

## Identifying “Serious” Misconduct

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Characterizing certain behaviour as “serious” professional misconduct has significant consequences. It may affect whether a complaint or investigation report will be referred to a discipline hearing. It can also determine the gravity of a sanction imposed upon a registrant if a finding is made.

Earlier this year the regulators for the dental, nursing and midwifery professions in the UK released the results of a study on “the concept of seriousness in fitness to practise cases”. In the UK, while more forward looking (in terms of focussing on changing future behaviour), the term “fitness to practise” roughly correlates to the concept of professional misconduct in Canada. The study involved analysis of actual cases, interviews with participants in the regulatory process, and a review of literature and other writings. The report has a number of observations that will be of assistance to Canadian regulators.

The study found that certain types of behaviour were more likely to be viewed as serious including dishonesty, sexual abuse, and certain criminal findings (especially if a custodial sentence was imposed). However, not every case in those categories were viewed as serious (e.g., falsifying notes did not always result in a serious sanction) and other types of conduct could also be viewed as serious depending on the circumstances.

Risk of harm to the client or to public safety is a key consideration as to the seriousness of the behaviour. Types of harm include:

- Physical harm,
- Emotional distress,
- Financial harm, and

- Abuse of trust (e.g., breach of confidentiality, crossing of boundaries, sexual misconduct).

Interestingly, the study found that the degree of the registrant’s engagement in the process (e.g., cooperation, providing an explanation, demonstrating insight, remorse, and remediation) had a significant impact on how seriously the regulator viewed the conduct both at the screening stage and at the adjudication stage. At the adjudication stage the degree of participation affected both finding and sanction. Legal representation was also viewed as significant, perhaps as it assists registrants in engaging in the process in a manner that minimizes the seriousness with which the conduct was viewed by the regulator. This observation raises some concerns about the fairness and equity of the regulatory process.

On a related note, the study identified attitudinal issues, especially “deep seated” attitudes, as significant to the seriousness of the conduct: “Attitudinal issues can be identified within the misconduct itself or within the registrant’s response to local or regulatory investigations, including the final hearings...”.

On the other hand, stressful working relationships, understaffing or other lack of resources, workplace culture (others engaged in similar behaviour without repercussions), inadequate training and supervision, organizational issues (e.g., lack of policies, problems with workplace technology) and other work environment issues were seen as making otherwise serious behaviours as being less significant.

The study found a fairly wide variability with how regulators approach the seriousness of private misbehaviour. The approaches to evaluating the significance of such actions includes:

- Relevance to professional practice,

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# Grey Areas

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

- Degree of carry-over risk to clients or the public,
- Whether the conduct was criminal,
- Use of the registrant's professional knowledge or status in the behaviour, and
- Whether violence was involved.

The study also found that there was little agreement as to whether misconduct affecting "public confidence in the profession" made the misconduct more serious. Some, not entirely consistent, perspectives on that issue include the following:

- Whether actions affect public confidence in the profession is too vague a concept to consider.
- How the public (especially the media) would perceive the behaviour, if it became known, is relevant to assessing its seriousness.
- Whether an objectively reasonable person would believe that the registrant should not be able to continue practising without restrictions means the misconduct is more serious.
- Where the conduct makes the public less willing to seek services from members of the profession, the misconduct is more serious.
- The need to send a message to the public and the profession, even if there was little risk of repetition by the individual registrant, means the misconduct is still serious.

The study found it troubling that there was little consensus on this issue.

The study also looked at what regulators could do to ensure consistency in approaches to the seriousness of similar behaviours (what the study called calibration and quality assurance). Suggestions include:

- Policies and training for decision makers,
- Independent legal advice,
- Team-based decisions,

- Having some experienced decision makers on the panel in every case,
- Post-decision case reviews, analysis and feedback, and
- The existence and impact of an external review body.

The study noted that there were differences in perspectives as to whether the seriousness of certain kinds of behaviour varied based on the nature of the professional contact with clients (e.g., physical touching, intimate disclosures), varying public expectations, risk profiles (e.g., how common serious disability or death can result), and the evolution of the views of the regulator. The study was not able to draw many conclusions from the available information on this point.

Some of findings made by the study include:

- The statutory ability of the regulator to impose remedial dispositions influences the type of cases that are referred to discipline.
- Regulators in a sector working together to provide similar guidance to their registrants could enhance consistency in approach.
- Using risk analysis when dealing with concerns is a preferred approach to assessing the seriousness of behaviour. "Consideration of harm is important, as it very closely relates to the statutory regulatory objective to protect the safety, health and wellbeing of the public."
- "Public confidence in the professions then, is a somewhat nebulous concept, and one which is not consistently interpreted by decision-makers though it plays an important role in decisions about seriousness at the impairment and sanction stages of [discipline] panel processes."
- Work environment considerations have recently gained prominence in the professional regulatory realm and warrant further analysis.

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- There “appears to be no consensus on how broadly or narrowly to draw connections between conduct in a registrant’s private life and their professional practice.”

While some of the observations made in the study may seem trite to experienced regulators, other comments are innovative and thought provoking.

The report can be found at:

[https://www.nmc.org.uk/globalassets/sitedocuments/news/february-2022\\_concept-of-seriousness-in-fitness-to-practise-cases.pdf](https://www.nmc.org.uk/globalassets/sitedocuments/news/february-2022_concept-of-seriousness-in-fitness-to-practise-cases.pdf)