

Designation in Jeopardy

By Emily Sides Bonds

A defense lawyer faced with a client's loss of a valuable industry designation must act promptly after he or she is retained to investigate charges of misconduct by the CFP Board, respond to the charges, evaluate settlement, and prepare for the hearing, all within a relatively short time frame.

Navigating an Investigation or Complaint by the CFP Board

Some of your professional clients in the financial services industry likely have attained innumerable designations that are significant to the marketing and success of their businesses. One such designation is that of a certified

financial professional or CFP. Over 64,000 professionals have obtained the CFP designation and are, therefore, subject to the rules and regulations of the Certified Financial Planner Board of Standards, Inc. (CFP Board). Violations of the CFP Board rules and regulations can result in an investigation by the CFP Board, a formal complaint and hearing before the CFP Board Disciplinary and Ethics Commission, and the potential for sanctions, including, but not limited to, private or public reprimand, censure, or at the very worst, suspension or revocation of the right to use the CFP marks. This article will provide practical advice to the defense lawyer who is called upon to defend a client whose CFP designation is in jeopardy as a result of a CFP Board investigation or complaint.

The CFP Board takes very seriously its role in enforcing its high ethical standards and meting out discipline when those standards are compromised. In fact, the CFP Board views the active enforce-

ment of its standards as what delineates the CFP designation from other industry designations. Accordingly, the CFP Board does not sweep its investigations under the carpet; instead, those investigations are touted as accomplishments. In its 2011 Annual Report, the CFP Board listed one of its professional achievements for the year as "Opened 1,569 investigations (the highest number since 2004)." Certified Financial Planner Bd. of Standards, 2011 Annual Report, at 10 <http://www.cfp.net/about-cfp-board/governance/annual-reports>.

What Is the CFP Board?

The CFP Board is a nonprofit entity that owns the marks "Certified Financial Planner™" and "CFP." Certified Financial Planner Bd. of Standards, Inc., Purpose, Parameters & Policies of the CFP Board, at 2 (2013), <http://www.cfp.net/about-cfp-board/governance>. The CFP Board exists "to benefit the public by granting the CFP certification and upholding it as the recognized standard of excellence for competent and ethical personal financial planning." *Id.* In short, the CFP Board not only awards the designation to appropriate candidates with the requisite education, training and experience, but, after awarding the marks, it also enforces the rules and regulations



■ Emily Sides Bonds is a partner in the Birmingham, Alabama, office of Jones Walker LLP. Her practice primarily focuses on the defense of insurance professionals and attorneys. Ms. Bonds was recently recognized by *Alabama Super Lawyers* as one of the Top 25 female lawyers in the State of Alabama.

applicable to those professionals who come under the board's jurisdiction. *Id.* at 6.

Organization of the CFP Board

Before exploring the practical steps to respond to a CFP Board investigation or complaint, a defense attorney must understand the structure of the board. The CFP Board operates through a board of directors, which establishes the CFP Board policies. *Id.* at p. 7. The board of directors employs a chief executive officer who manages the daily activities of the board. *Id.* In addition, the CFP Board uses several working groups to accomplish its objectives. Important to this article is the Disciplinary and Ethics Commission (DEC), which holds disciplinary hearings and makes findings of whether those professionals obtaining the CFP designation have violated the applicable rules and regulations of the CFP Board. *See* Certified Financial Planner Bd. of Standards, Inc., Disciplinary Rules and Procedures art. 2.1, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/disciplinary-rules-procedures> (last visited Aug. 29, 2013).

What Are the Rules and Regulations of the CFP Board?

Several documents form the foundation for the CFP Board Standards of Professional Conduct. Those documents include the Code of Ethics and Professional Responsibility, Rules of Conduct, Financial Planning Practice Standards, and Disciplinary Rules and Procedures.

