

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 28285

This is a summary of a decision issued following the June 2013 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 outside business activity without providing notice and receiving prior written approval from his Firm; and 2) falsely certified to his broker-dealer that he was not engaged in outside business activity.

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

In his letter of May 2011 to the Financial Industry Regulatory Authority, Inc. (“FINRA,” formerly known as the National Association of Securities Dealers or “NASD”) Respondent stated that he had occasionally engaged in outside business activities that were approved after being run through the firm’s approved relationships. Respondent stated that, with the transaction at issue, he “needed to get paid promptly, as compared to waiting the 4 week plus ‘waiting period’ to be paid through the firm’s compensation channels.” Finally, Respondent stated that he “completed this one, isolated unauthorized activity due to financial hardship.”

In November 2012, Respondent entered into a Letter of Acceptance, Waiver and Consent (“AWC”) with FINRA. Respondent was associated with Firm, a broker-dealer, from April 2010 through January 2011. FINRA found that, from November 2010 through December 2010, Respondent solicited and sold a fixed indexed annuity to a customer outside of the scope of his employment with Firm without informing Firm of this business activity and receiving written approval. In addition, Respondent falsely certified to Firm that he was not engaged in outside business activity.

As a result of Respondent’s undisclosed and unapproved outside business activity, FINRA determined that Respondent violated NASD Conduct Rule 3030 and FINRA Rules 3270 and 2010. Finally, FINRA suspended Respondent from association with any FINRA member in any capacity for two months and fined Respondent \$5,000.

III. Commission’s Analysis and Conclusions Regarding Rule Violations

- A. *Rule 1.4 Violation – A certificant shall at all times place the interest of the client ahead of his or her own and 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’s Complaint alleged that Respondent failed to place the interest of the client ahead of his own and act with the duty of care of a fiduciary when he conducted an outside business activity without

notifying his broker-dealer and receiving written approval because he needed the commission quickly due to his personal financial hardship.

The Commission determined that it was not clear that Respondent was acting in a financial planning capacity and thus, did not owe a fiduciary duty to the client. In addition, even if Respondent was in a financial planning relationship, not informing his employer about this transaction would not constitute a breach of fiduciary duty. Thus, Respondent did not violate Rule 1.4 of the *Rules of Conduct*.

B. Rule 2.2(b) Violation – A certificant shall disclose to a prospective client or client a general summary of likely conflicts of interest between the client and the certificant, the certificant’s employer or any affiliates or third parties, including, but not limited to, information about any familial, contractual or agency relationship of the certificant or the certificant’s employer that has a potential to materially affect the relationship.

The Commission determined that Respondent failed to disclose to a prospective client or client a general summary of likely conflicts of interest between the client and the certificant, the certificant’s employer or any affiliates or third parties, including, but not limited to, information about any familial, contractual or agency relationship of the certificant or the certificant’s employer that has a potential to materially affect the relationship when he failed to disclose to a client that a fixed indexed annuity was an outside business activity that Respondent had not disclosed to and received written approval from his broker-dealer because Respondent needed to receive his commission quickly.

The Commission determined there was a conflict of interest because Respondent did not disclose to the client that he was being compensated differently and would receive his commission quicker if the client purchased the recommended product rather than purchasing a product authorized by Respondent’s employer and running the transaction through Firm. Respondent should have disclosed this difference in the compensation arrangement to the client. Thus, Respondent violated *Rules of Conduct* Rule 2.2(b).

C. Rule 4.3 Violation – A certificant shall comply with applicable regulatory requirements governing professional services provided to the client.

The Commission determined that Respondent failed to comply with applicable regulatory requirements governing professional services provided to the client when he: 1) engaged in an outside business activity without providing notice and receiving prior written approval and 2) falsely certified to Firm that he was not engaged in outside business activity, in violation of NASD Conduct Rule 3030 and FINRA Rules 3270 and 2010. Although Respondent claimed to have disclosed possible outside activities to his employer when hired, that was not sufficient as Respondent was required to make annual disclosures and to update Firm regarding any changes to his activities. Thus, Respondent violated Rule 4.3 of the *Rules of Conduct*.

D. Rule 4.4 Violation – A certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients.

CFP Board’s Complaint alleged that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services to clients when he: 1) engaged in an outside business activity without providing notice to Firm and receiving prior written approval; and 2) falsely certified to his broker-dealer that he was not engaged in outside business activity.

The Commission determined that engaging in outside business activities and failing to disclose to an employer did not equate to failing to exercise reasonable and prudent judgment concerning providing professional services to clients. Thus, Respondent did not violate Rule 4.4 of the *Rules of Conduct*.

E. Rule 5.1 Violation – A certificant shall perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board’s Code of Ethics.

The Commission determined that Respondent 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* when he: 1) engaged in an outside business activity without providing notice to Firm and receiving prior written approval and 2) falsely certified to Firm that he was not engaged in outside business activity, in violation of Rules 2.2(b), 4.3, and 6.5 of the *Rules of Conduct*. Thus, Respondent violated Rule 5.1 of the *Rules of Conduct*.

F. Rule 6.5 Violation – 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.

The Commission determined that Respondent engaged in conduct that reflected adversely on his integrity and fitness as a certificant, upon the CFP® marks, and upon the profession when he: 1) engaged in an outside business activity without providing notice and receiving prior written approval; and 2) falsely certified to his broker-dealer that he was not engaged in outside business activity. Thus, Respondent violated *Rules of Conduct* Rule 6.5.

IV. Discipline Imposed

The Commission found grounds for discipline under Articles 3(a) and 3(d) of CFP Board’s *Disciplinary Rules and Procedures* (“*Disciplinary Rules*”). Article 3(a) of the *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 2.2(b), 4.3, 5.1 and 6.5 of the *Rules of Conduct*. Article 3(d) of the *Disciplinary Rules* provides grounds for discipline for any act that is the proper basis for professional discipline. The Commission found grounds for discipline under Article 3(d) because FINRA suspended Respondent from association with any FINRA member in any capacity for two months and fined Respondent \$5,000. Pursuant to Article 4.3 of the *Disciplinary Rules*, the Commission issued a two-month suspension.

While considering the degree of sanction to impose, the Commission considered the following as mitigating factors:

1. Respondent’s conduct was an isolated incident involving only one client;
2. Respondent’s conduct did not result in client harm as the client’s money was returned and the transaction was reversed; and
3. According to Respondent, this investment was suitable and in the client’s best interests.

The Commission did not cite any aggravating factors.

The Commission consulted Anonymous Case Histories 24874, 26436 and 27791. The Commission also considered *Sanction Guidelines* 7 (Conflict of Interest), 12 (Violation of Employer Policies), and 33 (Professional Suspension Between One and Three Months).