

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30692

This is a summary of a decision issued following the June 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) engaged in an undisclosed outside business activity; (2) failed to perform due diligence in connection with the outside business activity, leading to a bar by the Financial Industry Regulatory Authority (“FINRA”); and (3) failed to disclose his FINRA bar to CFP Board.

II. Findings of Fact

2015 ABC Termination

Respondent holds his Series 7 and Series 66 securities licenses, and was associated with Firm ABC from May 2012 until December 2015. In December 2015, ABC terminated him, citing “concerns ... raised that he failed to disclose an outside business activity and acted beyond the scope of his role at the firm.”

According to Respondent, ABC terminated him because the firm was under the impression that he was in a partnership with a local accountant and tax preparer who referred clients to him at ABC. Respondent stated that, as a reason for his termination, ABC cited an email from the accountant to Respondent and prospective clients that referred to Respondent as the accountant’s “business partner” who could help them with investments. Respondent asserted that his relationship with the accountant was a personal one, that the accountant was simply a referral source for him, and that he never received any compensation from the accountant. Respondent also said that he never engaged in any outside activity with the accountant, nor was he a member of the accountant’s staff or on his payroll. Respondent explained that he failed to disclose the email correspondence with the accountant to ABC because he did not think it was important. Respondent also stated that the reference to him acting beyond the scope of his role at ABC was because his role with the firm was administrative in nature and his actions in soliciting business “fell outside the job description of what a Associate would do.”

FINRA AWC

In November 2016, Respondent entered into a Letter of Acceptance, Waiver and Consent (“AWC”) with FINRA with respect to his relationship and conduct with the above-mentioned accountant and tax-preparer. In the AWC, Respondent, without admitting or denying, accepted and consented to the entry of findings by FINRA and consented to a bar from associating with any member firm in any capacity. The AWC found that:

From September 2012 through December 2013 (the "Relevant Period"), [Respondent] engaged in an undisclosed outside business activity assisting a local tax preparer from whom he sought referral business. In connection with this undisclosed outside business,

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[Respondent] created at least 50 partnership agreements for clients of that tax preparer, including affixing inaccurate partnership agreement dates to the documents. [Respondent] failed to conduct adequate due diligence in drafting those agreements even though he expected that a majority of the agreements would be submitted to a state taxation authority in connection with ongoing audits of the tax preparer's clients.

The AWC also found that, as a result of these actions, Respondent violated FINRA Rule 3270, which prohibits outside business activities without written disclosure to ABC, and FINRA Rule 2010, which requires FINRA members to "observe high standards of commercial honor and just and equitable principles of trade" when conducting business.

The AWC specifically found that, from September 2012 through December 2013, Respondent created at least 50 backdated partnership agreements for the accountant's clients when Respondent had reason to believe that the clients were being audited by a State Department of Tax regarding certain tax deduction claims the clients made on partnership tax returns filed in prior years. The AWC also found that Respondent understood that the clients under audit did not have documented partnership agreements, so he inserted backdated effective dates using information from the previously filed returns. Further, the AWC found that, although he understood that most of the backdated partnership agreements would be submitted to the State Department of Tax, Respondent did not know whether the agreements he drafted accurately reflected partnerships that existed as of the effective dates that he inserted into the agreements and failed to appreciate that readers (including state auditors) might be misled into believing that the agreements had been in existence years earlier.

The AWC also found that Respondent "held himself out to be a partner of the tax preparer" and thus his activity was outside the scope of his business with the firm; however, Respondent never provided notice to ABC. The AWC further found that the Respondent used firm resources, including using his firm email address to communicate with clients of the accountant, thus creating the false impression his work was endorsed by the firm when it was not.

The AWC found that Respondent had no experience creating partnership agreements and no legal or tax expertise regarding partnerships. Respondent admitted that, to create the partnership agreements, he used a template of a partnership agreement that he found on the internet and used factual information from the tax returns that the accountant supplied to him.

Respondent's Failure to Disclose His FINRA Bar to CFP Board

In January 2017, pursuant to the above-described AWC, FINRA barred Respondent from associating with any member firm in any capacity. Respondent did not report the FINRA bar to CFP Board.

