STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: H. Kenneth Merritt, Esq.
PRB File Nos. 2017-018 & 2017-024

Decision No. 231

This proceeding was initiated by Disciplinary Counsel's and Respondent's filing of a proposed stipulation of facts. The parties filed recommended conclusions of law on September 20, 2019. On October 7, 2019, the parties jointly recommended that the Hearing Panel issue a public reprimand as the appropriate sanction for the Respondent's conduct. In addition, Respondent filed a separate memorandum with respect to the recommended sanction on October 14, 2019 and, with the consent of Disciplinary Counsel, three letters in support of the Respondent on October 22, 2019. On October 25, 2019, the Hearing Panel issued a ruling in which it: (1) accepted paragraphs 1 through 20; 23 through 39; and 41 through 61 of the parties' proposed stipulation of facts and rejected paragraph 22 and related portions of paragraphs 21 and 40 of the proposed stipulation of facts; (2) ordered the parties to file copies of the signed 5500-SF forms and related instructions for the years 2010 through 2015 that are referenced in the proposed stipulation of facts; and (3) afforded the parties until December 6, 2019 to file any further stipulation of facts for the Panel's consideration. On or about November 7, 2019 the parties filed the 5500-SF forms and related instructions. On December 11, 2019, the parties submitted a Superseding Stipulation With Respect to Facts 21, 22, and 40 of the parties' prior proposed stipulation of facts.[1]

[1] In a ruling issued December 12, 2019 the Panel accepted the further stipulation of facts while ordering stricken from the record an affidavit and various attachments that had been previously filed by Respondent on December 3, 2019. The affidavit and attachments are not part of the factual record for this decision.

Based on the factual record, the Hearing Panel finds and concludes that Respondent, H. Kenneth Merritt, Esq., made false statements in reports he filed with the Internal Revenue Service and U.S. Department of Labor in his capacity as administrator of his law firm's defined benefit retirement plan, in violation of Rule 8.4(c) of the Rules of Professional Conduct. The Panel concludes that Respondent should be publicly reprimanded for his unprofessional conduct.

FINDINGS OF FACT

1. Respondent, H. Kenneth Merritt, Esq., was admitted to the state and federal Bar of the State of New Jersey in 1979, the state and federal (S.D. and E.D.) Bar of the State of New York in 1980, and the state and federal Bar of the State of Vermont in 1988.

2. Respondent is in good standing in each of the jurisdictions referenced in Paragraph 1.

3. Respondent has no prior disciplinary record.

4. Respondent has cooperated fully with Special Disciplinary Counsel, has provided Special [Disciplinary] Counsel with all documents Special Disciplinary Counsel has requested, has submitted written information to Special Disciplinary Counsel, and has met with Special Disciplinary Counsel for a multi-hour interview.

5. Respondent is the Managing Director of Venture Law, Inc., a Vermont corporation d/b/a Merritt & Merritt (the "**Firm**").

6. The Firm was founded in 1996 by Respondent, and he is the majority shareholder and President. Respondent leads the Firm's transactional corporate practice and is also deeply involved in the local entrepreneurial community and active in multiple professional organizations and various angel and investor groups throughout the United States. He is a Founding Member of Slow Money Alliance and Vermont Businesses for Social Responsibility, as well as Board Member and Managing Director of North Country Angels, Vermont's only

angel investment group. For over 35 years, Respondent has concentrated in general corporate and securities transactions as well as the formation and governance activities of privately and publicly held companies, non-profit organizations, venture capital funds and financial institutions. Respondent led the drafting of the Vermont Benefit Corporation legislation, and he is passionate about fostering the growth of socially responsible businesses.

7. The Complaints in this matter were filed against Respondent by letters dated August 8, 2016 and August 9, 2016 by four former employees of the Firm (the "**Complainants**"), three of whom left the Firm in March 2016 to form a new firm.

8. The gravamen of the Complaints related to Firm pension-related issues, all of which have been resolved, as discussed below.

9. On September 1, 2016, shortly after filing the Complaints, three of the former employees filed a civil action (the "**Civil Action**") against the Firm in federal court relating in part to the Firm's Defined Benefit Plan (the "**Plan**"), as further described below in which the plaintiffs were participants.

10. Subsequent to the filing of the Civil Action, the Firm retained experienced Employee Retirement Income Security Act ("**ERISA**") counsel who filed a Motion to Dismiss on November 17, 2016. Pursuant to a Settlement Agreement dated February 7, 2017, the Civil Action was settled and dismissed with prejudice.

11. In or about 2001, at the suggestion and recommendation of the Firm's then-accountant, the Firm retained PRP Planning, Inc. ("**PRP**"), an experienced pension consultant. With the assistance of PRP, the Firm established the Plan in 2001 to serve as a retirement vehicle, primarily for the Firm's principals, but also for other employees of the Firm, subject to vesting. PRP drafted the original Plan in 2001 and amendments to the Plan in 2011.

12. The Plan is a "qualified" plan under ERISA and is subject to regulations promulgated under ERISA. Since inception of the Plan, federal law has required the Firm to file a Form 5500-SF ("**5500-SF**") with the United States Department of Labor ("**DOL**") and Internal Revenue Service ("**IRS**") annually relating to the Plan.

13. For Plan Years 2001 through 2015 PRP prepared for Respondent's signature and filed the Plan's 5500-SF.

14. At the time the Firm established the Plan, Respondent had no experience in setting up or administering a pension plan and no knowledge about applicable regulatory requirements, so the Firm and Respondent relied on PRP to establish the Plan and to prepare all required filings.

15. Since inception of the Plan, the Firm has been the Sponsor and Administrator of the Plan.

16. As required under ERISA, the Firm established a trust (the "**Trust**") to hold the assets of the Plan.

17. Respondent has served as a Trustee of the Trust since inception of the Plan.

18. As the Plan is a defined benefit plan, all contributions to the Plan are made by the Firm. Employees do not contribute to the Plan.

