

FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA

CONDUCT REVIEW COMMISSION (CRC)

DISCIPLINARY PANEL

**GUIDANCE NOTE – No 1/2019**

**‘MINOR INSTANCES OF UNSATISFACTORY CONDUCT’**

**UNDER THE FPA DISCIPLINARY REGULATION 2019**

**Purpose – to provide information and guidance about what approach the CRC takes to minor instances of misconduct**

1. This Guidance Note seeks to assist Financial Planning Association of Australia (FPA) Members, staff and Disciplinary Panels on when and how to categorise conduct of Members as being only a **‘minor instance of unsatisfactory conduct’**. This term is defined in the FPA Disciplinary Regulation 2019 (DR).
2. When such a categorisation has been made, a less serious range of sanctions can be applied to the Member, if they have been found to have breached a provision of the FPA Code of Professional Conduct (the Code). For example, expulsion from the FPA is not an available sanction for these cases<sup>1</sup>.

**Nature of this Guidance Note – it is not binding, but it seeks to assist**

3. The decision to be made on sanctions for established breaches of the Code is not one that can be the subject of hard and fast rules for every type of misconduct. Each case has to be considered on its own facts and merits. That said, there may be similarities between many misconduct<sup>1</sup> allegations and the circumstances in which they are made.
4. This Guidance Note therefore does not bind Disciplinary Panels of the FPA; it is intended to assist them. It may be revised from time to time.

**What does a minor instance of unsatisfactory conduct mean?**

5. The term *‘minor instance of unsatisfactory conduct’* is defined in clause 6 of the FPA Disciplinary Regulation 2019, as follows:

***‘Minor Instance of Unsatisfactory Conduct’ means a Breach that in the opinion of the Chair of the Conduct Review Commission is appropriate to consider minor in nature, having regard to factors such as:***

- a) the impact of the Breach;*
- b) whether the breach or its consequences were unintended;*
- c) any acknowledgement by the Member of the Breach; or*
- d) any remedial action taken by the Member; and*
- e) the public interest.’*

6. This Guidance Note deals with six main questions:

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<sup>1</sup> Schedule E to the FPA Disciplinary Regulation 2016 sets out the actions which may be taken where there is a minor instance of unsatisfactory conduct. Schedule B sets out sanctions and costs for breaches generally and includes additional possible sanctions of expulsion, supervised practice and other discipline. Schedule B sanctions may not be imposed if a Disciplinary Panel decides that the conduct was a minor issue.

- **General considerations** - what are some of these, which need to be taken into account in deciding that a particular breach is or is not a minor instance
- **'appropriate'** - in particular, when might it be appropriate to classify conduct as minor?
- **When** should such a determination be considered?
- **Practical issues** - are there any practical issues to be managed in making determinations that a breach is minor?
- **Who should make** such a determination?
- **What sorts of conduct** might or might not appropriately be regarded as minor within the meaning of the phrase?

