

CFP BOARD OF STANDARDS

CFP BOARD

DIVORCE GUIDE

**NAVIGATING DIVORCE AND OTHER
CONFLICTS WITH MARRIED CLIENTS**



CFP Board designed this guide to help CFP® professionals recognize, fully disclose and properly manage Conflicts of Interest that arise in marital Financial Planning Engagements — particularly those related to divorce.

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INTRODUCTION AND KEY TAKEAWAYS

For a married couple, beginning their joint Financial Planning Engagement with a CFP® professional is an exciting time to build a financial future together. During the Engagement, however, a CFP® professional may have duties to one spouse that are adverse to the other spouse. If so, then the CFP® professional has a **Conflict of Interest**. This guide applies the *Code of Ethics and Standards of Conduct* to marital Conflicts of Interest (including divorce) and identifies a CFP® professional's options for representing one or both Clients after learning of an intent to divorce and after the divorce is final. Here are the key takeaways:

1 Different Perspectives

Although disputes between a couple are sometimes called “marital conflict,” their differences in opinion do not present a Conflict of Interest for a CFP® professional unless they prevent the marital Clients from agreeing on joint goals.

2 Separate Property

One or both spouses may own Separate Property. There is no Conflict of Interest when the Clients agree on how to maintain the property or the owner decides to maintain the property separately. Nor is there a Conflict of Interest when a CFP® professional provides educational information about Separate Property. A Material Conflict of Interest will arise, however, when a CFP® professional recommends whether to keep the property separate or convert the property to Marital Property. In that circumstance, the CFP® professional has duties to one Client that are adverse to the other.

A CFP® professional should refrain from making a recommendation about whether to keep the property separate or to convert the property. A CFP® professional ordinarily would provide education, including options that are available

to the Owner, that would enable an informed decision. A CFP® professional who decides to make such a recommendation must disclose the Conflict of Interest that this recommendation presents (so that each Client may understand and provide informed consent to the conflict), obtain informed consent, and manage the conflict. If either Owner does not consent, then the CFP® professional must not make a recommendation.

3 Divorce

When a CFP® professional learns of an intent to divorce, there is a Material Conflict of Interest. A CFP® professional must proceed as follows:

■ Address the Protection of Client Assets.

Within a reasonable period after learning of an intent to divorce, a CFP® professional must determine, if not already known, whether the account authorizations permit one Client to take an action, such as withdrawing assets, that may not be in the best interests of the other Client, and if so, must take prudent and reasonable action either to protect the assets or to inform the Clients of the potential consequences if the Clients do not take available steps to protect their assets.

A CFP® Professional Who Engages a Married Couple Has Two Clients, Not One

In a marital Engagement, the CFP® professional agrees to provide Professional Services to both spouses. A married couple is not a separate legal entity (such as a corporation) that functions as a single Client. Therefore, each spouse is a Client of the CFP® professional.

The *Code and Standards* requires a CFP® professional who provides Financial Planning to married Clients to provide the terms of the Engagement in writing to each Client (regardless of who signs a written Engagement), not just the “lead” spouse who communicates with the CFP® professional more frequently. A CFP® professional may provide Financial Advice, including Financial Planning, to one spouse when the other spouse is not a Client; however, if the CFP® professional is unable to obtain financial information about the other spouse, then the scope of Financial Advice that the CFP® professional is able to provide may be limited. A CFP® professional should describe any limitations to the Scope of the Engagement and consider stating in writing that the other spouse is not a Client.



■ **Address the Engagement.** A CFP® professional must determine whether the CFP® professional may continue to provide Financial Advice under a more limited Scope of Engagement or whether the CFP® professional must terminate the Engagement.

■ **Handle Requests for Confidentiality.** A CFP® professional may learn of the intent to divorce from only one spouse, who requests that the CFP® professional keep that information confidential from the other spouse. In this circumstance, the CFP® professional must maintain the confidentiality of the disclosing spouse's intent and terminate the engagement if the intent to divorce is not disclosed to the other spouse within a reasonable period.

■ **Only Provide Financial Advice That is Non-Adverse.** A CFP® professional may provide Professional Services, including Financial Advice, to each Client that may be delivered objectively and that are not adverse to either Client. A CFP® professional must not provide Financial Advice to one spouse that is adverse to the other spouse. Unless the joint Financial Planning Engagement is terminated and a new Engagement is established with just one Client (a situation that is addressed later in this guide), a CFP® professional must not provide Financial Advice to either Client about issues to be determined in divorce proceedings, such as the division of marital assets and continuing support arrangements.

**General Tips:
Plan in Advance
and Follow Firm
Policies**

- A CFP® professional is better equipped to manage marital Conflicts of Interest if the Engagement explicitly addresses the potential for those conflicts. This guide recommends that a CFP® professional consider including in the Engagement “Advance Agreement Provisions” for information sharing between the Clients, communication practices, authority to act and other protocols.
- A CFP® professional should review and follow their firm's policies and procedures for marital Engagements (if any) and become familiar with the steps to take when a marital Conflict of Interest arises.

■ **Limits on Following Client Instructions.** Unless the other Client consents, a CFP® professional must not follow an instruction from one Client (such as an instruction to withdraw assets) concerning Marital Property that is material to the other Client unless (1) the instruction involves a transaction made in the ordinary course of the advisory relationship (a normal, routine activity consistent with past practices), (2) the CFP® professional also acts as custodian and must comply with the account agreement terms or (3) there is an urgent situation where the CFP® professional reasonably believes that following the instruction will prevent significant harm, including but not limited to physical or mental spousal abuse, a substantial loss in the value of Client assets, embezzlement, expatriation or furtherance of criminal activity.

■ **New Engagements With One Client.** If the CFP® professional terminates the joint Engagement, then the CFP® professional may enter a new Engagement with only one Client (unless the Clients have agreed otherwise).

- The CFP® professional must not share or use the former Client's confidential information (i.e., information that the current Client does not have) to serve the current Client. If the confidential information is material

and relevant to the issues to be decided in the divorce proceedings, then the CFP® professional must not provide Financial Advice to the current Client concerning the issues to be decided in the divorce proceedings.

- As part of unwinding the joint Financial Planning Engagement, the CFP® professional must honor the former Client's request for information and documents that the Client was entitled to receive under that joint Engagement, even if the CFP® professional enters a new Engagement with one Client.

