

**FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA
CONDUCT REVIEW COMMISSION (CRC)**

DISCIPLINARY PANEL

DISCIPLINARY REGULATION 2019

PROCEEDINGS REGARDING: SON HUYNH (350042)

DETERMINATION: CRC 2022-2 (final)

PANEL: Gregory Burton SC, FCI Arb (Chair), Presiding Member

Cherie Feher FPA, Panel Member

Michael Miller FPA, Panel Member

HEARING DATE: 30 November 2022

DETERMINATION DATE: 12 December 2022

DETERMINATION:

1. The member is on or before 31 December 2022 to provide a written apology to the complainant in the following substantive terms: "I apologise to you for my following conduct: I did not provide to you in a timely fashion the records to which you were entitled on ending the relationship of client and financial adviser; I did not adequately communicate with you the reasons for the delay in terms of personal medical constraints and make alternative arrangements for record provision; I did not confirm in writing our telephone and in-person discussions; as a consequence, I did not confirm in writing the effect of ending the client-financial adviser relationship on any future requests for assistance you may make; I did not advise you of a sell-down alternative which did not require a Record of Advice in October 2019 and December 2019."
2. On or before 28 February 2023 the member is to undertake individual training (estimated to be approximately one day in duration) with a financial services compliance consultant in respect of the options and obligations connected with general financial advice, personal financial advice and execution-only/transaction without advice services, with the consultant to be chosen by agreement between the member and the responsible manager of the

member's financial services licensee and employer (the responsible manager).

3. On or before 30 June 2024 the member is to complete the first unit of the Certified Financial Planner (FPA Professionalism) programme or any alternative course of training that the responsible manager considers provides substantively similar professional training and development.
4. If the member does not comply with order 2 and does not provide to the FPA on or before 28 February 2023 signed written intention to comply with order 3, then on or before 31 March 2023 the member is to pay to the FPA \$9,990.

REASONS FOR DETERMINATION

Background, relevant provisions of Disciplinary Regulation, process

1. On 26 April 2022, the FPA Investigating Officer (IO) provided a report (the IO report) to the then Chair of the FPA Conduct Review Commission (CRC), alleging that Mr Son Huynh (the member) had engaged in conduct which constituted a number of breaches of the FPA Code of Professional Practice (the Code), arising from a complaint submitted 25 August 2020 from a former client of the member. This attracts the jurisdiction, under the FPA Constitution and FPA Member and Affiliate Regulation 2022, of the CRC which is exercised in accordance with the procedures in the FPA Disciplinary Regulation 2019 (the DR). The member, who had been a member since 6 February 2014, remained subject to jurisdiction despite not having renewed his membership at 30 June 2022, because the events the subject of complaint occurred while he was a member.
2. The IO report was sent to the member on in about late April 2022. The member was given an extension of time to respond, until 13 May 2022. No response was received within the extended period.
3. Under Sections 6.1 and 6.2 rules 53 and 54 of the DR, the Chair may summarily dismiss all or part of a complaint. This did not occur.
4. Section 7.1 rule 57 of the DR requires that, to the extent a complaint or investigation is not summarily dismissed under Sections 6.1 and 6.2, the

Chair must direct the FPA to commence Disciplinary Proceedings under Section 7.1 of the DR. This is done by directing the FPA to issue a Notice of Disciplinary Proceedings against the member on the basis that the member has a case to answer in respect of one or more of the allegations of breach.

5. The DR does not require the Chair to form a view as to whether or not the member actually breached any provision of the Code (and the Chair formed no such view), only whether or not under rule 57 there is a case to answer in respect of the alleged breaches. By reason of rule 66, the Chair is not required to provide reasons.
6. The question whether or not a member may be found to have breached a provision of the Code is to be determined under Part 8 of the DR on the basis, under rule 95 in that Part, of the reasonable satisfaction of the relevant Disciplinary Panel (Panel).
7. Likewise, in the direction process the Chair forms no view as to the sanctions, if any, that ought to be imposed on the member, if it eventuates that a Panel was to conclude that the member has committed a breach or breaches as alleged. The question of the seriousness or otherwise of any found breach is one that a Panel will need to address if a finding of breach is established.
8. Section 7.1 rule 58 of the DR requires the direction to commence Disciplinary Proceedings to particularise those allegations of Breach (a term defined in rule 6(h)) for which the member has a case to answer.
9. Section 7.1 rule 59 of the DR permits the Chair to re-formulate an allegation of Breach if the Chair is of the view that the Breach particularised by the IO does not conform to the alleged conduct reported by the IO. The then Chair re-formulated the allegations of Breach in reliance on that provision, stating:

