General Dental Council | protecting patients, regulating the dental team

Case Examiner
Indicative Outcomes Guidance
(26 February 2018)

Index

Part 1: Background & introduction

1. This document has been developed by the General Dental Council ("the GDC") for use by the Case Examiners when considering allegations referred to them by the Registrar.

2. Guidance on indicative sanctions has been utilised within fitness to practise proceedings for over a decade and its use has received strong endorsement from the Courts. This document is intended to support the Case Examiners' decision making, by providing a framework which enables them to focus their attention on the relevant issues.

3. The aim is to provide guidance for the Case Examiners on the broad types of cases which they may consider ought to be considered by a Practice Committee (and, if appropriate, the Interim Orders Committee), and which cases can be closed with no further action, advice or a warning.

4. As it is only guidance, it does not, however, seek to impose a "tariff" or to fetter the Case Examiners' discretion to dispose of a case as they see fit, based on its own individual facts and the available evidence. The Case Examiners are always free to depart from it, although this will heighten the obligation to give reasons for their particular decision.

5. This document is intended to be a living document, to be reviewed in light of case law, updates to the GDC's Standards, feedback from the Case Examiners and other internal and external stakeholders.

Part 2: Features of cases and benchmarks

Examples of types of cases which it may be appropriate for the Case Examiners to refer to a Practice Committee

6. Whilst, as set out above, each case will be considered on its merits, and the Case Examiners are not bound to dispose of a case in a certain manner, there are certain cases where, if they consider that there is a real prospect of the facts of the allegation being found proved and of the statutory ground (misconduct etc.) being established, there is likely to be a real prospect of current impairment being established, and referral to a Practice Committee is likely to be warranted.

7. This is particularly likely to be the case where there is a risk to the public, or where the need to uphold proper professional standards and public confidence in the registrant and in the professions would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of the case. It is also the case that repetition is an aggravating factor, and whilst on the first occasion it may be appropriate to, for example, close a case with no further action, advice or a warning, repetition of unacceptable behaviour may indicate that a registrant's fitness to practise is impaired.

8. If the Case Examiners decide that a case in one of these categories ought not to be considered by a Practice Committee, they should give much fuller reasons, so that all parties can understand how they reached the particular conclusion.

9. Examples of types of cases which it may be appropriate for the Case Examiners to refer to a Practice Committee include where there are features such as:

- dishonesty or deliberately misleading behaviour, deliberate overtreatment, misleading clinical behaviour, criminal convictions or cautions (or equivalent criminal penalty) regarding dishonesty as well as the misappropriation of NHS funds
- persistent and deep-seated attitudinal issues or patterns of behaviour which are incompatible with professional registration
- persistent lack of insight into seriousness of actions or consequences
- sexual impropriety, indecency or violent or dysfunctional behaviour
- the abuse of children, vulnerable adults or any form of abusive behaviour including being placed on a barred list
- a serious or repeated lack of integrity on the part of the registrant
- a criminal conviction involving violence or sexual misconduct or a criminal conviction resulting in a custodial sentence
- a caution for an offence relating to violence, sexual misconduct, or dishonesty
- the receipt of a finding of impaired fitness to practise by another regulator
- an unwillingness to practise or behave in an ethical or responsible manner including in relation to misleading advertising or the inappropriate or misleading use of the title 'specialist'
- a serious, deliberate or repeated breach of confidentiality which does not fall within a DPA exemption
- deliberately or recklessly causing avoidable harm to patients

- supervised neglect over a prolonged period or resulting in serious consequences for a patient
- repeatedly failing to undertake treatment on the NHS owing to a lack of remaining allocated funds
- failing to ensure continued continuity of care for patients who are midway through a significant course of treatment
- knowingly undertaking treatment or performing tasks or procedures for which the registrant has not had training, lacks the requisite skills or lacks the necessary competence
- working outside scope of practice
- failing to maintain an adequate standard of professional performance, knowledge or competence in areas relevant to the registrant's practice such that there is a real risk to the health and safety of patients or the public
- the repetition of behaviour, where the Investigating Committee or Case Examiners have previously provided advice or a issued a warning
- ignoring a foreseeable risk of harm to patients or repeated clinical mistakes
- failing to maintain safe standards of premises, equipment or other aspects of the clinical environment or failure to ensure adequate protection for patients such that there is a real risk to the health and safety of patients or the public
- failing to maintain appropriate indemnity or registration or to provide evidence of appropriate indemnity or registration - *If the Registrant failed to have registration at the time of investigation this would be considered by the GDC's Illegal Practice team*
- failing to co-operate with an employer or the Council
- failing to act to protect patients from harm including not acting when a colleague is a risk to patients
- repeatedly or deliberately advertising services inaccurately or making claims which are unjustifiable, inaccurate or likely to confuse or cause members of the public to be misled
- the serious abuse of a clinical relationship; or other serious abuse of the privileged position enjoyed by registered professionals
- the misuse of prescribing privileges, including self-prescribing for financial or other personal gain or where there is evidence of an underlying health condition or of substance misuse; and prescribing drugs other than for use on patients in the course of day to day practice – *the ability to prescribe is a privilege and should not be abused*
- suffering from a recurring or remitting episodic health condition or any health condition which may potentially impair fitness to practise, judgement or insight

- prescribing inappropriate drugs, or inappropriate dosages especially when such prescribing is reckless or unjustified or has put patients at risk of harm
- poor record-keeping practice or failure in other administrative tasks essential to continued patient safety - *whilst this type of case may be amenable to remediation, the Committee will need to balance any such remediation with the wider public interest and the issue of insight and the likelihood of repetition*
- persistent failure to listen to or explain matters to patients or a failure to obtain appropriate consent, especially where such a failure has resulted in irreversible treatment or treatment which cannot be remedied adequately
- any serious abuse of position or other inappropriate or improper behaviour towards patients, the public, practice staff, other colleagues or trainees
- failure of duty of candour in failing to raise concerns about matters which may (or may have) posed a risk to patient or public safety; and/or by inhibiting others from raising concerns which may (or may have) posed a risk to patient or public safety
- a serious medical condition (including addiction or the misuse of drugs) or apparent failure to be following appropriate medical advice or other appropriate advice regarding modifying her or her practice as necessary in order to minimise risks to patients including ceasing work if advised
- practising where there is a risk of public or self-harm due to the use of alcohol or drugs
- a repeated failure to adhere to an NHS contract and to provide treatment on the NHS even when UDAs are no longer available
- failure to ensure adequate protection for patients or sufficient regard for patient safety

Examples of types of cases which it may be appropriate for the Case Examiners to dispose of with advice or a warning

10. There may also be cases where the Case Examiners have determined that there is a real prospect of some or all of the facts being proved, but that there is no real prospect of those facts amounting to misconduct or deficient professional performance (etc.) or, alternatively, that there is no real prospect of a Practice Committee finding the registrant's fitness to practise is currently impaired.

11. However, simply because there is no real prospect of a finding of misconduct, deficient professional performance (etc.) or current impairment being made does not mean that the issues in the case do not necessitate the provision of advice or a warning from the GDC. Accordingly, the Case Examiners may consider that, the absence of aggravating or mitigating factors, advice or a warning could be appropriate in these types of cases.