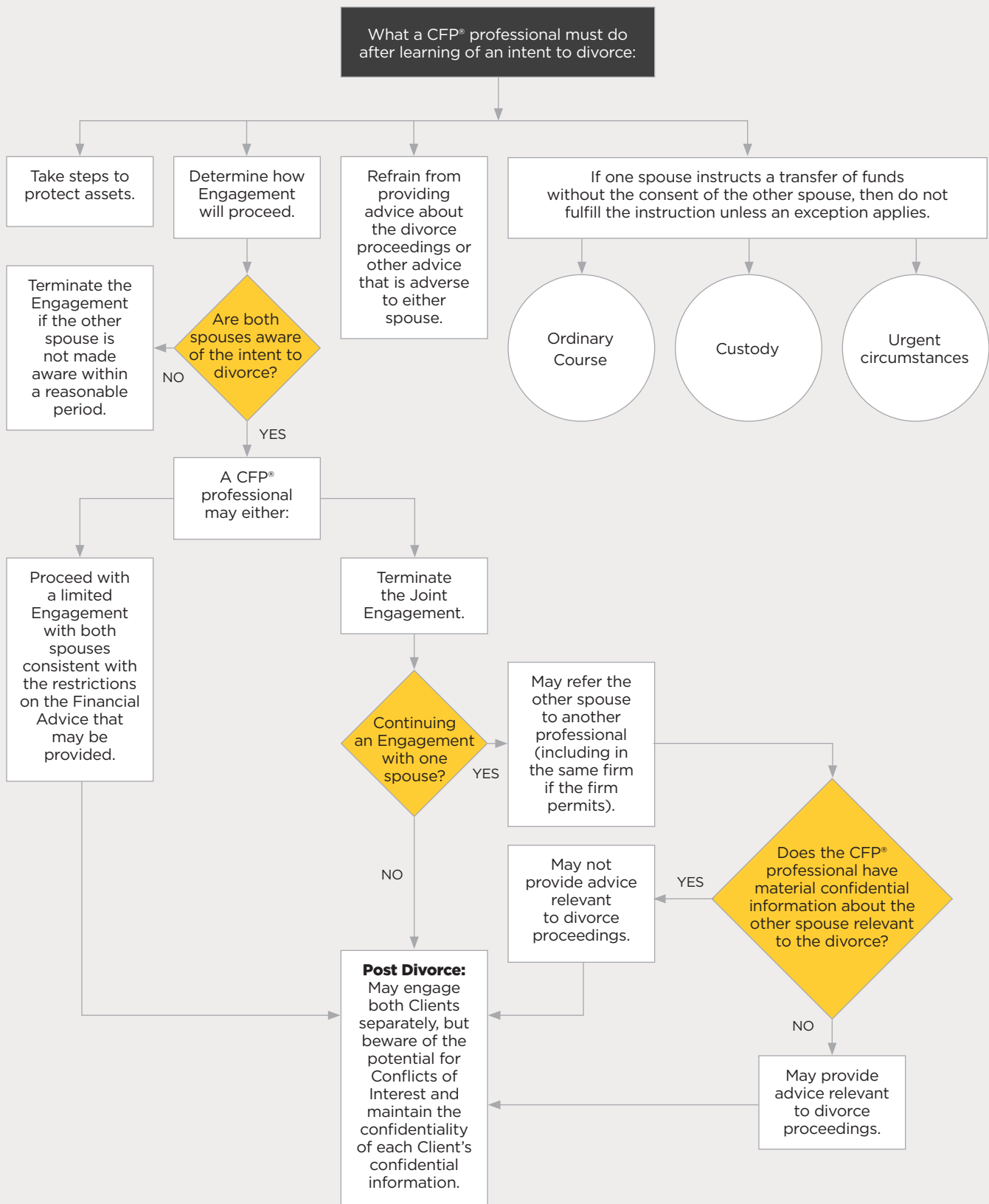
■ **Representation of the Other Spouse.** Another professional in the CFP® Professional's Firm may represent the former Client so long as the CFP® Professional's Firm does not otherwise prohibit such arrangements and the professionals protect the privacy of their Client's confidential information (including confidential information held in the firm's technology platform).

■ **Post-Divorce Engagements.** After the divorce is final, a CFP® professional may enter into separate Engagements with each of the former spouses (unless the Clients have agreed otherwise) and must carefully assess potential conflicts and preserve the confidentiality of each Client.

Divorce Advice Requires Specialized Competency

This guide addresses the Duty to Disclose and Manage Conflicts of Interest and other obligations that arise under the *Code and Standards* as part of a marital Financial Planning Engagement. This guide does not address divorce law or how to competently provide Financial Advice to a Client during a divorce. Some financial professionals specialize in financial issues that arise uniquely during a divorce. Under the *Code and Standards*, a CFP® professional who is not competent to provide these services must gain competence, obtain the assistance of a competent professional, limit or terminate the Engagement, and/or refer the Client to a competent professional.

DIVORCE CONFLICT DECISION TREE



OVERVIEW OF RELEVANT CODE AND STANDARDS PROVISIONS

Duties of a CFP® professional discussed in this guide include the Fiduciary Duty (and its component obligations) and the Duty of Confidentiality.

Fiduciary Duty. At all times when providing Financial Advice to a Client, a CFP® professional must act as a fiduciary, and therefore, act in the best interests of the Client. This requires a CFP® professional to fulfill the Duty of Loyalty, the Duty of Care and the Duty to Follow Client Instructions.

- The **Duty of Loyalty** requires a CFP® professional to avoid Material Conflicts of Interest or fully disclose Material Conflicts of Interest to the Client, obtain the Client's informed consent, and properly manage the Conflict of Interest. Conflicts of Interest arise when a CFP® professional has duties to one Client that are adverse to another Client. A Conflict of Interest also arises when a CFP® professional's interests (including the interests of the CFP® Professional's Firm) are adverse to the CFP® professional's duties to a Client.
- The **Duty of Care** requires a CFP® professional to act with the care, skill, prudence and diligence that a prudent professional would exercise in light of the Client's goals, risk tolerance, objectives, and financial and personal circumstances.
- The **Duty to Follow Client Instructions** requires a CFP® professional to follow a Client's reasonable and lawful direction.

Duty of Confidentiality. A CFP® professional must keep confidential and may not disclose any non-public personal information about any Client, subject to limited exceptions. One exception is that the CFP® professional may disclose information with the Client's consent, so long as the Client has not withdrawn the consent. Accordingly, a CFP® professional may not disclose the confidential information of one spouse to the other spouse absent the consent of the spouse whose information is being disclosed. Another exception to the duty of confidentiality is that a CFP® professional may produce confidential documents in response to discovery requests issued in divorce proceedings.