“I have re-formulated the allegations of the IO, in the main to give as precisely as seems possible dates of the alleged conduct and also to state *within* the allegation the provision which it appears is being relied on by the IO to make each allegation. I have also split the

last of the allegations into two matters as there appears to me to be two breaches which are being alleged and in order to give the member a fair chance to respond to each.”

10. Pursuant to the direction dated 23 May 2022 the FPA issued to the member a Notice of Disciplinary Proceedings dated 4 October 2022 which contained the re-formulated allegations (the Notice).
11. The Notice set down the hearing for 30 November 2022 and provided an opportunity in accord with timetable directions for various matters including provision of further material by the member and in reply by the FPA, any application to extend time or adjourn the hearing and to be represented. Applications were to be accompanied by reasons with supporting documents.
12. The member’s application to adjourn the hearing made 25 October 2022 was refused on the same date by the Chair for lack of substantiation. The member was advised that any renewal of application with appropriate substantiation would be reviewed. No further application was received but the member on 26 October 2022 submitted a letter for the hearing which will be discussed below.
13. At the appointed time on 30 November 2022, after some technological misstarts, the member appeared and represented himself. The IO and the member were successively attested on the truth of their evidence in chief including the IO report and were cross-examined. Each made oral submissions supplementing their written material. The submissions included liability and sanction if any of the four alleged Breaches was found. The Panel reserved its decision, which is hereby given with its reasons.

Allegations of Breach in the Notice of Disciplinary Proceedings

14. The allegations of breach in the Notice are as follows:
 1. **It is alleged that the Member upon receiving a written request, failed to provide the client or a person authorised by the client original documents and electronic files related to the provision of professional services within 21 days from the date of the request in that the Member was obstructive to the Complainant’s request to transfer her client file and documents to the Complainant or to the Complainant’s newly**

engaged financial planner herself or her newly engaged financial planner, in that further having received a request on or about 28 May 2020 requesting transfer of documents from the Member to the Complainant, and despite the Complainant having repeated such requests on or about 2 June 2020, 16 June 2020, 6 July 2020 and on her behalf by the new advisor on 11, 14 and 21 August 2020 and on 1 and 8 September 2020, the Member failed to fully comply with the request until 7 October 2020.

It is the FPA's view that, if proved, this breaches FPA Code of Professional Practice as follows:

Rule 7.29 of Practice Standard 7 "A Member must, upon receiving a written request by the client, and subject to the legal requirements of the Member's employer or authorising Licensee, provide the client or a person authorised by the client, any original documents and electronic files related to the provision of professional services within 21 day from the date of the request. Unless compelled by law, this does not include documents which have been prepared or received by the Member in the provision of professional services, such as internal notes, memoranda, quotes or other working documents."

- 2. It is further alleged that the Member failed to fulfil his professional commitments in a timely and thorough manner and to take due care in planning, supervising and delivering professional services in that the Member failed adequately to communicate and explain how the Complainant's action in ceasing to pay ongoing service fees would impact on the service that he, the Member, was providing, or the responsibilities that would then devolve to the Complainant, and that the Member did not adequately document these changes, between 25 October 2018 and 31 December 2018 and subsequently.**

It is the FPA's view that, if proved, this breaches FPA Code of Professional Practice as follows:

Principle 8 Diligence "Provide professional services diligently: Diligence requires fulfilling professional commitments in a timely and thorough manner, and taking due care in planning, supervising and delivering professional services."