### General considerations

7. It seems clear that, of its nature, a classification that something is minor involves an acknowledgment that the conduct has occurred: that is, that it happened and that there has probably been a breach.
8. When a member, whose conduct is under review at a CRC Panel hearing, argues that they did not breach a provision of the Code, but that if they did it was 'only minor', the Panel will need to proceed with caution. There may be other allegations in respect of which no such contention is made. If the Panel then makes a determination on only one aspect, (that it was minor), it risks not being able to look in a balanced way at all of the conduct, so as to determine an appropriate sanction overall. It might also raise risks about the impartiality of the Panel.
9. For this reason, if it is argued that the Member did not breach a provision of the Code, but that if they did it was 'only minor', the Panel will need to ensure that it focusses only on the question of whether that breach and other breaches have occurred, at that stage of the hearing. For their part, the member cannot have it both ways before a determination of a breach has been made and expect at that point in the proceedings to be told that there will only be a lesser sanction, unless they are acknowledging that they breached in respect of all of the allegations.
10. To put it another way, classifying conduct as being a minor instance is fundamentally about the appropriate sanction to be imposed, not about whether there was a breach. Any such contention about the seriousness of the conduct should really be made when the sanction or penalty is being considered.
11. This is made clear by the factors set out in the definition of minor instance. These extend beyond the breach itself (indeed the only stated factor going to breach relates to intention), to its impact and any acknowledgments of regret and steps taken to remedy the conduct in question.
12. From the wording of the definition, there are several explicitly mentioned factors:
  - The word 'minor' has a number of meanings but most relevantly it means *'lesser, as in size, extent, or importance, or being the lesser of two'*;<sup>2</sup>
  - because of the two words, '*such as*' in the list of five factors set out in the definition it is not an exhaustive or complete list; this means that the underlying purpose of the Code must also be kept in mind in deciding on sanctions and in deciding on appropriateness;
  - the other factors are the **impact** of the breach; whether it was **unintentional**; was there an **acknowledgment**; and was there **any remedial action** taken. Consideration of these factors is self-explanatory.

### Appropriate?

13. The final factor is the **public interest**; this requires additional comment, which is set out below. One of the reasons why this factor was added in the 2019 version of the DRs is that even though the FPA Code of Professional Practice is a private, Association Code, (as opposed to

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<sup>2</sup> See Macquarie Dictionary, Revised Third Edition page 1217

being part of public law or legislation), consideration of the public interest or public protection is of major importance.

14. This is because a central purpose of the FPA Code and the associated DRs which help to make the Code work in practice is to protect the public. This is quite apart from the important reasons of self-regulating the profession and establishing appropriate standards of professional conduct. Thus:
- it must be *appropriate* to consider a breach minor in nature;
  - this requires, as stated, consideration of all the circumstances or in other words judgment, including whether for example a member under review poses a risk to the general public in the way they are operating and will continue to operate, as evidenced by the allegations before a Panel;
  - the existence or satisfaction of any of the criteria does not mean that, just because they have been met, conduct should be regarded as a minor instance in the defined sense; it must also be **appropriate** to consider conduct to be a minor instance; and
  - the public interest in only those who are suitably qualified being allowed to practise, and in public protection and public confidence in the profession need to be maintained when considering sanctions for conduct found to be in breach of the Code.

#### When should this be considered?

15. There are a number of provisions in the Disciplinary Regulation which will require that the phrase Minor Instance of Unsatisfactory Conduct be considered. These are explored below.
16. **First**, a member might wish to contend that their conduct was 'only minor'. **Clause 41** of the DR enables an Investigation Officer to recommend to the CRC Chair that an alleged breach should be treated as such. The result could be that, if the Member agrees to comply with a course of action set out in Schedule E (such as undertaking remedial education, paying fines or giving an undertaking), the matter will be disposed of. Such a case could arise where, based on their knowledge of the member and their investigation, the Investigation Officer may be confident that conduct by a member was a one – off.
17. An agreement by a Member of this kind amounts to a finding that the breach is proven, and no Panel consideration would be necessary, because of **clause 43** (which is to that effect).
18. **Second**, when an Investigation Officer completes their report, they are required under **clause 51 f)** to address the issue of whether any possible breach could be summarily disposed of as being only a minor instance.
19. **Third**, under **clause 104** of the Disciplinary Regulation the panel is required to make a determination in respect of each allegation before it that is proven or dismissed. It is required to provide a statement of reasons for a determination as to Breach under **clause 107**. **Clause 113** requires that where a determination as to Breach is made without the Panel going on to consider sanction, the Panel is required to give the parties an opportunity to make submissions as to sanction prior to making a determination on that question.

