

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES  
NUMBER 30537

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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 his old firm to a new firm without authorization from either the old firm or the clients; (2) breached his contract with the old firm by taking client information to a new firm and failing to timely notify the old firm of his resignation; and (3) failed to make payments on a breach of contract judgment issued by a court with appropriate jurisdiction.

II. Findings of Fact

For nearly 20 years, Respondent worked for Firm ABC (“ABC”) as a financial planning advisor. As part of his employment, Respondent had executed an employment agreement and a restrictive stock transfer agreement. Both agreements contained restrictive covenants, including requirements not to undertake the planning or organization of any business activity competitive with the work Respondent performed for the company and to refrain from taking client lists, the content of all clients files or other information concerning clients, and an agreement that, for two years following his departure, Respondent would not contact any current or former clients of ABC.

In May 2014, Respondent began having discussions with Firm DEF (“DEF”), which was located in City V, State W, about Respondent moving to State Y and becoming employed by DEF. In June 2014, DEF suggested that its attorney review Respondent's agreements with ABC and proposed to pay Respondent a salary of \$180,000, assuming he managed to bring with him \$40 million in assets under management from ABC. That same month, Respondent sent his employment agreement to DEF. DEF then sent Respondent a proposed resignation letter to give to ABC and a sample email or letter for Respondent to send to his clients that provided his personal email and phone number.

DEF further suggested that Respondent should have client information since there was a possibility he would lose access to the information when he resigned from ABC. DEF also suggested that Respondent let his clients know he was leaving ABC before ABC could contact the clients. In July 2014, Respondent called, emailed, and met with clients to tell them he was leaving ABC. Respondent resigned from ABC in July 2014.

*State Z Circuit Court Case No. 14-08806-CKB*

In September 2014, the Circuit Court for County X, State Z (“Court”) issued a Temporary Restraining Order after finding that the rights of ABC with respect to its confidential and proprietary information, trade secrets, clients, and competitive interests were being, and would continue to be, violated by Respondent. The Order prohibited Respondent from contacting any current or former clients of ABC and directly or indirectly competing with ABC within 60 miles of City Y, State Z. In October 2014, the Court issued an order granting a preliminary injunction that prohibited

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Respondent from: (a) retaining, using, or disclosing any client information he obtained in his capacity as an employee of ABC; and (b) having any contact with any current client of ABC until July 2016, or until further order of the court.

The Court said that Respondent violated several sections of his employment agreement including: (a) a prohibition against undertaking the planning or organization of business activity competitive with his work for ABC; (b) a prohibition against taking client lists, client files, or other client information from ABC; (c) a prohibition against contacting current or former clients of ABC for two years after leaving ABC; and (d) an obligation to provide 60 days written notice of termination when circumstances permit. The Court noted that Respondent admitted under oath that he committed most of these breaches.

#### *American Arbitration Association Award*

Three arbitrators held a four-day arbitration hearing regarding ABC's claims against Respondent. The arbitrators found that 29 clients of ABC moved to DEF to work with Respondent and that their accounts represented approximately \$40 million in assets under management. The arbitrators determined that this was the exact amount of assets Respondent represented to DEF that he anticipated being able to bring with him to DEF.

In June 2016, the arbitrators issued an award that found Respondent had violated paragraphs 1, 8, 10, 11, and 13(c) of his employment agreement and the terms of his restrictive stock transfer agreement because he engaged in extensive planning to join DEF and solicited clients of ABC to follow him to DEF while he was still employed at ABC. The arbitrators awarded ABC \$608,708 which represented two years of commissions received by DEF from clients, excluding some friends and family members. The arbitrators also required ABC to pay Respondent \$45,143 for his stock in ABC.

#### *State Z Circuit Court Case No. 16-06733-CKB*

In August 2016, the Court issued a judgment in favor of ABC against Respondent that confirmed the \$607,708 arbitration award plus interest. Respondent said on his Investment Advisor Public Disclosure that he was in negotiations to pay the award. To date Respondent has not made any payments towards the award.