- 3. It is further alleged that the Member failed to fulfil his professional commitments in a timely and thorough manner and to take due care in planning, supervising, and delivering professional services in that the Member failed to implement the Complainant's request to sell securities within an acceptable time frame in October 2019.**

It is the FPA's view that, if proved, this breaches FPA Code of Professional Practice as follows:

Principle 8 as set out above.

- 4. It is further alleged that the Member failed to fulfil his professional commitments in a timely and thorough manner and to take due care in planning, supervising, and delivering professional services in that the Member failed to implement the Complainant's request to sell securities within an acceptable time frame in December – January 2020.**

It is the FPA's view that, if proved, this breaches FPA Code of Professional Practice as follows:

Principle 8 as set out above.

- 15.** The question whether or not a member may be found to have breached a provision of the Code is to be determined under Part 8 of the DR on the basis, under rule 95 in that Part, of the reasonable satisfaction of the relevant Disciplinary Panel (Panel).

Consideration and conclusions on Breach

- 16.** As to alleged Breach 1, In his letter of 26 October 2022 the member said:

"I accept that actions (and/or inactions) by me in this regard have caused unnecessary delay(s) in the transfer of necessary documentation; and subsequently (and inadvertently) undue stress on the Complainant.

I ask that clemency be given, in assessing the matter, given the context and unprecedented events (COVID, restrictions, etc.) we all were experiencing during this time. Our office/team was severely hampered by staff shortages which hindered our performance and deliverability of our service, and I take full responsibility. As explained in my previous response letters, there were circumstances where on at least one (1) occasion, an attempt was made to contact the Complainant via phone failed, to which a return call was never received.

As soon as we were able to hand the physical documents to the Complainant, we did so, and I can assure the FPA that at no time I (or my staff) had any intentions of being deliberately obstructive."

- 17.** As to alleged Breach 2, in the same letter the member said:

"I accept that I have not taken then necessary steps to document evidence to reflect and support (my) actions carried out that, in my opinion, adequately communicated and explained to the Complainant how the result of her ceasing to pay ongoing service fees would impact on the service we were providing. As outlined in my previous response letter (26 August 2021) during both an appointment on Thursday, 25 October 2018 and phone call on Thursday, 01 November, the Claimant was informed that our responsibility for the management of the SMSF and any other agreed services, including ongoing advice services, will effectively cease on the day the last payment is received and that she will be responsible for all matters relating to the management of the fund, including all of its requirements and responsibilities. I also informed her to ensure that she contacts all the relevant providers and update the fund's contact details, including physical and postal address, which were set up to use the relevant details of BL Advisory Group. The Claimant replied on both occasions confirming that she understood this.

The last ongoing service fee that we received occurred on **Thursday, 01 November 2018**; and hence it is reasonable to state that any previous services and responsibilities we had, ceased after this date."

- 18.** As to alleged Breaches 3 and 4, in the same letter the member said that both required a record of advice (ROA) and gave the timeline. For the first, the request was made 4 October 2019, it was not agreed to because the client-adviser relationship had ended some ten months earlier, but when on 10 October 2019 it was discovered that there was insufficient cash to comply with the ATO requirement, assistance was provided with an ROA on 14 October and sell-down occurred on 15 October with funds available 17 October. For the second, the request made 11 December 2019 was said by the client to be needed by 31 December; in telephone conversations on 16 and 17 December, confirmed in a further telephone conversation on 30 December, it was agreed to occur on 6 January 2020. An ROA was provided on 6 January 2020 and sell-down occurred on 7 January 2020. The invoices for each ROA and sell-down, not differentiated as to those two components, at \$440 each were issued but not paid until 9 November 2021.
- 19.** The member was asked during his oral evidence to confirm whether he accepted the alleged Breaches.
- 20.** On alleged Breach 1 the member said that he did not deny that he had caused delays, he asked for clemency and added new information, which the Panel accepts, that with some personal constraints at the time he arranged the physical transfer of the files as soon as he could. He gave details of the personal constraints which we have not reproduced for privacy reasons.

