

INVESTMENTS & WEALTH MONITOR

A reprinted article from July/August 2018

EXTRACURRICULAR ACTIVITIES

Complying with the Investments & Wealth
Institute *Code of Professional Responsibility*

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Complying with the Investments & Wealth Institute *Code of Professional Responsibility*

By Robert E. Frankel, JD, AIF®

The Investments & Wealth Institute Professional Review Board (PRB) is seeing with greater frequency cases involving professionals' involvement in, for want of a better term, extracurricular activities, which can include active and passive activities outside of work.

Some everyday conduct seems to implicate the express language of the legal, regulatory, and firm policies governing their employees' outside business activities. Financial Industry Regulatory Authority (FINRA) Rule 3270, one of several relevant rules, states as follows:

No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.

For example, on the most benign end of the spectrum are volunteer work for a charity or other nonprofit and writing an article that is published in a trade journal. Writing or serving as a volunteer might imply a status of officer, director, or independent contractor, even if such

work is done without any compensation. Generally, if one is contemplating engaging in such outside activities, he or she should consult with the firm's legal or compliance professionals before commencing such activities because the rules may require advance notice and approval by the firm.

On the other end of the spectrum are potentially problematic activities including, for example, unapproved or violative purchases of shares of publicly traded companies in a disclosed brokerage account held at another financial institution that may be attributed to the financial advisor. For example, what if you are remarried and your spouse purchases shares of a new initial public offering (IPO) at a disclosed brokerage account owned by the spouse as custodian for her biological minor child living in your house and supported by you? Investment properties can create issues for advisors. What if your spouse manages rental properties in collaboration with you even if such properties were acquired long before your entry into the financial services industry? Loans from friends to you or an attributed person can be problematic if the friend is also a firm client. Other areas to be cognizant of the need to consult with compliance or legal personnel include placement of your biggest client into hot IPOs, to ensure the client is not somehow prohibited from participation by the attribution

rules or other conflicts of interest. In addition, personal participation in private placements, passive investments, or other outside businesses along with family and/or friends who also may be brokerage clients of your firm can present unique challenges if you associate with these co-investors as friends and neglect to remember they are firm clients. Certified professionals also have been tripped up when asked to provide consulting services to another person or entity that is a friend or helping a friend raise capital, even when such activities are done without any compensation.

GROUNDS FOR DISCIPLINE

To avoid discipline by The Institute, professionals need to comply with their legal, regulatory, and firm requirements in the practice of their profession.¹ FINRA provides a set of rules for these outside activities pursuant to FINRA Rules 3210 through 3280. Violations of these FINRA rules also will be violations of Principle 8 if the professional is governed by the FINRA rules.² Sometimes the regulatory rules require absolute prohibition against certain conduct. Often, these rules allow the conduct at issue but require advance notice to and prior approval by the firm. Consultation with compliance or legal personnel would be advisable when contemplating involvement in something outside your employment or if you previously engaged in such activities before joining firm.

DISCIPLINARY PROCESS

The Institute's disciplinary process is a peer review process that may result in a hearing. Fact finders and decision makers are entirely made up of a licensee's peers. A thumbnail of the process follows.³ First, The Institute's staff investigates the matter, prepares a petition (which is reviewed by The Institute's legal counsel), and submits the petition to the PRB for review. The PRB can either dismiss the petition, return it for further research, or, if good cause is shown, appoint a three-person panel to hear and review evidence concerning the petition. Licensees are required to file answers within 30 days after receipt of the petition. In drafting answers, licensees should garner all relevant information and put together a concise and thorough response to the petition, along with all supporting documentation. Care should be taken to look at the salient facts relevant to the violations alleged. Consultation with the Code and Rules is advisable.

Thereafter, a discovery phase occurs where both sides exchange information that they plan to use at the hearing, and either side may request information from the other side. The PRB delegates fact-finding authority to a hearing panel, which is made up of the licensee's peers and from a pool of volunteers who neither serve on The Institute's board of directors nor on the PRB. A hearing occurs within 90 days after the end of the discovery phase. At the hearing, the petition and supporting documents set forth the violations allegedly at issue, and the accused is given the opportunity, with or without representation of counsel, to make a statement and to set forth and elicit a defense through witnesses and documents. Formal evidentiary rules are relaxed, and questions may follow from the panel members. At the conclusion

of the hearing, the panel meets and makes a recommendation to the PRB, which thereafter reviews the recommendation and issues a decision in the case including disciplinary measures (if any). The PRB's decision may be appealed to an appeals board whose decision becomes final.