Code of Ethics and Professional Responsibility

The Code of Ethics and Professional Responsibility contains seven general principles guiding the "CFP registrant," or CFP professional, meaning a professional who has been granted the right to use the CFP marks, or a CFP candidate, meaning a person seeking to obtain the right to use the marks. These guiding principles include integrity, objectivity, competence, fairness, confidentiality, professionalism, and diligence. Code of Ethics and Professional Responsibility, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/code-of-ethics-professional-responsibility> (last visited Aug. 30, 2013).

Rules of Conduct

The Rules of Conduct contain a more specific statement of appropriate conduct of a CFP professional in his or her activities. These rules establish the basis for disciplinary action, and therefore they must be analyzed meticulously by a defense attorney. Examples of the Rules of Conduct include Rule 1.4 requiring a CFP professional to "place the interest of the client ahead of his or her own." Rules of Conduct R. 1.4, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct> (last visited Aug. 30, 2013). Further, under Rule 1.4 a CFP professional providing financial planning owes the client "the duty of care of a fiduciary as defined by the CFP Board." *Id.* Another example is Rule 2.2, which requires that a CFP professional disclose to clients and to prospective clients information regarding the compensation of the CFP professional. Rules of Conduct R. 2.2. Finally, Rule 4 contains a litany of obligations that a CFP professional owes to his or her clients, including offering advice only in areas in which the CFP professional is competent and exercising reasonable and prudent professional judgment in providing services to a client. Rules of Conduct R. 4.

Financial Planning Practice Standards

The Financial Planning Practice Standards are guidelines that CFP Board-certified financial planners should use in generating a financial plan for clients. These standards outline a step-by-step approach to take in the financial planning process. Financial Planning Practice Standards, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/financial-planning-practice-standards>.

Disciplinary Rules and Procedures

The Disciplinary Rules and Procedures specify the procedures that the CFP Board will use when enforcing the Code of Ethics and Professional Responsibility, the Rules of Conduct, and the Financial Planning Practice Standards. Disciplinary Rules and Procedures, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/disciplinary-rules-procedures>. In responding to an investigation or a formal complaint, consult the CFP Board website, www.cfp.net, to access current Disciplinary Rules and Procedures

as they are amended from time to time. These rules must be thoroughly analyzed before responding to any investigation or complaint submitted to the CFP Board.

The Disciplinary Rules and Procedures allow disciplining a CFP professional for conduct that violates the Code of Ethics and Professional Responsibility or the Rules of Conduct, for failing to comply with the Financial Planning Practice Standards, for violating a federal, state, or international law, for conduct that is the basis of other professional discipline, for conduct that violates the Disciplinary Rules and Procedures, for failing to respond to the CFP Board, or for making a false or misleading statement to the CFP Board. *See* Disciplinary Rules and Procedures art. 3. This list of potential causes of discipline is not exhaustive, however, as "other acts or omissions amount to unprofessional conduct may constitute grounds for discipline." *Id.* In short, the potential for discipline by the CFP Board is unlimited in scope and reach.

Responding to a CFP Board Investigation

Investigations by the CFP Board of CFP professionals begin as a result of a complaint by the public, all of which the CFP Board will investigate, or disclosures by CFP professionals during their renewal application or as a result of required reporting to the CFP Board. Certified Financial Planner Bd. of Standards, Inc., Disciplinary Board Trends and Compliance Tips Webinar, Nov. 29, 2012, <http://www.cfp.net/certificants/conduct.asp>. The person authorized to investigate a possible rules violation of a CFP professional is the staff attorney employed by the CFP Board. *See* Disciplinary Rules and Procedures art. 2.6. After receiving a complaint or a disclosure directly by a CFP professional, the CFP Board staff attorney will initiate the investigation. *Id.* at art. 6.1. The CFP Board staff attorney will send a notice of investigation to the CFP professional. *Id.* at art. 6.2. The notice of investigation will identify the nature of the complaint and its source. The notice of investigation will demand a response in writing to the complaint within 30 days. *Id.* **Caution:** The failure to respond to a notice of investigation could be grounds for discipline under Article 6 of the Disciplinary Rules and Procedures. However, as amended effective January 1, 2013,

a CFP professional has a second chance to respond to a notice of investigation: “At the expiration of the 30 calendar-day period if no response has been received, CFP Board Counsel shall give written notice of a second request for information via certified mail.” *Id.* If no response is received within 20 days of the date of the second letter, then the matter is automatically referred to the

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DEC (Disciplinary and Ethics Commission). *Id.* at art. 6.2(a).

