

Guidance on the Registrar's Rule 9 power of review (July 2017)

Introduction

1. Since 1 November 2016, the GDC's Registrar has had the power to review decisions to close cases without referring them to a Practice Committee.
2. That new power is set out in section 27(6A)¹ /36N² (6A) and section 27AB³/36OB⁴ of the Dentists Act 1984 ("the Act") and Rule 9 of the *General Dental Council (Fitness to Practise) Rules Order of Council 2006* ("the Rules").

Stage 1: review requirements

3. The following determinations are reviewable determinations within the meaning of the Rules:
 - (i) a determination by the Registrar that an allegation against a registered dentist is not one to which section 27 of the Act applies or that an allegation against a registered dental care professional is not one to which section 36N of the Act applies⁵ (i.e. a determination at triage or a determination at assessment that a complaint or information does not amount to an allegation); and
 - (ii) a determination by the Case Examiners or the Investigating Committee that an allegation referred to them ought not to be considered by a Practice Committee⁶ (this will include cases which are closed with a warning, advice, or no further action).
4. The power of review exists in respect of an entire determination, or parts of a determination. This may include circumstances where some allegations on a case have been closed, and others have been referred to the Investigating Committee or on to a substantive hearing.
5. In order for an application for review of a reviewable determination to be valid under the terms of the Rules, it must be made:
 - (i) on the Registrar's own initiative, or by the registrant, or by the maker of the allegation ("the informant"), or by any other person who, in the opinion of the Registrar, has an interest in that determination⁷; and
 - (ii) save in exceptional circumstances (see paragraphs 11 - 12 below), within two years of the date of the determination⁸.
6. The Rules do not require an application for review to be made in any specific format but it is suggested that an individual wishing to make an application should do so in writing using the application form on the website:
<http://www.gdc-uk.org/Dentalprofessionals/Fitnesstopractise/Pages/Rule-9-Reviews.aspx>

¹ for dentists

² for dental care professionals ("DCPs")

³ for dentists

⁴ for DCPs

⁵ see Rule 9(2)(a) of the Rules. Such decisions are made by a member of the GDC's staff, acting with authority delegated from the Registrar

⁶ see Rule 9(2)(b) of the Rules

⁷ see Rule 9(1) of the Rules. A person with an interest in the determination may include the registrant's employer(s) or bodies with which he or she has a contract to provide services, other regulators (UK or abroad) and other individuals or organisations who may, in the particular circumstances of the case, have such an interest

⁸ see Rule 9(5) of the Rules

The application should set out the basis on which the review is requested, bearing in mind the grounds for review under the Rules are limited to those set out at paragraph 15 below. The application should be sent to the Rule 9 Legal Adviser at Rule9review@gdc-uk.org.

7. Where an application for review is received, it will be considered by the Rule 9 legal adviser⁹, acting under delegated authority from the Registrar, in line with the principles set out below.

Time limit and “exceptional” circumstances

8. As set out above, the Rules provide that the Registrar must not, save in exceptional circumstances, begin a review of all or part of a determination more than two years after the date of that determination¹⁰.
9. For the purposes of the two-year time limit, the relevant date is the date on which the application for a review is received.
10. If an application is made out of time, the Registrar should be asked to determine whether “exceptional” circumstances exist so as to justify the waiver of the time limit. Although what amounts to “exceptional” circumstances is ultimately a matter for the Registrar, it may assist if any person making an application after the expiry of the two year period sets out the reason(s) for the delay and why they believe their application should still be considered.
11. In terms of what may amount to “*exceptional*” circumstances, the Courts have held that “*exceptional*” describes “*a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon*”. It need not be “*unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered*”¹¹.
12. In considering whether “exceptional” circumstances exist in the particular case, such that they justify the waiver of the usual two-year time limit, the Registrar should consider:
 - (i) the extent of the lapse of time;
 - (ii) the reason(s) for the lapse of time;
 - (iii) the extent to which relevant evidence is no longer available due to the lapse of time;
 - (iv) the seriousness of the allegations;
 - (v) whether the allegations involve a single episode of misconduct, or a wider pattern of behaviour;
 - (vi) the extent of any continuing risk to the public and/or to the public interest;
 - (vii) the extent to which the allegation has been ventilated in another forum (for example, via an NHS or Parliamentary and Health Service Ombudsman complaints process, other formal investigation or inquiry, or in the civil courts); and