Marital Conflicts of Interest are One Type of Conflict That May Arise in a Joint Engagement

Every joint Engagement calls for heightened attention to identifying Conflicts of Interest and fulfilling the Fiduciary Duty and Duty of Confidentiality to each Client. While this guide focuses on Conflicts of Interest in a marital Financial Planning Engagement, similar conflicts may arise when a CFP® professional provides Financial Advice to multiple members of the same family or Clients who have interests in the same assets (e.g., joint property owners or business partners). Some of the key takeaways in this guide concerning marital Engagements might apply to other joint Engagements, while others might not.



BE PROACTIVE: USE ADVANCE AGREEMENT PROVISIONS

The *Code and Standards* does not explicitly require a CFP® professional to address the potential for a marital Conflict of Interest in the marital Financial Planning Engagement. However, a CFP® professional should prepare for the possibility of divorce when engaging married Clients. While a CFP® professional may be uncomfortable raising this issue at the outset of the Engagement, a CFP® professional is trained to discuss other uncomfortable subjects with married Clients, such as the potential premature death of a spouse. Moreover, a significant percentage of marriages end in divorce.

A CFP® professional is better equipped to manage marital Conflicts of Interest if the Engagement addresses steps for managing the conflict should the conflict arise, which this guide refers to as **Advance Agreement Provisions**. Advance Agreement Provisions allow the Clients and CFP® professional to determine how to handle Conflicts of Interest before they arise. Some Advance Agreement Provisions the CFP® professional should consider include those addressing the sharing of information between the spouses, terms of communication, authority to act, handling of Separate Property, limitations on services a CFP® professional will provide if a Conflict of Interest arises and Engagements after the marital Engagement ends.



A CFP® professional must review and follow firm policies and procedures before modifying any template Engagements.

A CFP® professional might choose to include Advance Agreement Provisions in different documents. For example, a CFP® professional might include some Advance Agreement Provisions in an Engagement and other Advance Agreement Provisions in account agreements or a privacy policy.

1. Require Mutual Sharing of Material Financial Information

In a joint Financial Planning Engagement, including a marital Engagement, a CFP® professional wants both Clients to be candid with each other and with the CFP® professional about Material information. A CFP® professional should explain the Duty of Confidentiality to the Clients and request that the Clients mutually consent to the disclosure to both spouses of all information Material to the marital Financial Planning Engagement. The agreement should make clear that the CFP® professional is authorized to (and generally will) share information disclosed by one spouse to the other spouse unless that spouse revokes that authority. The CFP® professional also should make clear what would be the consequence of revoking the authorization to share information (e.g., termination of the Engagement).

A CFP® professional should be wary of entering into a joint Engagement with a Client who does not agree to share Material information with the other Client.

2. Establish Communication Protocols

Advance Agreement Provisions may clarify how the CFP® professional will communicate with the married Clients. For example, the Advance Agreement Provisions might require a CFP® professional to send certain communications to both spouses and require that both spouses periodically attend meetings. The Advance Agreement Provisions also might provide that if the CFP® professional becomes aware of an intent to divorce, then the CFP® professional will deliver all communications to both spouses simultaneously.

Set Expectations Early by Using Advance Agreement Provisions

- ✓ Require mutual sharing of material financial information.
- ✓ Establish communication protocols.
- ✓ Clarify each Client's authority to act.
- ✓ Document Separate Property intentions.
- ✓ Address limits on the services the CFP® professional will provide if there is a Divorce Conflict of Interest.
- ✓ Establish who the CFP® professional may serve if there is a Divorce Conflict of Interest and the parties terminate the joint Engagement.

CFP Board's next step is to prepare and then publish sample Advance Agreement Provisions that a CFP® professional might include in an Engagement Letter. This language will supplement CFP Board's library of [Sample Engagement Letters](#).

3. Clarify Each Client's Authority to Act

The CFP® professional should inform the Clients about how both individual and joint account authorizations work, including each Client's ability to withdraw assets without the consent of the other Client, the circumstances in which the consent of both Clients is required and who

can direct trading within the accounts. The CFP® professional should make the Clients aware of options, if any, that the account provides to restrict the authority for transactions without the consent of both Clients, such as granting the CFP® professional discretion to require consent of both spouses for material transactions.

4. Document Separate Property Intentions

Advance Agreement Provisions may address issues concerning Separate Property, as discussed later in this guide, such as confirming whether the Clients intend to maintain Separate Property separately or convert the Separate Property to Marital Property.

5. Address Limits on the Services the CFP® Professional Will Provide If There Is a Divorce Conflict of Interest

The CFP® professional may include an Advance Agreement Provision stating that if a Divorce Conflict of Interest arises, then the CFP® professional will not provide Financial Advice to either Client about issues to be determined in

divorce proceedings, and unless the other Client consents, a CFP® professional will not follow an instruction (such as an instruction to withdraw assets) from one Client concerning Marital Property that is materially adverse to either Client unless certain conditions are present (as discussed elsewhere in this guide).

6. Establish Who the CFP® Professional May Serve If There Is a Divorce Conflict of Interest and the Parties Terminate the Joint Engagement

Advance Agreement Provisions may provide that if there is a Divorce Conflict of Interest and the CFP® professional terminates the Engagement, then the CFP® professional may enter a new Engagement with neither spouse, only one of the spouses or both spouses. The Advance Agreement Provisions further may provide that if the CFP® professional enters a new Engagement with one spouse, then the CFP® professional will not share or use the former Client's confidential information to serve the current Client (unless an exception to confidentiality applies).

Even if the married Clients enter into Advance Agreement Provisions, when they decide to divorce, a CFP® professional must reassess how to manage the Conflict of Interest. The CFP® professional should review any Advance Agreement Provisions with the Clients and determine whether the provisions still reflect their intent. As discussed later in this guide, the CFP® professional also will need to establish new terms of the Engagement.



**Does your firm have
policies and procedures
for addressing a Divorce
Conflict of Interest?
Be sure to check.**

CONFLICTS OF INTEREST THAT ARISE IN A MARITAL FINANCIAL PLANNING ENGAGEMENT

Conflict Management Depends on the Scope of Engagement

This guide focuses on joint Engagements for Financial Planning (a collaborative process that helps maximize the married Clients' potential for meeting life goals through Financial Advice that integrates relevant elements of the Clients' personal and financial circumstances). A CFP® professional might provide married Clients (either individually or jointly) Financial Advice that does not require Financial Planning (such as solely providing portfolio management). What the *Code and Standards* will require in those non-Financial Planning Engagements will depend upon the facts and circumstances and the Financial Advice being provided.

This guide identifies three common circumstances in which a CFP® professional may have duties to one spouse that are adverse to the other spouse:

- (1) when the Clients have different perspectives,
- (2) when a Client has property that might be separate property (as described later), and
- (3) when the Clients intend to divorce.