19. The Plan provides in Article 2 "Fiduciaries":

> 3.2.1 Standard of Conduct. The duties and responsibilities of the Plan Administrator with respect to the Plan shall be discharged (a) in a non-discriminatory manner; (b) for the exclusive benefit of Participants and their Beneficiaries; (c) by defraying the reasonable expenses of administering the Plan; (d) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (e) by diversifying the investments of the Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (f) in accordance with

the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of the Act.

20. The Plan provides in Article 5 "Loans":

3.5.3 Limitations. No loan to any Participant or Beneficiary can be made to the extent that such loan, when added to the outstanding balance of all other loans to the Participant or Beneficiary, would exceed the lesser of (a) fifty thousand dollars ($50,000.00) (reduced by the excess, if any, of the highest outstanding balance of loans from the Plan during the one year period ending on the day before the date on which the loan was made over the outstanding balance of loans from the Plan on the date on which such loan was made) or (b) one-half of the Present Value of the Participant's vested Accrued Benefit determined as of the Anniversary Date coinciding with or immediately preceding such loan or, ten thousand dollars ($10,000), if greater. For the purposes hereof, all loans from all plans of the Employer and other members of a group of employers described in sections 414(b), (c), (m) and (o) of the Code shall be aggregated. In no event shall a loan to a Participant exceed the Present Value of the Participant's vested Accrued Benefit, based on the assumptions in the definition of Actuarial Equivalence in Part 1 Article 2.

21. In connection with annual filing of the Form 5500-SF, PRP sent Respondent only the signature page to the Form 5500-SF, which Respondent signed on behalf of the Firm as Plan Administrator and Plan Sponsor and returned to PRP.

22. PRP did not send Form 5500-SF filing instructions or a draft of the entire Form 5500-SF to the Firm or Respondent.

23. After each 5500-SF was filed, PRP sent the Firm a report with respect to the Plan, which included an as-filed copy of the 5500-SF.

24. Respondent, as a Trustee of the Plan and the President of the Firm, was the person legally responsible for the Firm's administration of the Plan and for ensuring that the Plan complied with applicable laws and regulations.

25. Respondent failed to take the steps necessary to educate himself regarding ERISA requirements and limitations.

26. Respondent acknowledges that he failed to make appropriate inquiries about ERISA requirements and failed to exercise due diligence in regard to his responsibilities on behalf of the Firm as Administrator of the Plan and as Trustee of the Plan.

27. Beginning in 2010 and continuing into 2015, Respondent, through a limited liability company, Verdure Capital Management, LLC, ("**Verdure**"), borrowed an aggregate of $1,495,000 from the Plan (the "**Loans**").

28. Respondent used the Loans from the Plan to Verdure for personal and Firm expenditures.

29. At all times the outstanding balance of the Loans never exceeded Respondent's interest in the Plan. For example, as of July 1, 2017, the present value of Respondent's interest in the Plan was $1,860,084. As of January 1, 2017, the total value of the Plan was $4,353,410.

30. The present value of the Complainants' interest in the Plan was less than $200,000 at the time of filing of the Complaints.

31. Respondent is the sole owner and Manager of Verdure. .

32. Under ERISA, transactions between a defined benefit plan and specified parties are prohibited transactions (with certain exceptions). Under ERISA regulations, Verdure is given the same status as Respondent because it is wholly owned and controlled by Respondent. As a result, the Loans to Verdure were prohibited under ERISA.

33. As noted above, from inception of the Plan, including with respect to Plan years 2010 through 2015, federal law required the Firm to file a 5500-SF with the DOL and IRS annually relating to the Plan.

34. Among the questions included on the 5500-SF for Plan years 2010 through 2015 are:

a. "**6a** Were all of the plan's assets during the plan year invested in eligible assets? (See instructions.)"; and

b. "**10b** Were there any nonexempt transactions with any party-in-interest? (Do not include transactions reported on line 10a.)."

35. Above the signature lines on each 5500-SF is the following certification:

> Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including, if applicable, a Schedule SB or Schedule MB completed and signed by an enrolled actuary, as well as the electronic version of this return/report, and to the best of my knowledge and belief, it is true, correct, and complete.

36. The instructions for the 2010 5500-SF include the following:

a. "**General Instructions** . . . To be eligible to use Form 5500-SF, the plan must . . . [h]ave 100% of its assets invested in certain secure instruments with a readily determinable fair value.";

b. "**Penalties.** Plan administrators and plan sponsors must provide complete and accurate information and must otherwise comply fully with the filing requirements. . . . Certain penalties are administrative . . . Others require a conviction.";

c. "**Other Penalties** . . . A penalty up to $10,000, five (5) years imprisonment, or both, may be imposed for making any false statement or representation of fact, knowing it to be false, or for knowingly concealing or not disclosing any fact required by ERISA. See section 1027, Title 18, U.S. Code, as amended by section 111 of ERISA.";

d. "**Line 6a—Eligible Plan Assets.** To be eligible to file the Form 5500-SF, all of the plan's assets must be 'eligible plan assets.' Answer line 6a 'Yes' or 'No.' Do not leave this question blank. If the answer to line 6a is 'No' you CANNOT file the Form 5500-SF and must file the Form 5500. See discussion under Who May File Form 5500-SF.

