

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 23037

This is a summary of a decision issued following the February 2011 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® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* (“Standards”) when he failed to inform his financial planning client that he was renting her property below the market price and that he exercised discretionary authority over her online account without obtaining prior written authorization from the client and principal approval from Respondent’s firm.

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

In July 1995, Respondent contacted the client, then 84 years old, after seeing her featured in a newspaper article about elderly homeowners in financial trouble. Respondent and the client entered into a written agreement and Respondent conducted the financial planning process. Respondent received assistance from an advanced advisor from a wholly owned subsidiary of his firm.

Respondent recommended that the client obtain a reverse mortgage in order to achieve her objective of retaining her house. Respondent made arrangements for her to obtain a reverse mortgage and attended the closing. The client received an original principal amount of approximately \$383,000. After liabilities and costs were paid, approximately \$168,000 was deposited with Respondent’s firm and used to purchase a long-term care policy, a healthcare policy, certificates and mutual funds.

In June 1996, Respondent learned that the current tenant of one of the client’s two living quarters on the property would be leaving. Respondent and the client entered into an oral agreement in which he would rent the vacated living quarter at the rate of \$500 per month. No lease was signed. Respondent remained on the property until June 2003. At that time, he paid \$600 per month in rent.

Respondent established an online bill-paying account for the client and used the account to pay her bills. Respondent asserted that he performed this service with the knowledge and permission of his client and of her daughter, but that he did not obtain written authorization.

In December 2007, the client filed a seven-count Complaint against Respondent and his firm with the state superior court alleging: 1) breach of fiduciary duty and fraudulent concealment thereof; 2) breach of contract and fraudulent concealment thereof; 3) breach of covenant of good faith and fair dealing and the fraudulent concealment thereof; 4) conversion and fraudulent concealment thereof; 5) negligent handling of investments and fraudulent concealment thereof; 6) violation of a state Act and fraudulent concealment thereof; and 7) unjust enrichment and fraudulent concealment thereof. Counts 4 and 7 were alleged against Respondent only and not his firm.

In her complaint, Respondent's client alleged that the reverse mortgage recommended by Respondent was deceptive, unfair, misleading, and harmful to her financial well-being, and that it caused her to lose nearly all the equity in her home. Respondent's client stated that in June 2007, she sold her home for approximately \$2,400,000. The total payoff of the reverse mortgage was approximately \$2,164,000, including repayment of the principal on the loan of approximately \$383,000 as well as approximately \$1,781,000 in non-contingent interest, contingent interest and maturity fees. Further, Respondent's client alleged that he received a financial benefit from investing the proceeds of the reverse mortgage with his firm.

The client also alleged that Respondent rented property from her at a below-market rate without disclosure of the benefit he received from that rate and that Respondent did not disclose to her that he was financially benefiting from providing and implementing investment advice for her.

In May 2009, Respondent and his firm filed a motion to strike several counts of the Complaint. In October 2009, the Court granted Respondent and his firm's motion to strike counts 4 and 6 only. In Respondent's October 2010 response to the CFP Board's Notice of Investigation, a manager of regulatory affairs at Respondent's firm indicated that the firm had not yet filed an answer to the matter because they were waiting for the plaintiff to file an amended complaint.

In 2008 Financial Industry Regulatory Authority, Inc. ("FINRA," formerly known as the National Association of Securities Dealers or "NASD") initiated an inquiry into the litigation. In May 2008, FINRA issued Respondent a Letter of Caution. FINRA found that Respondent used his client's online password to access her financial account and transacted activity on her behalf, such as paying bills. FINRA concluded that Respondent violated NASD Conduct Rule 2510(b) by failing to acquire written authorization from his client and principal approval from his firm prior to the exercise of discretionary authority.

In May 2008, Respondent responded to FINRA's request for a written explanation of his plans to ensure future compliance. Respondent stated that he had "carefully reviewed" Rule 2510(b), had arranged to receive further training in the area with his registered principal; and had informed his staff of the ruling and arranged for them to attend the additional training. Respondent said he was not disciplined by his firm for his conduct regarding the client, but he received coaching from his compliance supervisor.

