

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES  
NUMBER 26886

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This is a summary of a decision issued following the June 2012 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® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he: 1) sent anonymous letters to former clients falsely identifying himself as a former Compliance Officer with a broker-dealer; 2) denied, under oath, any involvement in writing the anonymous letters during his deposition testimony, but later admitted that he answered falsely under oath and knew the answers were false when he provided the original testimony; and 3) violated the terms of a preliminary injunction prohibiting him from contacting former clients, resulting in a Contempt of Court Order, three-day jail term and \$500 fine.

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

**2008 Former Firm Civil Suit**

In February 2008, Former Firm filed a Complaint against Respondent in the Court. The Complaint raised allegations of breach of contract and misappropriation of trade secrets by asserting that Respondent had taken client information and contacted clients of Former Firm in violation of his employment agreement. The parties entered into an Agreed Preliminary Injunction (“Preliminary Injunction”) in February 2008. The Preliminary Injunction permitted Respondent to accept business from clients or potential clients who initiated contact as long as he submitted those names to Former Firm by 5:30 pm each day. Respondent filed an Answer to the Complaint denying the claims<sup>1</sup> and requested that the Civil Suit be submitted to FINRA for arbitration pursuant to FINRA regulations. The issue as to the appropriate forum to resolve the dispute was the subject of several appeals and the end result was two separate proceedings, one before FINRA, discussed below, and another in Court.

Former Firm filed a Motion for Contempt of Court seeking sanctions against Respondent. In December 2008, the judge granted Former Firm’s Motion for Contempt against Respondent. According to Respondent’s attorney, the Motion was precipitated by telephone calls Respondent

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<sup>1</sup> Respondent asserted the employment agreement was unenforceable because it was not entered into with, or properly assigned to, Former Employer and was overbroad.

made to two individuals who were clients of Former Firm. The Court held Respondent in contempt for his attempt to solicit business from Client 1. As a result of its Contempt Order, the judge sentenced Respondent to three days in jail. The judge also fined Respondent \$500.

In December 2008, Former Firm filed a Motion for Sanctions against Respondent. Former Firm alleged that in January 2008, one month prior to Respondent's departure from Former Firm, Respondent submitted several anonymous, defamatory letters to Former Firm's clients. Former Firm alleged that Respondent identified himself in the letters as a former Compliance Officer with Broker-Dealer, which he later admitted he was not.

Respondent provided a copy of one of the letters, which stated the following: 1) A Former Firm employee ("Employee"), was not properly licensed in the State to buy and sell individual stocks or to sell variable annuities; 2) Former Firm was aware of this situation, yet approved all client paperwork; and 3) Former Firm's clients should file complaints with FINRA and the Securities and Exchange Commission ("SEC") against Former Firm. Respondent stated that "both arbitration panels dismissed [Former Firm's] defamation claims because the substantive information contained in the letter related to Employee's license issues was true."

In Former Firm's Motion for Sanctions, it alleged Respondent perjured himself during his deposition taken in October 2008 when he repeatedly denied any involvement with writing the letters. Former Firm engaged two forensic experts, a handwriting expert and a fingerprint expert. Their expert reports indicated, to a reasonable degree of scientific certainty that Respondent lied under oath about his knowledge and involvement with the letters. After learning about the expert reports, Respondent submitted an errata sheet to his deposition, correcting ten answers to questions related to his knowledge of the creation and addressing of the letters. In a supplemental deposition, Respondent admitted that he answered falsely under oath and knew the answers were false when he provided the original testimony. In January 2009, a private arbitrator fined Respondent \$17,000 for lying under oath during his deposition. In March 2012, Respondent provided documentation to CFP Board evidencing payment of approximately \$17,000 towards the fine. Although not required to do so, Respondent's colleague paid approximately \$6,000 towards Respondent's fine.

In August 2009, the arbitrator:

- 1) determined the Employment Agreement entered into by Former Firm and Respondent was unenforceable because it was overbroad;
- 2) imposed a Permanent Injunction, ordering Respondent to refrain and desist from:
  - a) disclosing and/or using Former Firm's confidential information and trade secrets;
  - b) competing with Former Firm by providing services offered by Former Firm to its existing clients;
  - c) soliciting, directly or indirectly, Former Firm's existing clients; and
  - d) disclosing any information contained in Former Firm's client files to any competitor of Former Firm; and

3) determined that Respondent breached his employment agreement by improperly soliciting advisory clients of Former Firm, which caused damages to Former Firm of approximately \$4,000.

The Arbitrator also ordered Respondent to pay:

- 1) Approximately \$26,000 in attorneys' fees and court costs to Former Firm; and
- 2) Approximately \$5,000 in punitive damages To Former Firm.

The Arbitrator found insufficient credible evidence to support Former Firm's remaining claims, including its defamation claim. The Court confirmed the Arbitrator's Arbitration Award in April 2010.