For the purposes of this line, 'eligible plan assets' are assets that have a readily determinable fair market value for purposes of this annual reporting requirement as described in 29 CFR 2520.103-1(c)(2)(ii)(C), are not employer securities, and are held or issued by one of the following regulated financial institutions: a bank or similar financial institution as defined in 29 CFR 2550.408b-4(c) (for example, banks, trust companies, savings and loan associations, domestic building and loan associations, and credit unions); an insurance company qualified to do business under the laws of a state; organizations registered as broker-dealers under the Securities Exchange Act of 1934; investment companies registered under the Investment Company Act of 1940; or any other organization authorized to act as a trustee for individual retirement accounts under Code section 408. Examples of assets that would qualify as eligible plan assets for this annual reporting purpose are mutual fund shares, investment contracts with insurance companies or banks that provide the plan with valuation information at least annually, publicly traded stock held by a registered broker dealer, cash and cash equivalents held by a bank. Participant loans meeting the requirements of ERISA section 408(b)(1) are also 'eligible plan assets' for this purpose whether or not they have been deemed distributed."; and

e. **"Line 10b.** Plans that check 'Yes' must enter the amount. Check 'Yes' if any nonexempt transaction with a party-in-interest occurred...If you are unsure whether a transaction is exempt or not, you should consult either with a qualified public accountant, legal counsel, or both. If the plan is a qualified pension plan and a nonexempt prohibited transaction occurred with respect to a disqualified person, an IRS Form 5330 is required to be filed with the IRS to pay the excise tax on the transaction.

Nonexempt transactions. Nonexempt transactions with a party-in-interest include any direct or indirect . . .

> **B.** Lending of money or other extension of credit between the plan and a party-in-interest . . . .
>
> **D.** Transfer to, or use by or for the benefit of, a party-in-interest, of any income or assets of the plan . . . .

Party-in-Interest. For purposes of this form, party-in-interest is deemed to include a disqualified person. See Code section 4975(e)(2). The term 'party-in-interest' means, as to an employee benefit plan:

> **A.** Any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of the plan; . . .

G. A corporation, partnership, or trust or estate of which (or in which) 50% or more of:

1. the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

2. the capital interest or profits interest of such partnership, or,

3. the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in A, B, C, D, or E."

37. The instructions for the 5500-SF for the Plan years 2011 through 2015 are substantively the same as those for 2010 as excerpted above.

38. For Plan years 2010 through 2015 Respondent signed the 5500-SF filed for the Plan in his capacities as the Plan Administrator and the Employer/Plan Sponsor. Each of the 5500-SF Forms signed by Respondent for Plan years 2010 through 2015 included a Schedule SB that had been completed and signed by an actuary.[2]

39. Respondent never requested that PRP provide him with the complete draft 5500-SF or the filing instructions before signing a 5500-SF.

40. The signature page of the Form 5500-SF for Plan years 2010 and 2011 contained Line 10b and the signature page for Plan years 2012 and 2013 contained Line 6a. The signature page of the Form 5500-SF for Plan years 2014 and 2015 contained neither Line 6a nor Line 10b.

41. For each of the Plan years 2010 through 2015, the 5500-SF filed for the Plan and signed by Respondent contained an answer of "Yes" on Line 6a, thereby representing that the Plan's assets were "invested in eligible assets."

42. The Loans to Verdure were not "eligible assets" under ERISA.

[2] The parties' stipulation did not include any reference to the Schedule SB forms. However, at the Panel's request the parties submitted complete copies of the returns/reports that were submitted to the IRS and DOL, and those documents show that a Schedule SB was attached to each return/report.

43. For each of the Plan years 2010 through 2015, the 5500-SF filed for the Plan and signed by Respondent contained an answer of "No" on Line 10b, thereby representing there were no "nonexempt transactions with any party-in-interest."

44. The Loans to Verdure were, in fact, such non-exempt transactions.

45. When Respondent made the Loans to Verdure and when he signed each signature page, he did not investigate or make inquiry into whether the Loans from the Plan to Verdure were prohibited transactions or whether the Verdure obligation to the Plan constituted an eligible asset for purposes of Lines 6a and 10b on the 5500-SF. Respondent did not seek advice from PRP, accountants, legal counsel or any other qualified individual with regard to the Loans to Verdure or his signing of the annual 5500-SF.

46. When the completed 5500-SF was filed by PRP, a copy was sent to the Firm, but Respondent does not recall ever reviewing the 5500-SF when it was received from PRP and believes it was filed by the Firm's administrative staff.

47. In September 2016, in responding to allegations in the Civil Action, Respondent was advised that the Loans the Plan had made to Verdure were prohibited transactions under ERISA and that Respondent should take immediate steps to remedy the ERISA violations as provided for in ERISA and DOL guidelines governing prohibited transactions.

48. In September 2016, in order to comply with ERISA requirements for remediating the ERISA violations, Respondent retained experienced ERISA compliance counsel to direct the steps required to put the Plan back into compliance.

49. ERISA imposes excise taxes as a penalty for engaging in prohibited transactions.

50. The Firm retained CPAs experienced in ERISA plan compliance to calculate the excise taxes due and to prepare and file Form 5330s (the forms required to be filed in connection with the payment of the excise taxes).

51. Aggregate excise taxes of $140,142.74 were paid by the Firm to the IRS. In addition, penalties and interest of $23,225.78 were paid by the Firm to the IRS in connection with the Form 5330 filings.

52. Further, on July 1, 2017, to remedy the ERISA violations, the Verdure Loans totaling $1,470,000.00 were repaid in full by Respondent, with interest of $305,169.22.

53. The present value of Respondent's interest in the Plan as of July 1, 2017 was $1,860,084.00.

54. The value of the Plan as a whole as of that date was in excess of $4,000,000.

55. As permitted by ERISA, the Plan made two participant loans totaling $100,000 ("**Participant Loans**") to Respondent and Respondent's spouse, who is also a shareholder and employee of the Firm. These loans were not repaid by Respondent and his spouse on the quarterly amortization schedule required by ERISA, which made them non-compliant loans. These Participant Loans were repaid in full with interest by Respondent and Respondent's spouse.

56. IRS conducted an audit of the Plan that began in February 2017 and was completed in August 2018. Prior to the completion of the audit, Respondent remedied all conditions of non-compliance, as noted above. In addition to the other penalties and interest paid to bring the Plan into compliance with ERISA, the Firm also paid the IRS an additional penalty of $15,000 in connection with the completion of the audit.

