

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 26226

This is a summary of a decision issued following the June 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 and after January 1, 2009. The Rules in effect under the *Code of Ethics and Professional Responsibility* (“Code of Ethics”) were Rules 101 through 705 and under the *Rules of Conduct* were Rules 1.1 through 6.5.

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he: 1) engaged in a private securities transaction with a client and failed to: a) give prior written notice to his firm regarding his outside business activities; and b) obtain prior written approval from his firm regarding his outside business activities, in violation of his firm’s company policy requiring disclosure of outside business activities; and 2) failed to disclose to a client the referral fee he received for the client’s investment in the private securities transaction.

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

From 2007 through 2008, Respondent invested with a firm colleague in an outside investment. Respondent stated his firm’s policy was to require notification prior to engaging in an outside business activity. Respondent stated he asked his colleague how to handle reporting the investment to his firm’s Compliance Department. Respondent stated his colleague told him that since the investment was personal and real estate-related, he did not have to report it. He also told Respondent he had already reported the investment to their firm himself and was waiting on them for direction. Respondent accepted his colleague’s explanation.

In March or April 2008, Respondent referred a client to his colleague and the outside investment. A few months later, Respondent’s client invested in the outside investment. Some time thereafter, Respondent received a referral fee from his colleague. Respondent did not notify his firm that he received the referral fee.

In February 2009, FINRA began an investigation of Respondent’s outside investment by conducting an unannounced interview with Respondent at his firm’s office. Respondent admitted he was not entirely forthcoming with FINRA during the unannounced interview. Respondent stated he withheld the following information from FINRA:

- 1) Respondent personally invested with his colleague in the outside investment;
- 2) Respondent provided a client with his colleague’s contact information; and
- 3) Respondent received a referral fee from his colleague for soliciting the client’s investment.

Respondent noted that in April 2009, he provided FINRA with additional information he had previously withheld.

Respondent's firm's Compliance Department conducted interviews with Respondent shortly after FINRA interviewed Respondent. Respondent withheld the same information from his firm as he had from FINRA. Respondent later provided his firm with the information he had previously withheld. Respondent's firm terminated him in March 2009. Respondent was terminated for withholding material information from his firm and FINRA regarding his association with the outside investment.

In August 2009, FINRA concluded its investigation of Respondent. Without admitting or denying FINRA's findings, Respondent accepted and consented to FINRA's findings of fact and violative conduct. FINRA determined that: 1) In March 2008, Respondent engaged in a private securities transaction without notifying his firm and without obtaining his firm's prior written approval; 2) In September 2008, Respondent received a referral fee from his colleague for referring the client to his colleague and the outside investment. By participating in a private securities transaction without giving prior written notice to, or obtaining prior written approval from, his employer member firm, Respondent violated NASD Conduct Rules 3040 and 2110; and 3) In February 2009, FINRA staff sent a letter to Respondent requesting that he provide information in connection with the outside investment. Respondent responded, and omitted material facts in that response. Respondent failed to respond completely to FINRA's request until April 2009. By failing to respond timely to FINRA staff's requests, Respondent violated FINRA Rules 8210 and 2010.

Respondent consented to the following sanctions: 1) a suspension from association with any FINRA member in any capacity for seven months; 2) a fine; and 3) an order to pay restitution to the client for whom Respondent received the referral fee.

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 determined that Respondent engaged in conduct involving misrepresentation when he failed to disclose to a client the referral fee he received from his colleague for the client's outside investment. Therefore, Respondent violated Rule 102.

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

The Commission determined that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when he engaged in a private securities transaction with a client and failed to: 1) give prior written notice to his firm regarding his outside business activities; and 2) obtain prior written approval from his firm regarding his outside business activities, in violation of his firm's company policy regarding disclosure of outside business activities. Therefore, Respondent violated Rule 201.

