

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 26931

This is a summary of a decision issued following the February 2014 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 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*.

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when she: 1) assisted a client with obtaining restitution from an insurance company after taking two withdrawals in an Annuity contract year with the knowledge that it would reduce the guaranteed withdrawal benefits of the Annuity; and 2) altered dates on a client document.

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

2009 Customer Complaint

Respondent’s client was a victim of a Ponzi scheme and needed cash immediately to cover his living expenses. Respondent advised the client to take an Internal Revenue Service (“IRS”) Code Section 72(t) withdrawal from his variable annuity, which had a guaranteed minimum withdrawal benefit (“Annuity”). Respondent advised the client to take withdrawals in December 2008 and January 2009, so the withdrawals would be in two separate tax years and in compliance with the requirements of the IRS 72(t) rule.

In July 2009 the client contacted Respondent regarding his June 2009 Annuity statement and expressed concerns about the lowered account value. Respondent contacted the insurance company and learned that the two withdrawals were taken during the same annuity contract year and exceeded the guaranteed annual withdrawals. Because the client exceeded the guaranteed annual withdrawal, the insurance company adjusted the guaranteed withdrawal benefit and the guaranteed annual benefit downward. Respondent admitted that she neglected to research and communicate the Annuity contract terms. Respondent requested that insurance company restore the client’s Annuity account to the amount it would have been if the withdrawals were taken in two separate contract years. According to Respondent, the insurance company requested that the client make the request in writing, therefore making it an official complaint. In the formal written complaint, the client stated he was unaware of the effects the January 2009 withdrawal would have on his account and that had he known, he would not have taken the withdrawal.

In October 2009 the parties settled the complaint by agreeing to restore the clients’ accounts to their pre-adjusted amount. The settlement cost \$41,000 paid entirely by an individual contribution from Respondent Respondent stated that her Errors and Omissions insurance covered the settlement amount.

2011 Resignation

In December 2010, Respondent's client signed paperwork to buy a variable annuity to replace an old annuity. Shortly thereafter, the client began the process of rolling over his 401k into the same annuity. Respondent instructed the client to sign a new Variable Annuity Disclosure form ("VAD"). Respondent initially instructed the client to date the VAD to correspond with the original application but was later advised by her firm that the VAD should be dated the date it was signed by the client. In December 2011, Respondent submitted the form to her firm. In January 2011, Respondent resigned from her firm. A report on Respondent's Form U-5 indicates she was permitted to resign following internal discovery that she submitted the signature page from a previously signed form and altered the date to facilitate a subsequent deposit into an existing variable annuity. The Form U-5 filing indicated that the client subsequently affirmed the transaction. In her statement to CFP Board, Respondent acknowledged altering the date on the VAD.

In 2011, the Financial Industry Regulatory Authority ("FINRA," previously the National Association of Securities Dealers or "NASD") conducted a review of the circumstances reported on Respondent's Form U-5. In March 2011, FINRA issued Respondent a Cautionary Action Letter. In the letter, FINRA cautioned Respondent with regard to FINRA Rule 2010 and NASD Rule 3110(a). FINRA Rule 2010 states "a member, in the conduct of her business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 3110(a) states, "each member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 under the Securities Exchange Act of 1934."

III. Commission's Analysis and Conclusions Regarding Rule Violations

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

CFP Board's Complaint alleged that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when she advised her client to make two withdrawals from her Annuity account in the same contract year but neglected to properly research and communicate the Annuity contract terms, resulting in a decrease in the Annuity guarantee amount.

The Commission determined that during the hearing Respondent made statements that were inconsistent with her statements to CFP Board during its investigation and with the statement she made to FINRA. For example, in the record Respondent indicated that she made an error in advising the client to make two withdrawals during the Annuity contract year that would reduce the guaranteed withdrawal benefit and the guaranteed annual benefit. These statements were in direct conflict with Respondent's testimony during the hearing that she and the client knew the withdrawals would impact the guaranteed withdrawal benefit and the guaranteed annual benefit. Based on Respondent's testimony during the hearing, the Commission determined that Respondent properly researched and communicated the terms of the Annuity contract. Given that the record indicated that the client would have taken the withdrawals regardless of the consequences, Respondent acted in the best interest of her client by taking the actions she did. The Commission determined, however, that Respondent made a misstatement to the insurance company and her errors and omissions insurance carrier by stating that she made an error in processing the withdrawals in the same contract year. Respondent failed to exercise reasonable and prudent professional judgment in her actions in attempting to have the client made whole. Thus, Respondent violated *Code of Ethics* Rule 201.

B. Rule 607 violation – 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.

CFP Board's Complaint alleged that Respondent engaged in conduct that reflects adversely on her integrity and fitness as a CFP Board designee, on the marks, and on the profession when she advised her client to make two withdrawals from his Annuity account in the same contract year but neglected to properly research and communicate the Annuity contract terms, resulting in a decrease in the Annuity guarantee amount.