12. The examples below are not an exhaustive list of the types of cases which it may be appropriate for the Case Examiners to close with advice or a warning, but are intended to be useful as a quick reference guidance and an indicator for the Case Examiners both as to the position of the GDC, and of previous decisions made:

- a failure to keep up to date in general or take part in audit or appraisal – *advice may be appropriate for this type of case especially if it involved limited potential risk to patients. Although, as it is a potential lack of compliance with a fundamental tenet of safe practice, the Case Examiners may conclude a warning is more appropriate in certain cases*
- a single instance of poor communication or of rudeness which has no other aggravating features – *the Case Examiners may wish to consider issuing advice or, if serious, a warning as to appropriate communication standards and acceptable behaviour*
- poor diagnostic skills not resulting in significant patient harm or irreparable damage/one-off clinical mistakes – *advice may be appropriate in these types of case as the imposition of a warning may be viewed to be disproportionate*
- failing to undertake treatment on the NHS where appropriate; including failing to undertake treatment on the NHS owing to a registrant having used available funds (UDAs) already - *a warning may be appropriate for this type of case as it involves a potential risk to patients. As it involves deceptive behaviour, however, it may be appropriate to refer to a Practice Committee, depending on the circumstances of the case*
- relatively minor overtreatment of patients or overtreatment undertaken over a short period of time and not repeated – *advice or a warning may be appropriate for this type of case, depending on the circumstances*
- instances of isolated/unrepeated unprofessional or otherwise unacceptable behaviour – *a warning may be appropriate for this type of case as it involves potentially the need to send a signal to the public and the profession as to proper standards of behaviour*
- failing to maintain safe standards of premises, equipment or other aspects of the clinical environment – *so long as there was no real risk to patients or other aggravating feature(s), advice may be suitable for this type of case*
- failing to ensure continued continuity of care for patients (otherwise than midway through a significant course of treatment as per paragraph 132 above) – *a warning may be appropriate for this type of case*

- prescribing contrary to guidelines or prescribing inappropriate drugs or inappropriate dosages – *advice may be appropriate but a warning may be imposed owing to the potential risks to patients in receiving an inappropriate prescription. This assumes no serious patient harm occurred to the patient or no other aggravating feature*

- a criminal caution (including a conditional caution) *unless there are any aggravating features, such as that the caution relates to a violent, sexual or dishonesty type offence, a warning may be appropriate for this type of case*

- misleading behaviour which can include omissions as well as commissions – *a warning may be appropriate. This is owing both to the need to send an appropriate signal to the public as to the requisite standards of behaviour and owing to the potential for members of the public to have been misled*

- a criminal conviction (other than for violent, sexual or dishonesty type offences) not resulting in a custodial sentence – *a warning may be appropriate for this type of case*

- advertising services inaccurately or making claims which are unjustifiable, inaccurate or likely to confuse or cause members of the public to be misled – *a warning may be appropriate unless there are significant mitigating factors*

- one-off serious clinical mistakes – *a warning may be appropriate for this type of case, if there is a real prospect of misconduct being established*

- failing to maintain an adequate standard of professional performance, professional knowledge or competence in areas relevant to the practice – *a warning may be appropriate for this type of case*

- inappropriate commentary, statements or discussion on public social networking websites or other social media/websites/chat rooms/forums etc. – *the reputation of the profession and the continued public interest is paramount. For a first instance, advice may be a proportionate disposal; a warning might be appropriate if there is then repetition of the conduct*

- being disciplined or subject to completed disciplinary proceedings where an adverse finding short of dismissal or a finding of impairment was made by an employer, contracting agency or body or other regulator – *reasons should be given if the outcome of the Case Examiners is not consistent with the decision of the regulator and the level at which it restricted or affected the registrant's practice*.

Part 3: Specific types of cases

Personal behaviour

Sexual misconduct

13. Allegations of sexual misconduct encompass a wide range of behaviour, from criminal convictions for sexual assault and sexual abuse of children (including child pornography) to any form of sexually motivated behaviour involving patients and/or colleagues.

14. Sexual misconduct has the potential to undermine public trust and confidence in the profession. This is particularly so where:

    (i) there has been any abuse of the position of trust which exists between a patient and dental practitioner, or between a dental practitioner and a junior colleague;

    (ii) there has been abuse of children or vulnerable adults, particularly where there is also an element of grooming;

    (iii) a registrant has been convicted of a criminal offence involving sexually motivated or indecent conduct, or relating to child pornography; and/or

    (iv) the registrant has been required to register as a sex offender.

15. In those cases, the need to protect the public interest by maintaining public confidence in the profession, and by declaring and upholding proper standards of conduct is such that, where there is a real prospect of the facts being established, there is also likely to be a real prospect of misconduct being established and of a finding of current impairment being made by a Practice Committee.

16. In such cases, referral to a Practice Committee is likely to be appropriate.

Abuse of the privileged position enjoyed by registered professionals

17. The GDC has made it clear that patients have the right to be protected indefinitely from registrants who seriously abuse the trust placed in them, for example for their own sexual gratification or profit. It has outlined that dentistry relies on the existence of an intimate professional relationship between strangers, in circumstances in which patients have little choice but to be trusting. Everyone is vulnerable as a patient in a dental practice and therefore relies on the professional's trustworthiness, which they are entitled to expect because of the professional's registered status.

18. In addition to the responsibilities which come with the clinical relationship, registrants have other privileges which society has given them on the understanding that they will be used responsibly, for legitimate professional purposes. These privileges range from specific rights and access to less tangible privileges such as respect for one's professional opinion. The GDC has made it clear that registrants who abuse the trust which society places in them should forfeit the privileges which come with professional registration.

19. Cases involving inappropriate personal behaviour or the abuse of the position of a professional are serious and may jeopardise public trust and confidence in the dental professions. As such, the Case Examiners may consider that a referral to a Practice Committee is likely the appropriate disposal of a case if there is a real prospect of the facts alleged being found proved. Equally, in exceptional cases, the Case Examiners may wish to consider that a published warning is more appropriate bearing in mind

the issue of proportionality. If the Case Examiners determine to close the case, they would need to provide detailed reasons explaining the conclusions they have reached.

Violence

20. Violent behaviour is of concern to the GDC even though such behaviour may not be directly connected with dentistry. It can cause legitimate public concern about patients' and colleagues' personal safety in a professional context. Encouraging other registrants or members of the public to indulge in such behaviour could also be considered unprofessional.

21. In many cases, the violent behaviour will be alleged as impairment of fitness to practise on the basis of a criminal conviction or caution. Where no criminal conviction or caution resulted from the behaviour concerned, the Case Examiners may however be asked to consider the matter as an allegation of misconduct.

22. Occasionally, it will be alleged that the registrant's fitness to practise is impaired by reason of the Disclosure and Barring Service including the person in a barred list (within the meaning of the Safeguarding Vulnerable Groups Act 2006 or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007)[1] or the Scottish Ministers including the person in the children's list or the adults' list (within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007)[2].

23. Inclusion in a barred list results from information about relevant convictions or cautions and/or any other referral information assessed by the DBS using a comprehensive risk assessment process, which suggests the person may pose a future risk of harm.

Dishonesty

24. Patients, employers, colleagues and others have a right to rely on registrants' integrity. Important choices about treatment options and significant financial decisions can be made on the basis not only of registrants' skill but also of their honesty.

25. The GDC's position is that dishonesty, particularly when associated with professional practice, is highly damaging to public confidence in dental professionals as it undermines the trust that the public are entitled to have in registrants. In that regard, the Privy Council has emphasised that:

> *"…Health Authorities must be able to place complete reliance on the integrity of practitioners; and the Committee is entitled to regard conduct which undermines that confidence as calculated to reflect on the standards and reputation of the profession as a whole"*[3].