C. Rule 406 – A CFP Board designee who is an employee shall perform professional services with dedication to the lawful objectives of the employer and in accordance with this Code of Ethics

The Commission determined that Respondent failed to perform professional services with dedication to the lawful objectives of the employer when he engaged in a private securities transaction with a client and failed to: 1) give prior written notice to his firm regarding his outside business activities; and 2) obtain prior written approval from his firm regarding his outside business activities, in violation of his firm's company policy requiring disclosure of outside business activities. Respondent's firm terminated him for violating this policy. Therefore, Respondent violated Rule 406.

D. 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 determined that Respondent failed to perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities when he engaged in a private securities transaction with a client and failed to: 1) give prior written notice to his firm regarding his outside business activities; and 2) obtain prior written approval from his firm regarding his outside business activities, in violation of NASD Conduct Rules 3040 and 2110. Thus, Respondent violated Rule 606(a).

E. 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 determined that Respondent failed to perform professional services in accordance with the applicable rules, regulations and other established policies of CFP Board when he engaged in a private securities transaction with a client and failed to: 1) give prior written notice to his firm regarding his outside business activities; and 2) obtain prior written approval from his firm regarding his outside business activities, in violation of his firm's company policy requiring disclosure of outside business activities. As a result, Respondent violated Rules 201, 406, 606(a) and 607. Thus, Respondent violated Rule 606(b).

F. 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 determined that Respondent engaged in conduct that reflects adversely on his integrity and fitness as a CFP Board designee, upon the marks, and the profession when he: 1) engaged in a private securities transaction with a client and failed to: a) give prior written notice to his firm regarding his outside business activities; and b) obtain prior written approval from his firm regarding his outside business activities, in violation of his firm's company policy requiring disclosure of outside business activities; and 2) failed to disclose to a client the referral fee he received from his colleague for the client's outside investment. Thus, Respondent violated Rule 607.

G. Rule 5.1 – A certificant who is an employee/agent shall perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's Code of Ethics

The Commission determined that Respondent failed to perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's *Code of Ethics* when he failed to provide his firm with timely, honest responses to their questions regarding Respondent's private securities transaction with a client. Respondent's firm terminated his employment as a result of his omission. Thus, Respondent violated Rule 5.1.

H. Rule 6.5 – A certificant shall not engage in conduct which reflects adversely on his or her integrity or fitness as a certificant, upon the CFP[®] marks, or upon the profession

The Commission determined that Respondent engaged in conduct that reflects adversely on his integrity and fitness, upon the CFP[®] marks, and upon the profession when he failed to provide his firm and FINRA with timely, honest responses to their questions regarding Respondent's private securities transaction with a client. Respondent's firm terminated his employment as a result of his omission. Thus, Respondent violated Rule 6.5.

IV. Discipline Imposed

The Commission found grounds for discipline under Articles 3(a) and 3(d) of the *Disciplinary Rules*. Article 3(a) provides grounds for discipline for a violation of the *Code of Ethics*. The Commission found Article 3(a) grounds for discipline because Respondent violated the *Code of Ethics* Rules discussed above. Article 3(d) provides grounds for discipline for any act which is the proper basis for professional suspension. Respondent received a seven-month suspension from FINRA, providing grounds for discipline under Article 3(d).

Based on the above rule violations and grounds for discipline, the Commission issued an Order to Suspend for seven months Respondent's right to use the CFP[®] marks pursuant to Article 4.3 of the *Disciplinary Rules*.

The Commission cited the following mitigating factors:

1. Respondent did not attempt to persuade his client to invest in the outside business activity;
2. Respondent was not aware that he would receive a referral fee, and disclosed to his client when he did become aware that he would receive a referral fee;
3. Respondent was out of the financial planning business for one year due to the FINRA suspension, and did not use the CFP[®] certification marks at that time;
4. Respondent notified his clients that he was not able to service their financial planning needs during the FINRA suspension;
5. Respondent is now reregistered with a different broker dealer, and a large percentage of his former clients have moved their business back to him;
6. Respondent was quite remorseful; and
7. Respondent reported his FINRA suspension to CFP Board in a timely manner.

The Commission also cited the following aggravating factors:

1. Respondent borrowed money for the outside business investment; and
2. Respondent was not truthful with FINRA initially, nor with his employer.