

THE DISCIPLINARY AND ETHICS COMMISSION

IN THE MATTER OF

CLAYTON BENWAY,

Respondent.

CFP Board Case No. 2023-65123

November 8, 2024

ORDER

CFP Board established the *Fitness Standards for Candidates for CFP® Certification and Former CFP® Professionals Seeking Reinstatement* (“*Fitness Standards*”) to ensure that an individual’s prior conduct does not reflect adversely upon their fitness for CFP® certification, the profession, or the CFP® certification marks. Under the *Fitness Standards*, a misdemeanor conviction is conduct that may reflect adversely and will bar an individual from becoming certified unless the candidate petitions CFP Board’s Disciplinary and Ethics Commission (“DEC” or “Commission”) for a fitness determination in accordance with CFP Board’s *Procedural Rules*, and the DEC grants the petition or permits the individual to reapply for certification at a later date.

I. PROCEDURAL HISTORY

On July 20, 2023, Respondent submitted his initial application for CFP® certification, in which he disclosed a 2022 domestic assault charge and a 2023 disorderly conduct charge. (DEC Book at 11-12.) Respondent had previously disclosed a 2015 DUI¹ conviction. (DEC Book at 9-10.)

On November 27, 2023, CFP Board’s Enforcement Counsel provided notice to Respondent that a misdemeanor conviction may reflect adversely upon his fitness for CFP® certification, the profession, or the CFP® certification marks, and informing him that he must file a Petition for Fitness (“Petition”) by December 28, 2023. (*Id.* at 6-7.)

On January 18, 2024, Respondent filed his Petition². (*Id.* at 145-62.)

On June 27, 2024, a Hearing Panel of the Commission convened at CFP Board’s headquarters in Washington, DC to hear testimony and consider documents and information relevant to Respondent’s Petition. (Transcript of Hearing of Clayton Benway[], June 27, 2024 (“Tr.”) at 1.) DEC Counsel appeared for the Commission and for the Hearing Panel of the Commission,

¹ Respondent initially disclosed this 2015 DUI conviction to CFP Board when he registered a pre-certification profile with CFP Board on November 11, 2017. (DEC Book at 9-10.)

² Respondent filed and argued his Petition pursuant to CFP Board’s former *Procedural Rules*, as revised, effective February 21, 2022, and former *Fitness Standards* effective June 30, 2020 through June 30, 2024. Accordingly, the Commission applied those standards for fitness and the factors relevant to Respondent’s fitness for CFP® certification found in Article 5.2 of those *Procedural Rules*, which were otherwise updated and replaced by the *Procedural Rules*, and *Fitness Standards*, as revised, effective July 1, 2024.

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Enforcement Counsel appeared by video for CFP Board, and Respondent appeared by video on his own behalf.

The Commission has considered the Hearing Panel's recommendation and issues this final Order.

II. FINDINGS OF FACT

A. Background

Respondent has passed the following FINRA examinations: (1) Series 63 – Uniform Securities Agent State Law Examination (2010); (2) Series 7 – General Securities Representative Examination (2011); (3) Series 66 – Uniform Combined State Law Examination (2015); (4) SIE – Securities Industry Essentials Examination (2019); (5) Series 65 – Uniform Investment Adviser Law Examination (2022); (6) Series 7TO – General Securities Representative Examination (2019). (DEC Book at 22.)

Respondent was previously registered and employed as a Relationship Manager for a large brokerage firm in his home state of California for approximately three years, until December 2021. (*Id.* at 24.) Respondent then moved to Minnesota with his wife (now ex-wife) and their infant child to be closer to her family. (*Id.* at 44; Tr. at 18.) Respondent said that this move was very difficult for him—he remained unemployed for nine months, left his friends and support network behind, and his in-laws' lack of support started causing disagreements. (*Id.*)

In September 2022, Respondent joined a small firm in Minnesota as an Investment Adviser Representative at. (*Id.* at 21.) He is currently unregistered. (*Id.*)

B. Conduct that May Reflect Adversely

1. 2015 DUI Misdemeanor Conviction

Respondent testified that on June 30, 2015, he pleaded guilty and was convicted of driving under the influence of alcohol (BAC 0.08% or higher) in the Superior Court of California, County of San Diego Central Division. (*Id.* at 45, 58.) He was sentenced to wear a SCRAM ankle monitoring bracelet that tested for alcohol intake for 90 days, serve 80 hours of community service, and complete a nine-month First Conviction Program and MADD program. (*Id.*) His driver's license was suspended and later restricted, and he was ordered to pay a \$2,133 fine. (*Id.*) [Redacted.]

On May 16, 2018, the court granted Respondent's petition to dismiss the 2015 DUI matter. (*Id.*) Respondent testified that he believes the case was expunged in 2018. (*Id.*; *see also* Tr. at 17.)

