THE DISCIPLINARY AND ETHICS COMMISSION

IN THE MATTER OF

DAVID E. MARTIN,

Respondent.

CFP Board Case No. 2022-64202
November 15, 2024

ORDER

Certified Financial Planner Board of Standards ("CFP Board") granted Respondent the right to use the CFP®, CERTIFIED FINANCIAL PLANNER®, and CFP™ certification marks ("CFP® marks") on March 24, 1989, and he has been certified since that date. (DEC Book at 12, 103.)[1]

I. PROCEDURAL HISTORY

On September 5, 2023, following an investigation, Enforcement Counsel filed a Complaint with the Disciplinary and Ethics Commission ("Commission" or "DEC") alleging that there are grounds to sanction Respondent for violations of Rule 4.3, and Rule 3.6 of CFP Board's *Rules of Conduct*. (DEC Book at 5-8.) The Complaint cites a January 28, 2018 Consent Agreement and Order with the Pennsylvania Department of Banking and Securities. (*Id*. at 86.)

On October 3, 2023, Respondent submitted an Answer, in which Respondent stated that he agreed with all of the factual allegations and grounds for sanction. (*Id*. at 103-105.)

On February 21, 2024, a Hearing Panel of the Commission convened at CFP Board's headquarters in Washington D.C. to hear testimony, and review and consider documents, information, and argument relevant to the Complaint. (Transcript of Hearing of David Martin, February 21, 2024 ("First Tr.") at 1.) DEC Counsel appeared for the Commission and a Hearing Panel of the Commission. Enforcement Counsel appeared by video conference for CFP Board. Respondent appeared on his own behalf by video conference.

After the February 21, 2024 hearing, DEC Counsel scheduled a second hearing session and provided the parties a list of topics to be discussed as well as a request for documents that might corroborate information in Respondent's Answer and his hearing testimony. (*See* Exhibit A.) Neither party produced additional materials. On March 15, 2024, the Hearing Panel convened by video conference to resume the hearing. (Transcript of Hearing of David Martin, March 15, 2024 ("Second Tr.") at 1.)

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

[1] The DEC Book and any other exhibits to this Order will not be published under Article 17.7 of the *Procedural Rules*.

II. FINDINGS OF FACT

A. Background

Respondent has passed the following Financial Industry Regulatory Authority, Inc. ("FINRA") examinations (a) Series 6 – Investment Company Products/Variable Contracts Representative Examination (1982); (b) Series 63 – Uniform Securities Agent State Law Examination (1982); (c) Series 22 Direct Participation Programs Representative Examination (1984); (d) Series 7 – General Securities Representative Examination (1987); (e) Series 65 – Uniform Investment Advisor Law Examination (1994); and (f) Series 24 – General Securities Principal Examination (2000). (DEC Book at 59, 103.)

Respondent maintains an insurance license with the Pennsylvania Insurance Department. (DEC Book at 84, 103.)

Respondent has been associated with a registered investment advisor as an investment advisor representative since 2006. (*Id.* at 70, 103.)

B. Consent Agreement and Order

On March 29, 2018, Respondent entered into a Consent Agreement and Order with the Pennsylvania Department of Banking and Securities (DEC Book at 93-99, 103), in which he consented to the following findings:

> From on or about February 2012 until at least November 2017, Respondent and his firm borrowed money from three clients. (*Id*. at 94, 103.)
>
> At all times material, Respondent "controlled" his firm and caused it to commit the alleged acts. (*Id*.)
>
> By engaging in the acts and conduct set forth above, the Pennsylvania Department of Banking and Securities finds that the Respondent and his firm engaged in dishonest and unethical practices in the securities business by borrowing money from a client pursuant to Section 305(a)(ix) of the [Pennsylvania Securities Act of 1972, 70 P.S § 1-101; *et seq*. ("1972 Act")], 70 P.S, § 1-305(a)(ix) and Regulation 305.019(c)(3)(vi), 10 Pa. Code§ 1-305.019(c)(3)(vi), (*Id.* at 95, 103.)

