

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 25530

This is a summary of a decision issued following the March 2013 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 before and after January 1, 2009. The Rules in effect for conduct occurring before January 1, 2009 were Rules 101 through 705 of CFP Board’s *Code of Ethics and Professional Responsibility* (“*Code of Ethics*”). The Rules in effect for conduct occurring after January 1, 2009 were Rules 1.1 through 6.5 of CFP Board’s *Rules of Conduct*. The Standards in effect at all applicable times were Standards 100-1 through 600-1 under the *Financial Planning Practice Standards* (“Practice Standards”).

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he: 1) sold a client a variable annuity, which resulted in the concentration of the client’s assets in variable annuities and 10% early withdrawal penalties on the client’s monthly withdrawals; 2) held himself out as a financial planner providing comprehensive financial planning services but did not provide financial planning services to the client; and 3) failed to notify CFP Board of a change in his contact information within 45 days, in violation of Rule 6.3

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

2008 Client FINRA Arbitration

In October 1997, Respondent sold an insurance policy to Client 1, Client 2’s husband. Client 2 died in November 2004. In December 2004, Financial Firm issued a check to Client 2 for approximately \$500,000, and Respondent delivered the check to her. Client 2 sought Respondent’s advice on what to do with the insurance proceeds and how to accomplish her financial goals.

In December 2004, Respondent sold Client 2 a variable annuity for a purchase price of almost \$500,000 (“Variable Annuity A”). Client 2 informed Respondent that she planned to immediately withdraw \$48,000 for current expenses and approximately \$40,000 per year or \$3,300 in monthly payments thereafter. Client 2 was assessed a 10% early withdrawal penalty on her withdrawals from the Internal Revenue Service (“IRS”) because she was younger than 59 ½ years old.

Respondent stated that Client 2’s assets outside of the variable annuity were a variable annuity purchased in April 2004 for approximately \$130,000 (“Variable Annuity B”), a mutual fund account worth approximately \$100,000, a consulting business, and a home worth \$500,000. Variable Annuity A had surrender charges for seven years. Respondent’s recommendation resulted in a large percentage of Client 2’s approximately \$630,000 non-real estate assets to be invested in illiquid variable annuities.

Respondent stated that Variable Annuity A was suitable because Client 2’s objective was to protect her money from her husband’s creditors. In the Customer Information section of the Variable Annuity A

application, the purpose of the annuity contract is listed as wealth accumulation and income. There is an option to fill in a reason not listed on the application, but that was left blank. On the Asset Allocation Questionnaire, Client 2 described her primary investment goal as supplementing her retirement savings.

The variable annuity paid 3.5% of the purchase amount or approximately \$14,000 in commission to the registered representative. Respondent received 5% of the commission and his wife received 95%.

In September 2008, Client 2 filed a Statement of Claim against Respondent in FINRA Dispute Resolution. Client 2 alleged that Respondent's recommendation and sale of Variable Annuity A to her was unsuitable. In November 2008, Respondent filed his Answer to the Statement of Claim. In July 2009, Client 2 entered into a Settlement Agreement and Release with Respondent for a payment of approximately \$23,000 and the surrender of Variable Annuity A.

In his Answer to the Statement of Claim, Respondent denied that he held himself out to Client 2 as only a "retirement planning specialist." Respondent stated that "[h]e provides comprehensive financial planning regardless of the client's age, race, gender, income or account balance."

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 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*

The Commission determined that Respondent generally holds himself out as a financial planner. In this particular matter, however, Respondent's role was to effect the conversion of the life insurance proceeds to a variable annuity. Respondent received the business from Client 2 solely because he sold the life insurance product that generated the cash proceeds upon the death of her husband. Client 2 was clear that this was Respondent's role, and therefore Respondent did not hold himself out as a financial planner. Thus, Respondent did not violate *Code of Ethics* Rule 102.