26. When considering whether there is a real prospect of dishonesty being established, the Case Examiners may wish to have regard to the test set out in Ivey[4] and which consists of subjective and objective elements. As such, the Case Examiners may wish to consider:

    (i) the actual state of the registrant's knowledge or belief in relation to the facts (the question being whether it is genuinely held); and, following this:

[1] see section 27(2)(h) of the Dentists Act 1984

[2] see section 27(2)(i) of the Dentists Act 1984

[3] *Dey v General Medical Council* [2001] UKPC 44

[4] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords) [2017] UKSC 67*

(ii) whether the registrant's conduct would be considered dishonest by the standards of ordinary decent people. There is no requirement for the registrant to appreciate that their conduct is dishonest by these standards.

27. In practice, it may be difficult, particularly at the Case Examiner stage, to be confident about a Registrant's knowledge or belief, as the only evidence about such may come from the Registrant themselves. As such, and without being tested, such evidence may not inevitably be accepted. In reality therefore, the key element of the test is the second element – the objective test – because even a genuinely held belief could still be found to be dishonest by reasonable people, depending on the circumstances.

28. It is important to bear in mind, however, and predominantly in respect of clinical opinion, the fact that a belief may be a minority one, and against the mainstream, does not necessarily mean that an adherence to such would be regarded as objectively dishonest.

29. Sometimes, an allegation of dishonesty must, however, inevitably flow from the other allegations. For instance, an allegation is made that a registrant failed personally to carry out essential investigations and that this amounts to misconduct. If the Case Examiners are satisfied that there is a real prospect of a finding that the registrant deliberately and falsely recorded the outcomes of those investigations, then an allegation of dishonesty would usually follow.

30. Where there is a real prospect of an allegation of dishonesty being found proved there is a presumption that the matter, unless minor, ought to be considered by a Practice Committee. This is because, regardless of whether or not there is a public protection issue, this type of misconduct has the potential to undermine the trust that both the public and the profession are entitled to have in registrants.

31. Serious dishonesty in professional practice may include (but is not limited to):

- defrauding an employer;
- misappropriation of NHS funds;
- falsifying or improperly amending patient records;
- submitting or providing false references;
- providing inaccurate or intentionally misleading information on a CV or other formal document;
- providing over-treatment[5];
- issuing practice policies which do not reflect the true NHS position;
- issuing practice policies which unduly influence patients to receive more expensive or unnecessary treatment;

[5] Issues of overtreatment can be complex and the Case Examiners will need to consider whether the evidence suggests that the treatment provided was, for example, reckless, unsupportable or carried out deliberately. The Case Examiners will need to take into account the fact that registrants are entitled to make clinical judgements so long as appropriate treatment planning and clinical record keeping is also undertaken.

- research misconduct, ranging from presenting misleading information in publications to dishonesty in clinical trials;

- failure to inform the GDC of a criminal proceedings or a criminal conviction; or

- making a false declaration on an application form.

32. Whilst there is an initial presumption that the GDC should take some action when the allegations concern dishonesty, there are cases alleging dishonesty that are so minor in nature that taking action on registration could be seen to be disproportionate. Such cases might include, in the absence of any other concerns, a failure to pay for a ticket covering all or part of a journey on public transport. In those circumstances, a warning is likely to be appropriate.

33. However, where minor dishonesty is concerned, issues such as repetition and attempts to cover up or disguise dishonest behaviour must be borne in mind by the Case Examiners. There is a presumption that repeated dishonesty, no matter how minor, should be referred to a Practice Committee for consideration bearing in mind the need to protect the public interest.

Misleading behaviour

34. In terms of misleading behaviour, circumstances where such an allegation (as opposed to an allegation of dishonesty) is raised by the Registrar may include where there was:

- an honest and genuine mistake, or an innocent explanation for the actions in question;

- no intention to mislead;

- no obvious benefit accruing to the registrant or practice; or

- a relatively minor element of deception with no risk of harm to patients or to the public interest.

35. Where the allegations relate only to misleading behaviour, with no other aggravating behaviour or circumstances, the Case Examiners may wish to consider that a warning or advice is appropriate and proportionate.

Criminal convictions

36. Under the Dentists Act 1984[6], a registrant's fitness to practise may be regarded as impaired by reason of a conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence[7].

37. A registrant's fitness to practise may also be regarded as impaired by reason of:

[6] see section 27(2)(d)/36N(2)

[7] where, unusually, the Case Examiners are considering an allegation arising from a conviction which does not involve an illegal act in England and Wales, the Case Examiners will need to check the case has been referred as a case of misconduct (as opposed to a conviction) and should consider the matter accordingly

- having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)[8];

- having agreed to pay a penalty under section 115A of the Social Security Administration Act 1992 (penalty as alternative to prosecution)[9]; or

- in proceedings in Scotland for an offence, having been the subject of an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging him absolutely[10].

38. Since 30 September 2013, registrants have been obliged to inform the GDC if they are subject to criminal proceedings anywhere in the world[11]. This means that a registrant must inform the GDC if anywhere in the world, on or after 30 September 2013, they:

(a) are charged with a criminal offence;

(b) are found guilty of a criminal offence;

(c) receive a conditional discharge for an offence;

(d) accept a criminal caution (including a conditional caution), or otherwise formally admit to committing a criminal offence;

(e) accept the option of paying a penalty notice for a disorder offence (in England and Wales), a penalty notice under the Justice Act (Northern Ireland) 2011 or a fixed penalty notice under the Antisocial Behaviour etc. (Scotland) Act 2004;

(f) receive a formal adult warning (in Scotland).

39. Registrants are not required to inform the GDC of a fixed penalty notice for a road traffic offence; a fixed penalty notice issued by local authorities (for example for offences such as dog fouling, or graffiti); or an antisocial behaviour, preventative justice, or other social order. For the purposes of the GDC's proceedings these do not count as "convictions" and, if referred to the Case Examiners, must be presented as an allegation of impairment by reason of misconduct.

40. A conditional discharge is a sentence following a finding of guilt made against the registrant. However, owing to the provisions of the Section 14 of the Powers of Criminal Courts Sentencing Act 2000, which states that a conditional discharge is not a conviction for any purpose other than the proceedings in which the order was made, the GDC must present the case as that of impaired fitness to practise by reason of misconduct and not by reason of conviction.

41. If the allegation is that of impairment of fitness to practise by reason of conviction, rather than misconduct, the Case Examiners should adjourn the case so that it can be re-assessed by the Registrar. Otherwise, the Case Examiners should consider the underlying behaviour or actions which gave rise to the sanction and to determine whether there is a real prospect of the facts alleged amounting to misconduct, and a Practice Committee making a finding of current impairment.

[8] see section 27(2)(e)(i)/36N(2)(e)(i) of the Dentists Act 1984
[9] see section 27(2)(e)(ii)/36N(2)(e)(ii) of the Dentists Act 1984
[10] see section 27(2)(f)/36N(2)(f) of the Dentists Act 1984
[11] Standard 9.3 of *Standards for the Dental Team (2013)*; *Guidance on reporting criminal proceedings (2013)*

42. As set out above, a registrant's obligation to inform the GDC of criminal proceedings arises as early as the charging stage. The Case Examiners will not normally see cases where the registrant has yet to stand trial, as such cases are likely to be put on hold pending the outcome of the criminal proceedings. However, in some circumstances, there may be cases where other elements of misconduct are progressed separately from the criminal matters, and these may come before the Case Examiners for determination.

