

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 29324

This is a summary of a decision issued following the February 2018 hearings of the Disciplinary and Ethics Commission (“Commission”) of Certified Financial Planner Board of Standards, Inc. (“CFP Board”). The conduct at issue in this case occurred after January 1, 2009. The Rules in effect at that time under the *Rules of Conduct* were Rules 1.1 through 6.5.

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he: (1) took client information from Respondent’s old firm without authorization from the firm or clients; (2) transferred client information to Respondent’s new firm for financial gain; (3) failed to treat client information with the level of confidentiality required by applicable law; and (4) failed to securely handle electronically stored information.

II. Findings of Fact

2014 Firm ABC’s Civil Suit

In September 2014, firm ABC (“ABC”) filed a Complaint against Respondent alleging that Respondent misappropriated ABC’s confidential proprietary information, including ABC’s clients’ information, such as client names, account numbers, account values, and addresses. In December 2014, ABC filed an Amended Complaint against Respondent, Respondent’s Branch Manager (“BM”), and Firm DEF (“DEF”), as Defendants. Later, in August 2016, ABC filed a Second Amended Complaint alleging the same causes of action against the same Defendants. ABC alleged that Respondent, BM, and DEF conspired to misappropriate ABC’s confidential proprietary information, including ABC’s clients’ information, such as client names, account numbers, account values, and addresses. Respondent left ABC’s employment for a position with DEF and he allegedly misappropriated client information to unlawfully compete against ABC.

In the Second Amended Complaint, ABC alleged the following causes of action: (1) Breach of Contract against Respondent; (2) Intentional Interference with Contractual Relations against DEF and BM; (3) Negligent Interference with Contractual Relations against DEF and BM; (4) Breach of Fiduciary Duty against Respondent; (5) Intentional Interference with Economic Relations against Respondent, DEF, and BM; (6) Negligent Interference with Economic Relations against Respondent, DEF, and BM; (7) Conversion against Respondent, DEF, and BM; (8) Statutory and Common Law Unfair Business Practices against Respondent, DEF, and BM; (9) Misappropriation of Trade Secrets against Respondent, DEF, and BM; (10) Violation of Penal Code Section 502 against Respondent, DEF, and BM; (11) Unjust Enrichment against Respondent, DEF, and BM; and (12) Injunctive Relief against Respondent, DEF, and BM.

Respondent generally denied the allegations against him. Respondent also filed a Cross-Complaint against ABC for Intentional Interference with Prospective Economic Advantage, Unfair Competition, and Defamation. ABC generally denied the allegations in the Cross-Complaint.

Court's Findings

The matter was tried in the Superior Court of State X, County of Y ("Court") before Judge between December 2016 and March 2017. In June 2017, Judge issued the Court's Final Statement of Decision in which the Court made several factual and legal findings. A summary of those findings can be found below.

Respondent worked for ABC as a salaried financial advisor from 1999 to August 2014. ABC is a Registered Investment Advisor firm that provides clients with financial investment advice and manages client assets for a fee, typically a percentage of the client's assets under management ("AUM"). Respondent executed a confidentiality agreement with ABC in June 2001. The Confidentiality Agreement stated that ABC client information and client lists are the confidential information of ABC and prohibited the use of such information for any other purpose than ABC business. Respondent also executed an acknowledgement of the most recent update to ABC's Associate Handbook in January 2014. The Handbook prohibited employees from using ABC's trade secrets and proprietary information for anything other than ABC business.

In July 2014, BM emailed Respondent about potentially joining DEF. BM stated DEF would offer Respondent a hiring bonus of 1.5 times trailing 12 months production. For Respondent, this bonus amounted to \$1.5 million. It was based on an expectation that Respondent would bring over \$100 million of AUM to DEF. BM also would personally profit through financial incentives from DEF based on a successful recruitment and conversion of clients to DEF. DEF and Respondent agreed that Respondent would receive 44% of gross dealer concessions, and DEF 56%.

BM asked Respondent to provide documentation substantiating his claimed AUM and fees for the trailing 12 months. Respondent accessed ABC's system to obtain the necessary information. In July 2014, Respondent sent BM two emails attaching ABC information including client names, account numbers, and account values. BM responded to Respondent, stating DEF would not accept the documents. BM had printed screenshots that he sent to a DEF Manager ("Manager"). At an in-person meeting, Respondent later provided BM with a 52-page billing report that he printed from ABC's secure network. The report contained the same client information that BM previously would not accept.

