

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30804



This is a summary of a decision issued following the October 2017 hearings of the Disciplinary and Ethics Commission (“Commission”) of Certified Financial Planner Board of Standards, Inc. (“CFP Board”). The Petition for Reinstatement after a Suspension at issue in this case was filed after January 1, 2013. CFP Board’s *Disciplinary Rules and Procedures* (“*Disciplinary Rules*”), which had an effective date of January 1, 2013, were in effect at that time.

I. Issue Presented

Whether a petitioner, who had his right to use the CFP® certification suspended for a period of four years (“Respondent”), has proven by clear and convincing that he has been rehabilitated, has complied with all applicable disciplinary orders and provisions of CFP Board’s *Disciplinary Rules*, and that he is fit to use the CFP® marks.

II. Findings of Fact Relevant to the Commission’s Decision

In March 2013, following a hearing before CFP Board’s Disciplinary and Ethics Commission (“Commission”), CFP Board issued an order suspending Respondent’s right to use the CFP® certification marks for four years. See ACH 25389. This discipline followed the Commission’s determination that Respondent recommended and sold unsuitable variable annuities and an unsuitable variable universal life insurance product to a 73-year old financial planning client. Respondent failed to clarify the client’s investment objectives after the client selected every investment objective on a client data sheet. In addition, Respondent failed to complete a cash flow analysis to determine if the client would have sufficient liquidity after purchasing two variable annuities and a variable universal life insurance policy. Despite failing to complete a cash flow analysis, Respondent placed a substantial majority of the client’s investable assets into equity-based, illiquid instruments. The Commission determined that Respondent’s conduct violated Rules 201, 202, 606(b), 607, 701 and 703 of CFP Board’s *Code of Ethics and Professional Responsibility* and *Financial Planning Practice Standards* 200-1, 200-2, and 300-1, providing grounds for discipline pursuant to Articles 3(a) and 3(b) of CFP Board’s *Disciplinary Rules and Procedures* (“*Disciplinary Rules*”). Accordingly, the Commission suspended Respondent’s right to use the CFP® certification marks for four years, pursuant to Article 4.3 of the *Disciplinary Rules*.

Pursuant to Article 16.2 of CFP Board’s *Disciplinary Rules*, an individual who has received a suspension for a period of longer than one year must petition Commission for reinstatement. At the hearing, a petitioner must prove by clear and convincing evidence that the petitioner has been rehabilitated, has complied with all applicable disciplinary orders and provisions of CFP Board’s *Disciplinary Rules*, and that the petitioner is fit to use the CFP® marks. Respondent submitted a Petition for Reinstatement of CFP® Certification to use the CFP®, CERTIFIED FINANCIAL PLANNER™,  and  (“CFP® marks”) to CFP Board.

The Commission determined that Respondent did not meet his burden to prove by clear and convincing evidence that he had been rehabilitated. In support of its determination, the Commission made the following findings based on the record:

1. Respondent met his burden to demonstrate that he maintained competence and learning in the area of financial planning during the suspension period. The record contained information that CFP Board obtained from its records indicating that during the suspension period Respondent completed 136

continuing education hours. This was well in excess of the 60 hours he was required to complete during his four-year suspension.

2. Respondent met his burden to demonstrate that his conduct since his suspension has been exemplary and beyond reproach. Respondent provided a brief letter of reference from the president of his broker-dealer. This individual reported that Respondent had “diligent work habits and strong knowledge of the securities industry...” More importantly, the record indicated that Respondent was not the subject of a customer complaint or professional discipline during the period of his suspension. The Commission believed a clean regulatory record was an important showing under this factor.
3. Respondent met his burden to demonstrate that he made restitution and settled claims from the individuals injured or harmed by Respondent’s misconduct. Respondent’s BrokerCheck report indicated that he settled the client arbitration, which was the matter underlying Respondent’s suspension, for \$65,500. Respondent contributed \$50,000 to the settlement. During the hearing CFP Board Counsel argued that Respondent failed to make full restitution through the \$65,000 settlement because the client alleged her damages were \$300,000. CFP Board Counsel asserted that for Respondent to make full restitution he needed to provide additional restitution to the client. The Commission determined that in this instance, the settlement with the client constituted full restitution. While there may be an instance where paying an agreed upon settlement does not constitute full restitution this is not such an instance. The client and Respondent agreed to resolve the dispute through a mutually agreed to settlement. Based on the evidence in the record, Respondent appears to have satisfied his responsibilities pursuant to the settlement agreement.
4. Respondent failed to meet his burden to provide documentary evidence of all Respondent’s business activities during the suspension period. Respondent provided no documentary evidence of his activities during the suspension period with his initial submission. The Commission considered that the recommendation letter provided with his initial submission discussed Respondent’s business activities but determined that such evidence did not satisfy the purpose of this requirement, which was for the Commission to evaluate a respondent’s actual conduct of his or her business during the period of the suspension. To do so, the Commission needs the record to contain documentary evidence of the Respondent’s business activities, such as copies of client agreements, advertising to clients, copies of a respondent’s website, copies of financial plans prepared by a respondent, or other work product prepared by a respondent. Testimonial evidence on its own does not provide the Commission with a sufficient window into the business activities of a respondent. The Commission determined that the evidence necessary to satisfy this requirement is largely dependent on the conduct that led to the suspension.