43. The purpose of the GDC's fitness to practise process is not to punish the registrant a second time for a criminal offence[12]. Rather, it is to consider whether a registrant's fitness to practise may be impaired as a result of the criminal conduct and, if so, whether a matter ought to be considered by a Practice Committee which can impose restrictions upon registration in order to protect the public, maintain public confidence in the dental and dental care professions and their regulation, and declare and uphold proper standards for the dental and dental care professions.

44. In principle, where a registrant has been convicted of a serious criminal offence, he or she should not be permitted to resume practice until he or she has satisfactorily completed his sentence. The Courts have held that "*only circumstances which plainly justify a different course should permit otherwise*"[13].

45. When the Case Examiners are considering the issue of current impairment, they may wish to consider the length and type of sentence imposed by the criminal court, but should take care to properly appraise the nature and the gravity of the conduct, and should bear in mind that factors which are relevant to sentencing in the criminal courts may not be relevant to their own deliberations. Information on mitigation may also be relevant at this stage, although the Case Examiners must be careful to not go behind the facts of a conviction.

46. Whilst each case must be considered on its merits, there are certain categories of case where the presumption is that the matter ought to be considered by a Practice Committee, regardless of whether a custodial sentence was imposed or of any mitigation put forward. These will tend to be cases where the offences are indictable only[14] or "either way" offences[15] and as a consequence of the type of case, the public interest is engaged such that there is a real prospect of a finding of current impairment.

47. These may include (but are not limited to):

- cases of murder, manslaughter and other offences against the person (including any cases involving violence – in a domestic or non-domestic context - and racially or religiously aggravated offences);

- sexual offences (including rape, attempted rape, sexual assault, sexual activity with a child under 13, sexual activity with a child under 16, familial sexual offences, sexual activity with a person with a mental disorder, and abuse of children through prostitution and pornography, and sexual offences involving abuse of trust);

- burglary, robbery, theft, handling stolen goods and other offences involving an element of dishonesty including fraud and forgery, false or misleading statements etc.;

[12] *Dey v General Medical Council (Privy Council Appeal No. 19 of 2001)*

[13] This is known as the Fleischmann principle after the case of *Council for the Regulation of Health Care Professionals v (1) General Dental Council & (2) Alexander Fleischmann* [2005] EWHC 87 (Admin)

[14] i.e. cases which are triable only in the Crown Court

[15] as set out in Schedule 1 to the Magistrates' Court Act 1980

- arson or criminal damage endangering life;
- offences against the State or public order (including terrorist offences);
- firearms offences;
- obscene publications (including possession of indecent photographs of a child, possessing prohibited images of children or possession of extreme pornographic images);
- other convictions for offences with a racially or religiously aggravated element, or motivated by hostility or prejudice based on sexual orientation, disability or transgender identity.

48. Equally, there will be certain cases involving minor convictions (generally "summary only" matters i.e. those which may only be tried in the Magistrates' Court) or cautions, where the initial presumption is that the matter is likely not to require referral or that, if referred, is not likely to be considered serious enough to warrant a finding of currently impaired fitness to practise. These types of cases could include:

- one-off drink driving offences where there is no evidence of underlying health concerns. In considering the case and the prospect of a finding of current impairment the Case Examiners may wish to take into account the amount of alcohol consumed and the reasons for driving;
- disorderly behaviour whilst drunk and which does not involve violence; or
- minor criminal damage.

49. Convictions for such minor offences, or some other convictions not resulting in a custodial sentence might appropriately, on a first offence, result in the issuing of a published warning. The Case Examiners may consider that it is appropriate for that warning to remind the registrant of the requirement outlined in the GDC's *Standards for the Dental Team (2013)* to ensure that their conduct, both at work and in their personal life, justifies patients' trust in them and the public's trust in the dental profession[16].

50. As set out in the Case Examiner Guidance Manual, the GDC considers that as a matter of policy, a warning should be published, save that:

- the GDC will not publish, as part of a warning, any information which directly relates to the health or private and family life[17] of the registrant concerned, or which directly relates to any identifiable third party;
- otherwise, it will be for the Case Examiners to consider, on a case by case basis and balancing the public interest against the interests of the registrant, any exceptional circumstances giving rise to reason(s) why a warning which they are minded to issue should not be published.

51. In considering the above, the Case Examiners should bear in mind that the evidence which resulted in the registrant being convicted will normally have been heard as part of public proceedings in a criminal court. As such, it may appear contradictory for the Case Examiners not to publish a decision to issue a

[16] see Standard 9.1 of *Standards for the Dental Team (2013)*. Standard 6.3 of *Standards for Dental Professionals (2005)* required registrants to maintain appropriate standards of personal behaviour in all walks of life so that patients have confidence in you and the public have confidence in the dental profession

[17] i.e. the registrant's right to live his or her life privately, and to enjoy family relationships, without interference

warning in a case which has been already been publicly decided. In addition, where a registrant has been convicted of a criminal offence, publication of a warning has an important role in the maintenance of public confidence in the dental professions and their regulation, and the declaring and upholding of proper standards.

52. In considering the duration of the published warning, the Case Examiners should have regard to the criteria set out in paragraphs 173 and 174 of the Guidance Manual. In addition, in criminal cases, the Case Examiners may wish to consider the length of the sentence imposed by the court, which may be a helpful guideline to the Case Examiners in considering the issue of proportionality. If the duration of the warning differs markedly from the length of the sentence, the Case Examiners would be expected to provide reasons for this.

53. If the registrant has failed to inform the GDC of a conviction, or has failed to declare a conviction when required to do on an application form, the Registrar is likely to raise an allegation of dishonesty. Where the Case Examiners consider that there is a real prospect that dishonesty will be established, there may be a presumption of current impairment, and the Case Examiners may wish to refer the matter to a Practice Committee for determination. If dishonesty has not been alleged, the Case Examiners should consider adjourning to direct the Registrar to consider raising an allegation of dishonesty.

Cautions

54. A caution may be given when there is sufficient evidence for a conviction and it is not considered to be in the public interest to instigate criminal proceedings. Offenders must admit guilt and consent to a caution in order for one to be given.

55. Conditional cautions are another alternative to criminal proceedings, available in England and Wales, which enable offenders to be given a suitable disposal, involving rehabilitative and/or reparative conditions, without the involvement of the usual court processes. As for a caution, the offender must admit the offence and must sign a document under which he or she consents to being given a conditional caution.

56. Where a case is presented as a caution case, it is an allegation of impairment by reason of the caution itself. As a consequence, the Case Examiners should not go behind the admitted offence or the caution given, although it is, of course, for them to determine whether there is a real prospect of a Practice Committee making a finding of current impairment based on the matters alleged.

57. Unless the matter is very minor, or historic (in which no further action, or advice might be appropriate) the Case Examiners may consider that a warning is an appropriate disposal of such cases.

Other outcomes from the criminal process

58. In addition, the Case Examiners may occasionally encounter Scottish direct measures, where offenders may be given a warning by the Procurator Fiscal, given the option of paying a fine (also described as a "fixed penalty conditional offer"), given the option of paying compensation, or offered the chance of referral for specialist support or treatment. A direct measure does not involve an admission of guilt, but if a person does not challenge a direct measure within 28 days, the penalty is deemed accepted.

59. The Case Examiners may also encounter:

- fixed penalty notices issued under the Penalty Notice for Disorder scheme;

- preventative justice or other social orders (including anti-social behaviour orders, serious crime prevention orders, or parenting orders);

- restorative justice orders (through which parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future) which are not part of a conditional caution; and/or

- community resolution (where a minor offence or anti-social behaviour incident is resolved through informal agreement between the parties rather than via the criminal justice process).