Around the same time, Respondent requested a list of ABC clients that he had serviced from ABC's Director of Corporate Operations ("Director"). Respondent told Director that the information was for a client service effort he was undertaking for ABC's benefit on LinkedIn. He also stated that he had approval from ABC's Chief Compliance Officer ("CCO") to obtain the list. While Respondent had emailed CCO to seek approval to obtain the LinkedIn list to send ABC clients an email to ask them to connect on LinkedIn, CCO never approved the request. Director sent Respondent the client list in July 2014. Respondent sent the list to his personal email and copied it to a flashdrive. He also used the information to connect with ABC clients on LinkedIn. Respondent's motivation for obtaining the LinkedIn list was made clear when BM advised Respondent to change his affiliation with DEF on LinkedIn immediately when he made the move over to the firm because it would automatically email an announcement to everyone Respondent was connected to which would generate calls to Respondent's DEF branch office.

In July 2014, Respondent's wife's personal email account was used to send a 59-page ABC Performance Report to Respondent's personal email with an account summary for 809 ABC client accounts, including client names, account numbers, and account values. Respondent also emailed to his personal email account a document containing the names, address, email addresses, telephone numbers, account information, and social security numbers of prospective ABC clients. The same document was also stored on Respondent's laptop in a folder name "Finance ZZZ." ZZZ is DEF's stock ticker symbol.

Respondent also asked a new account specialist (“Specialist”) at ABC to assist him in creating a spreadsheet of ABC client information, including names, addresses, telephone numbers, account values, and email addresses. Respondent used the list prepared by Specialist to make telephone calls to ABC clients. Respondent destroyed this list, but phone records for DEF and Respondent indicate that he used the information from the list to make telephone calls to ABC clients.

Respondent also provided DEF and BM with information about ABC’s confidential model investment portfolios. He sent these portfolios to his personal email account.

In August 2014, Respondent received an employment offer from DEF. The offer included an upfront payment of \$1.5 million as an initial loan to be forgiven over time contingent on him remaining a DEF employee. Respondent accepted the offer on August 6, 2014 and set his start date for later in August 2014. He resigned from ABC in late August 2014. He informed ABC that any further questions or inquiries about his status should be referred to his attorneys.

In August 2014, Respondent provided BM with a flashdrive containing the names, addresses, and telephone numbers of ABC clients. DEF then began mailing announcements to those ABC clients announcing that Respondent had joined DEF. Respondent also used the list to call ABC clients he previously serviced. BM used the list to create an electronic list to track ABC clients moving to DEF and shared that list with others at DEF. After Respondent's departure, ABC sent clients an email regarding his abrupt departure, and encouraged them to remain with ABC.

In October 2014, BM urged Respondent to continue his efforts to recruit clients away from ABC to DEF, reminding him of the AUM needed to reach the compensation level he had at ABC and additional volume needed to reach higher compensation awards. BM also stated to Respondent, "I know it's an uphill battle but remember, your clients are way better off coming with you than they are staying with [ABC]." Respondent ultimately transferred approximately \$52.5 million in AUM to DEF, or 29% of the AUM serviced at ABC.

The Court found Respondent liable for breaching his contract with ABC. Respondent violated ABC’s Confidentiality Agreement and Associate Handbook when he utilized confidential ABC information for purposes other than "company use" or "disclose[d]" "confidential company or customer information" "to people outside the company." The Court also noted that Respondent sought information from Director regarding client email addresses under false pretenses, as he represented it was for a legitimate client effort on behalf of ABC, when in actuality it was used to recruit ABC clients to follow him to DEF.

The Court found Respondent, BM, and DEF liable for misappropriating ABC's trade secrets. The Court determined that ABC had demonstrated the trade secret status of its information. The efforts undertaken by ABC to cultivate and create its client information entitled it to trade secret protection. The Court detailed the numerous actions Respondent, BM, and DEF undertook to misappropriate ABC’s information.

The Court found Respondent, BM, and DEF liable for engaging in unfair business practices against ABC. ABC presented evidence that Respondent qualified as an investment adviser under both Regulation S-P and State A Financial Information Privacy Act ("FIPA"). After his resignation from ABC, Respondent became a "nonaffiliated third party" to ABC. The confidential client information in the ABC Client List, ABC Billing Report and ABC Performance Report constitutes nonpublic personal information and personally identifiable financial information under Regulation S-P and FIPA.

In connection with this finding, the Court specifically noted that Respondent admitted in his trial testimony that it was not publicly available information that these individuals were consumers of financial services. The Court also determined that it is undisputed that Respondent never had client consent to take the confidential client information. The Court determined, however, that since Regulation S-P protects consumers from disclosure of their information when the consumer has interacted with a financial institution or investment adviser, DEF and BM were not liable under Regulation S-P because the consumers did not provide the information to them. FIPA, however, applies more broadly. Thus, the Court found that ABC demonstrated that Respondent had engaged in an unfair competition against ABC under Regulation S-P, and that Respondent, BM, and DEF had engaged in unfair competition against ABC under FIPA.