Once a CFP professional has received a notice of investigation, it is imperative that he or she obtain the assistance of counsel to prepare a written response to it and to navigate the additional informal inquiries that the CFP Board staff or attorney or other staff may make. Importantly, the CFP professional should also immediately report the notice of investigation to his or her errors and omissions carrier. While his or her insurance may not offer coverage for an administrative complaint such as a CFP Board notice of investigation, the investigation-generating circumstance could be related to an earlier complaint by a third party that was covered by the errors and omissions carrier. In other words, the errors and omissions carrier may view the administrative complaint as related to a complaint for which it earlier provided counsel and thereby offer a courtesy defense to the CFP professional for the CFP Board inquiry. When in doubt, the best advice is to report the CFP Board notice of investigation to an errors and omissions carrier and

request that the carrier review it and determine coverage.

As we all know from litigation, while 30 days is not insignificant, it is often not sufficient to conduct a full-blown investigation and to draft a detailed answer to a complaint. If you are contacted and the deadline for a response is nearing, it is advisable to request an extension for the response from the CFP Board even though the Disciplinary Rules and Procedures make clear that the board does not favor extensions, and, therefore, the board may not grant your. *See* Disciplinary Rules and Procedures art. 5.3 (“Extensions and/or continuance are generally disfavored by CFP Board. CFP Board Counsel may, however, grant reasonable requests for extensions and continuances, as deemed appropriate.”). The request for an extension should be made in a formal letter sent by fax, e-mail, or both to the CFP Board employee that sent the notice of investigation. **Caution:** Make sure that you have the extension in hand before the deadline for response passes.

Responding to a Notice of Investigation

The CFP Board staff attorney will examine the complaint and the response received from a CFP professional or his or her attorney to determine whether probable cause exists to refer the matter to the DEC (Disciplinary and Ethics Commission). Rule 6.3 of the Disciplinary Rules and Procedures gives the CFP Board staff attorney options at this stage. The CFP Board staff attorney has the option to dismiss the allegations, dismiss the allegations with a letter of caution to the CFP professional, or begin the work necessary to formulate a complaint to be filed by the CFP Board. *See Id.* at art. 6.3. Thus, without any doubt, a CFP professional’s best course of action is to take all the steps necessary to make sure a matter ends with the notice of investigation stage. Here are some helpful tips for a defense lawyer formulating a response to a notice of investigation:

- As mentioned above, make sure that your client does not respond to a notice of investigation without appropriate investigation and assistance of counsel.
- Send the response in letter form. An e-mail is much too informal for this type of complaint, and a letter indicates to the

CFP Board staff attorney that the CFP professional takes this matter seriously.

- Respond to all of the allegations contained in the notice of investigation; failing to do so has serious consequences, namely an adverse inference concerning the allegations, explained in more detail below. Disciplinary Rules and Procedures, at Article 6.2(b).
- The response should not only admit or deny the allegations, but it should supply the CFP professional’s “side of the story” to explain why the conduct alleged does not amount to a violation of the Code of Ethics or Rules of Conduct. For example, if the charges in a notice of investigation relate to a misrepresentation to a customer, then assuming that the allegations are untrue, the CFP professional must not only deny the allegations, but describe the matters that were discussed with the customer.
- A response should provide any relevant documentation that would indicate to the CFP Board staff attorney that the allegations are not true, or if they are true, explain why they do violate the CFP Board Code of Ethics or Rules of Conduct. **Caution: Less is not more in this situation.** A lawyer should advocate for the dismissal of all charges by explaining why the conduct does not rise to the level of a violation of the Code of Ethics or Rules of Conduct.

