CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 21547

This is a summary of a decision issued following the February 2009 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. Issues Presented

Whether a CFP® certificant ("Respondent") violated CFP Board's *Standards of Professional Conduct* when she: 1) invested the majority of a client's ("Client") investment funds in a long-term contract when one of the Client's goals was liquidity; 2) did not inform the Client of a federal tax benefit that would allow for liquidity; 3) did not disclose information about fees, charges or commissions regarding a variable annuity in which she invested the Client's funds; and 4) did not disclose to the Client that Respondent was only authorized to sell long-term care insurance policies for one company.

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

In August 2007, during a routine background check, CFP Board discovered a July 2006 customer complaint filed against Respondent and his employer ("Firm") by the Client, with whom Respondent had a financial planning relationship. In a detailed complaint letter to Respondent, the Client alleged the following:

1. The investments recommended by Respondent were unsuitable;
2. Respondent failed to discuss the fees, charges or commissions regarding a Retirement Advisor Variable Annuity ("RAVA" or "Annuity");
3. When the Client asked Respondent the amount of the commission associated with the sale of the Annuity, Respondent said she thought it was $1,000 but did not disclose the amount in writing;
4. Respondent misstated the Client's risk profile as moderate-aggressive instead of moderate-conservative;
5. When the Client told Respondent the Client wanted to compare long-term care plans, Respondent only presented her with one long-term care option issued by one provider ("Provider");
6. In 2004, the Client told Respondent that the Client wanted to invest in a condominium for $145,000 pre-construction, but Respondent said that it was too risky;
7. Respondent invested $100,000 of the Client's money in a Real Estate Investment Trust ("REIT") without explaining how or why the REIT was appropriate for the Client's goals;

8. Respondent invested virtually all the Client's money in long-term assets, leaving the Client with very little liquidity; and
9. Respondent ignored the Client's goals, which were: 1) to have income for the rest of her life; 2) to minimize tax payment for her heirs in the event of her death; 3) to purchase a condominium; and 4) to have the ability to travel.

The Firm's Registered Principal sent written questions to the Client regarding the complaint. The Client e-mailed her responses to the Registered Principal in August 2006. In her response, the Client listed four investment goals: 1) to be provided enough income to live out her life; 2) to minimize taxes paid by her heirs; 3) to purchase a condominium at a specific beach for personal and rental use; and 4) to have enough money to travel.

Regarding her risk tolerance, Client said that she had never heard of risk tolerance and that she had told Respondent that at age 61 she should not be taking too many risks. In September 2004, the Client alleged Respondent gave the Client a book that listed her risk tolerance as being moderately aggressive. The Client said she questioned Respondent about the error regarding her risk tolerance and that Respondent said she would make the correction.

The Client also stated in her e-mailed response that she had no knowledge of annuities, money markets, brokerage accounts or individual retirement accounts ("IRAs") and that her only experience investing was in the stock of the company that employed her. The Client said she had no involvement in the selection of the investments. The Client also said she was told to sign a variable annuity application which already had the disclosures and agreement section checked and she was not given any copies.

In December 2006, the Firm sent a second response letter to the Client. The Firm said the reason other policies were not offered to the Client for comparison was because the Firm had an exclusive servicing agreement with the Provider that only allowed Respondent to present long-term care policies from the Provider.

In a telephone conversation with CFP Board staff in September 2008, Respondent said when the Client came to her regarding financial planning, the majority of the Client's assets had been in a 401(k) and a cash balance pension plan. Respondent placed the majority of the Client's assets in an IRA where the assets would be subject to taxation if removed.

Respondent said she and the Client agreed to place $100,000 of the IRA assets in a money market account and $100,000 in a REIT to provide income replacement in four plus years. Respondent also placed $500,000, amounting to 71% of the Client's funds, into a 10-year RAVA. Respondent advised against the condominium because of the tax implications if Client received a large lump sum from the IRA or a payout in excess of the allowed distribution.

Respondent admitted in her hearing testimony that she did not apprise the Client of the opportunity to utilize net unrealized appreciation in her IRA. This opportunity would have provided the Client the necessary liquidity to purchase a condominium. The Commission determined that Respondent knew or should have known about IRA rollover and special consideration for net unrealized appreciation in the United States Tax Code.