60. Such cases should be framed as an allegation of impairment on the basis of misconduct rather than on the basis of conviction or caution. In each case, the Case Examiners should consider the underlying behaviour or actions which gave rise to the sanction, and should determine whether there is a real prospect of a Practice Committee considering that the facts alleged amount to misconduct, and making a finding of current impairment. If not, the Case Examiners may wish to conclude the matter with advice or a warning.

Social media and the internet

61. Registrants must bear in mind that there is an increased trend and public interest in the publication of opinions or discussion topics which take place on social networking sites such as Twitter, You Tube, Flickr, Facebook, LinkedIn, GDPUK, Instagram, Pinterest or Myspace (this list is not exhaustive) or as part of fan forum sites or other online interfaces. Care must be taken to ensure that a registrant does not deliberately or inadvertently bring the reputation of the profession into potential disrepute either through their actions or the actions of another. Registrants should take due care to ensure that any comments, posts, photographs, 'likes' or other publications are appropriate for public disclosure. Registrant's must be mindful that once published they have little to no control as to dissemination

62. The Case Examiners will need to consider cases involving social media or the internet carefully, bearing in mind the GDC's *Guidance on using social media (2013)* and apply the appropriate measure of caution when looking at an issue. The Case Examiners will need to bear in mind that notwithstanding the context of current political or media trends the question for them is the issue of currently impaired fitness to practise. Unless there are aggravating features, the Case Examiner may wish to consider that an appropriate response to this type of case, bearing in mind the issue of proportionality, will be a warning, unless it is a first occasion, in which issuing advice may be more proportionate.

Clinical cases

63. As a general principle, registrants are entitled to exercise clinical judgement and discretion, so long as this is done in partnership with patients and documented so that they are able to justify their decision[18].

64. In addition, case law[19] has established that a practitioner is not negligent if he or she has acted in accordance with a practice accepted as proper by a responsible body of practitioners skilled in that particular form of treatment, nor is he or she negligent merely because there is a body of opinion which would adopt a different technique.

[18] see section 2 of *Standards for Dental Professionals (2005)* and Principles Two and Three of *Standards for the Dental Team (2013)*

[19] *Bolam vs Friern Hospital Management Committee* [1957] 1 WLR 582

65. As a result, the Case Examiners will recognise that different registrants will have different opinions, and simply because a subsequent treating practitioner disagrees with a course of treatment or planned treatment does not of itself necessarily indicate a fitness to practise issue, although any clinical regime needs to be justifiable and where appropriate supported by a reasonable body of opinion.

66. In considering whether a registrant's actions fall below what could reasonably be expected of a practitioner, a registrant should be judged against the standard of his or her own peers, and not that of the wisest and most prudent registrant or a specialist in that area. When considering whether a registrant met that standard, the clinical records are sufficient to allow the Case Examiners to determine what planning and judgement was exercised and whether or not the patient had been provided with sufficient information to make an informed decision.

67. However, overall, registrants must act in a patient's best interests[20] and provide an adequate level of care. Falling far below expected professional standards has the potential to indicate a real prospect of a finding of impaired fitness to practise being made, particularly where there is evidence of a reckless disregard for patient safety or a breach of a fundamental duty of practitioners. In such cases, the Case Examiners may wish to consider that a referral to a Practice Committee is appropriate.

Single clinical incidents

68. In considering any case involving a single clinical incident, the starting point should be for the Case Examiners to consider whether the information available indicates that there may have been a serious failure to meet the standards required of practitioners. As set out in the Case Examiner Guidance Manual, mere negligence does not constitute misconduct, but depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to misconduct.

69. In such cases, the Case Examiners should assess the alleged clinical failings and the effect these have had on the patient. However, the Case Examiners should bear in mind that it is not the degree of harm done which necessarily makes the misconduct serious, but the nature of the conduct itself, whatever the result. Some serious misconduct might not result in harm (although the risk of harm might be high) and some patients might suffer serious harm even though the registrant concerned has done his or her competent best.

70. As set out in the Case Examiner Guidance Manual, if the concerns arising out of a single clinical incident do not meet the threshold of misconduct, the Case Examiners may wish to consider concluding the matter with no further action or advice. If the Case Examiners consider that there is a real prospect of a Practice Committee finding that the concerns do amount to misconduct, but that there is no real prospect of a finding of current impairment being made, they may consider issuing a warning. If, on the other hand, there is a real prospect of the facts, misconduct and current impairment being established, then the Case Examiners will likely consider that the allegation ought to be considered by a Practice Committee.

Treatment planning

71. In *Standards for the Dental Team*, the GDC makes clear that from 30 September 2013, a Registrant must provide written treatment plan(s), should retain a copy (or copies) in the patient's notes, and should ask patients to sign the treatment plan(s).

[20] see section 1 of *Standards for Dental Professionals (2005)* and Standards 1.4 and 6 of *Standards for the Dental Team (2013)*

72. The plan must make clear the proposed treatment, a realistic indication of the cost, whether the treatment is being provided under the NHS or privately (and if mixed, which elements are private and which are NHS). Treatment plans should be kept under review, patients should be informed if any changes occur and an updated version in writing should be provided[21]. Consent must be clearly obtained by patient for any changes and those changes should be clearly documented[22].

73. In considering this type of case the Case Examiners may, if there have been relatively minor or no permanent consequences for a single patient and the registrant has no prior FTP history, consider issuing advice. If there are aggravating factors such as previous FTP history, or where lack of treatment planning might have led to over or under treatment, and where there is a concern about pecuniary advantage or informed consent, then the Case Examiners may wish to consider issuing a warning.

74. If there are additional allegations such as consent or dishonesty, or there is relevant fitness to practise history, the Case Examiners may consider referring the matter to a Practice Committee.

Informed consent

75. The GDC's *Standards for the Dental Team* provides that registrants must obtain valid consent before starting treatment, explaining all the relevant options and the possible costs. Registrants must also make sure that patients (or their representatives) understand the decisions they are being asked to make, and that the patient's consent remains valid at each stage of investigation or treatment. Where more than one registrant is involved in a patient's care, it is for each individual registrant to make sure that the patient has been provided with a treatment plan and has given informed consent.

76. The onus is always on a registrant to ensure that the patient is informed fully of the relevant risks and benefits of treatment. Discussions with the patient should be documented and should include the various options available. Treatment that involves conscious sedation or general anaesthetic requires written consent[23].

77. The GDC has made it clear that in considering consent, registered practitioners must bear in mind that if there are potential consequences for the patient's health and/or safety, or if there is doubt as to whether or not the patient is fully informed or able to provide informed consent, a registrant should not proceed with treatment, even if requested to do so by the patient. The registrant must also ensure that all such conversations and advice given is documented fully in the patient's records

78. The Case Examiners should bear in mind that when dealing with child patients, a registrant has an overriding duty to act in the best interests of the child, who should be involved as much as possible in decisions regarding their care.

- In England, Wales and Northern Ireland, a person is deemed to be a competent adult at the age of 18. However, children who have attained the age of 16 and 17 years may, where competent, also consent to treatment. Where a 16 or 17 year old consents to treatment, this cannot be over-ruled by parents, only by the Courts[24].

[21] see Standards 2.3.6, 2.3.7 and 2.3.8 of *Standards for the Dental Team (2013)*

[22] see Standards 3.3 and 3.3.5 of *Standards for the Dental Team (2013)*. Prior to 30 September 2013, *Standards for Dental Professionals* (May 2005) provided that "*whenever a patient is returning for treatment following an examination or assessment, give them a written treatment plan and cost estimate*".