It bears quoting Article 6.2(b) of the Disciplinary Rules and Procedures at length because the CFP Board will do more than draw an adverse inference if a CFP professional fails to respond to a notice of investigation.

Failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. An adverse inference is an inference, adverse to the concerned party, drawn from silence or absence of requested evidence. This rule applies to evidence that has been destroyed, evidence that exists but the party refuses to produce, and evidence that the party has under his/her control and has not produced. This adverse inference is based upon the presumption that the party who controls the evidence would have produced it, if it had been supportive of his/her position.

See Disciplinary Rules and Procedures art. 6.2(b). In addition, failing to respond to certain allegations in a notice of investigation, ignoring allegations in one, or failing or refusing to supply documents to the CFP Board could well result in the matter being referred to the DEC (Disciplinary and Ethics Commission).

Resulting Letter of Caution from CFP Board Counsel

As noted above, one of the options available to the CFP Board staff attorney reviewing a notice of investigation response is to dismiss the allegations finding probable cause to believe a violation occurred, but only reprimanding the CFP professional with a letter of caution. If in response to a notice of investigation, your client receives a letter of caution from the CFP Board staff attorney indicating that the matter will not proceed further, your first reaction may be to celebrate that the charges did not lead to a formal complaint to the DEC (Disciplinary and Ethics Commission). However, the CFP Board can still reopen an investigation of dismissed charges at any time. See Disciplinary Rules and Procedures art. 6.3. In addition, a letter of caution will become part of a CFP professional's permanent record with the CFP Board, which may be considered if ethics violations charges are made in the future. *Id.* at art. 11.1

Rule 6.3 of the Disciplinary Rules and Procedures permits a CFP professional to submit a letter in response to a letter of caution. I would recommend that you consider submitting such a response if a letter of caution is received from the CFP Board staff attorney. Do not couch a response in adversarial terms. Instead, detail why a letter of caution is not appropriate in this instance. Having such a letter in his or her CFP Board disciplinary file may assist the CFP professional if this particular allegation arises again or if new allegations arise and the board considers the letter of caution when meting discipline for the new allegations.

Response to a Formal Complaint

More likely than not, a CFP professional will not engage an attorney to represent him or her during a notice of investigation stage. Instead, he or she likely will call you after a formal complaint has been filed against him or her, which will make him or

her realize that the CFP Board could discipline him or her. Indeed, the CFP Board will publish a suspension, a public letter of admonition or revocation of the CFP designation in a press release and on its website. See Disciplinary Rules and Procedures art. 18.6. Further, the CFP professional will be required to advise his or her current clients of any CFP Board suspension or revocation. See Rules of Conduct R. 4.7. The fallout for a suspension or revocation could devastate a CFP professional financially.

A CFP professional will receive a formal complaint in a certified letter from the CFP Board staff attorney. It will provide instructions for responding and important deadlines. It is imperative an attorney engaged to respond to a formal complaint initially determine the applicable deadlines for a response. If an attorney needs more time to respond, he or she should seek it, requesting an extension in a formal letter and seeking and obtaining the extension before the time to respond expires. The language used in Article 7.6 of the Disciplinary Rules and Procedures unmistakably communicates that the CFP Board disfavors extensions:

CFP Board Counsel shall not grant any extension to file an Answer to the Complaint longer than 14 calendar days. CFP Board Counsel shall not grant more than one continuance. If more than one continuance is requested, the matter shall proceed to the DEC for review of the hearing materials without appearances by CFP Board or the Respondent [CFP professional].

I offer some other practical tips for responding to a CFP Board formal complaint to handle the situation well for a client.