1 The Clients Have Different Perspectives

Even though married Clients interested in a joint financial future may have different values, attitudes, expectations, risk tolerances, goals and priorities, this does not necessarily present a Conflict of Interest for a CFP® professional.

Instead, a CFP® professional must assess these elements of the Clients' personal and financial circumstances and work collaboratively with the Clients to help them identify, select and prioritize goals. Through this process, married Clients often compromise to develop joint goals by elevating their common interest in a joint financial future over their individual interests.

If married Clients are unable to agree on joint goals, then a Conflict of Interest may arise because the Financial Advice a CFP® professional might be asked to provide to achieve one spouse's goals may be adverse to the other spouse. In that circumstance, a CFP® professional may need to limit the scope of the joint Engagement to the goals that the couple has in common or terminate the joint Engagement.

2 One or Both Clients Has Separate Property

One or both spouses may own “Separate Property,” which is a term for one spouse’s assets that would not be “Marital Property” (or community property) if the Clients were to divorce. (See the examples of each in “Types of Separate Property” on page 14.)

This guide uses the term “Separate Property” to mean property that reasonably could be determined to be separate property in the event of a divorce (i.e., the guide is not making definitive determinations). The Clients might have agreed in a prenuptial agreement that they intend to treat certain property as Separate Property. Certain uses also may convert Separate Property into Marital Property. This could include, for example, using Separate Property to purchase a jointly titled asset such as a marital home. This guide refers to uses that would change the character of Separate Property to Marital Property as “converting” Separate Property. A CFP® professional with married Clients should have (or obtain) general competence about the uses of Separate Property that may convert Separate Property into Marital Property.

Be Careful Not to Provide Legal Advice.

Whether property constitutes Separate Property or Marital Property is a legal question that depends on application of state laws, which may vary and may be complicated. The legal title or ownership of the property does not necessarily

determine whether the property is separate or marital, and if divorcing spouses disagree, then a judge (or other decision-maker the parties appoint to decide disputes) would make that determination. A CFP® professional should be careful to avoid providing legal advice about whether a court might determine that any particular asset is Separate Property in the event of divorce. Depending on the materiality and potential use and management of the Separate Property, a CFP® professional should consider whether to recommend that the Clients consult with an attorney to determine the potential legal consequences of their intended use and management of the property.

Education. During the initial information gathering process and thereafter during the term of the Engagement, a CFP® professional should identify property that the Clients might want to maintain as Separate Property. A CFP® professional should help the Client understand the difference between Separate Property and Marital Property and the potential consequences of using the Separate Property in a way that would convert the Separate Property into Marital Property — such as using Separate Property to purchase a marital home. The CFP® professional should provide sufficient information about the advantages and disadvantages of maintaining the property as Separate Property or converting the property to Marital Property, so that the Client is able to make an informed decision. For example, the advantages of owning Separate

Couples Who are Planning to Marry, Recently Married or Interested in Combining Their Finances

Combining household finances is a transformative event. A CFP® professional may need to educate newly married couples about the consequences of actions that might convert Separate Property into Marital Property, as discussed later in this guide. Because a couple that is planning to combine finances might not have shared their attitudes and expectations with each other, a CFP® professional in a joint Financial Planning Engagement also should identify disagreements and help the Clients navigate those differences to develop common goals.

Property include the Owner's right to give the Separate Property to another person during the marriage and to bequeath the Separate Property to another person upon the Owner's death. The CFP® professional must make clear that the decision to convert Separate Property often cannot be undone and may be irreversible without the other Client's consent.

Financial Advice. One or both spouses owning Separate Property does not by itself (absent additional facts) create a Conflict of Interest.

If the spouses agree and make an informed decision to maintain the property separately or to convert the property to Marital Property, then there is no Conflict of Interest. The CFP® professional may provide recommendations about the Separate Property that are consistent with the couple's decision.

If the spouses do not agree but the Owner has decided to maintain the Separate Property as Separate Property, then there also is no Conflict of Interest. The CFP® professional may provide Financial Advice to the Owner about the Separate Property in accordance with the Owner's decision.

If the Owner is undecided, then the CFP® professional should refrain from recommending whether to maintain the Separate Property as Separate Property or to convert the property



to Marital Property. While CFP Board does not foreclose the possibility that such a recommendation might fall within the scope of Financial Advice that a CFP® professional may provide to a Client, a CFP® professional ordinarily would provide education, including options that are available to the Owner, that would enable an informed decision.

If, however, the Owner is undecided and the CFP® professional does intend to make such a recommendation, then there is a Conflict of Interest. A recommendation to an Owner about whether to maintain the property as Separate Property (which benefits the Owner if later there is a divorce) or to convert the Separate Property to Marital Property (which benefits the non-Owner

Types of Separate Property

There are many circumstances in which Clients in a marital Engagement may have Separate Property, such as when they (1) marry and are seeking Financial Advice about combining (or not combining) their finances, and (2) maintain or acquire Separate Property during the marriage. Examples of Separate Property include:

Assets in a bank or investment account accumulated before the marriage;

Real estate acquired before the marriage;

Accumulated funds in a retirement account accumulated before the marriage;

A business that existed before the marriage;

An Inheritance bequeathed before or during the marriage; or

Proceeds from a civil judgment awarded before or during the marriage.

if later there is a divorce) presents a Conflict of Interest because the CFP® professional has duties to one Client that are adverse to the other. In that circumstance, the CFP® professional must disclose to both Clients:

1. The advantages and disadvantages to each Client of maintaining the property as Separate Property or converting the Separate Property to Marital Property, and that a decision to convert the Separate Property to Marital Property likely would be irreversible (with the result that the Owner later would not be able to claim sole ownership of the property),
2. That the CFP® professional has a Material Conflict of Interest because a recommendation may benefit one Client while being disadvantageous to the other Client, and how that conflict could affect the CFP® professional's recommendations, and
3. That unless the Owner instructs otherwise, the CFP® professional's recommendations would be based on the Owner's best interests (which could include the joint marital goals).

If both Clients consent to the Conflict of Interest, then the CFP® professional may provide the recommendation in the Owner's best interests.

If both Clients do not consent to the Conflict of Interest, then the CFP® professional must not make a recommendation regarding how to maintain the property.

Practice Tips

Other Duties Apply. The professional services that a CFP® professional provides in helping a Client determine whether to convert Separate Property implicates other *Code and Standards* obligations, including the Duty of Competence and the Duty of Care. Those other obligations are beyond the scope of this guide, which focuses primarily on the Duty of Loyalty.