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 4.2 of the Rules of Conduct, which provides that a certificiant shall offer advice only in those areas in which he or she is competent to do so and shall maintain competence in all areas in which he or she is engaged to provide professional services.

Article 13.1 of the *Disciplinary Rules* provides that a letter or other writing from a governmental or industry self-regulatory authority to the effect that a Respondent has been the subject of an order of professional discipline by such authority shall conclusively establish the existence of such professional discipline for

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purposes of disciplinary proceedings and shall be conclusive proof of the basis for such discipline by the Respondent. As defined in Article 13.4 of the *Disciplinary Rules*, professional discipline “shall include the suspension, bar or revocation as disciplinary measure by . . . [an] industry self-regulatory organization or professional association.”

FINRA is an industry self-regulatory authority. The above-described AWC is an order of professional discipline by FINRA, and Respondent is the subject of that order. Therefore, the AWC conclusively establishes the existence of such discipline for purposes of this disciplinary proceeding and is conclusive proof of the basis for such discipline by the Respondent.

Respondent is a certificant. The AWC is conclusive proof that Respondent: (a) drafted partnership agreements, for which he had no expertise or experience, and failed to adequately investigate the purported partnerships and, consequently, he did not know whether the agreements that he drafted accurately reflected partnerships that existed as of the effective dates he inserted into the agreements; and (b) failed to appreciate that the agreements could be misleading even though he knew that the majority of the agreements he created and dated were to be submitted to a state Department of Tax in connection with pending audits. Thus, Respondent violated Rule 4.2 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 4.3 of the *Rules of Conduct*, which provides that a certificant shall comply with applicable regulatory requirements governing professional services provided to the client.

Respondent is a certificant, and FINRA Rules 3270 and 2010 are applicable regulatory requirements governing professional services provided to the client. Under Article 13.1 of the *Disciplinary Rules*, the above-described AWC, finding violations of FINRA Rules 3270 and 2010, is conclusive proof that Respondent failed to comply with applicable regulatory requirements governing professional services provided to clients when he: (a) engaged in an unapproved outside business activity while employed with ABC; (b) created backdated partnership agreements in connection with that outside business activity that were potentially misleading; (c) failed to conduct adequate due diligence in drafting the agreements; and (d) used ABC’s resources to communicate with clients involved in the outside business activity, thus giving the false impression that the activity was endorsed by ABC. Respondent also admitted this ground for discipline in his Answer. Thus, Respondent violated Rule 4.3 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 4.4 of the *Rules of Conduct*, which provides that a certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients.

Respondent is a certificant. Under Article 13.1 of the *Disciplinary Rules*, the above-described AWC is conclusive proof that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services to clients when he: (a) engaged in an unapproved outside business activity while employed with ABC; (b) created backdated partnership agreements in connection with that outside business activity that were potentially misleading; (c) failed to conduct adequate due diligence in drafting the agreements; and (d) used ABC’s resources to communicate with clients involved in the outside business activity, thus giving the false impression that the activity was endorsed by ABC. Respondent also admitted this ground for discipline in his Answer. Thus, Respondent violated Rule 4.4 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 is a certificant. Under Article 13.1 of the *Disciplinary Rules*, the above-described AWC is conclusive proof that Respondent failed to perform professional services with dedication to the lawful objectives of his employer when he: (a) engaged in an unapproved outside business activity while employed with ABC; and (b) used ABC's resources to communicate with clients involved in the outside business activity, thus giving the false impression that the activity was endorsed by ABC, thereby violating ABC's policies and procedures. Respondent also admitted this ground for discipline in his Answer. Thus, Respondent violated Rule 5.1 of the *Rules of Conduct*.

Fifth 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. The acts set forth in the AWC are the proper basis for professional discipline, and the AWC constitutes professional discipline. Therefore, the AWC is conclusive proof that there are grounds to discipline Respondent for acts that are a proper basis for professional discipline. Respondent also admitted this ground for discipline in his Answer.