First, answer the formal complaint within 20 days of the date of service of the complaint. See Disciplinary Rules and Procedures art. 7.3. Similar to the response to a notice of investigation, the answer to a formal complaint must admit or deny every material allegation and submit all defenses and mitigating circumstances. *Id.* Different from an answer filed in litigation, the response to a CFP Board formal complaint must be specific and must read similar to a closing statement before a jury in a trial. Attach relevant documentation addressing the defenses or mitigating circumstances of a CFP professional to the answer instead of waiting for the later filing deadline to sub-

mit documents. Further, an answer should explain how each document is relevant to the answer. **Caution:** The CFP board will judge a CFP professional who fails to respond with an answer as in default. If a default occurs, then the CFP Board will issue an order of revocation. *Id.* at art. 7.4.

Second, request permission to appear at the hearing before the hearing panel

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when you file the answer. See Disciplinary Rules, Art. 7.5. A defense attorney must decide at this very early stage whether to request a hearing on the allegations, and if so, whether to conduct the hearing by telephone or in person. This is an important decision in defending a CFP professional from a CFP Board complaint. In my opinion, a CFP professional should request an in-person hearing. If someone's ability to use this designation is at stake, then he or she needs the opportunity to confront a panel of peers in person regarding allegations of misconduct.

Third, add other relevant deadlines to the case calendar. The procedures mandate that a CFP professional submit witness lists and counsel contact information 45 days before a hearing. See Disciplinary Rules and Procedures arts. 8.2, 8.3. The letter with the formal complaint will set forth the hearing date. Documents and supporting evidence must also be submitted 45 days before the hearing. *Id.* at art. 8.2. You may, though, have already submitted documentation with the answer. The documentation submitted cannot exceed 100 pages in length. If it does, and the additional documentation is imperative to the case, then

you must explain how each additional document relates to the allegations in the formal complaint. *Id.*

Fourth, submit the required hearing fee. The letter with the formal complaint will list the fee, and a CFP professional must submit it at least 45 days before the hearing date. *Id.* at art. 18.4.

Fifth, investigate the background and the employment of the potential hearing panelists. With the formal complaint, the CFP Board will provide a list of the persons who may be called to serve on the three-person hearing panel for your case. If you intend to raise any type of conflict of interest, then it must be detailed in the answer to the formal complaint. If evidence or information arises after you have submitted the answer that indicates that one of the potential panel members has a conflict of interest, then submit the additional information as soon as possible to the CFP Board.

Does Procedure Permit Discovery After a Formal Complaint Filing?

Generally, the Disciplinary Rules and Procedures do not envision permitting discovery after a formal complaint filing with one exception. A CFP professional's disciplinary file can be obtained from the CFP Board. Disciplinary Rules Article 8.1. The disciplinary file must be requested in writing after the filing of the formal complaint. I would request the disciplinary file as soon as possible after you are retained. The information may help you deal with any past disciplinary issues or to verify that the CFP Board has not previously disciplined your client if he or she accurately represented the situation to you. The materials obtained should be treated as confidential and used only with regard to the formal complaint.

Consider Settlement Opportunities Before the CFP Board Hearing

The Disciplinary Rules and Procedures contain a procedure for resolving formal complaints. Although the CFP Board staff attorney may negotiate settlements, the DEC ultimately must approve the terms. *See* Disciplinary Rules and Procedures art. 14.1. The process works in these steps: (1) Either the CFP Board staff attorney or the defense attorney initiates the settlement discussion; (2) The CFP Board staff attorney, authorized

to reach a provisional agreement on behalf of the board, and the defense attorney come to terms on the settlement; (3) The terms are put in writing, as an offer, which the hearing panel then considers; (4) The offer must include (a) the act or practice engaged in by the CFP professional; (b) the rule violated; (c) the mitigating factors considered; (d) the evidence that exonerated the CFP profession or indicated that he or she has transgressed a lesser violation or should receive a lesser sanction; (e) any other relevant evidence considered by the CFP Board staff attorney; (f) consent to the offer by the CFP professional; and (g) waiver of the CFP professional's rights of appeal to the appeals committee or to any court. *Id.*