[23] see Standard 3.1.6 of *Standards for the Dental Team (2013)*

[24] the refusal of treatment by a 16 or 17 year old can be over-ruled by parents or the Courts

- A child aged under 16 can, if they understand what is being proposed (in terms of the treatment and the possible risks involved), consent to dental treatment. Whether a child aged under 16 has capacity to consent is a matter of judgment for the registrant and may vary depending on nature of the proposed treatment.

- In Scotland, a child who has reached the age of 16 is deemed to be competent to make their own healthcare decisions. Prior to that age, a child may have capacity to give or withhold consent to treatment, depending on the nature and complexity of the treatment proposed, their level of understanding of the risks and benefits of the treatment, and the implications of not having treatment.

- Where a child under 16 does not have capacity to consent to the proposed procedure, a person with parental responsibility should make the decision on their behalf.

79. Adults are assumed to have capacity to consent to treatment, unless there is evidence to the contrary. However, the fact that a patient is suffering from a mental disorder does not mean that they automatically lack capacity to give valid consent. All cases must be assessed individually, with consideration being given as to whether the patient is able to understand the nature and complexity of the treatment proposed, the risks and benefits of the treatment, and the implications of not having treatment, and is able to use that understanding to consider whether or not to consent to that treatment. Where an adult lacks capacity, treatment can only be given if it is in their best interests.

80. Overall, the issue of informed or appropriate consent is a cornerstone of public interest and must be paramount in a registrant's mind prior to undertaking treatment. A failure to obtain, or to document consent, is a serious matter and the Case Examiners may wish to consider whether a referral to a Practice Committee is necessary having taken into account the totality of the evidence before it.

81. Where, on the other hand, the Case Examiners do not consider that there is a real prospect of current impairment being established, the Case Examiners may wish to consider whether the imposition of a warning.

Record-keeping

82. Dental professionals are required to make and keep accurate dental records of care provided to patients, whether NHS or private[25]. The GDC imposes a professional obligation to create records for dental treatment that is provided to patients, including discussions had with patients regarding treatment, decisions made and the findings of tests and investigations (including negative findings).

83. Clinical records should be made contemporaneously (i.e. at the time of, or immediately after the consultation/clinical contact, except in exceptional circumstances e.g. an emergency), should be dated and should clearly indicate, for each consultation/clinical contact, identifying details of the treating practitioner and who provided treatment.

84. They should be accurate and sufficiently detailed so that when viewed by another registrant, retrospectively for the purposes of audit, or for any other reason, the reader is clear as to the actions carried out by the registrant as well as the clinical thinking and judgement applied and the information given to the patient.

[25] obligations in respect of retention of NHS records are set out in the *Records Management Code of Practice for Health and Social Care 2016*

85. The Case Examiners may, on occasion, be asked to consider allegations that a registrant has amended records retrospectively and that this was misleading or dishonesty. In such circumstances, the Case Examiners will be mindful that simply because the recording style of a registrant varies, this does not of itself demonstrate conclusively that the registrant has altered or falsified the clinical record. It is plausible, for example, that a registrant who has encountered a difficult phase of treatment or some other difficulty may write fuller and more comprehensive notes from the date in question.

86. The Case Examiners must be also mindful that it is not always unacceptable for records to be amended retrospectively, although it is contrary to good practice to do so without making a note outlining any changes and the reason for the amendment, the date of amendment and the identity of the maker of the amendment.

87. It would, however, be misleading and potentially dishonest to alter other records at the same time in order to paint a different picture or attempt to mask any mistake or misconduct. Retrospective amendment without documented reasons made at the time of amendment can often lead to concerns regarding a registrant's probity.

88. The Case Examiners will also bear in mind that the submissions of the informant should be taken into account and that simply because something is documented in a clinical record is not necessarily conclusive evidence that it occurred. The Case Examiners must exercise caution when closing an allegation based solely on the fact that the clinical records support the registrant's account, unless the records contain objective evidence such as a signed treatment plan.

89. Where an allegation relates to the Registrant's record keeping, the Case Examiners may bear in mind that absent or poor record keeping on a small number of occasions is unlikely, in itself and in isolation, to amount to an issue of misconduct or impairment of fitness to practise justifying action upon registration. As a result, the Case Examiners will need to exercise caution before concluding that there is a real prospect of a registrant's fitness to practise being found to be impaired by a Practice Committee based solely on a record keeping allegation. Instead, the Case Examiners may consider that advice is more appropriate.

Prescribing medicines

90. The GDC has published *Guidance on prescribing medicines (2013)* which sets out that, when prescribing medication a registrant must have an understanding of the patient's current health and medication, including any relevant medical history, in order to prescribe safely. If in doubt, a registrant should contact the patient's GP or other appropriate healthcare professional.

91. Registered dentists are legally entitled to prescribe anything from the *British National Formulary* (BNF) and *BNF for Children* (BNFC). However, dental prescribing within the National Health Service (NHS) is restricted to those drugs contained within the *List of Dental Preparations* in the *Dental Practitioners Formulary* (DPF). Dental Hygienists and therapists can prescribe certain medicines for their patients' dental needs under Patient Group Directions.

92. Registrants must not prescribe medicines for themselves, and prescribing medicines for those with whom a registrant has a close personal relationship should only be done in an emergency situation. Registrants should use remote means (e.g. telephone, email or a website) to prescribe medicines for dental patients only if there is no other viable option and it is in their best interests, and must not remote prescribe for non-surgical cosmetic procedures such as the prescription or administration of Botox or injectable cosmetic medicinal products.

Implants

93. The provision of implants can be routine for some registrants. It can, however, also be a high- risk and complex area of dentistry. Registrants who undertake this area of work may need to be highly qualified and capable. In any event registrants who provide implant treatment must, at minimum, be able to demonstrate that they are trained, competent and indemnified to provide implant dentistry.

94. Registrants must also give thorough explanations of the risks and complications of such treatment to patients and documented in the clinical records. Further, rigorous treatment planning must also have been undertaken. The registrant must be able to demonstrate compliance with the GDC's guidance on implants.

95. The failure to comply with the GDC's guidance or to adhere to any of the elements outlined above could indicate an issue of current impairment and potential need to refer the matter to a Practice Committee if there is a real prospect of the facts alleged being found proved and of misconduct or deficient professional performance being established.

Pre-purchased dental treatments

96. Members of the public can pre-purchase dental treatments or even give treatment as a gift. The registrant as a dental professional, however, has an obligation to ensure that any work carried out is appropriate for the individual and that, further, the registrant has adequately outlined the risks and potential consequences of treatment prior to agreeing to undertake any pre- purchased work. This is especially important bearing in mind the need to put patients' interests first even where this may mean the registrant has to turn down work. Treatment planning is essential in demonstrating effective communication.

97. If there is a real prospect of finding proved that a registrant has failed to put patients' interests first in light of the guidance given to registrants[26], the Case Examiners may wish to consider whether a referral to a Practice Committee is appropriate. In making this assessment, the Case Examiners may wish to consider, as part of their assessment of whether there is a real prospect of a Practice Committee making a finding of current impairment, whether the public interest is engaged especially in relation to the need to declare and uphold proper standards and maintain public confidence in the dental team.