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

The Complaint alleged that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when he sold Client 2 Variable Annuity A, which resulted in the concentration of her assets in illiquid variable annuities and 10% early withdrawal penalties on her monthly withdrawals. The Commission determined that the assets placed in Variable Annuity A were likely a large portion of Client 2's assets, however, CFP Board did not provide documentation to demonstrate Client 2's total assets and total liabilities. Therefore, the Commission was unable to determine whether Respondent's recommendation of Variable Annuity A was suitable. The Commission noted, however, that Respondent was extremely sloppy in documenting Client 2's primary objective of asset protection and defining the relationship. Thus, Respondent did not violate *Code of Ethics* Rule 201.

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

The Complaint alleged that Respondent failed to act in the interest of Client 2 when he sold her Variable Annuity A, which resulted in the concentration of her assets in illiquid variable annuities and 10% early withdrawal penalties on her monthly withdrawals. The Commission determined that the assets placed in Variable Annuity A were likely a large portion of Client 2's assets, however, CFP Board did not provide

documentation to demonstrate Client 2's total assets and total liabilities. Therefore, the Commission was unable to determine whether Respondent's recommendation of Variable Annuity A was suitable. The Commission noted, however, that Respondent was extremely sloppy in documenting Client 2's primary objective of asset protection and defining the relationship. Thus, Respondent did not violate *Code of Ethics* Rule 202.

D. Rule 606(b) – A CFP Board designee shall perform services in accordance with applicable rules, regulations and other established policies of CFP Board

The Complaint alleged that Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board when he: 1) sold Client 2 Variable Annuity A, which resulted in the concentration of her assets in illiquid variable annuities and 10% early withdrawal penalties on her monthly withdrawals in violation of Rules 201, 202, 607 and 703; 2) held himself out as a financial planner providing comprehensive financial planning services but did not provide financial planning services to Client 2; and 3) failed to notify CFP Board of a change in his contact information within 45 days, in violation of Rule 6.3. The Commission determined that the assets placed in Variable Annuity A were likely a large portion of Client 2's assets, however, CFP Board did not provide documentation to demonstrate her total assets and total liabilities. Therefore, the Commission was unable to determine whether Respondent's recommendation of Variable Annuity A was suitable. The Commission determined that Respondent did not hold himself out as a financial planner to the client. The Commission did find that Respondent violated Rule 6.3. The Commission noted, however, that Respondent was extremely sloppy in documenting Client 2's primary objective of asset protection and defining the relationship. Thus, Respondent violated *Code of Ethics* Rule 606(b).

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

The Complaint alleged 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) sold Client 2 Variable Annuity A, which resulted in the concentration of her assets in illiquid variable annuities and 10% early withdrawal penalties on her monthly withdrawals; and 2) held himself out as a financial planner providing comprehensive financial planning services but did not provide financial planning services to Client 2. The Commission determined that the assets placed in Variable Annuity A were likely a large portion of Client 2's assets, however, CFP Board did not provide documentation to demonstrate her total assets and total liabilities. Therefore, the Commission was unable to determine whether Respondent's recommendation of Variable Annuity A was suitable. In addition, the Commission determined that Respondent did not hold himself out as a financial planner to Client 2. Thus, Respondent did not violate *Code of Ethics* Rule 607.

F. Rule 703 – A financial planning practitioner shall make and/or implement only recommendations which are suitable for the client

The Complaint alleged that Respondent failed to make and implement only those recommendations that are suitable for the client when he recommended and sold Client 2 Variable Annuity A, which resulted in the concentration of her assets in illiquid variable annuities and 10% early withdrawal penalties on her monthly withdrawals. The Commission determined that the assets placed in Variable Annuity A were likely a large portion of Client 2's assets, however, CFP Board did not provide documentation to demonstrate her total assets and total liabilities. Therefore, the Commission was unable to determine whether Respondent's recommendation of Variable Annuity A was suitable. Thus, Respondent did not violate *Code of Ethics* Rule 703.

G. Rule 6.3 – A certificant shall notify CFP Board of any changes to contact information within 45 days

The Commission determined that Respondent changed the address where he receives his business correspondence in April 2011 but did not notify CFP Board of this change to his contact information until July 2012. Thus, Respondent violated *Rules of Conduct* Rule 6.3.