The offer submitted by CFP Board staff attorney and the CFP professional must be submitted to CFP Board staff at least 40 days before the hearing. The offer stays all proceedings including the hearing. The hearing panel then considers the offer, and if it accepts it, it is submitted to the DEC (Disciplinary and Ethics Commission). *Id.* at art. 14.2. However, the hearing panel may reject the offer or propose a counteroffer, which a CFP professional must accept or reject within 20 days. *Id.* at art. 14.3. The Disciplinary Rules and Procedures specifically provide that neither the rejection of the offer by the hearing panel nor the DEC will be "given consideration in the determination of the issues involved" in the proceeding before the CFP Board or in any other CFP Board proceeding. *Id.* at art. 14.3. These settlement guidelines were amended within the last year and create much broader parameters for resolving the charges against a CFP professional. As with any litigation, a defense attorney will need to determine whether the facts against a CFP professional warrant engaging in settlement negotiations.

Preparing for the CFP Board Hearing

The most pressing matters to consider in preparing for a CFP Board hearing are the witnesses that you will call to testify during the hearing and the documents that you will present to the hearing panel. The CFP Board must receive a testifying witness list at least 45 days before a hearing. *See* Disciplinary Rules and Procedures art. 8.3. The list must contain a statement explaining the nature and extent of the witnesses' tes-

timony and whether a witness will appear live or by telephone. It is imperative that you interview and determine which witnesses you will call more than 45 days before the hearing. **Caution:** Do not forget to designate your client as a witness.

Similarly, you must submit the documents that you wish to submit to the CFP Board at least 45 days before the hearing. *Id.* at art. 8.2. Hopefully, you will have already submitted the majority of the important documents with the answer. However, new documents may surface so you will need to make sure to review the file again and determine if you have additional documentary evidence to submit.

A CFP professional also must designate the counsel of record at least 45 days before a hearing date. *Id.* at art. 8.4. If you filed the answer, then you have already been disclosed as counsel of record. However, I would include a statement when you submit the witness list and documentary evidence identifying yourself as counsel and noting whether you will appear by phone or in person.

The rules and procedures also permit filing motions regarding procedural or evidentiary matters, but it is unlikely that one will become necessary. At most, you may need to file a motion to determine a conflict of interest of a potential hearing panel member or to seek leave to supplement your witness list or the documents produced. You must file these types of motions 30 days before a hearing. *Id.* at art. 9.1. The chair of the hearing panel decides all motions, and he or she can rule upon them without holding a hearing even if one has been requested. *Id.* at art. 9.4. The motion must not exceed two pages, single spaced, and it cannot include more than 10 pages of attachments. *Id.* at art. 9.3.

When preparing for a hearing, it is imperative to investigate the anonymous case histories found on the CFP Board website, www.cfp.net. The anonymous case histories will give you some idea about how the CFP Board has decided cases with similar facts, and more importantly, the facts that hearing panels deemed to be mitigating circumstances. It may take several hours to review these case histories, but again, they offer the best guidelines to use in deciding how to present your evidence, determining the facts that show mitigating

circumstances and making a case against disciplining your client.

The CFP Board will provide notice of the date and place of the hearing. *Id.* at art. 10.1. If you will travel to the hearing, request as much notice as possible directly from the CFP Board and a hearing time suitable for your travel schedule. Before the hearing, prepare your client and the independent witnesses. The three-person panel will likely cross-examine the CFP professional, and so you must prepare him or her as much as you would prepare a client for a trial cross examination. I suggest gathering all relevant documents (complaint, answer, documents, and witness lists) in a notebook for the CFP professional to review before you hold the preparation session. During your preparation session, take the time to walk through all of the facts and then conduct a mock examination. **Caution:** The hearing panel will consist of at least two CFP professionals who probably will not have legal training, but they generally will have broad financial planning backgrounds. The CFP professional who you represent must have detailed knowledge of the facts and the duties owed by a financial planner.