The Court then addressed Respondent's claims against ABC for intentional interference with prospective economic advantage, unfair competition, and defamation. The Court found that Respondent failed to prove that any of the statements made by ABC were false, or that ABC failed to use reasonable care to determine the truth or falsity of the statement. Thus, the Court found that Respondent had not proved any of his claims, and that he was not entitled to damages.

Court's Judgment after Bench Trial

In June 2017, the Court ordered that ABC recover from Respondent, DEF, and BM, jointly and severally, damages in the amount of \$1,500,000 with interest at an annual rate of 10%. The Court also ordered ABC recover against Respondent, DEF, and BM, jointly and severally, costs in the sum of \$159,535.95.

The Court also ordered that the preliminary injunction entered in November 2014 against Respondent be converted to a permanent injunction, and modified it as follows: a) the injunction now includes DEF and BM; b) any trade secrets possessed by the Defendants not previously returned shall be returned to ABC; and c) the \$25,000 bond ABC posted was exonerated and shall be returned to ABC.

In August 2017, the attorney for ABC filed an Acknowledgement of Satisfaction of Judgment ("Acknowledgement") with the Court. The Acknowledgement confirmed that the Court's Judgment was satisfied in full as to the money portion. The permanent injunction portion of the Judgment was to remain in effect.

2014 FINRA Letter of Caution

In October 2014, FINRA issued a Letter of Caution to Respondent. FINRA found the following deficiency: Respondent did not comply with FINRA Rule 2010, Standards of Commercial Honor and Principles of Trade. Specifically, FINRA stated that, under Regulation S-P, Respondent was prohibited from disclosing non-public customer information to non-affiliated third parties unless customers are provided certain notices, and the customers are afforded a reasonable opportunity, before disclosure to any non-affiliated third party, to opt out of the disclosure. Respondent violated Regulation S-P by emailing customer information to his new prospective firm, DEF. FINRA also noted that Respondent admitted to taking customer information, including names, addresses, and telephone numbers, with him to DEF. FINRA found no evidence customers were provided notice and the opportunity to opt out of the disclosure to DEF. Respondent's actions violated Regulation S-P, and in tum, violated FINRA Rule 2010.

III. Grounds for Discipline

First Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 3.1 of the *Rules of Conduct*, which provides that a certificant shall treat information as confidential except as required in response to proper legal process; as necessitated by obligations to a certificant's employer or partners; as required to defend against charges of wrongdoing; in connection with a civil dispute; or as needed to perform the services.

Respondent, a certificant, failed to treat client information, such as client names, account numbers, and account values, as confidential when he provided client information that he obtained while employed with ABC to DEF. Examples of Respondent's unauthorized disclosure include:

- In July 2014, Respondent sent BM two emails attaching ABC information including client names, account numbers, and account values.
- At an in-person meeting, Respondent later provided BM with a 52-page billing report that he printed from ABC's secure network. The report contained the same client information that BM previously would not accept.

The act of providing the client information to DEF violated ABC's Confidentiality Agreement and Associate Handbook, which designated such information as confidential. In addition, Respondent violated Regulation S-P, which designated such information as confidential and, generally, required Respondent and/or ABC to provide the clients whose information Respondent disclosed to DEF prior notice of the disclosure and the opportunity to opt out of the disclosure. Respondent did not do so prior to disclosing the clients' information to DEF. Finally, the Commission determined that Respondent's disclosure was not done pursuant to any of the exceptions enumerated in the rule. Thus, Respondent violated Rule 3.1 of the *Rules of Conduct*.

Second Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 3.2 of the *Rules of Conduct*, which provides that a certificant shall take prudent steps to protect the security of stored information, whether physically or electronically, that is within the certificant's control.

Respondent, a certificant, failed to take prudent steps to protect the security of stored information, whether physically or electronically, that was within the certificant's control when he obtained confidential ABC client information which he sent to his personal email, copied to a flashdrive, and later released to DEF. Examples of such failures include:

- Respondent sent the list containing confidential client information to his personal email and copied it to a flashdrive.
- In July 2014, Respondent's wife's personal email account was used to send a 59-page ABC Performance Report to Respondent's personal email with an account summary for 809 ABC client accounts, including client names, account numbers, and account values. Respondent also emailed

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to his personal email account a document contain the names, address, email addresses, telephone numbers, account information, and social security numbers of prospective ABC clients. The same document was also stored on Respondent's laptop in a folder name "Finance ZZZ."

Respondent's failure to ensure that he took prudent steps to protect this client information is demonstrated by the fact that this information was sent to or stored on personal emails accounts or devices that did not have the same level of protection the information would have had if it had remained on ABC's network and devices. Further, movement to Respondent's personal email and devices facilitated the unauthorized disclosure of the clients' information to DEF. Thus, Respondent violated Rule 3.2 of the *Rules of Conduct*.