In the Consent Agreement and Order, Respondent consented to the following sanctions:

> Respondent and his firm shall pay investigative and legal costs in the amount of $2,500. (*Id*. at 95, 104.)
>
> Respondent and his firm shall pay [an] administrative assessment in the amount of $7,500. (*Id*. at 96, 104.)

Respondent and his firm are ordered to comply with the 1972 Act and the regulations adopted by the Department, and in particular Section 305(a)(ix) of the 1972 Act, 70 P.S. § 1-305(a)(ix) and Regulation 305.019(c)(3)(vi), 10 Pa Code§ l-305.019(c)(3)(vi). (*Id*.)

C. Evidence Presented

1. Respondent Refers Clients to a Real Estate LLC Investment

In approximately 2005, Respondent's firm began leasing office space at a building owned by a limited liability company ("Real Estate LLC"). Some of the Real Estate LLC's investors were owners of a real estate firm that also leased space in the building; the rest were Respondent's clients whose names he had provided to the owner of the real estate firm as potential investors in the Real Estate LLC (the "Original Real Estate LLC Investors"). (*Id*. at 91; Second Tr. at 8.)

Respondent testified that he did not know whether the owner of the real estate firm ever disclosed to the Original Real Estate LLC Investors that Respondent had supplied their names. (Second Tr. at 25.) Nor did Respondent present any evidence that he had conducted due diligence on the investment in the Real Estate LLC, or that he had provided those clients with any disclosures about the investment, including whether his involvement in the investment went beyond providing their names to the owner of the real estate firm.

Respondent stated that he did not have an ownership interest in the Real Estate LLC or earn any compensation for referring the Original Real Estate LLC Investors to the investment. (DEC Book at 91; Second Tr. at 12).)

By 2010, according to Respondent, two of the four building tenants had filed for bankruptcy and abandoned their lease obligations; for a time, he was the only tenant paying rent, even paying extra to cover the businesses that vacated the building. (*Id*.; Second Tr. at 86.) The third tenant, the real estate firm, also eventually abandoned its lease and ownership responsibilities. (DEC Book at 91.) This put the Original Real Estate LLC Investors at financial risk. (*Id*.)

Respondent said that he feared the rent he was paying was not being used to pay the mortgage on the building, and he contacted the mortgagor to reset the payment schedule to avoid foreclosure, salvage the building's equity, and protect his clients, the Original Real Estate LLC Investors. (*Id*.; Second Tr. at 15, 54-55; *see also* Second Tr. at 17: "These people had money with me, and I had a – I had an ethical obligation. I had a – an obligation to take care of them and, looking back, it was a mistake.") Respondent stated that, for years, he paid all mortgage obligations and tax and utility bills, using funds from his own 401(k) and IRA. (DEC Book at 91; Second Tr. at 32.) Respondent admitted that he paid these amounts to avoid losing his clients or having them file complaints against him. (Second Tr. at 19-20.)

2. Respondent Enters Loan Transaction with Other Clients

Eventually, the mortgage lender stopped honoring the reset payment schedule and the building was again at risk of being foreclosed upon. (DEC Book at 91; Second Tr. at 87.) To protect the equity in the building, Respondent brought in other clients (the "Second Real Estate LLC Investors") to infuse capital into the Real Estate LLC that owned the building and pay off the mortgage lender. To effect the transaction, Respondent entered into an arrangement with the Second Real Estate LLC Investors under which they would loan $550,000 to help pay off the mortgage, and Respondent would pay them interest at a 6% fixed rate in the form of a personal guarantee. (Second Tr. at 64, 89.) None of the Second Real Estate LLC Investors is a member of Respondent's immediate family, or an institution in the business of lending money. (DEC Book at 104-105.)

Respondent confirmed in this testimony that he personally guaranteed the notes in order to "bail out" the Original Real Estate LLC Investors. (Second Tr. at 42-43.) He believes the Second Real Estate LLC Investors were aware of this, but he never disclosed it to them. (Second Tr. at 56-57.) Respondent presented no written documentation of his arrangement with the Second Real Estate LLC Investors. (Second Tr. at 57, 59.) He testified that this was because they "didn't know how to write it." (Second Tr. at 58; *see also id.* at 59.)