57. The amounts borrowed by Verdure for the benefit of Respondent never exceeded the dollar value of Respondent's interest in the Plan, and at all times the assets in the Plan (exclusive of the amount of the Loans) were alone sufficient to pay all accrued benefits owed to Plan participants other than Respondent.

58. No other Plan participants were impacted by Respondent's actions or by the funds borrowed from the Plan.

59. With the steps taken by Respondent and the Firm, including the repayment of the Loans to Verdure and the payment of excise taxes and an IRS-imposed penalty, the ERISA violations have been remedied in accordance with ERISA compliance requirements, and the Plan is in compliance with ERISA.

60. No client funds were ever in the Plan or ever at risk, and no client interests were involved at any time.

61. Respondent acknowledges that he failed to exercise due diligence with respect to the Verdure Loans and that he should have known that:

a. Verdure was a "party-in-interest" under ERISA;
b. the Loans were not "eligible assets" under ERISA;
c. The Loans were "nonexempt transactions with [a] party-in-interest" under ERISA;
d. The Loans were prohibited transactions in violation of ERISA; and
e. Respondent was not permitted under ERISA to use the Loans for personal and Firm expenditures.

CONCLUSIONS OF LAW

Rule 8.4(c) of the Vermont Rules of Professional Conduct states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." V.R.Pr.C. 8.4(c).

> The term "dishonesty" means, among other things, "conduct evincing a lack of honesty, probity or integrity in principle" and a "lack of fairness and straightforwardness." *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (quotation omitted); *see also In re Herman*, 348 P.3d 1125, 1132 (Or. 2015) ("[D]ishonesty includes a disposition to lie, cheat, or defraud; and a lack of trustworthiness or integrity."). "Deceit" has been described as including "the suppression of a fact by one who is bound to disclose it." *Shorter*, 570 A.2d at 767 n.12 (quotation and alteration omitted); *see also Att'y Grievance Comm'n of Md. v. Floyd*, 929 A.2d 61, 66 (Md. 2007) ("[T]he law recognizes that deceit can be based on concealment of material facts as well as on overt misrepresentations.").

In re Adamski, 2020 VT 7, ¶ 24, __ Vt. __, __ A.3d __; *see also In re Strouse*, 2011 VT 77, ¶ 15, 190 Vt. 170, 34 A.3d 329 ("A duty [to speak] may arise from the relations of the parties, or superior knowledge, or means of knowledge.").

"[W]hile Rule 8.4(c) is broad and . . . encompasses conduct both within and outside the realm of the practice of law . . . .[it] applies only to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law." *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 12, 187 Vt. 35, 989 A.2d 523; *see also id.* (concluding that the rule reaches conduct "that reflects on an attorney's fitness to practice law").

In order to find a violation of Rule 8.4(c), the majority of courts "look for some culpable state of mind." ABA Ctr. For Prof'l Responsibility, Annotated Model Rules of Prof'l Conduct 679 (8th ed. 2015); *see, e.g., Iowa Sup. Ct. Disciplinary Bd. v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011) ("[T]he better view is to require some level of scienter that is greater than negligence to find a violation of [Rule 8.4(c)]"); *In re Cutright*, 910 N.E.2d 581, 589–90 (Ill. 2009) (requiring "some act or circumstances that showed the respondent's conduct was purposeful"); *People v. Head*, 332 P.3d 117, 129 (Colo. O.P.D.J. 2013) (requiring proof that respondent acted "knowingly or with a reckless state of mind").

At least one jurisdiction has drawn a distinction, with respect to the requisite state of mind, between *acts* alleged to be fraudulent or deceitful, on one hand, and *false statements* alleged to be dishonest or misrepresentation, on the other hand:

> [F]or "acts" alleged to be "fraudulent or deceitful," a specific intent is typically necessary to be proven to demonstrate that the conduct in question was fraudulent in fact. To the contrary, for "false statements" alleged to be dishonest or a misrepresentation, there is no additional intent element, specific or otherwise, to prove. Accordingly, in the context of Rule 8.4(c), so long as an attorney knowingly makes a false statement, he necessarily engages in conduct involving misrepresentation. No intent to deceive is necessary.

Att'y Grievance Comm'n of Md. v. Dore, 73 A.3d 161, 174 (Md. 2013); *see also id.* ("[D]ishonesty and misrepresentation under Rule 8.4(c) have no requirement of intent to deceive.").

Applying these principles to the facts, the Panel concludes that Respondent violated Rule 8.4(c). He made numerous false statements, in his capacity as the administrator of his law firm's defined benefit plan, to the Internal Revenue Service and U.S. Department of Labor. The 5500-SF forms submitted under Respondent's signature each year from 2010 through 2015 contained numerous false statements.

To begin with, his statements that "I have examined this return/report, including, if applicable, a Schedule SB or Schedule MB completed and signed by an enrolled actuary, as well as the electronic version of this return/report" were false. Respondent maintains that he never reviewed any portion of the returns other than the signature page. These were multi-page returns and they included an attachment filled out by an actuary—Schedule SB.[3] One obviously cannot claim to have reviewed a document based on reviewing only one portion of the document. Respondent lied when he stated that he had reviewed the various returns. Respondent knew that his statements were false. Accordingly, these misrepresentations—made in each annual statement for plan years 2010 through 2015—violated Rule 8.4(c).

In addition, the answers to Questions 6a and 10b on the 5500-SF forms were false. With respect to Question 6a, all of the defined benefit plan's assets during the plan years were not, in fact, invested in "eligible assets." And, with respect to Question 10b, there were, in fact, "nonexempt transactions" with a party in interest during the years in question. As stipulated by the parties, Question 10b and the false answer to that question appeared on the signature pages of the 5500-SF form for plan years 2010 and 2011, respectively, and Question 6a and the false answer to that question appeared on the signature pages of the 5500-SF form for Plan years 2012 and 2013, respectively. Respondent cannot dispute that he knowingly made these false statements, in violation of Rule 8.4(c).