### 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 certificiant shall treat information as confidential except as required in response to proper legal process; as necessitated by obligations to a certificiant's employer or partners; as required to defend charges of wrongdoing; in connection with a civil dispute; or as needed to perform the services.

Respondent, a certificiant, took confidential client information such as client lists, client files, or other client information from ABC for his use at DEF, in violation of his employment agreement. Respondent admitted that he took possession of the clients' information before asking the clients to transfer their accounts to DEF. Therefore, 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 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 is a certificant. Respondent violated several sections of his employment agreement including: (a) a prohibition against undertaking the planning or organization of business activity competitive with his work for ABC; (b) a prohibition against taking client lists, client files, or other client information from ABC; (c) a prohibition against contacting current or former clients of ABC for two years after leaving ABC; and (d) an obligation to provide 60 days written notice of termination when circumstances permit. This finding is supported by the findings of the arbitration panel. Therefore, Respondent violated Rule 5.1 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 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 is a certificant. Respondent breached his employment agreement and failed to comply with an arbitration award and a judgment. Respondent's action in failing to abide by his contractual obligations and a judgment issued by a court of competent jurisdiction reflect adversely on himself, the CFP® marks and the profession because it could cause the public to lose faith that a CFP® professional will abide by his or her contractual promises and the law. Therefore, Respondent violated Rule 6.5 of the *Rules of Conduct*.

#### IV. Discipline Imposed

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

After careful consideration of the evidence in Respondent's matter, the Commission 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:

1. a Private Censure for Conduct 4: Breach of Contract; and
2. a Private Censure for Conduct 12: Employer Policies Violation.

The Commission consulted Anonymous Case Histories ("ACH") 24452, 29430, and 28765. In ACH 24452, a CFP® professional: (a) failed to satisfy his payment obligations to at least five CFP® professionals who provided instructor services for his consulting company; (b) breached his contact with two universities resulting in an outstanding debt to the universities; and (c) filed for chapter 13 bankruptcy. The Commission issued a one-year and one-day suspension of his right to use the CFP® marks.

In ACH 29430, a CFP® professional failed to file taxes for several years and was the subject of a \$136,000 IRS tax lien. The CFP® professional incurred the lien due to multiple years of not filing taxes. At the time of the hearing the

CFP® professional had not repaid the tax lien. The Commission issued a one-year and one-day suspension of his right to use the CFP® marks.

In ACH 28765, a CFP® professional: (a) submitted a false and inaccurate business expense report to his former employer; (b) used his former employer's confidential client information to solicit business to his new employer; (c) used his personal email account to communicate with customer about business-related matters; and (d) failed to report a professional discipline to CFP Board within 30 days. The Commission issued a Public Letter of Admonition.

The Commission found ACH 28765 to be the most persuasive of the ACHs it consulted because it involved the use of confidential client information to solicit business for his new employer. 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:

1. Respondent's actions harmed another CFP® professional;
2. CFP Board cautioned Respondent in 2014 about his representation of his compensation method as a fee-only despite the fact that he was receiving commissions as insurance agent and was affiliated with a firm that marketed insurance products and received commissions;
3. Respondent admitted that he planned for weeks for the resignation and to take ABC's confidential client information to solicit clients for DEF; and
4. Respondent has not set up a payment plan to start paying the judgment. Although State W law may allow him to defer payment while he provides support to his son who is in college, Respondent's income in the past few years would appear to allow him to start making payments on the judgment.

The Commission considered the following mitigating factors:

1. Clients spoke highly of Respondent as their financial planner and indicated that they would follow him wherever he works;
2. The award and subsequent judgement may overstate the damages incurred by ABC because the arbitrators did not appear to consider what ABC would have paid the Respondent for his salary; and
3. Respondent's conduct did not appear to harm his clients.

The Commission found the aggravating factors, particularly the planning of his resignation and his refusal to pay the judgment, to be of more significant weight than the mitigating factors. Given these factors, and the multiple instances of misconduct, the Commission decided to aggravate the recommended sanction for Conduct 4 and 12 from a Private Censure to a Public Letter.