mr. Owings refused to authorize the check, and asked if he "would find any more surprises." **App. 75 (T. 183-184).** JAC disclosed at that

time that certain charges had been made on the credit card. This disclosure was made prior to any sort of discovery of the charges by BECO. **App. 55 (T. 101).**

In the days after July 21, BECO shareholders and employees contacted the credit card company, sent items ordered by the Clampitts and delivered to the BECO office back or refused delivery, and made clear to the Clampitts they should stop using the Card. **App. 55 (T. 101-102).** No new charges were made on the Card thereafter.

When the charged items were placed into the July accounting detail (which was created in early August), collections for the Clampitts for the month of July were insufficient to cover their overhead for the month. Argumentative correspondence was exchanged over the ensuing months about what amount was owed to whom (primarily between Dan Erdel and JAC), but no agreement was ever reached. **App. 82 (T. 209)**. In December 2010, BECO shareholders forwarded a complaint to OCDC and contacted law enforcement. The Clampitts provided a response to the OCDC complaint. OCDC recommended that the parties mediate their dispute, which BECO refused to do. **App. 82 (T. 210).**

JAC was charged with three felonies – stealing, attempted stealing, and fraudulent use of a credit device relating to the use of the card. **App. 139-140 (Exhibit 1).** Defense counsel, Douglas W. Hennon, entered the case in May 2013.

Extensive discovery was done through September 2013 in an effort to unravel what had occurred and what might be left owed by the Clampitts to the firm. **App. 51 (T. 86-87).** During the course of the depositions of Mr. Owings, Mr. Erdel, a bookkeeper and a secretary, an approximate amount of $6,700 was reached. **App. 51 (T. 87).** This amount was about $1,000 less than BECO had originally claimed it was owed. **App. 39 (T. 40-41).**

The case went to trial before Judge Terry Tschannen in Chariton County in November 2013. At the close of the State's case on the first day of trial, the Court granted JAC's motion for judgment of acquittal on the stealing and attempted stealing charges. **App. 232 (T. 359).** During this first day of trial, and before any finding of guilt had been made, defense counsel tendered a restitution check to Monty Platz, the prosecutor in the case, who refused to accept the check. **App. 40 (T. 42).**

The trial proceeded past JAC's motion for judgment of acquittal on the charge of Fraudulent Use of a Credit Device, and went into a second day. Respondent testified as a witness for JAC. He testified that he approached JAC about how they were going to pay for things at the new firm, and suggested they charge items on the credit card and pay for it out of collections at the end of the month. He testified that he considered the card to be James A. Clampitt's card

because his name was on the card and it was his understanding that JAC was responsible for the card. **App. 240 (T. 23-24).**

At the close of the evidence, the Court took the matter under advisement. In December 2013, Judge Tschannen found JAC guilty of Fraudulent Use of a Credit Device. After the finding of guilt and before the sentencing hearing on February 6, 2014, defense counsel again offered restitution to the prosecutor, Mr. Platz. Mr. Platz THEN contacted the law firm, who indicated they wanted not only restitution, but an apology letter, and certain other conditions. **App. 40 (T. 42-44).**

At final disposition on February 6, 2014, Judge Tschannen suspended imposition of any sentence and placed JAC on 4 years probation. JAC was serving a sentence in the Department of Corrections at the time for his convictions of Involuntary Manslaughter and Leaving the Scene of an Accident.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD NOT SANCTION RESPONDENT BECAUSE HE DID VIOLATE RULE 4-8.4(a) IN THAT HE DID NOT KNOWINGLY ASSIST OR INDUCE HIS SON IN THE FRAUDULENT USE OF A CREDIT CARD DEVICE AND BECAUSE HE DID NOT VIOLATE RULE 4-8.4(c) IN THAT HIS CONDUCT DID NOT INVOLVE DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION.

State v. Vestal, 740 S.W.2d 378 (Mo. App. 1987)

Supreme Court Rule 4-8.4(a)(c)

Supreme Court Rule 4-5.2(b)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD ACCEPT THE PANEL'S RECOMMENDATION FOR A PUBLIC REPRIMAND, IF DISCIPLINE IS APPROPRIATE, BECAUSE THE CONDUCT AT ISSUE AMOUNTED TO THE UNAUTHORIZED USE OF A CREDIT CARD DEVICE AND NO HARM WAS INTENDED IN THAT THE INTENT OF RESPONDENT WAS THAT THE CHARGES WOULD BE REIMBURSED IN THE NORMAL COURSE OF BUSINESS.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD NOT SANCTION RESPONDENT BECAUSE HE DID VIOLATE RULE 4-8.4(a) IN THAT HE DID NOT KNOWINGLY ASSIST OR INDUCE HIS SON IN THE FRAUDULENT USE OF A CREDIT CARD DEVICE AND BECAUSE HE DID NOT VIOLATE RULE 4-8.4(c) IN THAT HIS CONDUCT DID NOT INVOLVE DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION.