Moreover, the Panel concludes that Respondent should also be held responsible under Rule 8.4(c) for the remaining false answers to Questions 6a and 10b that did **not** appear on the signature pages. Respondent expressly represented that he had reviewed the returns. If he had requested a complete draft of the returns and instructions and reviewed them, or if he had reviewed the as-filed copies of the returns that were sent to him and the related instructions, he would have readily learned that the answers prepared by PRP for Questions 6a and 10b were

[3] The Schedule SB set forth an actuary's valuation of the assets in the Plan and funding targets for the plan participants for each of the Plan years in question. By his own admission, Respondent never reviewed that form before signing the declaration.

false.[4] Respondent could have done so but chose not to. Under the circumstances presented—where a lawyer has recklessly signed a form under oath that is required by law to be submitted to a regulatory agency—a lawyer should not be allowed to claim that he did not actually *know* that he had made a false statement on a form because he or she did not review the form before signing it. In *People v. Kolbjornsen*, 35 P.3d 181 (Colo. O.P.D.J. 1999), the court held that:

> [the respondent's] submission under oath of false information on his tax returns and [his] bankruptcy schedules, were, if not outright intentional, sufficiently reckless to constitute knowing conduct." *In the Matter of Patrick Anene Egbune,* 971 P.2d 1065, 1073 (Colo.1999) *cert. denied,* 526 U.S. 1115, 119 S.Ct. 1762, 143 L.Ed.2d 793 (1999) (holding that reckless conduct, not mere negligent conduct, is equivalent to knowing conduct and *citing People v. Small,* 962 P.2d 258, 260 (Colo.1998)); *People v. Rader,* 822 P.2d 950, 953 (Colo.1992)(holding that an attorney's conduct can be so careless or reckless that it must be deemed to be knowing and thus constitutes a violation of a specific disciplinary rule).

Id. at 183–84.

To conclude otherwise would encourage irresponsible behavior. In sum, Respondent's conduct was sufficiently reckless to find violations under Rule 8.4(c) for the remaining false statements.[5]

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[4] The following language appears in bold type at the top of the first page of the 5500-SF: **"Complete all entries in accordance with the instructions to the Form 5500-SF."** It also bears noting that it did not require any special legal expertise on the part of Respondent to understand, if he had read the instructions, *see* Finding of Fact ¶ 36, that the draft answers prepared by PRP to Questions 6a and 10b were incorrect in light of the facts which were known to Respondent regarding the Verdure loans.

[5] The Panel notes that its recognition of these additional violations, based on false statements that did not appear on the signature pages, made no difference in the Panel's selection of an appropriate sanction. Multiple violations are attributable to the false statements that appeared on the pages signed by Respondent. The additional violations based on answers to questions not on the signature pages did not materially enlarge the scope of Respondent's violations to the point that a more severe sanction would be justified.

Respondent's conduct reflected adversely on his fitness to practice law. Submitting false statements on a required federal return to federal agencies is obviously a serious matter that raises questions regarding a lawyer's integrity and competence to practice law.

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing panels are guided by the ABA Standards when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

> When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803. "Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction. . . . This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors." *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

The Duty Violated

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) ("*ABA Standards*"), Theoretical Framework, at 5. Other duties are owed to the general public, the legal system, and the legal profession. *Id.* In this case, Respondent violated duties owed to the public:

> The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty . . . .

Id. (citing various rules, including Model Rule 8.4(c)).

Respondent was serving as the plan administrator and the trustee of a trust holding the assets of the defined benefit plan. He was serving in that capacity not only on his own behalf but also on behalf of the other employees of the law firm. He failed to perform his duties with honesty and integrity.

Mental State

"The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, "[a lawyer's] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *Id.*, Theoretical Framework, at 6. The mental state of "knowledge" is present "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result." *Id.* The mental state of "negligence" is present "when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*; *see also id.*, at 19 (definitions of "intent," "knowledge," and "negligence"). The

Supreme Court has observed that "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *In re Fink*, 2011 VT 42, ¶ 38.

The Panel concludes that Respondent acted knowingly in connection with his false statement that he had "examined this return/report, including, if applicable a Schedule SB or Schedule MB completed and signed by an enrolled actuary, as well as the electronic version of this return/report . . . ." Respondent knew that he had **not** examined the entirety of the multi-page returns/reports for the years in question, but rather only the signature page. Although one might argue that he acted with an intention to deceive, the Panel concludes that the better view is that he knew the statement was false but did not intend to achieve a wrongful result through the statement.

Although the issue of Respondent's mental state with respect to the false answers to Questions 6a and 10b is more complex, the Panel concludes that Respondent's state of mind is properly considered to be knowing under the specific circumstances presented. In support of his assertion that his state of mind should be characterized as negligent, Respondent maintains that he had no knowledge of the applicable regulatory requirements and that he hired and relied exclusively on a pension consultant, PRP, to prepare the 5500-SF filings. Respondent concedes that he was the person responsible for ensuring that the Plan complied with all applicable laws and regulations and that he should have taken steps, as the plan administrator and as trustee of the trust holding the assets of the Plan, to educate himself about ERISA's requirements and to make inquiries in connection with 5500-SF returns. Nevertheless, he argues that he had no reason to believe he was making false statements on the return and therefore his state of mind should be considered negligence.

In *In re Fink*, 2011 VT 42, 189 Vt. 470, 22 A.3d 461, the Court held that a respondent's subjective belief that he was not charging an unreasonable fee and that he would ultimately earn the fee could justify characterizing his mental state as negligent for purposes of the sanctions inquiry—even though it could not obviate the panel's determination that he had, based on the objective facts, charged an unreasonable fee, in violation of the rules. *Id.* ¶¶ 40-41. "[W]hile a lawyer's good faith, but unreasonable, belief that his actions are not misconduct is not a defense to a violation, such an error can be a factor imposing discipline." Id. ¶ 41. The Court explained that:

> [i]n the context of sanctions . . . knowing conduct does not encompass both knew or should have known. If the definition extended to constructive knowledge then no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk.