### **2008 Former Firm FINRA Arbitration**

In April 2009, the Panel: 1) denied and dismissed all of Respondent's claims, including tortious interference with contractual relations, fraud, business disparagement and defamation; 2) determined that the Non-Solicitation of Clients Covenant contained in the Employment Agreement was unenforceable as overly broad; 3) determined that Former Firm breached its fiduciary duty by failing to adequately supervise the activities of Employee by allowing her to perform duties without appropriate licenses; 4) determined that the Former Firm was jointly and severally liable to Respondent and required Former Firm to pay Respondent \$25,000 in attorneys' fees; and 5) dismissed all Former Firm's counterclaims, including breach of fiduciary duty, business disparagement, defamation, and libel.

### **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 engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when: 1) in January 2008, while still employed at Former Firm, Respondent sent anonymous letters to Former Firm's clients falsely identifying himself as a former Compliance Officer with Broker-Dealer; and 2) in October 2008, Respondent denied, under oath, any involvement in writing the anonymous letters during his deposition testimony. In December 2008, during a supplemental deposition, Respondent admitted that he answered falsely under oath and knew the answers were false when he provided the original testimony. The arbitrator fined Respondent approximately \$17,000 for lying under oath. Therefore, Respondent violated *Code of Ethics* 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, while still employed at Former Firm, Respondent sent anonymous letters to Former Firm's clients identifying himself as a former Compliance Officer with Broker-Dealer. Respondent had never been a Compliance Officer with Broker-Dealer. Therefore, Respondent violated *Code of Ethics* Rule 201.

*C. 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 determined that Respondent failed to show respect for other financial planning professionals when, while still employed at Former Firm, Respondent sent anonymous letters to Former Firm's clients, expressing concerns about Former Firm's business practices and identifying himself as a former Compliance Officer with Broker-Dealer. Further, the Commission determined that Respondent's misstatements in the letters were not fair and honorable competitive practices. Therefore, Respondent violated *Code of Ethics* Rule 602.

*D. Rule 606(b) – 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 services in accordance with applicable rules, regulations and other established policies of CFP Board when he: 1) sent anonymous letters to Former Firm's clients falsely identifying himself as a former Compliance Officer with Broker-Dealer; 2) denied, under oath, any involvement in writing the anonymous letters during his deposition testimony, but later admitted that he answered falsely under oath and knew the answers were false when he provided the original testimony; and 3) violated the terms of the Preliminary Injunction, resulting in a Contempt of Court Order, three-day jail term and \$500 fine. As a result, Respondent violated Rules 102, 201, 602, and 607. 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 Commission determined 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) sent anonymous letters to Former Firm's clients falsely identifying himself as a former Compliance Officer with Broker-Dealer; 2) denied, under oath, any involvement in writing the anonymous letters during his deposition testimony, but later admitted that he answered falsely under oath and knew the answers were false when he provided the original testimony; and 3) violated the terms of the Preliminary Injunction, resulting in a Contempt of Court Order, three-day jail term and \$500 fine. Therefore, Respondent violated *Code of Ethics* 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, 602, 606(b) and 607 of the *Code of Ethics*. Pursuant to Article 4.3 of the *Disciplinary Rules*, the Commission issued a one-year suspension. In addition to the two-year suspension, the Commission required Respondent to complete 12 hours of continuing education during the period of his suspension. The 12 hours of continuing education had to consist of six individual courses concentrating on professional conduct and fiduciary responsibility as found in topics 76-78 of CFP Board's Principal Topics List. Respondent was not permitted to count the 12 hours of remedial education required by the Commission towards the normal 30 hours of continuing education required for renewal every two years.

In imposing a two-year suspension, the Commission considered as mitigating factors that:

- 1) CFP Board previously dismissed this matter twice;
- 2) CFP Board exercised its right to reopen this matter but failed to provide specific reasoning for its decision;
- 3) Respondent cooperated with CFP Board's investigation; and
- 4) Respondent has no prior disciplinary history.

The Commission considered in aggravation that:

- 1) Respondent's testimony during the hearing lacked credibility. Specifically, Respondent stated that Client Z was his client when the record shows that Client Z was a client of Former Firm. A further contradiction occurred when the Respondent stated that he called Client Z after recognizing her voice on a voicemail; however, Client Z stated in an affidavit that she did not call Respondent;
- 2) Respondent did not express remorse for his conduct. Respondent stated that he thought what he did with respect to the anonymous letters he mailed to clients of Former Firm was an ethical thing for a CFP® professional to do;
- 3) Respondent only admitted that he perjured himself after he found out that Former Firm engaged the services of a forensic handwriting and fingerprint experts who concluded that the anonymous letters were in fact written by Respondent;
- 4) Respondent did not know if he currently provided financial planning to his clients. After further questioning, Respondent stated that he assumed he was providing financial planning services since he tries to "cover all bases." Respondent admitted, however, that he does not execute a formal financial planning agreement or other document referencing that the service being provided is financial planning; and
- 5) Respondent allowed his colleague to pay part of his contempt fine.