Document How Decisions Were Made. It may be the case that the CFP® professional provided objective educational information, that the CFP® professional made no recommendation, and that the Owner made any decision to take action that would cause the Separate Property to become Marital Property. If so, then CFP Board recommends that a CFP® professional document (and consider having the Clients acknowledge in writing) that this is how the decision was made.

Illustration

Spousal Inheritance Creates a Potential Conflict of Interest

Wanda is a CFP® professional who has been providing Financial Planning to her married clients, David and Maria, for more than 10 years. David and Maria have a joint Financial Planning Engagement with Wanda and have joint and individual accounts with Wanda's firm. Maria's father passes away unexpectedly. Maria has learned that she will soon be receiving an inheritance from her father's estate. Maria and David do not have a prenuptial agreement that addresses inheritance.

Maria is deciding whether to use the inheritance to pay down their mortgage. Wanda must educate Maria about the fact that the inheritance is Separate Property and the potential consequences to Maria of using the Separate Property to pay down their mortgage (including that the act of converting the Separate Property into Marital Property often cannot be undone and may be irreversible without David's consent). If Maria decides to use the Separate Property to pay down their mortgage, then Wanda may provide Financial Advice consistent with that decision. Wanda should consider documenting the discussion and sending a communication that reflects the discussion and Maria's determination.



3 One or Both Spouses May Intend to Divorce

A “Divorce Conflict of Interest” arises in the context of a divorce, separation, an intent to divorce or decision to manage finances independently. A Divorce Conflict of Interest arises because the Clients are likely to have different values, attitudes, expectations, risk tolerance, goals and priorities, with the result that the CFP® professional almost certainly will have duties to one Client that are adverse to the other Client. For example, one spouse might ask for the CFP® professional’s assistance in evaluating:

- The financial sufficiency of alimony and child support;
- The consequences of obtaining or refusing different assets during the divorce proceedings, such as the marital home;
- How to modify their estate and retirement plans (as the other spouse might have an interest in those assets); and
- The fairness of a divorce settlement proposal.

The Client also might provide instructions that are adverse to the other Client, such as to change investments or withdraw assets.

A CFP® professional must fully disclose the Divorce Conflict of Interest to both Clients, obtain their informed consent, and adopt and follow business practices reasonably designed to prevent Material Conflicts of Interest from compromising the CFP® professional’s ability to act in each Client’s best interests. As discussed in CFP Board’s *Guide to Managing Material Conflicts of Interest*, a Material Conflict of Interest may be so great that a CFP® professional cannot manage the conflict in the Client’s best interests and therefore must avoid the conflict. As discussed later in this guide, a CFP® professional in this circumstance almost certainly will be required to limit the terms of the joint Engagement or terminate the joint Engagement. In addition, this guide addresses whether the CFP® professional may enter a new Engagement with one spouse during the divorce.

A CFP® Professional May Provide Financial Planning to Friends and Family Members and Their Spouses

A CFP® professional who has a joint Engagement with married Clients and has a closer relationship with one spouse must prevent that personal relationship from compromising the CFP® professional’s objectivity and ability to provide Financial Advice in the best interests of both Clients.

WHAT A CFP® PROFESSIONAL MUST DO AFTER LEARNING OF A DIVORCE CONFLICT OF INTEREST

1. Address the protection of Client assets.

- ✓ Seek to protect joint assets or inform Clients of the potential consequences of not protecting joint assets.
- ✓ Determine if the Clients would like to change account authorizations.
- ✓ Inform the Clients of a potential court order.

2. Address the Engagement.

- ✓ Limit or terminate the Engagement.
- ✓ Terminate the Engagement if the disclosing Client requests confidentiality.
- ✓ Redefine the scope of Professional Services.

3. Address information sharing during the joint Engagement.

- ✓ Terminate the Engagement if the Clients do not consent to share confidential information that the CFP® professional needs.

4. Only provide advice that is not adverse to either Client.

- ✓ Do not provide Financial Advice about issues to be decided in divorce proceedings.

5. There are limits to when a CFP® professional may follow a Client instruction without the other Client's express consent.

- ✓ Do not follow a Client instruction that is materially adverse to the other Client unless at least one of three exceptions applies, as discussed in this section.

6. A CFP® professional may enter a new Engagement with one spouse.

- ✓ If you have material confidential information relevant to the divorce, then don't provide Financial Advice concerning the divorce.
- ✓ Honor the former Client's request for information and documents.

7. Another professional in the CFP® professional's firm may represent the other Client.

- ✓ Make sure the CFP® professional's firm does not prohibit such arrangements and that each Client's confidential information is protected.

There are many ways a CFP® professional may learn of the intent to divorce. Both spouses may share the news that they are intending to divorce. Alternatively, a CFP® professional may learn this information from only one spouse. Regardless of how a CFP® professional learns of a Divorce Conflict of Interest, a CFP® professional must proceed as follows.

1. Address the Protection of Client Assets

Within a reasonable period after learning of a Divorce Conflict of Interest, a CFP® professional must determine, if not already known, whether the account authorizations permit one Client to take an action, such as withdrawing assets, that may not be in the best interests of the other Client. The CFP® professional must take prudent and reasonable action either to protect the assets



Check if your firm has policies and procedures concerning Engagements with divorcing Clients.

or to inform the Clients of the potential consequences if the Clients do not take available steps to protect their assets. For example, the CFP® professional could inform the Clients that each Client has the authority to withdraw assets from a joint account without the authorization of the other Client, if that is what the account authorizations provide, and discuss reasonable steps the Clients can take, such as discussing potential actions with their attorneys.

A CFP® professional also should determine whether the Clients would like to make any changes to the account authorizations if the custodial account provides the option to make such changes. For example, the Clients may want to require both Clients to provide authorization before there is a transfer of assets. The CFP® professional also should inform the Clients of the potential for a court order in the divorce proceedings concerning the Clients' assets, such as an order freezing or placing limits or rules on the transfer of assets (or changing beneficiaries). The rules and terminology governing this process differ by state.

2. Address the Engagement

A CFP® professional cannot avoid the Conflict of Interest that an intent to divorce creates in a marital Financial Planning Engagement. Therefore, within a reasonable period, the CFP® professional must fully disclose and manage the Conflict of Interest. This requires the CFP® professional to limit or terminate the marital Engagement to prevent a breach of Fiduciary Duty or the Duty of Confidentiality to either Client.

One of the Clients may inform the CFP® professional of their intent to divorce and request that the CFP® professional keep the information confidential. (If the Client previously agreed to disclose Material confidential information with the other spouse, then the Client is withdrawing that consent to information sharing.) In this situation, the CFP® professional must explain

to the disclosing Client that this confidential information is adverse to the non-disclosing spouse and creates an unavoidable and unmanageable Conflict of Interest because of the duties the CFP® professional has to the non-disclosing Client. The CFP® professional should request that the disclosing Client inform the non-disclosing Client of the intent to divorce.