Id.

The circumstances in this case, however, are distinguishable. Respondent knowingly made a false statement. He knew that he had not examined the 5500-SF forms or the attached Schedule SB forms for purposes of ascertaining the accuracy of the information provided in the returns. His statement was a knowing lie. Moreover, having failed to review the 5500-SF forms and the accompanying instructions—which would have readily revealed the inaccuracy of the answers to Questions 6a and 10b even to an individual not familiar with ERISA law—he did not have a good-faith basis for believing that the answers to those questions were accurate—that the returns were "to the best of my knowledge and belief, true, correct, and complete." Finding of Fact ¶ 35. He never undertook the actions that would have put him in a position to make that statement in good faith. His failure to review the form in its entirety and the related instructions amounted to reckless conduct which, as recognized by various courts, is tantamount to knowledge.

Respondent suggests that he was entitled to rely exclusively on the pension consultant for the accuracy of the answers on the forms. There is no authority to support that proposition. Respondent signed the forms under oath and was responsible for the accuracy of the information—just as the person signing an income tax return vouches for the accuracy of the information in the return, even when an accountant is involved in the preparation of the return.

If Respondent had made efforts to review the forms and nevertheless made a mistake in reviewing the information, his state of mind might have appropriately been characterized as negligent. But Respondent did not examine the returns for purposes of ascertaining the accuracy of the information. In fact, Respondent took no affirmative steps that would allow him to assert that he held a good-faith belief.

The parties stipulated that Respondent never requested that PRP provide him with a complete draft of the 5500-SF forms or the filing instructions; never reviewed the as-filed copy of the 5500-SF returns provided to him by PRP, *see* Findings of Fact ¶¶ 23, 46; and never made any inquiry into whether the loans to his LLC were prohibited transactions or constituted eligible assets. Respondent "did not seek advice from PRP, accountants, legal counsel or any qualified individual with regard to the Loans to Verdure or his signing of the annual 5500 SF." Finding of Fact ¶ 45 (emphasis added). In short, Respondent completely abdicated any responsibility. Under all these circumstances, his state of mind must be considered to have been knowing in nature.[6]

[6] Respondent argues that his state of mind should be framed by his failure to meet his duties as the Plan administrator and that those failures – the failure to inquire about the Verdure loans and failure to review the 5500-SF forms in their entirety and the related instructions – amount to negligence. But however one might characterize Respondent's failure to meet his fiduciary duties, the conduct at issue for which

Injury and Potential Injury

The ABA Standards consider "the actual or potential injury caused by the lawyer's misconduct." *ABA Standards*, § 3.0(c), at 26. The term "injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id.*, Definitions, at 9. The term "potential injury" refers to harm that is "reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.* Under the ABA Standards, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *Id.* at 6.

Here, there was no harm to any client interest. The parties with an interest in the defined benefit plan were the Respondent himself and the employees of the firm. Moreover, none of the participants in the Plan lost any money as a result of Respondent's misconduct. The loans never exceeded Respondent's account balances, *see* Finding of Fact ¶ 29, and all loans were ultimately repaid to the Plan with interest, *see* Findings of Fact ¶ 52-55. Likewise, Respondent assumed responsibility for payment of the excise taxes and other penalties that arose because of the ERISA violations. *Id.* ¶ 51.

Nevertheless, there was significant actual injury to the public in this case. False statements made under oath and violations of federal law necessarily cause harm to the public's perception of attorneys. In this case, Respondent concedes that his statements to the effect that he had reviewed the 5500-SF returns and Schedule SB were false and that his false answers to Questions 6a and 10b had the effect of concealing extensive ERISA violations. Respondent violated ERISA by making prohibited loans totaling approximately $ 1.5 million over a six-year

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Respondent has been found in violation of Rule 8.4(c) are the false statements – not respondent's failure to meet his responsibilities as the Plan Administrator.

period to a limited liability company which he owned exclusively, and he made false statements in each of those years with respect to these violations.[7] Respondent made multiple misrepresentations regarding the loans in the course of six annual filings to the IRS and DOL.

In addition, there was necessarily harm to the other Plan participants from Respondent's recklessness. Although Respondent's conduct did not adversely affect the other firm's employees' financial interests, the fact that Respondent had not reviewed the returns in their entirety or otherwise taken steps to ensure that the information in the returns was accurate would raise concerns about Respondent's commitment to fulfilling his responsibilities as the Plan's administrator. Such misconduct would logically cause concern and a loss of confidence on the part of the other law firm's employees who were participating in the Plan.

Presumptive Standard under the ABA Standards

ABA Standard § 5.1 applies "in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation." Depending on whether a respondent has, or has not, been found to have committed a crime and on the nature of respondent's state of mind, the standard provides for a range of presumptive sanctions—from disbarment to private admonition. The standard for disbarment requires either the commission of "serious criminal conduct," § 5.11(a), or "*intentional* conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously

[7] Although the parties' stipulation focuses on the ERISA violations that resulted from the Verdure loans and the associated false statements in the 5500-SF returns, the parties also stipulated that Respondent violated ERISA in connection with a separate participant loan to Respondent, initially made in compliance with the loan limitation provision of the Plan and ERISA provisions, by failing to follow the quarterly amortization schedule required by ERISA. *See* Finding of Fact ¶55. However, Disciplinary Counsel did not charge Respondent with any violation based on this conduct and therefore the Panel does not consider that conduct in assessing injury and potential injury. Similarly, Disciplinary Counsel did not address whether the Verdure loans – to the extent that Respondent was the sole owner of Verdure – may have also violated the provision in the Plan that prohibited the making of loans in excess of $50,000 to a plan participant or beneficiary. *See* Finding of Fact ¶ 20. Therefore, the Panel does not address that issue either.

adversely reflects on the lawyer's fitness to practice." *Id.* § 5.11(b) (emphasis added). The standard for suspension requires a finding that the respondent has "knowingly engage[d] in criminal conduct." *Id.* § 5.12.