According to Respondent, when the building was sold in 2015 (for less than what was owed to all investors in the Real Estate LLC), the Original Real Estate LLC Investors were made whole on their investment. (Second Tr. at 58; DEC Book at 92.) Respondent made payments under his arrangement with the Second Real Estate LLC Investors—some directly and others by paying increased rent to the new owner of the building, who in turn paid the Second Real Estate LLC Investors. (Second Tr. at 68-69.) Respondent testified that he did not profit from these circumstances, that he continued to make payments to keep the investment afloat "because my name is much more important than anything I've ever made." (First Tr. at 31, 36.) He "wanted to have a good relationship with [his clients] because they were providing income to me, and I expected that to continue on." (Second Tr. at 48.)

The Pennsylvania Department of Banking and Securities discovered Respondent's arrangement with the Second Real Estate LLC Investors during a routine regulatory review of his firm in 2015. (DEC Book at 92; First Tr. at 31.) The regulator expressed concern about Respondent's personal guarantees, stating that the transactions were not at arm's length and could be considered unlawful borrowing from a client. (DEC Book at 92.) After negotiations, Respondent entered into the Consent Agreement and Order. (*Id*.)

D. Respondent's Testimony

Respondent admitted that he made mistakes with respect to his clients' investments in the Real Estate LLC but that he did so to protect them: "It was definitely not for personal gain. That's not what it was at all. I did not want to have to be in a position where I felt [I] let those people down." (First Tr. at 62.)

Respondent initially testified that, if this situation were to arise in the future and his clients were to be made whole, he would do it again. (First Tr. at 33.) Asked at the second hearing session what he would do differently if he had to do this all over again, Respondent testified that "I would let it crash and burn." (Second Tr. at 82). Even so, he said that "I don't believe I've done anything wrong in light of ethics and my faith. Obviously, there are circumstances and procedures that I would like to have done differently. But, you know, I would try to avoid finding myself in a position where I have to salvage operations again. I'm not going to ever be in that position again." (Second Tr. at 83.)

III. DISCUSSION

To impose a sanction on Respondent, the Commission must find grounds for sanction. The Commission found grounds for sanction based on the authority granted to it in Article 12 of the *Procedural Rules*.

First Grounds for Sanction

Rule 4.3 of the *Rules of Conduct* states that a certificant shall be in compliance with applicable regulatory requirements governing professional services provided to the client.

Article 7.2 of the *Procedural Rules* provides that a record from a (a) federal, state, local, or foreign governmental agency, (b) self-regulatory organization, or (c) other regulatory authority imposing discipline upon Respondent ("Professional Discipline") is conclusive proof of the existence of such Professional Discipline and the facts and violations that serve as the basis for such Professional Discipline. The fact that Respondent has not admitted or denied the findings contained in the record does not affect the conclusiveness of the proof. Professional Discipline includes a censure, injunction, undertaking, order to cease and desist, fine, suspension, bar, or revocation, and the surrender of a professional license or certification in response to a regulatory action or regulatory investigation. A record of Professional Discipline includes a settlement agreement, order, consent order, and Letter of Acceptance, Waiver, and Consent.

The Pennsylvania Department of Banking and Securities is a governmental agency. The Consent Agreement and Order is a record of Professional Discipline by that governmental agency, and Respondent is the subject of that record. Therefore, the Consent Agreement and Order conclusively establishes the existence of such Professional Discipline for purposes of this disciplinary proceeding and is conclusive proof of the facts and violations that serve as the basis for such Professional Discipline of Respondent.

Respondent was a CFP® professional at all times relevant to these first grounds for sanction.

The Consent Agreement and Order is conclusive proof that Respondent failed to comply with the Pennsylvania Securities Act of 1972 and regulations promulgated thereunder governing professional services provided to the client.

Therefore, there are grounds to sanction Respondent for a violation of Rule 4.3 of the *Rules of Conduct.* Respondent admitted these grounds for sanction in his Answer. (DEC Book at 104.)