2. 2022 Gross Misdemeanor Charge and Misdemeanor Conviction

On June 22, 2022, Respondent was charged with Interfering with a 911 Call—a Gross Misdemeanor in the State of Minnesota. (DEC Book at 27-28.) According to the arrest report, the

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911 call arose out of a domestic incident in which Respondent was intoxicated, sought to drive, and engaged in unruly behavior. (*Id.*)

On January 24, 2023, Respondent pleaded guilty to misdemeanor Disorderly Conduct—Offensive/Abusive/Boisterous/Noisy/Obscene, in District Court, County of Ramsey Judicial District, State of Minnesota. Under Respondent’s plea agreement, adjudication was stayed pending his payment of a \$200 fine, attendance at a one-day anger management class, completion of an 11-week outpatient substance abuse program, completion of 40 hours of community service, and 12-months of supervised probation starting April 11, 2023. (*Id.* at 33-40; Tr. at 19.) As part of his probation, Respondent agreed to “remain law abiding, including no new arrests, charges, or convictions [and] have no same or similar charges.” (DEC Book at 37.) Respondent was told that he must abstain from drinking, which he initially did. (Tr. at 40.)

3. 2023 Misdemeanor Charges

On July 9, 2023, while on probation, Respondent was involved in another alcohol-related domestic incident. (Tr. at 40-41.) Respondent was detained and cited for (1) Domestic Assault-Misdemeanor-Commits Act to Cause Fear of Immediate Bodily Harm or Death, (2) Assault-5th Degree-Fear of Bodily Harm or Death; and (3) Disorderly Conduct, and ordered to appear again in Ramsey County court. (*Id.* at 37, 41, 58; *see also* Exhibit-1.)

On July 10, 2023, the court entered an order prohibiting Respondent from contact with his wife. (*Id.* at 47, 58.) On December 12, 2023, the court lifted the “no contact” order, dismissed the first two assault charges, and stayed Respondent’s adjudication. (*Id.* at 37, 41, 58; *see also* Exhibit-1.) On March 8, 2024, the court sentenced Respondent to two days of confinement at the local correctional facility (crediting him for two days he had already been detained) and two years of probation. (Exhibit-1.) Respondent expects to complete the terms of his sentencing in April 2025. (Tr. at 21, 39, 42.)³

C. Respondent’s Petition, Subsequent Conduct, and Desire to Become a CFP® Professional

Respondent credibly testified that he has abstained from drinking alcohol since July 2023. (Tr. at 20-21.) Respondent also presented evidence showing that he was meeting the terms of his probations, criminal sentences, and conditional release requirements, including all random drug and alcohol testing. (*Id.* at 32-33; *see also* Exhibit-1.) [Redacted.]

Respondent testified that he has read CFP Board’s *Code and Standards* and prides himself on being a fiduciary. (*Id.* at 29.) Respondent stated that he has integrated CFP Board’s *Code and Standards* into his practice by meeting his fiduciary duties to all of his clients. He provided an example of his recommendation that a client rollover their 401(k) into their new employer’s plan

³ On March 8, 2024, Respondent’s probation officer recommended that Respondent be discharged from probation for his 2022 offense, and on March 29, 2024, a judge dismissed the 2022 case effective March 8, 2024, without an adjudication of guilt, stating that Respondent “has not been convicted of a crime.” (*Id.*)

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rather than into an IRA with his firm where he would earn fees. (DEC Book at 59; Tr. at 28.) Respondent also demonstrated his understanding of how CFP Board’s fiduciary duties includes the duty of loyalty, the duty of care, and the duty to follow client instructions. (DEC Book at 59.)

After the hearing, Respondent submitted three letters of reference—from his mother, brother, and a lead financial advisor at his current firm who is a CFP® professional. (Exhibit-3.)

Respondent has provided CFP Board a written certification that he has read, understands, and will comply with the *Code and Standards*. (DEC Book at 59.)

III. ANALYSIS OF RESPONDENT’S PETITION

A. Factors Relevant to Respondent’s Fitness

Under Article 13 of CFP Board’s *Procedural Rules*, Respondent must prove his fitness for CFP® certification by a preponderance of the evidence (“more probable than not to have occurred”) applying the factors relevant to fitness set forth in Articles 5 and 11.8.

1. Whether and how Respondent has taken actions designed to prevent the circumstances that required him to file a Petition

Respondent has taken significant steps to prevent further alcohol-related violations. He presented evidence that he (1) had not consumed alcohol for approximately one year and would continue to abstain from alcohol; and [redacted].

While these steps are evidence of Respondent’s short-term rehabilitation and show potential for long-term change, Respondent has only recently taken them. Given Respondent’s history and relationship with alcohol, the Commission believes more time is required to demonstrate that these steps are sufficient. At this time, Respondent has not met his burden to prove this factor.

