

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 27453

This is a summary of a decision issued following the June 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 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 he: 1) assisted a client to amend his living trust and pour-over will that provided compensation and assets to the client’s life partner and multiple charities; and 2) failed to respond to CFP Board’s requests for information.

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

2011 Civil Suit

PME was a client of Financial Services, Inc. where SK managed his investment portfolio until 2004. Until the time of his death, PME lived with his life partner, RM, in two adjoined condominium units in a small building where PME also owned two additional condominium units. Over his life, PME built an investment portfolio worth approximately \$3.25 million. In 2003, PME hired an attorney to assist him in drafting a living trust and pour-over will (“2003 Trust”). According to the 2003 Trust, upon PME’s death his home would pass to RM and the \$3.25 million in securities and two additional condominium units would pass to 75 different non-profit organizations (“NPOs”). PME also designated a corporate trustee to administer the 2003 Trust. The 2003 Trust specifically granted the University Performances \$100,000 and the Blind Babies Foundation \$36,000.

SK retired sometime in 2004, and at her recommendation, Respondent assumed the investment management duties for PME portfolio. At that time, Respondent was in a registered domestic partnership with JZ. In addition to assuming the investment management duties for PME’s portfolio, Respondent regularly socialized with PME and RM. JZ was not in attendance during those social interactions and it is unclear what relationship, if any, PME had with JZ. RM did not meet JZ until after PME’s death in 2010. Respondent and JZ’s domestic partnership ended in 2008 but the two maintained a friendship and business relationship.

In or around 2008, PME’s health began to decline and he suffered two strokes that severely impaired his physical and cognitive abilities. In May 2008, an individual thought to be either Respondent or JZ, downloaded a Form Living Trust form from the internet that then was amended and became the 2008 Trust. The 2008 Trust named JZ the successor trustee and sole beneficiary of all assets upon the death of PME. In May 2008, PME signed the 2008 Trust in Respondent’s office. Neither RM nor an attorney was present at that time. All witnesses to the signing of the 2008 Trust were Financial Services, Inc. employees and reported directly to Respondent.

PME passed away in August 2010. At that time, RM was unaware of the existence of the 2008 Trust. In January 2011, JZ filed a Petition for Order Confirming Successor Trustee and for Petition Ordering Modifying Trust (“JZ Petition”) with the Superior Court. The JZ Petition confirmed that the 2008 Trust was executed through a “do-it-yourself estate planning kit” and without the assistance of legal counsel. Without outside assistance, it is unclear how PME would have obtained the estate planning kit as he was physically impaired and did not own a personal computer.

Respondent stated that PME wanted to change the 2003 Trust because he did not want to leave RM homeless but was concerned about leaving any money to RM because he struggled with managing money. Respondent further stated that the 2003 Trust did not provide any money for RM to maintain the condos he would receive and he did not like the list of charities because his only passion was the opera. Respondent testified during the hearing that SK hired the attorney and created the list of charities on her own without input from PME. Finally, Respondent stated that he encouraged PME to meet with an attorney to create a life estate for RM, but PME refused to spend money on legal fees.

Respondent further testified that PME obtained the 2008 Trust from RM’s computer and that Respondent was not involved in obtaining the 2008 Trust. Respondent stated that he read the trust and had the documents signed and notarized in his office. Respondent also testified that while the 2008 Trust disinherited RM, there was a “gentleman’s agreement” that JZ would take care of RM while he was alive. JZ would also transfer the remainder of the money to charities of RM’s choice. Respondent did not provide any documentation of the “gentlemen’s agreement.”

The record reflected that JZ attempted to carry out the “gentleman’s agreement.” Court documents demonstrated that JZ attempted to conform the 2008 Trust by pleading that PME “omitted” to include a gift of a life estate consisting of two condos for RM and that the 2008 Trust would pay any expenses associated to the condos. The Superior Court would ultimately amend the 2008 Trust to incorporate these provisions of the “gentleman’s agreement.” The record also contained an unsigned, undated and unrecorded quitclaim deed from JZ to RM granting RM a life estate in the two condos.

Respondent also testified that he turned down PME’s request that he serve as trustee. Respondent stated that he recommended other possible trustees, but that PME rejected any suggestions. Finally, Respondent recommended that PME talk to JZ about being trustee because JZ had been managing his father’s trust.

In November 2011, the Regents of the University filed a petition to invalidate the 2008 Trust and to reinstate the 2003 Trust. The petition alleged elder financial abuse, interference with prospective economic advantage and unjust enrichment on the part of Respondent, Respondent’s firm/broker-dealer, and JZ.

In June 2012, the Superior Court issued an Order Preliminarily Approving Class Action Settlement (“Preliminary Settlement”). The Preliminary Settlement provided to the class a payment of \$3,000,000 and repayment of the proceeds from the sale of two of the condominiums. Respondent did not contribute to the Settlement as all proceeds therein were derived from PME’s estate and were reallocated per the 2003 Trust.