DISCIPLINE

Assuming that the PRB finds that grounds for discipline exist, it also will determine the appropriate remedy, which may include any of the following: (1) a private censure, which is a private letter from the PRB to the licensee, informing the licensee of the violation and seeking to get the licensee into compliance; (2) a public censure, which is a similar letter with the only difference being that the censure is made known to the public through publication in venues including the Institute website, media alerts, and/or notification to FINRA and other financial services organization; (3) a suspension of the licensee's right to use the Institute-owned mark for a set period of time; and (4) a termination of the licensee's right to use the marks. The rules also grant the PRB the authority to fashion any other order that it deems appropriate.

PRACTICE POINTERS⁴

AVOID FAULTY DISCLOSURE

One of the most common problems affecting licensees is faulty disclosure, which can take either of two forms: (1) affirmative misstatements or (2) material omissions. Read carefully the attestations you make when going through the recertification process. Licensees should take great care in ensuring that when they attest to having had no involvement in any matter identified in the attestation, that such attestation is true, complete, and accurate. Far too many licensees perhaps fail to read what they are signing, which has

resulted in a large number of petitions alleging nondisclosure. When in doubt, it is recommended to err on the side of disclosure.

In addition, the Rules themselves contemplate voluntary self-disclosures without the need to be asked to sign an attestation. Convictions of crimes deemed serious enough to be grounds for discipline and losses or suspensions of any other license, designation, or certification are reportable to The Institute within 60 days. Becoming a party to a civil, regulatory, or governmental matter or to an arbitration or mediation also requires prompt notice to The Institute. Again, when in doubt, disclose as soon as possible.

AVOID REINSTATEMENT

Although not within the purview of the disciplinary process, a large number of licensees let their licenses lapse for failure to complete the requisite continuing education (CE), pay the renewal fee, or make the renewal disclosures before the renewal deadline. It would be advisable to keep the license active by meeting the renewal requirements on time. Otherwise, a lapsed licensee is faced with the need to follow the reinstatement rules, which creates a number of hurdles to becoming eligible to continue to use the marks, including the need to: (1) file a timely request for reinstatement; (2) submit oneself a second time to acceptance by the Admission Committee, which can be delayed if any background check issue arises; (3) comply with the additional rules that would make one eligible for reinstatement, such as additional CE or passing the certification exam again; and (4) pay additional fees to apply.

APPLY PROPER MARKS USAGE

Another practice pointer outside the disciplinary process is marks usage.

If one receives a cease and desist letter due to letting a certification lapse, one should ensure compliance with such cease and desist notice, and it is highly recommended to document all efforts to comply. Misuse of a mark is a significant factor considered by the Admissions Committee in reinstatement applications; ignoring a request to stop using marks when one is not licensed can hurt an applicant.

CONCLUSION

In a recent survey⁵ of more than 1,000 clients commissioned by The Institute during fall 2017: “Eighty-eight percent of clients said knowing their advisor would lose his/her credentials if he/she failed to meet ethics standards was somewhat or very important.”

In 2007, The Institute first initiated a disciplinary process and hired a part-time paralegal. Thereafter, the Rules and the Code were drafted, revised, and

promulgated, and a formal disciplinary process was implemented. Those efforts were enhanced in 2011 with the hiring of a full-time lawyer. The addition of staff has indeed resulted in an increasingly robust disciplinary process, which, among other things, helps protect the public and strengthen the marks. Since the initiation of a formal disciplinary process, the PRB has issued 192 private censures, nine public censures, nine suspensions, and five terminations. 🍯

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ENDNOTES

1. The Institute's rules provide that a licensee can be subjected to discipline for violations of the Institute *Code of Professional Responsibility* (Code) or *Disciplinary Rules and Procedures* (Rules). Principle 8 of the Code requires Institute professionals “to [c]omply with legal and regulatory requirements related to one's practice of his or her profession.” The Guidance for Principle 8 makes it clear that professionals are bound under

Principle 8 by whatever legal, regulatory, and firm requirements they are bound to comply with already in their practices. For more detail, consult the Code and the Rules, <http://investmentsandwealth.org/ethics-standards/know-the-code> and <http://investmentsandwealth.org/ethics-standards/disciplinary-rules-procedures>. In the event of any discrepancy between the Code and the Rules and this article, the Code and the Rules shall control.

2. For those bound by other regulators, different rules on this subject may apply.
3. For more detail, consult the Rules, <http://investmentsandwealth.org/ethics-standards/disciplinary-rules-procedures>. In the event of any discrepancy between the Rules and this article, the Rules shall control.
4. Practice pointers are the opinion of this staff member and do not necessarily represent the view of any of the volunteer decision makers who would handle and decide actual discipline cases. Accordingly, while helpful, these practice pointers are not binding authority on The Institute or any of its boards, committees, or agents.
5. Investments & Wealth Client Research, August 2017, conducted by AbsoluteEngagement.com; 585 U.S. respondents and 444 Canadian respondents. The sample comprised investors who work with a financial advisor (across channel) and make or contribute to the financial decision-making in the household.



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