CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 21362

This is a summary of a decision issued following the November 2008 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 prior to January 1, 2009. The Rules in effect at that time under the *Code of Ethics and Professional Responsibility* ("*Code of Ethics*") were Rules 101 through 705.

I. Issue Presented

Whether a CFP® certificant ("Respondent") violated CFP Board's *Standards of Professional Conduct* when he did not inform his client ("Client") of a change in the federal tax law that negatively affected a retirement plan Respondent and his partner had implemented for the Client.

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

In September 2003, the Client hired Respondent and Respondent's partner to recommend, design and implement a plan to maximize the Client's retirement assets and minimize his tax liability. Respondent and his partner, who represented himself to the Client as an attorney specializing in the estate and income tax consequences of certain financial plans, recommended a pension rescue plan ("Plan") to the Client.

The Plan involved using funds from the Client's individual retirement account ("IRA") to purchase a life insurance policy ("Policy") under a profit sharing plan, with premiums to be paid for a specific number of years. Once the premium payments were completed, the Policy would then become part of a life insurance trust. According to tax laws in place at the time Respondent recommended the Plan, the Policy was to be taxed at its cash surrender value, an amount which would be less than the total premium payments made on the policy at the time of rolling it into the trust. Respondent and his partner represented to the Client that the Plan would minimize the Client's tax liability.

In February 2004, a new regulation came into effect that changed the taxation of life insurance policies distributed or sold by a profit sharing plan to a life insurance trust. The rule changed the fair market value of such policies from the cash surrender value to an amount equal to at least the total amount of premiums paid on the policy. The change eliminated the possibility of favorable tax benefits under the Plan as represented to the Client by Respondent and his partner, and exposed the Client to financial loss.

In February 2004, Respondent assisted the Client in completing the application for the Policy. The Client made four payments totaling $300,000 toward the Plan between March 2004 and May 2005. The Client became aware of the new rule in October 2005 and inquired of Respondent and Respondent's partner as to the effect of the new ruling on the Plan. At that time, Respondent and his partner advised the Client to consider selling the Policy.

III. Commission's Analysis and Conclusions Regarding Rule Violations

A. Rule 201 – A CFP Board designee shall exercise reasonable and prudent professional judgment in providing professional services.

The Commission found that Respondent did not exercise reasonable and prudent professional judgment because he: 1) failed to monitor the tax laws affecting his Client; 2) failed to keep the Client up to date; and 3) failed to inform the Client of the new rule or of its negative impact on the Plan. As a result, the Commission found that the Respondent did not act as a reasonable professional would have in similar circumstances. Thus, Respondent violated Rule 201.

B. Rule 401(a) – In rendering professional services, a CFP Board designee shall disclose to the client material information relevant to the professional relationship, including, conflict(s) of interest, the CFP Board designee's business affiliation, address, telephone number, credentials, qualifications, licenses, compensation structure and any agency relationships, and the scope of the CFP Board designee's authority in that capacity.

The Commission found that Respondent failed to disclose to the Client that Respondent's partner was acting as a life insurance agent rather than as an attorney. The Commission determined that, as a result, Respondent implied a level of sophistication on the part of his partner that was not relevant in this situation. The Commission found that the services being offered by Respondent's partner was material information relevant to Respondent's professional relationship with the Client, and Respondent did not disclose those services. By failing to disclose material information, Respondent violated Rule 401(a).

C. Rule 606(b) – In all professional activities a CFP Board designee shall perform services in accordance with applicable rules, regulations and other established policies of CFP Board.

The Commission found that because Respondent violated *Code of Ethics* Rules 201, 401(a), 607 and 701 as discussed herein, Respondent did not perform services in accordance with CFP Board rules. Thus, Respondent violated Rule 606(b).

D. Rule 607 – A CFP Board designee shall not engage in any conduct which reflects adversely on his or her integrity or fitness as a CFP Board designee, upon the marks, or upon the profession.

The Commission found that Respondent engaged in conduct which reflects adversely on his integrity as a CFP® professional when he: 1) failed to exercise reasonable and prudent professional judgment; 2) failed to disclose material information relevant to the professional relationship; 3) failed to act diligently by not providing the Client with a follow-up illustration of a "worst case" scenario under the new tax rule's safe harbor provisions; and 4) failed to perform professional services in accordance with CFP Board rules. Thus, Respondent violated Rule 607.

E. Rule 701 – A CFP Board designee shall provide services diligently.

The Commission found that Respondent failed to act diligently because he failed to advise the Client on the impact of the rule change on the Plan, and because he failed to provide the Client with a follow-up illustration of a "worst case" scenario under the safe harbor provisions of the new tax rule. Thus, Respondent violated Rule 701.

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 which violates the *Code of Ethics*. The Commission issued a Private Censure to Respondent pursuant to Article 4.1 of the *Disciplinary Rules*. In addition, the Commission ordered Respondent to complete three hours of continuing education courses in ethics within the six month period following the decision.

The Commission considered the following mitigating factors:

1. Respondent has provided financial services to clients for 20 years;
2. The Client signed a disclosure document acknowledging possible changes in valuation of the insurance policy due to new rule changes; and
3. Respondent insisted on meeting with the Client's legal and accounting professionals.

The Commission considered the following aggravating factors:

1. Respondent's misrepresentation of his partner's services;
2. Respondent's failure to produce notes or correspondence between the time he sold the plan to the Client and the time the client contacted Respondent about the tax law change; and
3. Respondent's failure to provide the Client with an updated illustration of the plan.