Letters to the Editor – In Defense of Faux Planners

January 6, 2009

The following letters are in response to the article In Defense of "Faux Planners," by John Robinson, which appeared on December 16, 2008. Previous responses to this article were published on December 23 and December 30. Mr. Robinson's response to these letters appears in this issue here.

Dear Editor:

Based on my 33 years in the business, Mr. Robinson is spot-on regarding Dan Moisand's opinion of the supposed importance of the CFP Designation. There doesn't seem to be any study to support Mr. Moisand's opinion. Moisand is certainly not the first person to express this opinion. I consider proponents of this type of legislation to be rather self-serving in that, as Mr. Robinson pointed out, proponents feel threatened by the scores of experienced, ethical, talented, and caring Financial Advisors and Planners. Most clients still refer to their Planner or Advisor as "my broker" regardless of their designation. Could it be that encouraging professionals to pursue the quest for the three little letters - and the expense of taking the course and then sitting for the exams - is another way to garnish revenue for another type of "special interest" group? Like Mr. Robinson, I hope that Moisand's opinion stirs debate. Can Mr. Moisand cite a study that would support his opinion before the debates begin?

By the way, the material I receive from your organization is excellent. Please keep up the good work.

Thanks,

Stephen Molinelli
Wealth Management Partners LLC
Ewing, NJ

Dear Editor:

Dan Moisand has long been a true leader in the financial planning movement. I appreciate the spirited debate which Mr. Moisand stimulated on these issues, and hope that the diverse comments will continue with the same constructive manner which Mr. Moisand intended.

Due to the "financial crisis," financial services regulatory reform is front and center at the federal level for 2009. It is highly likely that investment adviser and broker-dealer regulation will undergo significant chances, or some form of consolidation. Additionally, "financial planning" may become regulated itself, as a means of closing a "regulatory gap." Reports indicate that the new administration desires to have its proposal to Congress by April 3rd. Before then, expect proposals for some version of "reform" to be floated by the CFP Board/FPA/NAPFA, FINRA/SIFMA, the state securities regulators (through NASAA), and other organizations. In addition to addressing systemic risks in our financial system, Congress will likely take action affecting the delivery of financial services to the retail investor.

I would like to share my personal opinions on these possible changes.

The CFP® certification has attained status as the most recognized designation, at least in the eyes of consumers, and has come to signify financial advisory knowledge, experience and expertise. This does not mean that other designations do not also share these characteristics. However, the CFP® certification process was never designed to be an "entry-level exam" for "financial planners," nor a requirement for licensure as such. Still, the CFP Board has developed substantial resources which could be lent to the process of regulation of financial advisors, including expertise in establishing standards and devising examinations.

Should financial planners become regulated, there are many complex issues which need to be tackled in financial services reform, as they affect the delivery of investment and financial advice to individual investors. For example, how can functional regulation be restored? Rather than being regulated by the type of firm (BD, RIA, bank or trust company) where the financial advisor works, future regulation should seek to apply the same rules and standards of conduct to all those who perform the same activities.

Moreover, what will be the standard of conduct for financial planners? Should financial planning be undertaken in an "arms-length" relationship with the consumer, under which the rule of caveat emptor largely applies (subject to

consumer protections occasioned by the suitability standard and certain specific rules and regulations)? Or should all delivery of financial and investment advisory services be subject to a fiduciary standard of conduct (with very limited exceptions for product salespersons, permitting them to describe their products and sell them)? (Under state common law, the state courts increasingly find fiduciary duties to apply to financial planning activities; often legislation follows developments in the common law.)

If the fiduciary standard of conduct is to be embraced by future legislation over (all) financial planners, what form will it take? The triad of fiduciary duties is often referred to as the duties of due care, loyalty, and utmost good faith. Under English law, from which fiduciary law arose, the fiduciary duty of loyalty embraces three separate concepts: (a) the "no conflict rule" (which prevents a fiduciary placing himself or herself in a position in which his or her own interests conflict or may conflict with those of the client or beneficiary); (b) the "no profit rule" (which requires a fiduciary not to profit from his or her position at the expense of the client or beneficiary); and (c) the "duty of loyalty" – which sets forth that the fiduciary should act in the best interests of the client at all times. The application of these concepts to investment advisory activities and financial planning activities remains subject to legislative and/or judicial development. Public policy considerations should dictate how "strictly" fiduciary duties are applied. Then, the industry should conform (rather than the law conforming to industry practices, as has been a frequent statement by the SEC in recent years).

The financial planning community has a great deal to learn about fiduciary duties, why they are applied, and the standards of conduct they require. For example, the '33 Act and '34 Act place their primary emphasis on disclosure as a means of protecting investors. In contrast, fiduciary duties exist in recognition of the enormous disparity of knowledge between the advisor and client, which knowledge gap cannot be overcome by mere casual disclosures (due to lack of knowledge of complicated investment and financial planning topics by most consumers, and due to behavioral biases which deter most investors from reading and seeking to understand disclosures). As a result, despite the emphasis by the SEC on disclosure of conflicts of interest, fiduciary law requires something more – the informed consent of the client to proceeding in the presence of the conflict of interest. Such consent would rarely be given by an informed client if the conflict of interest were not managed to keep the best interests of the client paramount at all times; clients rarely undertake gratuitous transfers to their advisors. In summary, we all (including this author) have a great deal to learn about fiduciary duties and how they are applied.

Another issue relates to who will regulate fiduciary advisors. Establishing fiduciary standards of conduct would be an important step in the establishment of

a true profession in which the public's interest is served. To maintain high professional standards of conduct, typically professional regulatory organizations (PROs) exist. The PROs are overseen through a scheme of government oversight. But, if commercial interests (such as FINRA, whose members are BD firms) are permitted to oversee "professional financial planners," then it is highly likely that, as Justice Benjamin Cardoza warned so long ago, "particular exceptions" will occur to either the application of fiduciary standards of conduct or to the manner in which they are applied.

There are indeed interesting times. I urge all members of the financial planning community to let your thoughts be known to the industry organizations to which you belong. 2009 will likely lead to regulation which will impact us all.

Sincerely,

Ron A. Rhoades, JD, CFP®
CCO and Director of Research
Joseph Capital Management, LLC
Hernando, FL

Editor, FiduciaryNow.com

Mr. Rhoades provided this pamphlet - "Common Sense II" – which expresses support for the adoption of fiduciary standards of conduct for all those who provide financial planning services.

Dear Editor:

Mr. Robinson is obviously well qualified as an RIA, but I cannot believe that he reduces estate planning, long term care and retirement issues to "qualitative" status! We need both professional standards and a fiduciary level of responsibility for all who hold themselves out as "Financial Planners," "Financial Advisors" or whatever else they may call themselves to portray a trusted advisor. The public deserves no less.

Susan MacMichael John, CFP
Financial Focus, Inc.
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Dear Editor:

In reference to the ongoing discussion of the relative status of the CFP designation, I would suggest that the designation has little to do with financial planning competence in the real world. Rather, it rewards the person willing to take the time and expend the effort to pass the requisite tests, with the end result being a set of generally recognized initials. That does not denigrate the financial planning skill of successful CFPs; it simply suggests that learning to be a competent financial planner is independent of the CFP—or for that matter any other such designation—program. Many CFPs are captive or semi-captive servants of the insurance industry. One could reasonably argue that the term "insurance planner" is oxymoronic. The first CFP I encountered back in 1979 had just induced a retired newspaper executive to put his entire pension rollover into a University Life fixed annuity. Eh?

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