III. Commission's Analysis and Conclusions Regarding Rule Violations

- A. *Rule 102 Violation – 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.*

CFP Board's Complaint alleged that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly made 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 when he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client's life partner and multiple charities; 2) attempted to appropriate the client's assets for Respondent's own personal gain by having his domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will; and 3) failed to provide a response to CFP Board with regard to his conduct. According to Article 6.2(b) of the *Disciplinary Rules*, failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. Respondent refused multiple requests to provide information related to the above conduct.

The Commission determined that CFP Board did not prove the allegations in its Complaint relating to the 2008 Trust. The Commission determined that there was no evidence that Respondent induced PME to change the 2003 Trust. Respondent stated that PME wanted to change the 2003 Trust because he did not want to leave RM homeless but was concerned about leaving any money to RM because he struggled with managing money. Respondent further stated that the 2003 Trust did not provide any money for RM to maintain the condos he would receive and he did not like the list of charities because his only passion was the opera. Respondent testified during the hearing that SK hired the attorney and created the list of charities on her own without input from PME. Respondent stated that he encouraged PME to meet with an attorney to create a life estate from RM, but PME refused to spend money on legal fees. Finally, the Commission determined that there was no evidence to demonstrate that Respondent induced PME with the 2008 Trust document.

The Commission also determined that there was insufficient evidence to determine that Respondent attempted to appropriate PME's assets for Respondent's own personal gain by having Respondent's domestic partner named as the successor trustee and sole beneficiary of the 2008 Trust. Respondent stated that PME wanted to change the 2003 Trust because he did not want to leave RM homeless but was concerned about leaving any money to RM because he struggled with managing money. These wishes appear to be reflected in the "gentleman's agreement" testified to by Respondent during the hearing.

While there was no documentary evidence of the "gentleman's agreement," there was ample evidence in the record to corroborate Respondent's assertion that there was a "gentleman's agreement." Court documents demonstrate that JZ attempted to conform the 2008 Trust by pleading that PME "omitted" to include a gift of a life estate consisting of two condos for RM and that the 2008 Trust would pay any expenses associated to the condos. This would have alleviated PME's concerns that RM would be homeless under the 2003 Trust, while having any expenses for the two condos paid for by the trust. The Superior Court would ultimately amend the 2008 Trust to incorporate these provisions of the "gentleman's agreement." The record also contains an unsigned, undated and unrecorded quitclaim deed from JZ to RM granting RM and life estate in the two condos.

In addition, the Commission determined that there was no evidence that Respondent personally benefitted from the changes to the 2008 Trust. Respondent testified that he turned down PME's request that he serve as trustee of the 2008 trust and that ultimately PME chose JZ as the trust and beneficiary of the

estate. Further, there was corroborating evidence of the “gentleman’s agreement” as is noted above. Finally, Respondent’s registered domestic partnership with JZ ended shortly after the 2008 Trust was put in place and prior to JZ becoming the successor trustee. Respondent never received any assets from the 2008 Trust and CFP Board did not present any evidence that JZ ever took advantage of his position as trustee.

The Commission declined to draw an adverse inference under Article 6.2 because Respondent did provide a response, albeit a brief one, to CFP Board’s requests. Respondent also testified credibly at the hearing. Given Respondent’s response and testimony, the Commission did not feel that it could draw an inference based solely on an untested civil complaint.

The Commission determined that Respondent failed to cooperate, but that those allegations were improperly raised under the *Code of Ethics* given that all of his conduct occurred after January 1, 2009, when CFP Board ceased enforcing the *Code of Ethics* as a set of rules. Thus, Respondent did not violate *Code of Ethics* Rule 102.

B. 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 he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client’s life partner and multiple charities; and 2) attempted to appropriate the client’s assets for Respondent’s own personal gain by having his domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will. According to Article 6.2(b) of the *Disciplinary Rules*, failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. Respondent refused multiple requests to provide information related to the above conduct.

For the reasons stated in Rule 102 above, the Commission determined that CFP Board failed to prove that Respondent did not exercise reasonable and prudent professional judgment in providing professional services. Thus, Respondent did not violate *Code of Ethics* Rule 201.

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

CFP Board’s Complaint alleged that Respondent failed to act in the interest of his client when he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client’s life partner and multiple charities; and 2) attempted to appropriate the client’s assets for Respondent’s own personal gain by having Respondent’s domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will. According to Article 6.2(b) of the *Disciplinary Rules*, failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. Respondent refused multiple requests to provide information related to the above conduct.

For the reasons stated in Rule 102 above, the Commission determined that CFP Board failed to prove that Respondent did not act in the interest of his client. Thus, Respondent did not violate *Code of Ethics* Rule 202.