- 21.** On alleged Breach 2 the member accepted in retrospect that he should have confirmed with a written record but he did not accept that there was no communication with the former client, which took place in face to face meetings and telephone conversations. He said that the former client refused to engage in an ongoing service agreement but expected to continue to be treated as a fee-paying client. This repeated a view expressed in the letter already quoted and referred to. He pointed out that the fact that the former client did contact service providers was consistent with his communications with the former client, even if there was no written record as he now accepted there should have been.
- 22.** On alleged Breaches 3 and 4 the member said that he provided the assistance nearly a year after the fee-paying relationship ended, he had no obligation to do so but he did due to his knowledge of the former client's personal circumstances which meant that he felt he should assist. He would not go into those circumstances, quite properly, to protect the former client's confidentiality, beyond a general reference which we have not reproduced for reasons of privacy. He also had helped since he understood that the former client had not engaged another service provider and had no intention to move to another service provider since she believed that she was not in need of a service provider for advice, which was the reason that she had disengaged with the member at the end of 2018.
- 23.** In response to questioning the member said that he did not believe that providing an execution-only service for the sell-downs was an option and that an ROA was required under his licence. On this he set at the relevant time his own policy because he was self-licensed. He was now an employed authorised representative of another licensee and under that licensee's supervision and protocols.
- 24.** We consider that the member's candid acceptance in respect of Breaches 1 and 2 reflects accurately that his conduct did constitute a breach of the particularised rule and standard.
- 25.** On alleged Breaches 3 and 4 we find that the Breach is made out in each case. This is not for timing in respect of Breach 3, which was not

unreasonable in the circumstances. If we accept the member's evidence of the discussions with the former client, which we are inclined to do, the timing also was not unreasonable in respect of Breach 4.

26. The reason that we find these Breaches is that, once he chose (for good and compassionate reasons) to assist the former client, the member became obliged to inform the client (who had now become the client again as the service was to be invoiced) of the option of providing, at less expense, a sell-down service without an ROA. The member's self-imposed protocol of insisting on an ROA was unnecessary, reflected a lack of understanding of a professional service option, and denied the client the option of choosing that path.

Considerations and conclusions on sanction

27. The parties provided evidence and submissions on sanction if the Breaches were made out.
28. The member said that he was content to issue an apology to the former client on the matters of Breach that were found. He expressed in general terms a desire to re-join the FPA and to complete the programme to attain the standing of CFP.
29. The FPA did not change the views expressed in the IO report about the appropriateness of an apology and a monetary penalty, but added that the new information on the member's circumstances invited perhaps a less stringent view of the member's conduct.
30. We have come to the view that the member's conduct requires sanction but that the sanction should be tempered and moulded by the following factors: the member's recognition that his conduct fell short of some professional requirements; the member's being subject to supervision and policies of his licensee and employer; the member's acknowledgement that in the future he would undertake better record-keeping and communication with clients and former clients in relation to services; the member's stated desire to re-join a professional association, be subject to its standards and rules, and to undertake further training which will remedy the specific deficiency we have

found concerning sell-downs as well as reinforcing required standards and other requirements.

31. We also agree with the IO report and submissions the import of which was that the Breaches were not intentionally harmful but, rather, arose from an inadequate understanding of the requirements of managing a professional relationship.
32. Accordingly, we consider that the appropriate sanctions are an apology and requirements to undergo appropriate training on specific compliance obligations and broader professional development, the content of which we have set out in our orders.
33. We are mindful that the member is not currently renewed with the FPA, so far as we are aware is not presently a member of any other professional association with similar standards and that we cannot insist that certain arrangements are put in place between him and his employer and licensee.
34. Accordingly, if the member does not wish to engage with the orders we make concerning professional training and development, the alternative sanction ordered (in addition to the apology) is a fine of \$3,330 for each of Breach 1 and 2, totalling \$6,660, and a further fine of \$3,330 for Breach 3 and Breach 4 together since they involve the same underlying misunderstanding of the member's obligations as we have found.

Signed:



Gregory Burton SC



Cherie Feher CFP®



Michael Miller CFP®