H. Practice Standard 100-1 – Defining the scope of the engagement

The Complaint alleged that Respondent failed to mutually define the scope of engagement before providing financial planning services when he recommended and sold Client 2 Variable Annuity A without completing a scope of engagement or financial planning agreement. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) Client 2 believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the purchase of Variable Annuity A. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 100-1*.

I. Practice Standard 200-1 – Determining a client’s personal and financial goals, needs and priorities

The Complaint alleged that Respondent failed to mutually define Client 2’s personal and financial goals, needs and priorities making a recommendation because he recommended and sold Client 2 Variable Annuity A without clarifying and understanding her goals. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) Client 2 believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the purchase of Variable Annuity A. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 200-1*.

J. Practice Standard 200-2 – Obtaining quantitative information and documents

The Complaint alleged that Respondent failed to obtain sufficient quantitative information and documents about a client before a recommendation is made when he recommended Client 2 Variable Annuity A without first obtaining the necessary financial information. The Complaint also alleged that Respondent did not complete a cash flow analysis to determine if the annuity would leave Client 2 with sufficient liquid assets to cover expenses. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) the client believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the purchase of Variable Annuity A. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 200-2*.

K. Practice Standard 300-1 – Analyzing and evaluating the client’s information

The Complaint alleged that Respondent failed to analyze Client 2’s information to gain an understanding of her financial situation when he recommended Client 2 Variable Annuity A for protection from creditors without understanding her objectives were growth and income to supplement her retirement savings and her current need for monthly withdrawals. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) Client 2 believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the variable annuity purchase. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 300-1*.

L. Practice Standard 400-2 – Developing the financial planning recommendations

The Complaint alleged that Respondent failed to develop recommendations in an effort to reasonably meet Client 2’s goals, needs and priorities when he recommended and sold Client 2 Variable Annuity A, which subjected her to 10% early withdrawal penalties on her monthly withdrawals and concentrated her assets in illiquid variable annuities. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) Client 2 believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the purchase of Variable Annuity A. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 400-2*.

M. Practice Standard 500-2 – Selecting products and services for implementation

The Complaint alleged that Respondent failed to select appropriate products and services that were consistent with Client 2’s goals, needs and priorities when he recommended and sold Client 2 Variable Annuity A, which subjected her to 10% early withdrawal penalties on her monthly withdrawals and concentrated her assets in illiquid variable annuities. The Commission evaluated the four factors for determining whether financial planning is considered to have occurred and determined that: 1) Client 2 believed this was a limited engagement; 2) Respondent simply executed a transaction in 1997 and again in 2004; 3) Respondent did not perform significant data gathering; and 4) Respondent provided assistance only with respect to the purchase of Variable Annuity A. Therefore, the Commission determined that Respondent and Client 2 were not in a financial planning relationship. Thus, Respondent did not violate *Practice Standard 500-2*.

IV. Discipline Imposed

The Commission found grounds for discipline under Article 3(a) of CFP Board’s *Disciplinary Rules and Procedures* (“*Disciplinary Rules*”). Article 3(a) of the *Disciplinary Rules* provides grounds for discipline for any act or omission that violates the *Code of Ethics* and *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) of the *Disciplinary Rules* because Respondent violated Rule 606(b) of the *Code of Ethics* and Rule 6.3 of the *Rules of Conduct*. Pursuant to Article 4.1 of the *Disciplinary Rules*, the Commission issued a Private Censure to Respondent.

The Commission consulted Anonymous Case Histories 19888 and 21547. The Commission also consulted *Sanction Guideline 17* (Failure to Respondent to a CFP Board Request for Information or Notice of Investigation).

The Commission considered as mitigating factors that:

1. Respondent was not a threat to the public;
2. Respondent did not contribute the settlement of the FINRA arbitration;
3. Respondent performs pro bono work and volunteers with other financial planning organizations; and
4. Respondent has an otherwise clean compliance record in his 22 years in the financial planning business.

The Commission considered as aggravating factors that:

1. Respondent was unable to provide evidence that Client 2's primary objective was "asset protection;" and
2. Respondent was sloppy in defining the client relationship.