Sixth Ground for Discipline

Pursuant to Article 3(e) of the *Disciplinary Rules*, there are grounds to discipline Respondent for any act or omission that violates these rules or that violates an order of discipline. Under Article 13.2 of the *Disciplinary Rules*, every CFP® professional who receives a bar of a professional license must notify CFP Board within 30 days after receiving notification of the bar. The Commission found that Respondent entered into an AWC with FINRA, in which he consented to a permanent bar from association with any FINRA member in any capacity. Respondent did not disclose the professional discipline to CFP Board. Respondent also admitted this ground for discipline in his Answer. Therefore, Respondent violated Article 13.2.

IV. Discipline Imposed

The Commission found that Respondent's conduct violated Rules 4.2, 4.3, 4.4, and 5.1 of the *Rules of Conduct* and Articles 13.2 of the *Disciplinary Rules*, providing grounds for discipline under Articles 3(a), 3(d), and 3(e) of the *Disciplinary Rules*.

After careful consideration of the evidence in Respondent's matter, the Commission has decided to issue Respondent a Revocation of his right to use the CFP® certification pursuant to Article 4.4 of the *Disciplinary Rules*.

In arriving at its decision, the Commission determined that the applicable *Sanction Guidelines* recommended:

1. A Private Censure for Conduct 14(a): Failure to Disclose to CFP Board;
2. A Public Letter of Admonition for Conduct 14(b): Failure to Provide in Writing, Discuss, or Disclose Required Information to a Client;
3. A Private Censure for Conduct 20(d): Misrepresentation to Non-Clients;

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4. A Revocation for Conduct 28: Revocation of a Financial Professional License; and
5. A Public Letter of Admonition for Conduct 30: Securities Law Violation.

The Commission primarily relied on Conduct 28, as it was the most severe and reflected the fact that the Respondent has been barred by FINRA. The Commission largely viewed the other *Sanction Guidelines* as aggravating factors with respect to Conduct 28.

The Commission also consulted *Anonymous Case History (“ACH”) 29680*. In that matter, the Commission found that a former CFP® professional violated Rules of Conduct 3.7, 4.3, 4.4, 5.1, and 6.5 and Articles 3(A) and (D) of the *Disciplinary Rules* when he: (a) participated in at least three separate outside business activities without providing prior notice to, or receiving approval from, his employer; (b) loaned money to three individuals who were the former CFP® professional’s clients, in violation of firm policy; (c) presented a private securities transaction to clients in which eight clients ultimately invested without seeking or obtaining written approval from his employer; (d) provided false information and false documents to FINRA; and (e) represented to his employer in a compliance questionnaire that he was not participating in any outside business activities that required disclosure and that he had not participated in any private securities transactions when he was involved in outside business activities and private securities transactions. FINRA barred the former CFP® professional. The Commission imposed a Revocation based on this conduct. The Commission determined that Respondent’s conduct was similar to that in *ACH 29680* because he also participated in several outside business activities that were not approved by his firm and he also was the subject of a FINRA bar. Thus, the Commission decided that the relevant *ACH* and *Sanction Guidelines* dictated that a reasonable sanction for Respondent’s conduct was a Revocation.

The Commission considered mitigation that Respondent appeared genuinely remorseful and was extremely forthcoming during the investigation and during his testimony at the hearing. The Commission considered in aggravation that:

1. Respondent’s behavior involved dozens of instances of misconduct over a 15-month period;
2. Respondent testified that he did not disclose his interim suspension from using the CFP® marks to the military contractor he previously worked for even though having a professional credential, such as CFP® certification, was a job requirement;
3. Respondent rationalized his behavior despite red flags; and
4. Respondent consented to a permanent bar with FINRA with respect to his conduct.

After weighing the aggravating and mitigating circumstances, the Commission determined the aggravating factors reinforced the guidance provided by the *Sanction Guidelines* and the *ACH*. Specifically, the Commission determined that a revocation was warranted because, although the Respondent was contrite, he indicated during his testimony that he would not change his decision-making practices. Further, it was concerning to the Commission that Respondent appeared to approach situations from a “best case worst case scenario” viewpoint, rather than considering what is right and what is wrong, and that his FINRA bar indicated the gravity of the choices he made. Given these circumstances, the Commission determined that Respondent could not be rehabilitated by a suspension and determined to permanently revoke Respondent’s CFP® certification.