If the disclosing spouse does not tell the non-disclosing spouse their intent to divorce (or let the CFP® professional know that the disclosing spouse no longer intends to divorce) within a reasonable period, then the CFP® professional must terminate the joint Financial Planning Engagement without explaining to the non-disclosing Client the reasons for the termination. (For example, the CFP® professional could send an email to both spouses stating that the CFP® professional has decided to terminate the joint Engagement.) What constitutes a reasonable period will depend on the facts and circumstances. The CFP® professional should consider establishing a time frame with the disclosing spouse.

If both spouses are aware of the Divorce Conflict of Interest, then the CFP® professional should discuss with the divorcing Clients whether they are interested in having the CFP® professional continue to provide Professional Services, and if so, what those services will be and who will receive them. The CFP® professional must redefine the scope of Professional Services, which likely will be more limited than under the prior Financial Planning Engagement. While the Clients collaborated to reach agreement on joint financial goals during the marriage, when the Clients intend to divorce, they likely will have separate goals that no longer are aligned. Whereas they previously have operated as a joint economic unit, they will be transitioning to separate economic units. Therefore, when there is a Divorce Conflict of Interest, the joint Financial Planning Engagement will need to be revisited and appropriately limited in scope or terminated.

A CFP® professional may provide Professional Services (including Financial Advice) to both Clients that are objective and are not adverse to either Client. For example, the CFP® professional could provide objective financial information (such as account details, insurance and tax data) or periodically rebalance joint accounts to preserve assets. The Clients might expect some Professional Services, such as assisting with the production of documents and financial information for the divorce settlement. The CFP® professional must clarify with the Clients what Professional Services the CFP® professional will provide (and in some circumstances, what services the CFP® professional will not provide) and how the CFP® professional will provide those Professional Services, as discussed later in this guide.

While the *Code and Standards* requires neither written disclosure of a Conflict of Interest nor written consent to a Conflict of Interest, a CFP® professional should consider delivering a written description of the Divorce Conflict of Interest and a summary of how the CFP® professional will manage the Divorce Conflict of Interest. The *Code and Standards* provides that “the greater the potential harm the conflict presents to the Client...the less likely it is that CFP Board will infer informed consent absent clear evidence of informed consent.”

If the CFP® professional is terminating the Engagement, then the CFP® professional might include in the notice of termination information about each Client’s authority to withdraw assets

from a joint account without the authorization of the other Client, and disclose reasonable steps the Clients can take to protect their assets (such as discussing potential actions with their attorneys) and that there could be legal consequences if a Client improperly takes Marital Property.

3. Address Information Sharing During the Joint Engagement

The Duty of Confidentiality requires a CFP® professional to maintain the confidentiality of each Client’s information unless the Client consents to share the confidential information with the other spouse. If the Clients consented to information sharing in the Engagement, then the CFP® professional should remind the Clients of their agreement that the CFP® professional will share with the other Client the information that one Client provides. If the Clients did not previously agree to share information, then the CFP® professional should request that they consent to share confidential information needed to provide the agreed-upon Professional Services.

If the Clients do not consent to share confidential information needed to provide the agreed-upon Professional Services, then the CFP® professional must terminate the joint Engagement.

The CFP® professional also should establish a process that the CFP® professional will follow to send both Clients communications concerning the joint Engagement. The CFP® professional should determine the preferred method of

Production of Documents and the Duty of Confidentiality

During the divorce proceedings, a CFP® professional or the CFP® Professional’s Firm may receive a subpoena for the production of documents concerning one or both Clients. The Duty of Confidentiality permits disclosure of confidential information (1) with the consent of both Clients, or (2) for legal and enforcement purposes, as required to comply with a properly authorized subpoena. Therefore, a CFP® professional does not violate the *Code and Standards* when producing documents in response to a subpoena. A CFP® professional should inform and coordinate with their firm on any document production and inform the Client of the subpoena and the response to the subpoena.



communication, such as whether the CFP® professional will communicate directly with the Clients or through their counsel. Written communications, such as email, provide the best evidence of what was communicated. A CFP® professional should deliver written communications simultaneously.

4. Only Provide Advice That is Not Adverse to Either Client

A CFP® professional continuing to provide Professional Services to both spouses must not provide Financial Advice to either Client about issues to be determined in the divorce proceedings, such as the division of marital

assets, continuing support arrangements, the division of assets during the settlement, how to best position themselves for the future or other advice that could affect the settlement agreement. A CFP® professional must not provide either Client with that Financial Advice because the Financial Advice would be adverse to the other spouse and present a Conflict of Interest that the CFP® professional cannot manage. A CFP® professional who has been engaged to provide Financial Advice or Financial Planning has not been engaged to resolve disputes or determine the most equitable divorce outcome. That is the role of a mediator, arbitrator or collaborative divorce team.

Recommending a Professional With Competency In Divorce Proceedings

Any Client who is divorcing a spouse might benefit from a professional specially trained in divorce issues. This referral is Financial Advice under the *Code and Standards*, and both the Fiduciary Duty and the Duties When Recommending, Engaging and Working With Additional Persons apply to that referral. A CFP® professional must have a reasonable basis for the recommendation or Engagement based on the person's reputation, experience and qualifications. In addition, a CFP® professional must, at the time of the recommendation or prior to the Engagement, disclose to the Client any arrangement by which someone who is not the Client will compensate or provide some other material economic benefit to the CFP® professional, the CFP® Professional's Firm, or a Related Party for the recommendation or Engagement.

5. There Are Limits to When a CFP® Professional May Follow a Client Instruction Without the Other Client's Express Consent

After a Divorce Conflict of Interest arises, a Client may, for example, instruct the CFP® professional to transfer assets from a joint account to an account titled only in the instructing Client's name. The CFP® professional should make their firm's compliance department aware of the instruction and ask for guidance on how to proceed. The CFP® professional must review (1) the account agreement to confirm the Client has authority to provide the instruction and (2) the firm's policies and procedures that apply to this situation. If the Client has already filed for divorce, then a court order might be in place that would make the instruction unlawful.