Cosmetic treatments

98. The GDC has made it clear that any registrant who chooses to offer non-surgical cosmetic procedures should apply the standards set in relation to all other treatments within their scope of practice which includes being appropriately trained, being competent to undertake the treatment and holding professional indemnity insurance. The GDC does not differentiate between the registrant groups (unless the GDC has explicitly said so, for example with regard to tooth-whitening) with regard to this requirement.

99. The GDC has also made it clear that remote prescribing shall not be used in the provision of non-surgical cosmetic procedures such as the prescription or administration of Botox or injectable cosmetic.

100. The Case Examiners will need to consider these types of cases carefully and apply the appropriate measure of caution when looking at an issue relating to cosmetic treatments and issues relating for

[26] see section 1 of *Standards for Dental Professionals (2005)* and Standards 1.4 and 6 of *Standards for the Dental Team (2013)*

prescribing not in relation to dental treatment. Unless there are aggravating features, the Case Examiners may wish to consider that a proportionate response to this type of case will be, on the first occasion, a warning.

Tooth whitening

101. The GDC has made it clear that tooth whitening is classified as dentistry and that only dentists (or specially trained dental hygienists or dental therapists under the prescription of a dentist) can conduct this treatment. Tooth whitening can have serious physical implications if it is not applied appropriately and the High Court has noted[27] that the public is to be protected from treatment offered by those who are not qualified as professionals to give it.

102. If a registrant has undertaken tooth whitening on multiple occasions, when not qualified to do so, the Case Examiners may consider that the allegation ought to be considered by a Practice Committee and to the Interim Orders Committee, if the latter has not already considered the matter.

Scope of Practice

103. The GDC has outlined in detail in its *Scope of Practice* guidance what work can be undertaken by different categories of registrants. Crucially, a registrant must not undertake work outside their scope of practice, and this would include undertaking training courses which have as a pre-requisite a specific type of registration which they do not hold. Further, undertaking work prior to receiving confirmation of registration is a breach of the GDC's Standards guidance and should be viewed seriously.

104. Where the Case Examiners have found that there is a real prospect of it being established that a registrant has acted outside his or her scope of practice on one or more occasion, they may also consider that there is a real prospect of misconduct and current impairment being established, and that the matter ought to be referred to a Practice Committee for consideration. At that point, if the registrant's case has not already been considered by the Interim Orders Committee, the Case Examiners may also consider it is appropriate to make a referral to that Committee which will be able to consider whether an interim order should be imposed pending final resolution of the matter.

Working beyond training and/or competence

105. In addition, GDC registrants are required to work within their knowledge, skills, professional competence and abilities.

106. No registrant should agree to provide treatment they feel is unsafe or which they are not competent to provide. Standard 7.2.2 of *Standards for the Dental Team (2013)* sets out that registrants should only deliver treatment and care if they are confident that they have had the necessary training and are competent to do so. If they are not confident to provide treatment, they must refer the patient to an appropriately trained colleague.

107. When referring a patient to another practitioner, a registrant has a duty to ensure that the referral process is explained to the patient and that this is recorded in their notes. In addition, any discussions with colleagues about a patient's treatment should be documented.

108. Where the Case Examiners consider that there is a real prospect of it being established that a registrant knowingly conducted treatment or performed tasks or procedures for which he or she lacked the

[27] *General Dental Council v Jamous* [2013] EWHC 1428 (Admin)

requisite skills or the necessary competence, they may conclude that the matter ought to be referred to a Practice Committee for consideration.

Concerns allied to clinical care

Breach of GDC or other relevant standards

109. Registrants are required to comply with the terms and spirit of the GDC's standards guidance. As part of their personal, business, clinical or other arrangements registrants may also be required to adhere to or comply with other guidelines or legislation. This is covered in the GDC's standards guidance[28] and is a requirement of good clinical practice.

110. On occasion registrants may intentionally deviate from guidelines but to do so legitimately a registrant must be able to demonstrate:

- proper awareness of the governing framework;
- detailed consideration as to the justification for deviating from guidelines; and
- proper assessment of risks.

111. In essence, a registrant must act in a responsible manner and be prepared to justify their actions if questioned.

112. The Case Examiners will need to consider these types of cases carefully and apply the appropriate weight to evidence. They will need to remind themselves that they do not have a fact-finding role, and that ultimately some issues might need to be determined substantively at a Practice Committee, especially where a registrant identifies his/her reasons for deviating from recognised guidance and outlines that consideration was given.

113. Equally there may be certain types of guidance which a registrant must take into account and adhere to, for example requirements of:

- *Health Technical Memorandum 01-05: Decontamination in primary care dental practices*
- CHRE/PSA guidance "*Clear sexual boundaries between healthcare professionals and patients: responsibilities of healthcare professionals*".

114. The Case Examiners will remind themselves that their primary consideration is whether a case ought to be referred. In doing so, the Case Examiners will note that a registrant must be aware of appropriate and relevant guidelines. A registrant who is unaware of guidelines or breaches them may, in doing so, demonstrate that there is a real prospect of a finding of current impairment, notwithstanding that following the receipt of a complaint he or she has now become aware of the relevant guidance.

115. As with other cases a crucial issue for the Case Examiners to consider is whether or not the underlying alleged misconduct is so serious as to demonstrate a real prospect of a finding of current impairment being made.

[28] paragraphs 5.3 & 5.4 and 6.1 – 6.3 of *Standards for Dental Professionals (2005)*; Standards 1.3.1, 1.5.1, 1.9.1, 7.1.1, and 8.4.1 of *Standards for the Dental Team (2013)*

116. Features the Case Examiners may wish to consider in these types of cases could include:

- a demonstrable lack of previous continuing professional development;
- a disregard for patient safety or the rights or best interests of patients;
- the level of harm suffered by a patient or member of the public[29];
- the level of risk posed (either currently or at the time of complaint) to the wider public interest;
- the type of breach of guidance and whether this has been repeated;
- the status of the guidance at the time of complaint[30].

117. Cases involving the breach of guidelines issued by another agency can be serious and jeopardise potentially the public trust. In light of the GDC's guidance and the requirement to be aware of such guidelines, the Case Examiners may wish to consider that if there is a real prospect of the facts being found proved, then there may well be likely that there is a real prospect of misconduct being established and finding of current impairment being reached by a Practice Committee, bearing in mind the registrant's duties and the wider public interest. In those circumstances a referral to a Practice Committee may be the appropriate disposal of a case.

118. Equally, in certain cases, especially where there are no aggravating or public interest features, the Case Examiners may consider that there is no real prospect of a finding of current impairment and would wish to consider whether or not a warning is more appropriate bearing in mind the issue of proportionality. In exceptional cases the Case Examiners may consider that advice is appropriate particularly if there is strong mitigation such as the registrant was working under the direction of a more senior registrant. In those cases the Case Examiners may need to consider whether the issuing of a third party advice letter or a referral to the Registrar (or another agency) is appropriate.

119. If the Case Examiners determine to close the case with no further action, they should provide detailed reasons explaining the conclusions they have reached.

Failure to treat patients and staff with respect

120. The GDC has made it clear that dental professionals are required to act responsibly towards patients and staff. In doing so they must be aware of their tone of voice, body language and the way in which they handle patients' needs and anxieties[31].

121. A failure to adhere to this on its own with no other aggravating factors is unlikely to reach the threshold of a finding of impaired fitness to practise. Accordingly, the Case Examiners may consider no further action, or a letter of advice, or a warning. If a registrant repeats this behaviour or that which is thematically similar, it would be reasonable for the Case Examiners to determine that there is a real prospect of a finding of current impairment being reached and a referral should be considered.