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

CFP Board's Complaint alleged that Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board when he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client's life partner and multiple charities; 2) attempted to appropriate the client's assets for Respondent's own personal gain by having Respondent's domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will; and 3) violated Rules 102, 201, 202, 607 and 702(a) of the *Code of Ethics*. According to Article 6.2(b) of the *Disciplinary Rules*, failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. Respondent refused multiple requests to provide information related to the above conduct.

For the reasons stated in Rule 102 above, the Commission determined that CFP Board failed to prove that Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board. Thus, Respondent did not violate *Code of Ethics* Rule 606(b).

E. 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 his integrity and fitness as a CFP[®] professional, upon the marks, or upon the profession when he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client's life partner and multiple charities; 2) attempted to appropriate the client's assets for Respondent's own personal gain by having his domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will; and 3) violated Rules 102, 201, 202, 606(b) and 702(a) of the *Code of Ethics*. According to Article 6.2(b) of the *Disciplinary Rules*, failure to provide requested information may give rise to an adverse inference with respect to the underlying subject matter. Respondent refused multiple requests to provide information related to the above conduct.

For the reasons stated in Rule 102 above, the Commission determined that CFP Board failed to prove that Respondent engaged in conduct that reflects adversely on his integrity and fitness as a CFP[®] professional, upon the marks, or upon the profession. Thus, Respondent did not violate *Code of Ethics* Rule 607.

F. Rule 702(a) Violation – A financial planning practitioner shall enter into an engagement only after securing sufficient information to satisfy the CFP designee that the relationship is warranted by the individual's needs and objectives.

CFP Board's Complaint alleged that Respondent failed to enter into an engagement only after securing sufficient information to satisfy the CFP[®] professional that the relationship is warranted by the individual's needs and objectives when he: 1) induced a client to amend his living trust and pour-over will that provided compensation and assets to the client's life partner and multiple charities; 2) orchestrated the creation of a new living trust and pour-over will that no longer provided for the client's long-time life partner, contrary to the client's original wishes; and 3) attempted to appropriate the client's assets for Respondent's own personal gain by having his domestic partner named as the successor trustee and sole beneficiary of the living trust and pour-over will.

For the reasons stated in Rule 102 above, the Commission determined that CFP Board failed to prove that Respondent did not enter into an engagement only after securing sufficient information to satisfy himself

that the relationship was warranted by the client's needs and objectives. Thus, Respondent did not violate *Code of Ethics* Rule 702(a).

G. Rule 6.1 Violation – A certificant shall abide by the terms of all agreements with CFP Board.

According to Article 6.2 of the *Disciplinary Rules*, CFP Board shall give written notice to a respondent that he or she is under investigation and of the general nature of the allegations. A respondent has 30 calendar days from the date of the notice to respond. According to Article 6.2(a), failure to respond within 30 days will result in the matter being referred to a hearing panel. On December 20, 2011, CFP Board mailed a NOI to Respondent's address of record requesting a written statement from Respondent and documentation relating to the Civil Suit. Respondent failed to submit a response to the NOI.

Although not required by the *Disciplinary Rules* at that time, CFP Board then took the additional step of providing Respondent a second and third opportunity to respond when it sent an additional request for response on February 16, 2012 and October 10, 2012. Respondent failed to submit a response. Respondent admitted that he violated Rule 6.1 in his answer to CFP Board's Amended Complaint. Thus, Respondent violated Rule 6.1 of the *Rules of Conduct*.

H. Rule 6.5 Violation – A certificant shall not engage in conduct which reflects adversely on integrity or fitness, 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 submit a response to CFP Board's NOI, 2nd NOI, and 3rd NOI. Respondent admitted that he did not respond in full to CFP Board's requests in his answer to CFP Board's Amended Complaint. Thus, Respondent violated Rule 6.5 of the *Rules of Conduct*.

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* and/or *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 6.1 and 6.5 of the *Rules of Conduct*. Pursuant to Article 4.1 of the *Disciplinary Rules*, the Commission issued a Private Censure to Respondent.

The Commission considered as a mitigating factor that neither Respondent nor JZ benefitted personally from the 2008 Trust. All the funds from the 2008 Trust, with exception of \$1 million in expenses were restored to the intended beneficiaries of the 2003 Trust.

The Commission considered as aggravating factors that:

1. Respondent intentionally failed to respond to CFP Board requests for information; and
2. PME was harmed because he died not knowing that his estate plan was radically different than his stated objectives for the 2008 Trust.

In arriving at this decision, the Commission did not consult any Anonymous Case Histories as the facts of this case presented a unique set of circumstances. The Commission also consulted *Sanction Guideline 17* (Failure to Respond to a CFP Board Request for Information or Notice of Investigation).