Generally, the *Code and Standards* requires a CFP® professional to follow the Client's reasonable and lawful instructions. When there is a Divorce Conflict of Interest, however, unless the other Client consents, a CFP® professional must not follow an instruction (such as an instruction to withdraw assets) from one Client concerning Marital Property that is materially adverse to the other Client unless (1) the instruction involves a transaction made in the ordinary course of the advisory relationship (a normal, routine activity consistent with past practices), (2) the CFP® professional also acts as custodian and must comply with the account agreement terms, or (3) there is an urgent situation where the CFP® professional reasonably believes that following the instruction will prevent significant harm, including but not limited to physical or mental

Illustration

Following One Client's Instruction Without Informing the Other Client

Tai is a CFP® professional who works at a large dually registered firm. Tai has a written joint Financial Planning Engagement with Javier and Blair, spouses who have been Tai's Clients for more than 10 years. Tai has known Javier socially even longer, as they met in college and regularly play golf together.

Javier is Tai's primary contact. Blair rarely attends any meetings with Tai or speaks to Tai on the phone. Javier commonly requests changes to their joint accounts.

When Tai was golfing with Javier earlier in the month, Javier confided in Tai that he and Blair were having marital problems and he was planning to file for divorce. This presented a Material Conflict of Interest, but Tai took no action. At the time, Tai should have informed Javier that if Javier did not communicate the intent to divorce to Blair within a reasonable period, then Tai must terminate the joint Engagement. Tai also should have taken prudent and reasonable action at that time to protect the Clients' assets or inform the Clients of the potential consequences if the Clients did not take available steps to protect their assets.

Two weeks later, Javier instructed Tai to withdraw \$50,000 from the couple's joint money market account and deposit the funds into Javier's individual checking account. Tai executed the transaction. In doing so, Tai failed to manage the Material Conflict of Interest that Javier's intent to divorce raised. Tai should have contacted a compliance professional for guidance on how to proceed. Tai also should have informed Javier of the Conflict of Interest and encouraged Javier to disclose the intent to divorce to Blair before any withdrawal. Javier's request was not in the ordinary course of the advisory relationship, and there were no urgent circumstances. Therefore, if Javier persisted in the instruction to withdraw the funds, then Tai should have informed Javier that he would not follow the instruction without Blair's approval. Tai also should have informed Javier that there may be negative consequences if Javier seeks to effectuate the transaction on his own and without Blair's approval. Tai then would have needed to terminate the Engagement, inform Blair about Javier's interest in withdrawing money from the account, and inform Javier and Blair of the potential consequences if they did not take available steps to protect their assets.



spousal abuse (such as in situations where the disclosing Client is a victim of domestic abuse and requires funds to live independently), elder abuse, a substantial loss in the value of Client assets, embezzlement, expatriation or furtherance of criminal activity (in which case the CFP® professional should seek guidance from the firm's legal or compliance department and evaluate when to notify the other Client).

6. A CFP® Professional May Enter a New Engagement With One Spouse

If the Clients have not agreed otherwise, then the CFP® professional may enter a new Engagement with one of the Clients and not the other. The CFP® professional, however, continues to have a Duty of Confidentiality to the former Client and must not share or use that confidential information to serve the current Client. That Duty of Confidentiality applies to both quantitative information and qualitative information (including values, attitudes, expectations, needs and priorities). If the CFP® professional has material confidential information about the former Client that is relevant to the issues to be decided in the divorce proceedings, then the CFP® professional must not provide Financial Advice to the current Client concerning the issues to be decided in the divorce proceedings. Moreover,

as part of unwinding the joint Financial Planning Engagement, the CFP® professional must honor the former Client's request for information and documents that the Client was entitled to receive under that joint Engagement, even if the CFP® professional enters a new Engagement with one Client.

7. Another Professional in the CFP® Professional's Firm May Represent the Other Client

During the pendency of the divorce proceedings, CFP Board's *Code and Standards* does not prohibit a CFP® professional from entering a new Engagement with one Client when another professional in the CFP® Professional's Firm is representing the other Client, so long as the CFP® Professional's Firm does not otherwise prohibit such arrangements and the professionals do not review or divulge to each other the other Client's confidential information. A CFP® professional must abide by the firm's policies and procedures concerning the Engagement of a Client who has interests adverse to another Client, including policies implementing privacy regulations. For example, a CFP® Professional's Firm might have policies and procedures that prohibit professionals in the same firm from representing Clients who have a Divorce Conflict of Interest.

The Benefit of Provisions Giving the CFP® Professional Discretion to Require Consent of Both Parties

Joint account agreements commonly authorize one Client to transfer assets without requiring the consent of the other Client for each transaction. This authority provides convenience for each spouse. A CFP® professional should request that the Clients authorize the CFP® professional to require the consent of both Clients on a particular transaction if the joint account provides for such an option.



Illustration

Limiting the Scope of Engagement When Learning of a Divorce Conflict of Interest

Dinesh is a CFP® professional. His Financial Planning Clients, Monica and Luz, have decided to divorce. Dinesh scheduled a meeting with them to discuss how the Engagement will proceed. At the meeting, Dinesh explains that the decision to divorce creates a Conflict of Interest because he will have duties to each of them that will be adverse to the other.

Dinesh discusses with Monica and Luz their existing agreement to share information with each other, clarifies who has the authority to make transactions in their joint account and asks if they want to make any changes. He informs them that there could be legal implications if they make transactions that are not ordinary, and that without the consent of both Clients, he may not be able to assist with a transaction that in his judgment will have a material adverse effect on the other spouse. He also lets them know about the potential for a court order concerning their assets when the divorce proceedings begin and asks them to keep him informed about any order.

Dinesh then provides options on how the Engagement might proceed. He tells Monica and Luz that they can terminate the Engagement, or they can continue to receive some Professional Services. The scope of services, however, would be more limited, such as providing Financial Advice about periodic rebalancing.

Specifically, Dinesh explains that he will not be able to provide Financial Advice concerning issues to be decided in the divorce proceedings because this would create a Conflict of Interest that he could not properly manage. He also says that, to continue to provide Financial Advice in each of their best interests, he will continue to provide Professional Services to both of them only so long as they continue to agree that all communications will be shared with both Clients, preferably simultaneously.

Finally, Dinesh explains that he could continue an Engagement with one of them and not the other and that he can provide referrals of competent financial professionals for the other spouse.

Monica and Luz agree that they would like to continue the Engagement with Dinesh and limit the Engagement. After the meeting, Dinesh confirms this decision in writing that includes the conditions for continuing the Engagement and the more limited scope of services that he will provide.



OPTIONS AFTER THE DIVORCE IS FINAL

After a divorce is final, one or both Clients might want to reengage the CFP® professional. The CFP® professional may enter into Engagements with each Client (so long as the Clients have not agreed otherwise). However, the CFP® professional must carefully consider the potential for a Conflict of Interest, and if so, whether the CFP® professional would be able to properly manage the conflict.