[29] harm in this context does not necessarily relate to physical harm or clinical misconduct

[30] the Case Examiners will need to be satisfied that the Registrar has referred to the appropriate guidance or guidelines and that these were in force at the time the registrant is alleged to have breached them

[31] see Standard 1.2 of *Standards for the Dental Team (2013)*

122. The GDC has also made it clear that patients should be treated fairly, as individuals and without discrimination. In particular, a registrant should not discriminate against patients on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation. Registrants should also ensure that they do not discriminate against patients or groups of patients for any other reasons such as nationality, special needs, health, lifestyle or any other consideration[32].

Failure to raise concerns

123. The GDC has made it clear that patients are entitled to be protected from professionals who fail in their responsibilities and thereby put them at serious risk. All registrants have a duty to protect patients from harm, and have a responsibility and a public duty to raise concerns[33].

124. The GDC in its guidance[34] has also provided a framework and advice for registrants.

125. Where there is a real prospect of it being established that a registrant failed to raise concerns appropriately, the Case Examiners may wish to consider that, as a consequence of the GDC's guidance, there is a fitness to practise issue which requires resolution and so it may not be appropriate to close the case without advice or warning. As these types of cases will often involve an element of judgment, it may also be more appropriate for the case to be considered by a Practice Committee. Ultimately, however, it is a matter for the Case Examiners to determine and the Case Examiners will want to take into account the harm and potential harm or risk to patients and the public interest as well as the issue of remedy, repetition and remediation applicable to the consideration of current impairment.

126. Where there is evidence that another registrant failed to raise appropriate concerns the Case Examiners may wish to consider whether it is necessary for that registrant's case to be referred to the triage team for consideration, or if appropriate, whether it is necessary to issue third party advice.

127. The GDC has also made it clear that registrants must co-operate with any relevant formal or informal inquiry and give full and truthful information[35]. Where a registrant receives a letter from the GDC in connection with concerns about their fitness to practise, they must respond fully within the time specified in the letter, unless an extension of time has been granted.

128. Where there is evidence that a registrant has failed to engage or co-operate with the GDC, there may be a presumption that the matter should be referred to a Practice Committee. If there are exceptional circumstances or other issues to bear in mind, the Case Examiners may consider that an advice or warning is more appropriate.

Complaints handling

129. Principle Five of *Standards for the Dental Team (2013)* requires registrants to have a clear and effective complaints procedure. Registrants are required to make sure that there is an effective complaints procedure readily available for patients to use, and follow that procedure at all times; to respect a patient's right to complain; and to give patients who complain a prompt and constructive response.

[32] see Standard 2.3 of *Standards for Dental Professionals (2005)*; Standard 1.6 of *Standards for the Dental Team (2013)*
[33] see Principle Eight of *Standards for the Dental Team (2013)* and *Being open and honest with patients when things go wrong*
[34] see *Advice for Dental Professionals on Raising Concerns* and Principle Eight of *Standards for the Dental Team (2013)*
[35] see Standard 9.4 of *Standards for the Dental Team (2013)*

There is, in addition, *NHS complaints guidance* which provides information as to what to expect after making a complaint.

130. On its own, an allegation relating to complaint handling is unlikely to usually reach the threshold for a finding of impaired fitness to practise. However, the Case Examiners may consider that breach of the GDC's Standards in this regard amounts to misconduct, and that advice or a warning is appropriate, depending on the nature of the case. In that regard, the Case Examiners may wish to consider:

- the extent to which the registrant made sure that there was a system in place to address complaints made;
- whether there were other competing procedures or processes in place at the registrant's practice over which the registrant had no influence; and/or
- whether the registrant can adequately justify the alleged failure to adhere to GDC guidance.

Practising without appropriate indemnity insurance

131. Holding adequate and appropriate indemnity insurance is a fundamental requirement of practice. Standard 1.8 of *Standards for the Dental Team (2013)* states that registrants must have appropriate arrangements in place for patients to seek compensation if they suffer harm. This is so that any patient who suffers harm can recover any money they might be entitled to through compensation, in the event of a successful claim.

132. In June 2016, the GDC published updated *Guidance on indemnity (2016)*, following on from a change in the GDC's Registration Rules in November 2015 which means that dentists and dental care professionals applying for registration or restoration, and those renewing their registration each year, will need to tell the GDC that they have indemnity cover in place (or will have by the time they start practising). The guidance makes clear that making a false declaration to the GDC is a serious issue.

133. The GDC has made it clear that the onus is on a registrant to verify for themselves that they are indemnified and that a registrant has a personal and professional responsibility to ensure that they can produce evidence of indemnity when asked. The circumstances in which no indemnity or insurance is needed are limited and are explained further in the *Guidance on indemnity (2016)*[36].

134. The fact that a registrant is now not working, or has obtained retrospective indemnity does not necessarily address the issue of the underlying misconduct and the potential for a finding of currently impaired fitness to practise being made.

135. As such, in the event that a case involving failure to hold adequate indemnity insurance is referred to the Case Examiners, and the Case Examiners consider that there is a real prospect of the facts being established, they may also consider that there is a real prospect of misconduct and current impairment being established, and that the matter therefore ought to be referred to a Practice Committee for consideration.

136. At that point, if the failure to hold appropriate indemnity insurance is ongoing, and the registrant's case has not already been considered by the Interim Orders Committee, the Case Examiners may also

[36] the previous version of the *Guidance on Indemnity (2013)* is available at http://standards.gdc-uk.org/Assets/pdf/Guidance%20on%20indemnity%20(Sept%202013).pdf

consider it is appropriate to make a referral to that Committee which will be able to consider whether an interim order should be imposed pending final resolution of the matter.

137. There may also be circumstances where a practitioner was not appropriately registered at the time of the allegation, or the allegation itself relates to appropriate registration. If the registrant was not properly registered, they could not have been, as a consequence, indemnified.

Advertising

138. The GDC has made it clear in its *Guidance on ethical advertising (2012)* that all information or publicity material regarding dental services should be legal, decent, honest and truthful. The guidance states that misleading claims "*can make it more difficult for patients to choose a dental professional or dental services and this can lead to expectations which cannot be fulfilled and, in more serious cases, can put patients at risk of harm from an inappropriate choice*".

139. The guidance also sets out a number of requirements in relation to information displayed on a dental practice website (which must not display information comparing the skills or qualifications of any dental professional providing any service with the skills and qualifications of other dental professionals, and must be updated regularly) and makes clear that registrants who are not on a GDC specialist list should not use titles which may imply specialist status such as Orthodontist, Periodontist, Endodontist, etc. The guidance also reflects that registrants who are not on a specialist list should not describe themselves as "specialising in" a particular form of treatment but may use the terms "special interest in", "experienced in", or "practice limited to".

140. When considering cases relating to ethical advertising or the use of the title "specialist", the Case Examiners should consider:

- the date of the complaint and the dates from which the alleged misconduct stems[37];
- the efforts made by the registrant to rectify the position and the timeliness with which the registrant has made such steps; and
- whether there was a risk that the public may be confused and patients misled.

141. Unless there are aggravating circumstances (for example the repetition of the alleged misconduct) or mitigating circumstances (for example, definitive evidence to indicate that the Registrant was unaware and could not reasonably have been aware of the misleading advertising) the Case Examiners may consider issuing a warning for breaches of the guidance on ethical advertising or misuse of the title specialist.

February 2018

[37] the GDC has taken the pragmatic view that prior to 1 March 2012 the guidance on the title 'specialist' was not clear, and such cases will usually be closed at triage