Second Grounds for Sanction

Rule 3.6 of the *Rules of Conduct* states that a certificant shall not borrow money from a client. Exceptions to the rule include (1) the client is a member of the certificant's immediate family, or (2) the client is an institution in the business of lending money and the borrowing is unrelated to the professional services performed by the certificant.

Respondent was a CFP® professional at all times relevant to these second grounds for sanction.

The Consent Agreement and Order is conclusive proof that from February 2012 until at least November 2017, Respondent and the Firm borrowed money from three clients. Respondent admits that none of the clients is a member of Respondent's immediate family, or an institution in the business of lending money. (*Id.* at 104-105.)

Therefore, there are grounds to sanction Respondent for a violation of Rule 3.6 of the *Rules of Conduct.* Respondent admitted these grounds for sanction in his Answer. (*Id*.)

IV. THE COMMISSION'S DECISION

Under Article 12.3 of the *Procedural Rules*, the Commission's final order must impose a sanction if the Commission finds a violation that warrants a sanction. The Commission has discretion to order a sanction among the applicable sanctions set forth in Article 11.1 of the *Procedural Rules.*

CFP Board has issued non-binding *Sanction Guidelines* that are intended to serve as guidance for determining the appropriate sanction. In arriving at its decision, the Commission took into account the Principal Considerations set forth in the *Sanction Guidelines* as well as the following areas of conduct:

- Conduct 3: Borrowing Money from a Client (Public Censure); and
- Conduct 31: Securities Law Violation (Public Censure).

The Commission considered whether there were any material mitigating and aggravating factors relevant to the sanction imposed here, and, if so, what weight those factors may have in its decision.

The Commission determined the following factors to be aggravating:

1. Respondent has not credibly acknowledged wrongdoing or the extent of his unethical conduct.

2. Respondent offered no credible explanation as to why he had no documentation pertaining to the transactions at issue.

3. Respondent intentionally solicited and guaranteed investments for one set of clients so that other clients would avoid losses and he would minimize adverse claims against him.

4. Respondent does not appear to have conducted any due diligence or to have disclosed potential conflicts of interest with respect to the loans from and guarantees to his clients.

5. Had Respondent's notes not been discovered during a regulatory review, it appears Respondent would have continued his conduct.

6. Respondent could not produce records showing appropriate due diligence in connection with the investments by his clients.

7. Respondent failed to produce records showing that he fulfilled his responsibilities to the Second Real Estate LLC Investors including conducting due diligence on the investment or disclosing its attendant risks and potential conflicts of interest.

The Commission considered a mitigating factor that Respondent's conduct appears to have been an isolated incident.

The Commission consulted various Case Histories[2] to determine if any contained non-binding precedent that may be persuasive to its decision but found none materially relevant to the facts in this case.

Respondent's entanglements with his clients present serious concerns, as reflected in the many aggravating factors here. The lack of documentation around the transactions involving both the Original Real Estate LLC Investors' and the Second Real Estate LLC Investors, in particular, raises questions about whether Respondent used his reputation with his clients to encourage their investment in the Real Estate LLC, rather than conducting the necessary due diligence on the investment, disclosing its attendant risks, or disclosing the potential conflicts of interest that arose in connection with his guaranteeing the $550,000 note.

After considering the violations found and the several aggravating factors here, the Commission issues this Order imposing on Respondent a **Three-Year Suspension** of Respondent's CFP certification and right to use the CFP® marks and an **Undertaking** to hire an established securities compliance consultant to assist Respondent in the preparation of a comprehensive written Policies and Procedures Manual that incorporates the *Code of Ethics and Standards of Conduct* into his practice before applying for reinstatement.

Under Article 14.1 of the *Procedural Rules*, a CFP® professional who has been suspended for a period longer than one year must petition the Commission for reinstatement. The Commission notes that if Respondent determines to seek reinstatement, Respondent will be required to prove by clear and convincing evidence, among other things noted in Article 14, his rehabilitation and

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

fitness for CFP® certification and compliance with the terms of this order, under Article 14 of the *Procedural Rules*.

Ordered by:
Disciplinary and Ethics Commission
CFP Board