#### Practical considerations

20. Unless a member or the Investigation Officer have made a submission that a matter is minor, and there is a limited number of allegations, it is probably sensible for a Panel usually to defer making any ruling about whether conduct is minor, until the panel has:
- considered all of the allegations;
  - formed a view about the totality of the conduct alleged against a member;
  - decided, if it proposes to find that there has been a breach, to give the member not only the reasons for that finding but has given them the chance to make submissions on sanctions to be imposed.

21. There may be some circumstances when it may be appropriate to move from a breach determination straight to a sanctions decision, without any adjournment or reasons having been given at that stage. Even in such circumstances the member must always be given a chance in accordance with clause 113 to make submissions.
22. An example might be where all parties, the Panel included, are comfortable that conduct was isolated; and that one or more of the sanctions set out in Schedule E to the Disciplinary Regulation are sufficient.
23. Finally, just because a breach is not a minor instance does not mean that the fine which can be imposed must be greater than the maximum for such minor instances (\$5000). All that is set is a maximum fine of \$20,000. A fine could be less than \$5000.

**Who should make such a determination that conduct is a minor instance?**

24. The revised wording in the definition of minor instance of unsatisfactory conduct requires that the opinion of the CRC Chair (which includes a Deputy Chair who is presiding) be that the conduct fits the definition. The purpose of this change was to ensure that an independent mind is brought to bear on less serious conduct and that an independent mind is always brought to the issue whether conduct should be treated as minor. An example could be where clause 41 is to be used.
25. On other occasions the practical effect of the definition is that in a three-member panel situation, where two panel members could form a majority, at least one of those in the majority would need to be the Chair.

**What sorts of conduct may or may not be minor?**

26. As indicated above and in the definition, the words 'such as' indicate that other factors might be considered in deciding on whether conduct can be classified as a minor instance of unsatisfactory conduct. The views of members of the CRC Disciplinary Panel, meeting in Sydney in November 2018 on this general question are set out below. These are organised in two groups:
  - examples where the conduct might be able to be classified as a minor instance; and
  - examples where the conduct would usually not appropriately be so regarded.
27. In every case regard will need to be had to all the facts, circumstances and submissions of the parties and, of course to the DRs.
28. **Examples where the conduct might be able to be classified as a minor instance:**
  - No or minor financial impact on the client and whether any impact has been addressed and rectified;
  - No evidence of systemic misconduct;
  - No evidence of incompetence;
  - The context - the conduct was 'minor';
  - Was the conduct a mistake, what was its impact and was it corrected to no disadvantage to the client?
  - No fraud;
  - A general or minor clerical error was made;
  - Not signing a document which is not required by law and there was no impact on the client;
  - No negative impact on the FPA (which might go to the question of appropriateness);
  - The relative circumstances of the client, so that for example a relatively small dollar amount might have little or no impact on a well-to-do client, but the same amount may have much more significance to another client;
  - No evidence of an intentional error;
  - Did the member have processes to deal with the issue;
  - The existence of systems to ensure there would be no repetition of the conduct;

- What was the reason for the breach and was it to assist the client?
- No impact on the reputation of the profession;
- No significant public interest issue.

**29. Examples where the conduct probably should not be classified as a minor instance**

- [The reverse of each of the above examples];
- No file notes or other suitable records kept as a matter of practice;
- No FSG provided to the client at all or a significantly erroneous one;
- Not providing adequate disclosure;
- Not prioritising the client's interests over those of the adviser;
- Not placing investments in a timely manner and this was a systemic issue;
- Advice not implemented after client instructions and this had a significant effect on the client;
- Wilful or deliberate acts, with or without an intention to enrich the adviser;
- Was the conduct unbecoming of the FP Profession;
- A series of incompetent actions which alone do not amount to minor instances but taken together might.

Issued by the Chair and Deputy Chair of the CRC  
3 May 2019

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<sup>i</sup> In this Guidance Note, the terms 'misconduct' and 'unsatisfactory conduct' are, for convenience, used interchangeably, but the defined term in the FPA Disciplinary Regulation is 'Minor Instance of Unsatisfactory Conduct'.