Third Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 4.3 of the *Rules of Conduct*, which provides that a certificant shall be in compliance with applicable regulatory requirements governing professional services provided to the client.

Respondent, a certificant, failed to comply with applicable regulatory requirements governing professional services provided to his clients when he violated Regulation S-P by disclosing confidential customer information, such as client names, account numbers and account values, to his new prospective firm, DEF. Respondent admitted that he took client information with him to DEF, a third party. There is no evidence these clients were provided the required prior notice of the disclosure and the opportunity to opt out of Respondent's disclosure to DEF. These actions violated Regulation S-P, and in turn, FINRA Rule 2010. Thus, Respondent violated Rule 4.3 of the *Rules of Conduct*.

Fourth Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 5.1 of the *Rules of Conduct*, which provides that a certificant who is an employee/agent shall perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's *Code of Ethics*.

Respondent, a certificant, failed to perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's *Code of Ethics*. In the course of Respondent's service to clients, Respondent collected confidential information from clients. Implicit in this collection of information was the promise, reinforced by applicable law and regulation regarding privacy, the Respondent would maintain the confidentiality of this information. When Respondent disclosed the clients' information to DEF in violation of ABC's Confidentiality Agreement and Associate Handbook he failed to perform professional services with dedication to the lawful objectives of his employer. Thus, Respondent violated Rule 5.1 of the *Rules of Conduct*.

Fifth Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 6.5 of the *Rules of Conduct*, which provides that a certificant shall not engage in conduct which reflects adversely on his or her integrity or fitness as a certificant, upon the CFP® marks, or upon the profession.

Respondent, a certificant, engaged in conduct that reflects adversely on his integrity and fitness as a certificant, upon the CFP® marks, and upon the profession (a) when he violated ABC's Confidentiality Agreement and Associate Handbook, and misappropriated trade secrets and engaged in unfair competition, by providing DEF with confidential information such as ABC customer names, account numbers, and account values, and (b) when the Court entered the judgment and findings against Respondent. These actions reflect adversely because clients have an expectation of confidentiality when engaging with a CFP® professional for professional services. This expectation of confidentiality is critical to the exchange of information between a client and a CFP® professional as the exchange of information between a client and a CFP® professional is an important part of the financial planning process. Respondent's actions damage that expectation of privacy and may cause the public to be reluctant to share information with CFP® professional, which would impede the competent and ethical delivery of financial planning services to clients by CFP® professional. Thus, Respondent violated Rule 6.5 of the *Rules of Conduct*.

IV. Discipline Imposed

The Commission found that Respondent's conduct violated Rules 3.1, 3.2, 4.3, 5.1, and 6.5 of the *Rules of Conduct*, providing for discipline under Article 3(a) of the *Disciplinary Rules*.

After careful consideration of the evidence in Respondent's matter, the Commission has decided to issue Respondent a Public Letter of Admonition pursuant to Article 4.2 of the *Disciplinary Rules*. In arriving at its decision, the Commission determined that the applicable Sanction Guidelines recommended (a) a Private Censure for Conduct 4: Breach of Contract; (b) a Private Censure for Conduct 12: Employer Policies Violation; (c) a Public Letter of Admonition for Conduct 21: Judgment; and (d) a Public Letter of Admonition for Conduct 30: Securities Law Violation.

The Commission then consulted Anonymous Case Histories ("ACH") 22191, ACH 26886, and 26887. The Commission did not find any of these ACHs to be similar enough to Respondent's conduct. ACH 22191 contains no information about the CFP® professional's conduct and thus is not useful as precedent. ACH 26886 involved a dispute as to whether the CFP® professional complied with the agreed-on stipulations regarding the use of client information, which the Commission determined did not constitute violations. Finally, in ACH 26887, the CFP® professional had a violation of agreed-on stipulations regarding the use of client information, which was not of the severity and scope of Respondent's use of confidential client information in this matter. Further, the sanction imposed by the Commission in that instance also appears to have been influenced by the fact that the CFP® professional lied while under oath. Thus, the Commission did not rely on any of these ACHs.

The Commission then reviewed the aggravating and mitigating factors to determine whether there were any material factors, and if so, what weight those factors may have in its decision. The Commission considered the following in aggravation: that Respondent's behavior was intentional, which was evidence by his deliberate effort with BM and DEF to transfer confidential and proprietary ABC information to DEF. The Commission did not consider any mitigating factors. The Commission did not give great weight to the aggravating factor it identified as the intentional action here was at the core of the underlying violation of misappropriation of client information. Thus, the Commission chose to impose a sanction that was consistent with the Sanction Guidelines that recommended a Public Letter of Admonition.