The statute under which JAC was found guilty, and the Informant alleges Respondent violated, is Section 570.130 RSMo, which provides in relevant part as follows:

§570.130 Fraudulent use of a credit device

A person commits the crime of fraudulent use of a credit device or debit device if the person **uses a credit device** or debit device for the purposed of obtaining services or property, **knowing that:**

(1) The device is stolen, fictitious or forged; or

(2) The device has been revoked or cancelled; or

(3) ***For any other reason his use of the device is unauthorized;***

RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Specifically, the Informant alleges Respondent knowingly assisted or induced JAC in his fraudulent use of a credit device; and Respondent actively participated in the fraudulent use of the firm credit Card. In other words, Respondent knowingly assisted or induced JAC to use the firm credit Card without authority; and Respondent's role in the use of the firm card involved dishonesty, fraud, deceit, or misrepresentation.

JAC was not found guilty of using a stolen, fictitious or forged card, nor is the Card alleged to have been revoked or cancelled at the time of his purchases. Instead, JAC was found guilty under the "catch-all" provision that criminalized his use of the card because he knew that "for any reason," his use of the Card was "unauthorized." While the crime is entitled, "fraudulent use of a credit device," no element of fraud or intent to defraud is required, only that one know that the use was unauthorized. No definition of "unauthorized," is provided. Indeed, JAC was

found guilty of using the Card at issue, to purchase items, "knowing that [his] use of the device was unauthorized."

It is undisputed that JAC was not completely without authority to use the Card that bore his name. In addition, it is clear that Respondent was not a shareholder of BECO and needed a shareholder's authority to use the Card. It is further undisputed that JAC gave Respondent the authority to use the Card. If JAC had not been deemed by the Court to have given Respondent authority to use the Card, JAC could not have been found guilty. Thus, the theory of misconduct by Respondent must be that Respondent independently knew the use of the Card ws unauthorized. In order to establish a violation under Section 570.130 RSMo for fraudulent use of a credit device, the State must prove that the Defendant possessed ***actual knowledge*** at the time the device is used and that such use is unauthorized. "The issue is whether there was sufficient evidence from which the trial court could conclude that this defendant possessed actual knowledge." ***State v. Vestal***, 740 S.W.2d 378 (Mo. App. 1987)

No evidence was presented by Informant that Respondent had actual knowledge his use of the Card was unauthorized. The Informant would have this Court reach this conclusion solely based on Respondent's status as an attorney and career history as a CPA. If the Court were to follow the Informant they would be

ignoring clear evidence that was placed before them by Respondent. Namely, Respondent was given no notice, either by the statute or otherwise by the firm, of which use of the Card was within JAC's apparent authorization, and which were in excess thereof. Respondent is facing discipline based upon the bare assertions that JAC's use of the Card were impermissible. Finally, the actual evidence in the Panel hearing made the point clear: Respondent did not induce JAC. ***Id.*** at 192. Respondent did not assist JAC. ***Id.*** Respondent was not dishonest. ***Id.*** at 193. Respondent was not fraudulent. ***Id.*** Respondent was not deceitful. ***Id.*** Respondent did not misrepresent anything. ***Id.*** Every purchase on the Card was authorized by JAC. ***Id.*** at 207. Respondent's intent was not to be deceitful, dishonest or fraudulent in any way. ***Id.*** at 269. Respondent simply proposed charging items on the Card to a shareholder with authority to use the Card. Rule 4-5.2(b) provides that a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. And while the issue was ultimately ruled against JAC in his criminal trial, whether or not use of the card was authorized was very much an arguable question.

ARGUMENT

II.

THE SUPREME COURT SHOULD ACCEPT THE PANEL'S RECOMMENDATION FOR A PUBLIC REPRIMAND, IF DISCIPLINE IS APPROPRIATE, BECAUSE THE CONDUCT AT ISSUE AMOUNTED TO THE UNAUTHORIZED USE OF A CREDIT CARD DEVICE AND NO HARM WAS INTENDED IN THAT THE INTENT OF RESPONDENT WAS THAT THE CHARGES WOULD BE REIMBURSED IN THE NORMAL COURSE OF BUSINESS.

The Supreme Court should accept the Panel's recommendation for a public reprimand, if discipline is appropriate, because the conduct at issue amounted to the unauthorized use of a credit device and no harm was intended in that the intent of Respondent was that the charges would be reimbursed in the normal course of business.