The Panel concludes that Standard 5.13 provides the best guidance for this case.[8] It provides that a "[r]eprimand is generally appropriate when a lawyer engages in . . . conduct [other than that specified in §§ 5.11 & 5.12] that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Here, Disciplinary Counsel has not taken the position that a crime was committed. Moreover, the Panel has concluded that Respondent did not *intend* to provide false answers to Questions 6a and 10b on the 5500-SF forms. As explained above, Respondent's mental state is best characterized as knowing in nature—not intentional. Therefore, neither § 5.11 nor § 5.12 are applicable.

Respondent's conduct reflected adversely on his fitness to practice law. Lawyers routinely find themselves in positions where trust and honesty are required. And it is commonplace for lawyers to serve as fiduciaries. Misrepresentations on the part of a lawyer undermine the public's confidence in the legal profession. A public reprimand is the appropriate presumptive standard.

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[8] ABA Standard 7.2 provides for suspension "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to a client, the public, or the legal system." The Panel concludes, however, Standard 5.1 is clearly applicable and, therefore, should be applied. *See In re Adamski*, 2020 VT 7, ¶ 47 (declining to apply Standard 7.0 to Rule 8.4(c) violation and concluding that "Standard 5.0 is a better fit for this particular fact pattern."); *In re Strouse*, 2011 VT 77, ¶ 22 (applying Standard 5.13 and declining to apply to apply Standard 7.0 in case involving lawyer's concealment of relationship with senior partner's client's husband that resulted in a conflict of interest); *cf. In re Robinson,* 2019 VT 8, ¶ 47 n.7, 209 A.3d 570 (Standard 7.0 properly applied because "there [was] not another 'clearly applicable' standard for respondent's conduct").

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive standard of suspension. Under the ABA Standards, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standards*, § 9.21, at 50. Mitigating factors are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Id.* § 9.31, at 50-51. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

(a) Aggravating Factors

The following aggravating factors under the ABA Standards are present:

§ 9.22(c) (pattern of misconduct) and § 9.22(d) (multiple offenses)—Respondent made multiple false statements in connection with the annual filings of the 5500-SF forms over a six-year period. To the extent that the Respondent's false statements were repeated on multiple occasions over the course of several years, there was a pattern of misconduct. Moreover, each of the false statements constituted a separate violation of Rule 8.4(c) and, therefore, multiple offense were committed. However, the Panel recognizes that the essential attributes of Respondent's violations were established in the filing of the first 5500-SF form in 2010 and were simply repeated over time. The conduct underlying the violations did not change over time. Moreover, the violations involved only one entity—the law firm's defined benefit plan. Therefore, these two aggravating, while deserving of significant weight, should be tempered somewhat.

§ 9.22(i) (substantial experience in the practice of law)—At the time of the conduct in question commenced, Respondent had practiced law for approximately thirty years. His many years of experience should have alerted him to the impropriety of his conduct.

§ 9.22(l) (illegal conduct)—Respondent has admitted that he committed violations of ERISA by engaging in prohibited transactions. In addition, his false statements on the 5500-SF forms were illegal.

(b) Mitigating Factors

The following mitigating factors under the ABA Standards are present:

§ 9.32(a) (absence of a prior disciplinary record)—In over thirty years of practice Respondent has no prior disciplinary record.

§ 9.32(d) (timely good faith effort to make restitution or to rectify the consequences of misconduct)—When the ERISA violations came to light in 2016 Respondent took prompt action to remedy the violations and put the Plan back into compliance, including repaying the Verdure and personal loans and arranging for the payment of excise taxes, administrative penalties, and an auditing fee. On the other hand, the Panel notes that the violations came to light only as a result of a lawsuit filed against Respondent in 2016 by former employees of the law firm and that, as a practical matter, Respondent had to respond to the violations at that point in order to manage and minimize his legal exposure.[9] Those circumstances diminish somewhat the weight of this factor.

[9] Respondent maintains that the payment of excise taxes, administrative penalties, and the auditing fee also justifies application of the mitigating factor in § 9.32(k) for "imposition of other penalties and sanctions." Application of that factor is questionable for several reasons. First, it seems inconsistent to claim credit under one factor for voluntarily rectifying the consequences of misconduct by paying various monetary obligations while simultaneously claiming credit under another factor under a theory that the monetary payments resulted from "imposed" penalties. It is questionable whether both aggravating factors apply to what are essentially the same circumstances – the payment of the monetary obligations. Moreover, according to the parties' stipulation, the various payments were made by the law firm – a

§ 9.32(e) (cooperative attitude toward proceedings)—Respondent cooperated fully with Disciplinary Counsel in connection with the investigation of this matter. However, this factor is not entitled to significant weight because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g.*, *In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) ("[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation").

§ 9.32(g) (character or reputation)—Respondent has a good reputation in the community as a knowledgeable and effective business lawyer. He is widely respected for his work assisting startup businesses, as well as more established businesses, with a range of legal issues. Several individuals submitted letters lauding Respondent for his successful work with both for-profit and non-profit businesses in Vermont, for serving on boards, and for donating his time to various educational efforts, including his efforts aimed at promoting socially responsible businesses.

§ 9.32(l) (remorse)—Respondent has accepted responsibility for his misconduct.

(c) Weighing the Aggravating Mitigating Factors

After considering the various aggravating and mitigating factors and giving them their appropriate weight, the Panel concludes that the competing factors are essentially balanced. The presumptive sanction of public reprimand should be not be increased or reduced. Under the circumstances of this case, it is the appropriate sanction.

