

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES  
NUMBER 24706

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This is a summary of a decision issued following the June 2012 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 failed to: 1) communicate with Husband and Wife appropriately regarding conflicts with representing both after he became aware of their potential divorce; and 2) appropriately respond to Wife’s inquiries and subsequent check processing by failing to inform her that Husband refused to consent to the sale of investments to cover a large check.

II. Findings of Fact Relevant to the Commission’s Decision

Respondent first entered into a financial planning engagement with Husband and Wife in June 2007. According to Respondent, he prepared a detailed asset allocation and retirement analysis using Naviplan financial planning software. Respondent stated that he recommended the clients establish several accounts. One of the accounts was a joint account with check-writing capabilities for both clients, to address short and moderate term income needs and cash management. The second account contained a deferred variable annuity for long-term growth and income needs. According to Respondent, he recommended and all three parties agreed that it was strategically advantageous to name Husband as owner and annuitant for greater income in the event of annuitization. Wife was named beneficiary of the variable annuity.

According to Wife she never knew there was a separation of ownership of the couple’s assets into two separate accounts. Wife stated that Respondent always addressed her and Husband as the owners of both accounts.

According to Wife, she consulted an attorney in October 2009 for the purpose of obtaining a divorce. Wife informed the attorney that all funds invested with Respondent were held jointly in both her and Husband’s name. The attorney advised Wife to withdraw half of the funds immediately to prevent Husband from taking more than his fair share of the couple’s funds. Attorney informed Wife that a judge would eventually decide the amount each party would be awarded in the divorce proceedings.

Pursuant to Wife’s attorney’s advice, she contacted Respondent via telephone on October 2, 2009 and asked him to tell her the total amount of money in her and Husband’s account. Wife stated that she was shocked when Respondent told her the total amount in the account was

\$400,000. Wife asked Respondent how the account balance could be so low, and he replied that she had asked about the joint account. Wife asked Respondent if there was another account and Respondent told her there was another account with \$700,000, but it was in Husband's name only. Wife told Respondent that she had no idea that her name was not on the account and Respondent replied, "Well, you are the beneficiary."

Wife contacted her attorney to inform him of the conversation with Respondent and he advised her to withdraw almost all the funds in the joint account because the second account with the majority of the couples' assets was in Husband's name only. Wife called Respondent on October 2, 2009 and asked how long it would take to clear a very large check she was writing on the joint account. Respondent's only question to Wife was regarding where to deposit the proceeds. Wife ordered Respondent to deposit the funds in a local bank. Respondent told her that the check would clear by the following Monday. Respondent did not tell Wife that there were margin restrictions on the account.

In October 2009, Wife wrote a check for \$390,000 on the joint account and deposited it in her account at the local bank. Wife called Respondent on October 5, 2009 and asked him to review the joint account and determine whether the October 2 check had cleared. Respondent told her that \$390,000 had been removed from the account and the remaining balance was \$2,000. Respondent did not tell her that there were insufficient funds to cover the check she had written. Respondent denied that the October 5 conversation ever took place.

On October 7, 2009, Respondent called Wife to tell her that the \$390,000 check had been returned to the joint account because there were insufficient funds to cover the amount of the check. According to the grievance, Wife was surprised because two days earlier, Respondent told her the check had cleared. Wife went to her local bank to obtain information regarding the check and the bank informed her that the check was returned due to insufficient funds. Wife called the bank, which informed her that Respondent directed the bank to return the check to the joint account on October 5, 2009. The bank representative told Wife that normally financial advisors would ask the bank to hold the check until investments were sold to cover the amount of the check. In this case, Respondent did not make such a request, as he had spoken with Husband to request permission to sell securities, which Husband refused to provide.

According to Wife, she confronted Respondent with this information and he responded that he had no authority to sell the investments. According to the grievance, when Wife asked Respondent why he did not call her to get permission, or at least advise her of that the account had insufficient funds to cover the \$390,000 check, he did not respond and became very defensive. Wife stated that by instructing the bank to return the check, Respondent was acting in Husband's best interest and against her interest.

According to Respondent, Wife contacted him on October 2, 2009 and informed him that she would be writing a check out of the joint account, but did not tell him the amount of the check. According to Respondent, the \$390,000 check was not honored because the amount of the check written in relation to the account balance greatly exceeded margin limitations. Respondent stated that he did not stop any transfer of assets from the account.

Wife provided Husband's cell phone record detailing calls between Respondent and Husband during the period Wife's check was returned for insufficient funds. These calls appear to have been initiated by Respondent. Wife stated that this was additional evidence that Respondent favored Husband over her. The phone records indicate a series of calls from Respondent to Husband from October 5, 2009 to October 7, 2009. According to account documents provided by Wife, on October 6, 2009, Husband removed Wife as beneficiary of the variable annuity and replaced her name with his two children from a previous marriage.

