

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 21866

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. Issue Presented

Whether a CFP[®] certificant (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* (“Standards”) when he borrowed \$70,000 from his client’s margin account to invest in a business owned and controlled by Respondent’s wife.

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

In August 2007, another CFP[®] certificant (“Grievant”) contacted CFP Board to file a grievance against Respondent. The day prior, Grievant had an initial, information-gathering meeting with a husband (“Husband”) and wife (“Wife”) who were prospective clients (collectively, “Clients”). During the meeting, Grievant found a promissory note related to a loan from Husband to a business owned and controlled by Respondent’s wife (“Business”).

In August 2006, Respondent’s wife signed the promissory note on behalf of the Business. Husband signed the promissory note authorizing the loan. The Clients were Respondent’s clients at the time. At about the same time, Respondent sent Husband an e-mail message regarding the wire request for the promissory note.

In July 2008, CFP Board mailed a Notice of Investigation (“NOI”) to Respondent. At about the same time, CFP Board e-mailed a request for the Clients’ contact information to Grievant. In response, Grievant informed CFP Board that the Clients declined to get involved in the grievance and asked to be left out of any investigation.

Some time after receiving the NOI, Respondent visited Grievant’s office. The receptionist informed Respondent that Grievant was unavailable. Respondent left the office and returned in the afternoon. The receptionist again informed Respondent that Grievant was unavailable and provided Grievant’s mobile phone number to Respondent. Respondent asked if he could see Grievant the following week. The receptionist replied that she did not know. Respondent informed the Commission that he did not place a phone call to Grievant or his staff. Upon Grievant’s request, CFP Board sent a letter to Respondent recommending that Respondent refrain from further contact with Grievant, his staff and his clients.

In August 2008, Respondent sent CFP Board a response to the NOI stating that there were no transaction authorization forms for the margin loan. Respondent further stated that he did not provide promotional materials to the Clients and did not know if any existed. Respondent provided a program from a Business event as evidence of the advertising Respondent's firm did with the Business.

Respondent's response included a letter from Husband. The letter stated that Husband had worked with Respondent for over 10 years and considered Respondent a trusted advisor and friend. Husband said that the choice to work with the Business was his own. Husband informed CFP Board that the Business repaid the full amount of the loan with interest, in accordance with the terms of the promissory note.

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.*

To show a violation of Rule 201 of CFP Board's *Code of Ethics*, CFP Board must show that Respondent made judgments in such a manner that no reasonable professional in similar circumstances would have made. In addition, the Commission applied Advisory Opinion 2001-1 of the *Standards*. Under the Advisory Opinion, a financial planning practitioner who borrows funds from a client is presumed not to be acting in the client's best interest. The two exceptions to the presumption are: 1) when the practitioner is a family member of the client; or 2) when the practitioner is a financial institution acting in its normal course of business activity. The Commission determined that failure to act in the client's best interest is a failure to exercise reasonable and prudent professional judgment.

The Commission found that after Respondent's wife signed the promissory note, Respondent contacted Husband about the wire request for the promissory note. The Commission determined that Respondent borrowed \$70,000 from Husband's margin account to invest in the Business, and that Respondent used his wife's name on the promissory note to transfer the money out of Husband's margin account. The Commission presumed that Respondent was not acting in Husband's best interest because Respondent: 1) borrowed funds from Husband; and 2) was neither a family member of the Clients nor a financial institution. The Commission found that by not acting in Husband's best interest and by recommending the investment, Respondent failed to exercise reasonable and prudent judgment in providing professional services. Thus, Respondent violated Rule 201.

B. *Rule 602 – A CFP Board designee shall show respect for other financial planning professionals, and related occupational groups, by engaging in fair and honorable competitive practices.*

The Commission found that Respondent failed to show respect for other financial planning professionals and failed to engage in fair and honorable competitive practices because he persistently tried to have a face-to-face meeting with Grievant after the grievance was filed. Thus, Respondent violated Rule 602.

- C. *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 also violated Rule 607 by failing to show respect for a fellow professional and failing to engage in fair and honorable competitive practices when he persistently tried to have a face-to-face meeting with Grievant after the grievance was filed. The Commission found such conduct reflected adversely on Respondent's integrity or fitness, upon the marks, and upon the profession.

IV. Discipline Imposed

The Commission found grounds for discipline under Article 3(a) of the *Disciplinary Rules*, which provides for discipline for violation of the *Code of Ethics*. Based on the above *Code of Ethics* rule violations, the Commission found grounds for discipline and imposed discipline under Article 4 of the *Disciplinary Rules*. The Commission issued a Private Censure to Respondent.

The Commission considered the following mitigating factors:

1. Husband was not harmed by the investment, was very happy with the results of the investment and wrote a letter to CFP Board in support of Respondent;
2. Husband was not in support of the grievance; and
3. Husband was aware of the family relationship between Respondent and Respondent's wife, who was involved in the business.

In aggravation, the Commission considered the following factors:

1. Respondent failed to inform Husband of the potential conflict of interest regarding the loan or of the benefit he would derive from the investment;
2. Respondent made repeated unannounced visits to Grievant's office; and
3. Respondent was terminated in the past for borrowing money from a client.

The Commission noted in its decision that Respondent's approach to a fellow CFP[®] certificant at the certificant's place of business without calling first was totally unacceptable.