2. Whether and how Respondent has integrated the *Code and Standards* in Respondent’s practice

Respondent testified credibly about how he takes pride in being a CFP® professional and a fiduciary to clients. He expressed his understanding of the fiduciary duties set forth in the *Code and Standards* and said that he applies them in working with clients. But Respondent did not present sufficient evidence detailing how he is applying these duties, or whether and how he has integrated other provisions of the *Code and Standards* into his practice. Respondent has not met his burden to prove this factor.

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3. Whether Respondent has submitted positive letters of reference from current clients, supervisors, colleagues, or other professionals concerning the circumstances that required Respondent to file a Petition or the Respondent's character

Respondent submitted three letters of reference, from his mother, brother, and the lead financial adviser at Respondent's firm who is also a CFP® professional. (Exhibit-3.) All of the letters describe Respondent's character positively and speak to his integrity. The CFP® professional describes how Respondent always puts the client first and recommends that he be certified. However, none of the letters spoke to the circumstances that required Respondent to file a Petition, his struggles with alcohol, or the effectiveness of the actions Respondent has taken to prevent the circumstances that required him to file a Petition. Respondent has not met his burden to prove this factor.

4. Whether Respondent has provided a written certification that Respondent has read, understands, and will comply with, the *Code and Standards*

Respondent testified that he has read, understands, and will comply with the *Code and Standards*, which is bolstered by his testimony describing his fiduciary duty to clients. (DEC Book at 59; Tr. at 29.) Respondent has met his burden and proved this factor.

5. Whether Respondent has provided a properly completed CFP Board Ethics Disclosure Questionnaire

Respondent submitted a completed an Ethics Disclosure Questionnaire in connection with his Initial Application for CFP® certification on July 20, 2023, satisfying this factor. (DEC Book at 9-17.)

6. Any other factors the Commission or DEC Counsel determines are relevant to Respondent's circumstances

Respondent exhibited integrity throughout his testimony by calmly discussing his misconduct and credibly stating his remorse. The Commission believes that with time, Respondent could bring integrity to the CFP® marks and to the financial planning profession. Now, however, Respondent's Petition is premature. He is currently on probation for the 2023 misdemeanor charge. He had served only three months of probation under his 2022 plea agreement before his second alcohol-related domestic incident. One of terms of his 2022 sentencing required he abstain from alcohol. Another required he remain law-abiding and have no new charges. Respondent's consecutive charges for similar alcohol-related misconduct in a short period of time suggests a pattern or practice of misconduct.

Although Respondent has taken significant steps to change, Respondent did not meet his burden to prove—at this time—that he is ethically fit for CFP® certification. Respondent must demonstrate over an extended period of time that he remains law-abiding and avoids any new criminal charges or other personal or professional incidents that may reflect adversely on his fitness.

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B. Mitigating and Aggravating Factors

The Commission has considered whether there are any material aggravating or mitigating factors in this case and, if so, what weight those factors may have in its decisions.

The Commission cited in aggravation the following factors:

1. Respondent's three alcohol-related violations, the most recent while he was still on probation from an earlier offense, demonstrate a dangerous pattern of misconduct; and
2. Respondent served two days in jail as a result of his misconduct.

The Commission cited in mitigation the following factors:

1. There is no evidence that Respondent has any disciplinary history or customer complaints;
2. Respondent demonstrated remorse for his misconduct;
3. Respondent accepted responsibility for his misconduct; and
4. Respondent was candid in acknowledging his alcohol abuse and clearly stated how he is working to prevent future alcohol-related incidents.

C. Relevant Case Histories

The Commission has also consulted Case Histories⁴ to determine if any contain non-binding precedent that may be persuasive to the Commission. The Commission finds relevant to its decision CH 28212, where a candidate for CFP® certification was involved in three alcohol-related criminal matters within a short time. The Commission denied that candidate's Petition for Fitness Determination and issued a Temporary Bar for the candidate to demonstrate that he could sustain a five-year period with no alcohol-related incidents.

⁴ Case Histories (referred to as "CHs" or "ACHs") are available on CFP Board's website at <https://www.cfp.net/ethics/enforcement/case-history>.

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II. COMMISSION'S FITNESS DETERMINATION

After carefully considering the documentary and testimonial evidence presented, the mitigating factors, the significantly greater weight of aggravating factors, and the Case Histories reviewed, the Commission has determined that Respondent has not proved by a preponderance of the evidence his fitness for CFP® certification. Accordingly, the Commission **DENIES** Respondent's Petition for Fitness Determination and issues a **Temporary Bar for Four (4) Years**.

Ordered by:

The Disciplinary and Ethics Commission, CFP Board

Date: November 8, 2024