For example, if one Client has continuing obligations to the other Client under the terms of the divorce decree (such as alimony or child support obligations) or the Clients continue to jointly own a business or other assets, then there is an increased likelihood that a Conflict of Interest would arise if the CFP® professional has an Engagement with each Client. Additionally, one Client might ask the CFP® professional to reveal

confidential information about the Client's former spouse. Accordingly, a CFP® professional should take these potential situations into account when deciding whether to continue to work with divorced individuals who have continuing financial and other obligations to each other.

If the CFP® professional does engage both Clients and a material Conflict of Interest arises, then the CFP® professional must fully disclose the conflict, obtain informed consent from the Clients and properly manage the conflict, which may include limiting one or both Engagements to exclude Financial Advice about the issue causing the conflict. Additionally, the CFP® professional must maintain the confidentiality of each Client's information.

APPENDIX 1:

GLOSSARY OF

DIVORCE TERMS

Legal Issues in Divorce: Some important legal issues that arise in a divorce are the division of assets and debts (including concerning real estate and other investments, pensions, retirement accounts and personal property), rights to spousal support, and child custody and support (“Divorce Legal Issues”).

Types of Divorce Processes

There are different types of processes to resolve Divorce Legal Issues.

- In a **court process**, the parties resolve their Divorce Legal Issues in court proceedings before a judge, who makes final decisions either by consent of the parties or after a trial.
- In an **arbitration process**, the parties agree that a neutral third party, called an arbitrator, makes final decisions regarding Divorce Legal Issues that are binding on the parties.
- In a **mediation process**, the parties hire a neutral mediator to help the parties reach a voluntary agreement to resolve Divorce Legal Issues. The mediator may offer an independent perspective but does not make decisions for the parties. Mediation may occur at any time during the divorce process, and the mediation might end without an agreement between the parties on all issues.
- In a **collaborative divorce process**, the parties jointly or independently retain professionals such as Divorce Financial Analysts, attorneys and mental health professionals to help them work collaboratively to reach an agreement. Typically, the parties agree in advance that if the process fails, then none of the professionals who assisted the parties may continue to work with them in further proceedings. Additionally, the professionals typically will not work with either spouse in any capacity after the divorce is final.
- In a **“pro se divorce” process**, the parties negotiate directly with each other to resolve Divorce Legal Issues and do not have legal representation.

Roles a Professional May Serve

When a Divorce Conflict of Interest arises, a professional may provide Financial Advice or serve in other roles, including those set forth below.

- A **mediator** is a neutral individual hired by the parties to facilitate a dialogue with the goal of helping them reach a mutual agreement regarding Divorce Legal Issues.
- A **lawyer** is a licensed professional who provides legal advice and advocates for their Client's best interests.
- A **judge** is a public official in the judicial branch of government who makes final decisions about Divorce Legal Issues either by consent of the parties or after a trial.
- An **arbitrator** is a professional who the parties have retained to decide Divorce Legal Issues outside of court. The parties are bound by the arbitrator's decisions and may challenge the arbitrator's decisions in only limited circumstances.
- A **Divorce Financial Analyst** is a professional with specialized competency to provide financial information and analysis about issues unique to divorce, such as:
 - Interim measures to provide support during divorce;
 - The sources of income in the marriage — including executive compensation and bonuses — that may be used for determining, for example, alimony and child support;
 - Current and projected cash flow needs during divorce;
 - Responses to legal discovery requests concerning Financial Assets;
 - Assistance with tracing or valuing Separate Property;
 - Coordination with divorce counsel, including trial preparation or expert testimony; and
 - Data analysis about the division of property.

Divorce Financial Analyst services sometimes are called "Divorce Financial Planning." However, Divorce Financial Analyst services generally do not constitute financial planning within CFP Board's definition of that term.

One party may engage a Divorce Financial Analyst to advise and advocate for them and not their spouse. Alternatively, both parties may engage a Divorce Financial Analyst to serve as a Financial Neutral, as explained below.

A Divorce Financial Analyst does not function as a lawyer, judge, mediator or arbitrator. In other words, a Divorce Financial Analyst does not decide Divorce Legal Issues.

- A **Financial Neutral** works impartially with both spouses — and their attorneys, if they are represented — to gather and organize financial information, provide objective analysis, and assist the parties in making informed financial decisions. A Financial Neutral generally commits not to provide Financial Advice to either spouse after the divorce is final. A Financial Neutral is often a Divorce Financial Analyst.

APPENDIX 2:

MARITAL ENGAGEMENTS AND DIVORCE CHECKLIST

For Any Marital Joint Engagement

- ☐ Include Advance Agreement Provisions in the Terms of Engagement:
 - ☐ Require mutual sharing of material financial information.
 - ☐ Establish communication protocols.
 - ☐ Clarify each Client's authority to act.
 - ☐ Document intentions when discussing Separate Property decisions.
- ☐ Address limits on the services the CFP® professional will provide if there is a Divorce Conflict of Interest.
- ☐ Establish who the CFP® professional may serve if there is a Divorce Conflict of Interest and the parties terminate the joint Engagement.

Upon Learning of an Intent to Divorce

- ☐ Check your firm's policies and procedures for guidance.
- ☐ Protect joint assets or inform Clients of the potential consequences of not protecting joint assets.
- ☐ Determine if the Clients would like to change account authorizations.
- ☐ Inform the Clients of a potential court order.
- ☐ Only provide Financial Advice that is not adverse to either Client (unless the Engagement is terminated and a new Engagement is created with only one spouse).
- ☐ Recognize that there are limits on a CFP® professional's ability to follow a Client instruction.

- ☐ Address the Engagement options:
 - ☐ A continued, limited joint Engagement;
 - ☐ Termination of the joint Engagement and a new Engagement with one of the spouses during the divorce proceedings; or
 - ☐ Termination of the Engagement with no new Engagement (required if the spouse disclosing the intent to divorce requests confidentiality).
- ☐ If proceeding with a limited joint Engagement, commit the Clients to share necessary information and identify the Professional Services that the CFP® professional will and will not be providing.
- ☐ Make any appropriate referrals, such as to a Divorce Financial Analyst.
- ☐ Confirm the new scope of Engagement in writing, such as in a post-meeting email.
- ☐ If continuing an Engagement with one spouse:
 - ☐ Decline to provide Financial Advice relevant to the divorce proceedings if you have material confidential information about the other spouse (the former Client).
 - ☐ Honor any request from the former Client that the former Client was entitled to receive under that joint Engagement.

After Divorce

If you are considering retaining both Clients:

- ☐ Identify potential Conflicts of Interest that might arise in the future.
- ☐ Maintain the confidentiality of each Client's information.



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