Respondent answered CFP Board's Complaint by stating that commissions for the RAVA were disclosed in the prospectus. Later, in her testimony before the Commission, Respondent admitted this statement was untrue.

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 by investing 71% of the Client's investment funds in a 10-year contract, Respondent ignored the Client's goals of liquidity for the purpose of buying a condominium and for travel. Respondent did not inform the Client of an opportunity to use net unrealized appreciation, as allowed in the United States Tax Code, to increase her liquidity. The Commission determined that Respondent knew or should have known of the special tax considerations for net unrealized appreciation in the United States Tax Code. The Commission found that because Respondent ignored the Client's stated goal of liquidity and did not inform the Client of a method to further the goal of liquidity, Respondent failed to exercise reasonable and prudent judgment in providing professional services. Thus, Respondent violated Rule 201.

B. Rule 202 – A financial planning practitioner shall act in the interest of the client.

The Commission noted that the Client told Respondent that she did not have much experience with investments and relied on Respondent to place the Client in suitable investments that would support her investment goals. The Respondent had an obligation to disclose her compensation arrangement in writing to the Client because she had a financial planning relationship with the Client. The Commission found that Respondent failed to: 1) disclose that she was compensated by commissions and fees; 2) disclose the risks regarding the RAVA; and 3) allocate the Client's investments properly because Respondent placed 71% of the Client's funds into the RAVA and left the Client with very little liquidity. By failing to disclose her compensation arrangement to the Client, by failing to allocate the Client's investments properly and by leaving the Client with little liquidity, the Commission found that Respondent failed to act in the interest of the Client. Thus, Respondent violated Rule 202.

C. Rule 401(a) – In rendering professional services, a CFP Board designee shall disclose to the client material information relevant to the professional relationship.

The Commission found that Respondent failed to disclose in writing to the Client the exact amount of fees, charges or commissions for the RAVA based on: 1) the Client's statement that Respondent failed to discuss fees, charges or commissions regarding the RAVA; 2) the Client's statement that when she asked Respondent what the commission was for the RAVA, Respondent said she thought it was $1,000; and 3) Respondent's admission during her testimony that her earlier statement that the RAVA fees were disclosed on the prospectus was untrue. The

Commission found that information regarding fees, charges or commissions for an annuity is material information relevant to the professional relationship. The Commission further found that the Respondent's failure to disclose the information was unfair to the Client. Because Respondent failed to disclose material information relevant to the professional relationship, the Commission found that Respondent violated Rule 401(a).

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: 1) recommended that the Client invest 71% of her investment funds in a variable annuity where it would be tied up for 10 years; 2) failed to allocate properly the Client's investments and to explain the risks associated with those investments; 3) failed to disclose that she was compensated by commissions and fees; and 4) failed to disclose to the Client in writing and in advance of the transaction that Respondent was only allowed to sell the Provider's long-term care insurance policies. The Commission determined that these actions amounted to conduct that reflected adversely on Respondent's integrity and fitness as a CFP Board designee, upon the marks and upon the profession. Thus, the Commission found that Respondent violated Rule 607.

IV. <u>Discipline Imposed</u>

The Commission found that Respondent's violation of CFP Board's *Code of Ethics* Rules 201, 202, 401(a) and 607 amounted to grounds for discipline under Article 3(a) of the CFP Board's *Disciplinary Rules and Procedures*. Pursuant to Article 4.1 of the *Disciplinary Rules and Procedures*, the Commission issued a Private Censure to Respondent. The Commission also ordered Respondent to complete 12 hours of continuing education credits by December 31, 2009, in addition to the 30 hours required to meet renewal requirements. The Commission required that the continuing education credits relate to: 1) IRA rollover and special considerations for net unrealized appreciation opportunities; 2) asset allocation for retirement; and 3) ethics, especially pertaining to full disclosure of conflicts of interests.

The Commission considered the following aggravating factors:

1. Respondent's failure to disclose the customer complaint on her renewal declaration; and
2. That this was Respondent's second appearance before the Commission.

The Commission considered no mitigating factors.