CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30596

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) violated a State's fiduciary rule by failing to refund prepaid and unearned fees in a timely manner, as stipulated by Respondent's Forms ADV; (2) failed to provide notice to clients for the withholding of such fees over $500, in violation of State A's rules; and (3) failed to provide each client with a compliant Form ADV.

II. Findings of Fact

In April 2016, Respondent and his firm, ABC, of which he was the sole employee, owner, manager, and control person, entered into a Consent Order with the State A Division of Securities. According to the Consent Order, Respondent's Form ADV Part 2A stated that prepaid and unearned fees would be refunded to clients when specific conditions were met. However, the Form ADV Part 2A was inconsistent with Respondent's actual practices in that he would only refund prepaid and unearned fees if the client reset their investments to cash or divested from investments, and that refunds could take over one year to process. Respondent failed to refund prepaid and unearned advisory fees in a timely manner.

Respondent's Form ADV Part 1 informed clients that Respondent would provide notices required under State A's Commissioner's Rules, which required Respondent to provide concurrent notice of fees deducted for services. Respondent failed to provide clients with a notice of fees deducted as required by the rule. Respondent also collected more than $500 in prepaid and unearned fees from some clients, but mistakenly informed clients that he did not "require or solicit prepayment of more than $500 in fees per client" and failed to provide clients with an audited balance sheet prepared in accordance with generally accepted accounting principles, as required by the Form ADV Part 2A.

By engaging in the above-mentioned conduct, Respondent violated State A's fiduciary rule that prohibits investment adviser representatives from engaging in dishonest and unethical conduct. The Consent Order specifically found that Respondent's conduct violated Commissioner's Rules.

Respondent took and maintained custody or possession of funds in which clients of Respondent had a beneficial interest without complying with the requirements of the Commissioner's Rules.

Finally, Respondent violated the Commissioner's Rules by failing to furnish each investment advisory client with a compliant Form ADV Part 2 or a document with the information required by the Form ADV Part 2.

Respondent neither admitted nor denied the allegations in the Consent Order but agreed to: (a) withdraw himself and ABC as a State A investment adviser representative and State A investment adviser, respectively, within 10 calendar days of the Consent Order; (b) refund all prepaid and unearned fees to his clients; (c) deliver a withdrawal letter, approved by the Deputy Commissioner, to all investment advisory clients and custodians; and (d) agree not to reapply for registration or licensing under the State A Securities Act.

Respondent contends that the allegations concerning timely payment of refunds referred to four client accounts, one of which waived the right to any refund and another whose money was initially credited toward future transactions. Respondent said the other two clients he discovered were owed a refund after a review of client records. Finally, Respondent said that the prepayments of fees in excess of $500 involved two clients who requested an aggregation of fees for annual billing.

Respondent asserted that at the beginning of the investigation, he was transitioning out of investment advisory services into divorce planning and professional insurance sales, and that, in light of this, he agreed to a Consent Order rather than a protracted, expensive hearing. He stated that he and ABC were withdrawn from FINRA registration in March 2016, prior to the Consent Order. Respondent also stated that no client filed a complaint before or after the investigation and that no client was harmed.

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 1.4 of the *Rules of Conduct*, which provides that a certificant shall at all times place the interest of the client ahead of his or her own. When the certificant provides financial planning or material elements of financial planning, the certificant owes to the client the duty of care of a fiduciary as defined by CFP Board. CFP Board defines "fiduciary" as "one who acts in utmost good faith, in a manner he or she reasonably believes to be in the best interest of the client." CFP Board dropped this charge at the hearing. Thus, the Commission **did not** make any findings with respect to this Ground for Discipline.

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 2.1 of the *Rules of Conduct*, which provides that a certificant shall not communicate, directly or indirectly, to clients or prospective clients any false or misleading information directly or indirectly related to the certificant's professional qualifications or services. CFP Board dropped this charge at the hearing. Thus, the Commission **did not** make any findings with respect to this Ground for Discipline.

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 a certificant shall be in compliance with applicable regulatory requirements governing professional services provided to the client.

Respondent is a certificant. The Consent Order is conclusive proof that Respondent failed to comply with Commissioner's Rules, which are applicable regulatory requirements governing professional services provided to the client. Therefore, Respondent violated Rule 4.3 of the *Rules of Conduct*.

Fourth Ground for Discipline

Pursuant to Article 3(d) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts that are the proper basis for professional discipline. CFP Board dropped this charge at the hearing. Thus, the Commission **did not** make any findings with respect to this Ground for Discipline.

IV. Discipline Imposed

The Commission found that Respondent's conduct violated Rule 4.3 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 a Public Letter of Admonition for Conduct 30: Securities Law Violation. The Commission also consulted Anonymous Case Histories ("ACH") but did not find any analogous ACHs that were of sufficient similarity to warrant inclusion in the order.

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 did not consider any mitigating factors. The Commission considered in aggravation that Respondent did not report the Consent agreement with State A to CFP Board. The Commission did not provide significant weight to the aggravating factor it identified. This, combined with the lack of analogous ACHs, caused the Commission not to deviate from the Sanction Guidelines.