The Commission determined that during the hearing Respondent made statements that were inconsistent with her statements to CFP Board during its investigation and with the statement she made to FINRA. For example, in the record Respondent indicated that she made an error in advising the client to make two withdrawals during the Annuity contract year that would reduce the guaranteed withdrawal benefit and the guaranteed annual benefit. These statements were in direct conflict with Respondent's testimony during the hearing that she and the client knew the withdrawals would impact the guaranteed withdrawal benefit and the guaranteed annual benefit. Based on Respondent's testimony during the hearing, the Commission determined that Respondent properly researched and communicated the terms of the Annuity contract, despite what was in the record. Given that the record indicated that the client would have taken the withdrawals regardless of the consequences, Respondent acted in the best interest of her client by taking the actions she did. The Commission determined, however, that Respondent made a misstatement to the insurance company and her errors and omissions insurance carrier by stating that she made an error in processing the withdrawals in the same contract year. Respondent engaged in conduct that reflected adversely on her integrity and fitness as a CFP Board designee, on the marks, and on the profession by attempting to have the client made whole. Thus, Respondent violated *Code of Ethics* Rule 607.

C. Rule 701 violation – A CFP Board designee shall provide services diligently.

CFP Board's Complaint alleged that Respondent failed to provide services diligently when she advised her client to make two withdrawals from his Annuity account in the same contract year but neglected to properly research and communicate the Annuity contract terms, resulting in a decrease in the Annuity guarantee amount.

The Commission determined that Respondent and the client were fully aware of the Annuity contract terms and made the withdrawals with knowledge of the consequences. Respondent then took actions to attempt to remedy these consequences. As discussed above, the Commission determined that Respondent may have acted improperly in doing so, but Respondent's diligence was not at issue. Thus, Respondent did not violate *Code of Ethics* Rule 701.

D. Rule 4.3 violation – A certificant shall comply with applicable regulatory requirements governing professional services provided to the client.

The Commission determined that Respondent failed to comply with applicable regulatory requirements governing professional services provided to the client when she altered the date on a client document and submitted the document to her firm in violation of FINRA Rule 2110 and NASD Rule 3110(a). The Commission noted that Respondent admitted to this allegation during her testimony. The Commission also noted that her client instructed Respondent via email to change the date and Respondent's supervisor instructed her to date all documents with the same date and to shred the documents. Respondent followed her supervisor's instructions and was under pressure due to a bonus structure. Thus, Respondent violated *Rules of Conduct* Rule 4.3.

E. Rule 4.4 violation – A certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients.

The Commission determined that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services to the clients when she altered the date on a client document and submitted the document to her firm. The Commission noted that Respondent admitted to this allegation during her testimony. The Commission also noted that her client instructed Respondent via email to change the date and Respondent's supervisor instructed her to date all documents with the same date and to shred the documents. Respondent followed her supervisor's instructions and was under pressure due to a bonus structure. Thus, Respondent violated *Rules of Conduct* Rule 4.4.

F. Rule 6.5 violation – 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 her integrity and fitness as a certificant, on the CFP® marks, and on the profession when she altered the date on a client document and submitted the document to her firm in violation of FINRA Rule 2110 and NASD Rule 3110(a). The Commission noted that Respondent admitted to this allegation during her testimony. The Commission also noted that her client instructed Respondent via email to change the date and Respondent's supervisor instructed her to date all documents with the same date and to shred the documents. Respondent followed her supervisor's instructions and was under pressure due to a bonus structure. Thus, Respondent violated *Rules of Conduct* Rule 6.5.

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* or *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 201 and 607 of the *Code of Ethics* and Rules 4.3, 4.4 and 6.5 of the *Rules of Conduct*. Pursuant to Article 4.1 of the *Disciplinary Rules*, the Commission issued the Respondent a Private Censure. The Commission also required Respondent to complete 12 hours of remedial education in the areas of professional conduct and fiduciary responsibility.

The Commission considered as mitigating factors that:

1. Respondent's conduct occurred more than five years prior to the hearing;
2. Respondent's former employer appeared to be acting in a vindictive manner when it filed a Form U-5 regarding Respondent's actions in changing the dates;
3. Respondent had two liens, one of which was cleared at the time of the hearing and Respondent had a repayment schedule in place for the other; and
4. Respondent's conduct did not cause any client harm and both clients at issue in this matter were very happy with the service they received from Respondent.

The Commission considered as aggravating factors that:

1. Respondent's testimony during the hearing did not demonstrate remorse or a complete understanding of her actions;
2. Respondent had one previous CFP Board matter from 2007; and
3. The record indicated that Respondent misled the insurance company and her errors and omissions insurance carrier to make her client whole.

In arriving at its decision, the Commission consulted *Sanction Guidelines* 11 (Diligence), 14(a) (Failure to Disclose to CFP Board) and 20 (Fraud, Misrepresentation or Deceit). The Commission also consulted *Anonymous Case Histories* 19875 and 15982.

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