Wife provided a copy of Husband's June 7, 2011 deposition in the couple's divorce proceedings, which she stated indicated that it was Respondent's sole decision to set up the ownership of their accounts without input from her and Husband. Husband testified that when the accounts were set up, he intended that both accounts be joint accounts. Husband also testified that after Wife wrote the \$390,000 check, a representative of the financial institution to which it was delivered contacted Respondent on October 5, 2009 concerning the insufficient funds. Respondent called Husband that same day to ask if he was aware of the amount of the check Wife had written on the account. Respondent asked Husband what to do with the check and it was decided to return the check to AXA. Wife stated that Respondent's action benefited Husband and had an adverse effect on her. Wife's attorney asked Husband how much money was in the account at the time and he responded "\$394 [thousand]." Husband also testified that the clearing house called Respondent and told him that if he wanted the check to clear he would have to liquidate the margin account, but Respondent would not do anything without Husband's approval. Husband told Respondent that he wanted the check returned.

Wife stated that the joint account was frozen at the request of Husband's attorney and Respondent did not advise her or Husband that the freezing of the account would cause the account to incur monthly charges of \$900 due to margin interest. Respondent asserted in his testimony that Husband and Wife were very clear about the use of margin in the account. During Husband's deposition, when asked by Wife's attorney what made him decide to freeze the account, Husband testified that Respondent called him and asked, "[Husband], did you know that [Wife] tried to clean you out?" Respondent told Husband that Wife wrote a check for \$390,000 on the joint account. Husband told Respondent that he wanted the check returned. Wife stated that as a result of Respondent's failure to inform her and Husband about the monthly charges from freezing the account, they suffered a \$16,200 loss from December 10, 2009 until June 10, 2011.

An examination of the joint account brokerage statements for September, October and November 2009 indicate that no margin interest was charged to the account in August and September. A total margin interest of \$3,000 had been accrued year to date through September 30, 2009. The October statement indicates that margin interest began accruing on October 5, 2009 at a rate of 9.5%.

### III. Commission's Analysis and Conclusions Regarding Rule Violations

- A. *Rule 1.4 - 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*

The Commission determined that Respondent, while engaged in a financial planning relationship with Husband and Wife, failed to act in the best interest of Wife because Respondent favored Husband in their business relationship to Wife's detriment when he failed to: 1) communicate with both clients appropriately regarding conflicts with representing both after he became aware of a potential divorce; and 2) appropriately respond to Wife's inquiries and subsequent check processing by failing to inform her that Husband refused to consent to the sale of investments to cover the \$390,000 check. Thus, Respondent violated Rules 1.4 of the *Rules of Conduct*.

- B. *Rule 4.1- A certificant shall treat prospective clients and clients fairly and provide professional services with integrity and objectivity*

The Commission determined that Respondent failed to treat prospective clients and clients fairly and provide professional services with integrity and objectivity when he favored Husband in their business relationship to Wife's detriment by failing to: 1) communicate with both clients appropriately regarding conflicts with representing both after he became aware of a potential divorce; and 2) appropriately respond to Wife's inquiries and subsequent check processing by failing to inform her that Husband refused to consent to the sale of investments to cover the \$390,000 check. Thus, Respondent violated Rule 4.1 of the *Rules of Conduct*.

- C. *Rule 4.4 - A certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients*

The Commission determined that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services to clients when he failed to: 1) communicate with both clients appropriately regarding conflicts with representing both after he became aware of a potential divorce; and 2) appropriately respond to Wife's inquiries and subsequent check processing by failing to inform her that Husband refused to consent to the sale of investments to cover the \$390,000 check. Thus, Respondent violated Rule 4.4 of the *Rules of Conduct*.

### IV. Discipline Imposed

Article 3(a) of CFP Board's *Disciplinary Rules and Procedures* ("*Disciplinary Rules*") provides grounds for discipline for any act or omission that violates the *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 1.1, 4.1 and 4.4 of the *Code of Ethics*. Pursuant to Article 4.1 of the *Disciplinary Rules*, the Commission issued a Private Censure to Respondent. The Commission also imposed six hours of remedial education within 12 months of the date of this order in CFP Board Principal Topics

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areas 76-78. Respondent may not count the six hours of remedial education towards the normally required CE.

The Commission considered as mitigating factors that: 1) Respondent handled his client relationships appropriately prior to the divorce situation; 2) Respondent has no prior disciplinary history; 3) Respondent's actions did not result in monetary damages to either client; and 4) the client incurred margin interest charges with knowledge and disclosure.

The Commission considered as aggravating factors that Respondent: 1) failed to document that he sought the advice or instruction of his broker-dealer's compliance department in a contentious dispute between two of his clients; and 2) did not handle the conflicts of interest that arose when his clients separated.