III. Commission's Analysis and Conclusions Regarding Rule Violations

- A. *Rule 102 – In the course of professional activities, a CFP Board designee shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a false or misleading statement to a client, employer, employee, professional colleague, governmental or other regulatory body or official, or any other person or entity.*

The Commission found that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly making a false or misleading statement to the client, employer, employee, professional colleague, governmental or other regulatory body or official, or any other person or entity when he: 1) failed to disclose to his client and his employer that he was exercising discretionary authority in a client's account without obtaining prior written authorization; 2) failed to disclose to his client that he was renting her property below the market price. Thus, Respondent violated Rule 102.

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

The Commission found that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when he: 1) failed to inform his client that he was renting her property below the market price; and 2) exercised discretionary authority over his client's online account without obtaining prior written authorization from her and principal approval from Respondent's firm. Thus, Respondent violated Rule 201.

- C. *Rule 202 – A financial planning practitioner shall act in the interest of the client.*

The Commission found that Respondent failed to act in the interest of the client when he: 1) failed to inform his client that he was renting her property below the market price; and 2) exercised discretionary authority over his client's online account without obtaining prior written authorization from her and principal approval from Respondent's firm. Thus, Respondent violated Rule 202.

- D. *Rule 409 – If a CFP Board designee enters into a personal business transaction with a client, separate from regular professional services provided to that client, the transaction shall be on terms which are fair and reasonable to the client and the CFP Board designee shall disclose, in writing, the risks of the transaction, conflict(s) of interest of the CFP Board designee, and other relevant information, if any, necessary to make the transaction fair to the client.*

The Commission found that when entering into a personal business transaction with his client, Respondent failed to disclose, in writing, the risks of the transaction, conflicts of interest, and other relevant information, if any, necessary to make the transaction fair to the client when he failed to disclose to his client that he was financially benefitting from renting her property below market rate. Given his client's advanced age, the financial planning relationship, and the

apparent conflict of interest, Respondent did not disclose sufficient documentation to the client in this transaction. Thus, Respondent violated Rule 409.

E. Rule 606(a) – In all professional activities a CFP Board designee shall perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities.

The Commission found that Respondent failed to perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities when he failed to acquire written authorization from his client and principal approval from his firm prior to the exercise of discretionary authority in his client's online account in violation of NASD Conduct Rule 2510(b). Thus, Respondent violated Rule 606(a).

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

The Commission found that Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board when he: 1) failed to inform his client that he was renting her property below the market price; and 2) exercised discretionary authority over his client's online account without obtaining prior written authorization from her and principal approval from Respondent's firm. Respondent therefore violated Rules 102, 201, 202, 409, 606(a) and 607 of the *Code of Ethics*. Thus, Respondent violated Rule 606(b).

G. Rule 607 – A CFP Board designee shall not engage in 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 that reflects adversely on his integrity and fitness as a CFP Board designee, upon the marks, and upon the profession when he: 1) failed to inform his client that he was renting her property below the market price; and 2) exercised discretionary authority over his client's online account without obtaining prior written authorization from her and principal approval from Respondent's firm. Thus, Respondent violated Rule 607.

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 that violates the *Code of Ethics*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 102, 201, 202, 409, 606(a), 606(b) and 607 of the *Code of Ethics*. Pursuant to Article 4.1 of the *Disciplinary Rules*, the Commission issued a Private Censure to Respondent.

The Commission considered as mitigating factors that:

1. Reverse mortgages were new at that time and Respondent referred the client to the mortgage provider;
2. Respondent was not compensated for the reverse mortgage transaction;
3. The class action was conducted on an “opt out” basis in which the client was sent notice of her inclusion in the civil suit;
4. Respondent has had no other complaints against him;
5. The client’s daughter was receiving copies of the client’s bank statements during the period when the conduct occurred; and
6. The client purchased long term care which remains in effect.

The Commission considered as aggravating factors that:

1. The client was advanced in age;
2. Respondent had inadequate documentation for his rental agreement with the client in light of their financial planning relationship;
3. Respondent had a fiduciary relationship to his client because of the financial planning relationship, the client’s age, and the client’s lack of knowledge of the product involved;
4. The scope of loss to the client was large; and
5. The proceeds from the reverse mortgage were used to purchase products from Respondent from which he benefitted.