* * *

corporation, *see* Finding of Fact ¶ 5 – and not by Respondent, raising further questions as to whether ERISA monetary obligations attributable to a law firm (as the sponsor of the Plan) can be invoked by an individual respondent under § 9.32(k). Given the sparseness of the facts relating to these issues and the lack of any legal briefing from the parties on these issues, the Panel declines to apply the factor. In any event, even if the Panel were to apply the factor it would not change the outcome of its balancing of the aggravating and mitigating factors or the ultimate sanction imposed in this case.

Hearing panels consider prior disciplinary decisions "to augment our analysis under the [ABA S]tandards." *In re Strouse*, 2011 VT 77, ¶ 26, 190 Vt. 170, 34 A.3d 329. At the same time, it bears noting that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases." *Id.* ¶ 43 (Dooley, J., dissenting). The Panel has considered several disciplinary decisions involving Rule 8.4(c).

In *In re Strouse*, the Court held that a law firm associate who failed to inform her senior attorney that she had renewed a relationship with the senior attorney's client's husband engaged in deceit in violation of Rule 8.4(c). *Id.* ¶ 14 (maj. op.). The Court utilized Standard 5.13 as the pertinent presumptive standard. In arriving at an ultimate sanction of public reprimand the Court observed that even though the respondent had acted with a selfish motive "she acted not for greed or glory, nor for malice or lucre, but apparently for romantic reasons." *Id.* ¶ 34. The Court also cited, among other mitigating factors, respondent's expression of remorse for her conduct and her lack of any prior disciplinary record, as well as the fact that "the conduct at issue was not related directly to the handling of client matters or funds," *id.* ¶ 27, and that the representation of the firm's client was not impaired by respondent's conduct. *Id.* ¶¶ 33, 36. As was the case in *Strouse*, Respondent's false statements did not adversely impact any client of the law firm. Moreover, Respondent has no prior disciplinary record and has expressed remorse for his misconduct.

Several cases in which suspensions were imposed for violations of Rule 8.4(c) are distinguishable. In *In re Adamski*, 2020 VT 7, the Court concluded that a violation of Rule 8.4(c) had occurred where a lawyer "was aware that [the lawyer's] firm claimed an interest in a portion of the settlement proceeds and [without telling anyone of her actions] nonetheless took the settlement check from the firm and deleted case-related material from the firm's computer system." *Id.* ¶ 26. Although the Court applied Standard 5.13 as the presumptive guideline, it ultimately increased the sanction to a fifteen-day suspension based on its conclusion that the aggravating factors significantly outweighed the mitigating factors. The only mitigating factor present was the absence of a prior disciplinary record. The Court placed heavy emphasis on the fact that the respondent "acted selfishly to maximize the financial recovery for her wife, and derivatively, herself, at the expense of the firm," *id.* ¶ 52, and that respondent had refused to acknowledge the wrongfulness of the conduct at issue. *Id.* ¶ 49. By contrast, Respondent in this case was not pursuing any financial advantage for himself and accepted responsibility for his misconduct. Moreover, several mitigating factors are present here, including Respondent's efforts to rectify the consequences of his misconduct and evidence of a good reputation in the community. Thus, the balancing of aggravating and mitigating factors does not call for any adjustment to the presumptive sanction of public reprimand in the present case.

In *In re McCarty*, 2013 VT 47, ¶¶ 28-29, 194 Vt. 109, 75 A.3d 589, a lawyer who drafted and sent to his client's tenant an unlawful notice to vacate premises was found to have violated Rule 8.4(c) along with several other rules of conduct. In imposing a three-month suspension, the Court concluded that respondent had "intentionally violated the legal process by circumventing the statutorily prescribed eviction process." *Id.* ¶ 28. The Court found that the respondent had violated not only his general duty of honesty but also his duty "[as an officer of the court] to abide by legal rules of both substance and procedure that affect the administration of justice." *Id.* These additional considerations justified the application of a presumptive sanction of suspension. In addition, the Court found that the conduct resulted in considerable harm to both respondent's client and the tenant. *Id.* ¶ 30. By contrast, the conduct in the current case does not involve a client or a judicial process and did not result in any financial or physical harm and, therefore, does not call for a more severe sanction.

In *In re Levine*, PRB Decision No. 63 (2004), the respondent received a 30-day suspension for stating falsely, in an affidavit supporting a motion to appear in a case pro hac vice, that he had never been disciplined in any other jurisdiction when, in fact, he had been. The panel found that respondent submitted the statement knowingly. The sanction standard applied by the panel, Standard 6.12, provides for suspension for knowing submission of a false statement *to a court*. By contrast, the current case does not involve false statements to a court and is guided by a different standard, Standard 5.13, that provides for public reprimand.

In *In re Rice*, PRB Decision No. 64 (2004), the respondent violated numerous rules of conduct, including Rule 8.4(c), by concealing client assets from the client's creditors. As between Standard 5.13, which provides for public reprimand, and Standard 4.12, which provides for suspension, the panel elected to impose a suspension. In imposing a 90-day suspension the panel weighed aggravating factors heavily, including respondent's failure to acknowledge the wrongfulness of his conduct. The conduct at issue in the case involved the administration of justice and, therefore, was more serious than the conduct in the present case. In addition, Respondent in the present case acknowledged his wrongdoing and took steps to rectify the consequences of his misconduct.

In sum, examination of the pertinent case law confirms the Panel's conclusion that issuance of a public reprimand is the appropriate sanction under the circumstances presented.

ORDER

Based on the Panel's Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that Respondent, H. Kenneth Merritt, Esq., is publicly reprimanded for violation of Rule 8.4(c) of the Rules of Professional Conduct.

Dated: January 31, 2020

Hearing Panel No. 1

Anthony Iarrapino, Esq., Chair

Emily Tredeau, Esq., Member

Scott Hess, Public Member