The best evidence of how Respondent believed the charges on the Card would be handled is exactly what occurred – they would be put into the monthly accounting of the firm and be paid for out of monthly collections. As Dan Erdel testified at JAC's trial, an expense or charge on the Card attributable to a specific attorney was billed against that month's collections. **App. 173 (T. 122, lines 14-**

21). The first charge at issue was for U.S. Legal Forms, in the amount of $49.95, and was made on June 28, 2010. **App. 267 (Exhibit D)**. It was listed in the June accounting detail, attributed to JAC, and was in fact PAID out of June collections, which were sufficient to cover overheard and for JAC to receive a paycheck. **App. 267, 290, 292 (Exhibits D, H and K)**.

The remainder of the charges at issue were made in July. **App. 277 (Exhibit E**). They were placed into the July accounting detail which was created the first week of August (shortly after the Clampitts left). The Clampitts' July collections were insufficient to cover overhead. Dan Erdel further testified that if an attorney personally paid for an item, it was theirs to take, and if the charges on the Card had been covered by July collections we "probably" wouldn't be here (at trial) today. **App. 195-196 (T. 212-215).** Randal Owings testified before the Panel similarly – that we would not be here (at the hearing) if July collections had been sufficient to cover July overhead because firm "probably" would have never made a complaint to OCDC or law enforcement. **App. 63 (T. 133-134.)**

At the criminal trial, JAC was charged in Count II with attempted stealing for directing a firm check be cut to Kevin Hamlett, his criminal defense attorney, and billed against his monthly collections. **App. 139-140 (Exhibit 1).** The Court found said conduct to not be criminal and acquitted him of the charge. Such

conduct is the same as was the intention with the credit card – obtain something now and pay for it at the end of the month. The only difference is the means by which the money was advanced – one by check and one by credit card. Presumably, if the items charged on the credit card had been paid for by check, there would be no basis for discipline, as no crime would have been committed and no fraudulent intent present.

In determining a sanction, the Missouri Supreme Court looks at its own precedent and the ABA Standards for Imposing Lawyer Sanctions. The Standards provide a framework for analyzing sanction determinations:

(1) What ethical duty was violated?

(2) What was the lawyer's mental state?

(3) What was the extent of the actual or potential injury?

(4) Are there aggravating or mitigating circumstances?

Informant argues that Respondent violated a duty owed to the general public to maintain his person (sic) integrity. Informant further urges this Court to place some level of importance on the fact that he had previously worked as an accountant as an indicator as to what he knew JAC could or could not authorize. His experience as accountant tells us nothing about his actual knowledge of BECO's policy regarding use of the credit card. As indicated by both Mr. Owings

and Mr. Erdel, we would not even be here if July collections had been sufficient to cover overhead. That issue was beyond his control.

Respondent understandably was experiencing significant personal problems affecting his mental state. His father had recently passed, his teenage granddaughter was pregnant, and his son had very recently been involved in a fatal collision and was facing criminal prosecution.

The amount of the injury, after extensive discovery, was calculated to be $6,711.00. Depositions in JAC's criminal case were conducted in August and September 2013. The amount calculated was significantly less than the law firm's original claim. Informant argues that Respondent's payment of restitution should be given no mitigating weight, as it was paid only on the cusp of JAC's punishment hearing and only after Brett, Erdel requested restitution as a consideration for the State to not recommend a prison term. This is simply not accurate. Restitution in that amount was tendered, yet rejected, on the first day of JAC's trial in November 2013, before any finding of guilt. The tender was in no way conditioned upon anything, yet Mr. Platz refused to accept it. Restitution was again offered prior to sentencing, before any request was made by the law firm. An agreement was finally reached, and the requested apology made, but the tender of restitution should be given much mitigating weight.

Respondent has no prior disciplinary history. The disciplinary hearing panel noted that the "public does not need to be protected from the Respondent." **App. 255.** Informant repeatedly characterizes Respondent's conduct as dishonest and fraudulent, but there was no evidence that there was ever any such intention. If this Court deems his conduct at issue to be subject to discipline, then please adopt the Panel's recommendation for a public reprimand without conditions.

CONCLUSION

Respondent James Marshall Clampitt did not violate Rules 4-8.4(a) and 4-8.4(c) regarding the use of the credit card, because there was no evidence that he had the actual knowledge that JAC did not have authority to authorize the purchases. Further, he acted only pursuant to a supervisory lawyer's reasonable resolution of an arguable question of professional duty, such that Rule 4-5.2(b) provides he did not violate the Rules of Professional Conduct. Finally, if discipline is appropriate, the panel's recommendation of a public reprimand without conditions is a just result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2015, the Respondent's Brief was sent to the Informant's counsel via the Missouri Supreme Court e-filing system to:

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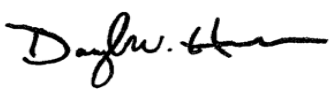
CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3,907 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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