The Hearing

Most likely a hearing panel will convene in Washington, D.C., at a local hotel to hear testimony and evidence related to the allegations of misconduct against a CFP professional. In the hearing room will be you, the accused CFP professional, the CFP staff attorney, the hearing panel members, a court reporter, and potentially, staff from the CFP Board. The hearing panel consists of three persons, and as noted above, two must be CFP professionals. *See* Disciplinary Rules and Procedures art. 2.4. In addition, two of the panel members must be members of the DEC ((Disciplinary and Ethics Commission) while one panel member can be a volunteer. *Id.* One hearing panel member will be designated as the chair. The chair will lead the hearing, rule on motions and keep order. *Id.* Also, do not expect the CFP Board staff attorney to be the same attorney who dealt with the notice of investigation or the formal Complaint. Since the CFP Board conducts multiple hearings over multiple days, it typically hires outside counsel to assist with prosecuting the charges against a CFP professional.

Here are some practical tips for representing your client during the CFP Board hearing.

- Make sure that you have adequately and thoroughly prepared your client for the examination by you and the potential cross examination by CFP Board staff attorney or by the hearing panel.
- Leave your adversarial hat at home. While the hearing functions similar to a trial, the hearing panelists typically are not attorneys. Instead, I would focus on presenting your position assertively without appearing adversarial. Your client should do the same.
- Make sure that your witnesses are available by phone. Have a list of the witnesses' phone numbers with a backup number for each one.
- Keep in mind that the hearing panel is not bound by rules of civil procedure or evidence and temper your objections accordingly. *See* Disciplinary Rules and Procedures art. 10.3.
- Give your client ample time to explain the facts directly to the hearing panel. A hearing panel is similar to a jury and needs to know and understand the position of the CFP professional directly from him or her.
- Consider the standard of proof. A hearing panel must find misconduct by a preponderance of the evidence defined in the Disciplinary Rules and Procedures as "a legal standard of review that generally means 'more probable than not,' *i.e.*, evidence which shows that, as a whole, the fact sought to be proved is more probable than not to have occurred." *Id.* at art. 10.3.
- Take the opportunity to provide a closing statement summarizing the facts and all mitigating circumstances to the hearing panel.

At the conclusion of a hearing, you will not be told the outcome. Instead, a hearing panel meets and makes its findings of fact and recommendations to the DEC (Disciplinary and Ethics Commission) for consideration. A hearing panel's report can either (1) determine that the facts were not proved or that the facts do not warrant discipline and recommend dismissal with or without caution, or (2) refer the matter to the DEC for discipline and recommend a form of discipline. *See* Disciplinary Rules and Procedures art. 11.1.

Upon reviewing a hearing panel's findings of fact and recommendations, the DEC can either accept the recommendation or send the matter back to the hearing panel for further consideration. *Id.* at art. 11.2. In addition, the DEC can request that a hearing panel conduct further proceedings. *Id.* In either event, however, the DEC must notify the CFP professional within 45 days of the

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hearing of the DEC's decision and the sanctions it will impose if it will impose them. *Id.*

Appeal

A CFP professional does have a right of appeal of the order of the DEC. The appeal must be filed within 30 days after the date of notice to the CFP professional of the DEC order. *See* Disciplinary Rules and Procedures, Art. 12. Procedures for the appeal are addressed specifically in the Rules and Procedures of the Appeals Committee, which are available on the CFP Board website.

Conclusion

A defense lawyer faced with a client's loss of a valuable industry designation must act promptly after he or she is retained to investigate charges of misconduct by the CFP Board, respond to the charges, evaluate settlement and prepare for the hearing, all within a relatively short time frame. The hearing process involves a panel composed of real industry professionals, all of whom need to be convinced directly by a CFP professional that either wrongdoing did not occur, or if it did, the actions did not amount to a violation of the CFP's various rules and standards. An attorney should conduct a hearing assertively but without the adversarial tone sometimes involved in litigation. 