The Commission acknowledged that prior decisions had previously accepted testimonial evidence to satisfy this requirement, but the Commission determined it would no longer follow those decisions on this issue. (See, for example, Anonymous Case Histories (“ACH”) 30059, 29954, 29216, 29259 and 30083.) In the future, a respondent must submit documents demonstrating the actual conduct of his or her business. A respondent may then supplement such evidence with testimony.

To ensure that Respondent was not treated unfairly, the Commission provided Respondent the opportunity to provide documentary evidence of his business activities by specifically requesting the following information from Respondent after hearing testimony from both parties:

- a. A copy of the all versions of an engagement letter or other written document defining the relationship between Respondent and his clients used during the period of his suspension and, if different than the versions of the engagement letter in use by Respondent during the suspension period, all versions of an engagement letter currently in use by Respondent.

- b. A copy of an actual financial plan prepared exclusively or primarily by Respondent for a client during the period of suspension. Respondent should take care to redact from the plan the name and contact information of the client.
- c. A copy of all marketing and other informational material in use by Respondent during the period of his suspension and, if different than the versions of the marketing and informational materials in use by Respondent during the suspension period, all marketing and other information materials currently in use by Respondent.

Respondent provided the following information in response to the Commission's request:

- a. A copy of a promotional flyer for Respondent and his firm, which Respondent indicates he uses during his seminar speaking engagements. Attached to this document was a basic fact-finding form and a document describing Respondent's services and how he could assist clients with achieving certain goals;
- b. A letter explaining Respondent's position in CFP Board's original enforcement action; and
- c. A sample financial planning engagement letter that contained a section for the client's name and contact information, a section describing the financial planning services to be provided, a section that provided other "material information", and a section describing "additional information".

The Commission noted that Respondent did not provide a copy of the requested financial plan or discuss why he did not provide the financial plan. The Commission was especially troubled by this omission due to the fact that record was replete with mentions by Respondent that he had continued his financial planning practice during the suspension. For example, in the promotional flyer Respondent provided to the Commission Respondent states that his goal is to "help clients meet their planning objectives." Respondent testified that he had around 200 clients in his practice in the "area of financial planning." Respondent also testified that when he is working with clients he starts with a financial plan. Given Respondent's testimony indicating that preparing financial plans was an important and significant part of his financial planning practice, it is perplexing that Respondent did not provide the requested information.

The Commission determined that, as a whole, Respondent's submission regarding his documentary evidence of his business activities during the suspension period was deficient. Respondent did not meet his burden on this issue.

The Commission determined that Respondent met his burden to prove by clear and convincing evidence that he had complied with all disciplinary orders and the *Disciplinary Rules*. The Commission acknowledged that Respondent had used the marks during his suspension period, which was evidenced by the inclusion of the CFP® marks on a third-party web property. After reviewing the circumstances of this use of the CFP® marks, the Commission concluded that Respondent was not aware of the use of the marks and had not played any role in the marks usage on the third-party web property. Thus, the Commission did not give the use of the CFP® marks during the suspension great weight.

The Commission also determined that Respondent failed to prove by clear and convincing evidence that he was fit to use the CFP® marks. In support of its determination, the Commission made the following findings based on the record:

1. Respondent failed to demonstrate that he has a proper understanding of CFP Board's *Standards of Professional Conduct* ("Standards"). Respondent's petition consisted of one letter that makes several conclusory statements about his compliance with the *Standards*. These statements, without more, are not

sufficient to satisfy the high standard of proof required in this case. For example, Respondent could have provided information or documents describing how he has improved or updated his process of selling annuities in compliance with CFP Board's *Standards*. Yet, Respondent provided no such information.

2. Respondent failed to demonstrate that he can be confidently recommended to the public as a CFP® professional. Respondent failed to provide a financial plan he prepared despite his testimony that he starts with a financial plan for his approximately 200 financial planning clients. Respondent did not provide any information to address how he has modified his business practices to ensure compliance with CFP Board's *Standards*. Thus, Respondent did not provide sufficient documentation to demonstrate by clear and convincing evidence that he can be confidently recommended to the public.
3. Respondent met his burden to demonstrate to the Commission how he planned to use the CFP® marks in the future. Respondent testified that if the Commission reinstated his right to use the CFP® certification he would be able to charge clients fees as an investment adviser since he would regain his exemption from having to take the Series 65 or 66 license.

Finally, the Commission determined by clear and convincing evidence, on the basis of the documentary evidence submitted, that Respondent completed all required forms, paid all required fees and reported the required CE hours.

III. Commission's Determination on Respondent's Fitness

Pursuant to Article 16 of the *Disciplinary Rules*, the Commission considered Respondent's reinstatement petition. The Commission determined that Respondent failed to meet the requirements of reinstatement as articulated in Article 16.2 of the *Disciplinary Rules*.

In reaching its decision, the Commission reviewed the ACHs cited previously in this order and ACH 27079, in which the Commission denied a respondent's reinstatement on the basis that the Respondent did not provide documentary evidence of all business activities.

Respondent's Petition for Reinstatement is hereby denied. Respondent may petition again for reinstatement in two years from the date of his hearing. If Respondent fails to file a petition in the required time frame, his right to use the CFP® marks will be permanently revoked. If the Commission denies Respondent's second petition, Respondent will be permanently barred from using the marks.