⁹ or other senior GDC lawyer who shall have had no previous or ongoing involvement in the case

¹⁰ see Rule 9(5) of the Rules. The date of the determination is the date upon which it was made by the Registrar, Case Examiners or Investigating Committee (and not the date it was served upon the registrant or informant, if different)

¹¹ *R v Kelly (Edward)* [2000] 1 QB 198, Lord Bingham CJ at 208

- (viii) whether the allegation raises an important, new and/or developing point of practice, principle or law.
13. Where the Registrar determines that such “exceptional” circumstances exist, he or she should give reasons for that decision before conducting an initial review as set out below. If, on the other hand, the Registrar determines that no such “exceptional” circumstances exist, he or she should record the reasons for that decision and the applicant should be informed that, for the reasons stated, the application will not proceed any further.

Stage 2: initial consideration of review

14. At the initial consideration stage, the Registrar is considering the preliminary question of whether to conduct a full review. The Registrar should bear in mind that, at this early stage, he or she will be considering relatively limited information, in that comments will not yet have been sought from any persons with an interest in the decision, and nor has the Registrar had the opportunity to conduct any further relevant enquiries.
15. As such, the threshold for considering whether to conduct a review is relatively low, and the Registrar should, at the initial stage, consider whether he or she has reason to believe that:
- (i) the determination may, for any reason, be materially flawed in whole or in part¹²; and/or
 - (ii) there is new information which may have led, wholly or partly, to a different determination¹³.
16. If the Registrar has reason to believe that (i) or (ii) above are met, the Registrar should go on to consider whether he or she has reason to believe that such a review is necessary for the protection of the public, necessary for the prevention of injustice to the registrant, or is otherwise necessary in the public interest¹⁴. If so, the Registrar may consider that it is appropriate to conduct a full review of the original decision.

Material flaw

17. The Rules do not specify what amounts to a “material flaw”. However, the Registrar should first consider whether there are any identifiable flaws or defects in the GDC process followed to date, or in the original decision itself.
18. If any such flaws can be identified, the Registrar should go on to consider whether those flaws may be material flaws.
19. The Registrar should not conclude that there was a material flaw in the original decision simply because he or she would have made a different decision. Instead, the Registrar should consider whether the flaw or flaws identified:
- (i) may have had an impact on the original decision-maker and may have influenced their judgment; and
 - (ii) are capable of having made a difference to the ultimate outcome of the case.
20. Some examples of what may amount to a material flaw are set out at paragraph 25 below.

¹² see Rule 9(3)(a) of the Rules

¹³ see Rule 9(3)(b) of the Rules

¹⁴ see Rule 9(4) of the Rules

New information

21. The Rules do not define what amounts to “new” information. However, in order for information to be considered “new” information, it must not have been in the possession of the GDC at the time the original decision was made.
22. If the information was in the hands of the GDC at that time, but was not provided to the original decision-maker, the failure to provide the information may instead be considered under the “material flaw” ground referred to above.
23. New information may be information of a factual nature, or further expert evidence. The new information should, however, be relevant to the specific allegation which formed the basis of the original decision. Where the new information instead relates to a new and distinct allegation against the registrant, it should be dealt with in accordance with the GDC’s usual triage and assessment processes, rather than via the Rule 9 review process.

Overlap with judicial review

24. Decisions of the Registrar, Case Examiners and Investigating Committee may be subject to challenge by way of judicial review. However, judicial review is a remedy of last resort and the claimant must generally demonstrate that they have exhausted all alternative remedies.
25. As such, it is likely that the Registrar’s power to review under Rule 9 of the Rules will be used as an alternative to judicial review. In practice, many of the grounds for judicial review can also be said to be grounds for considering that the decision was materially flawed, for example that:
 - the original decision-maker misinterpreted the law governing the decision;
 - the original decision-maker took into account irrelevant considerations, or failed to take into account relevant considerations;
 - the decision was so unreasonable that no reasonable decision-maker could have come to it i.e. it was outside a reasonable range of decisions;
 - the GDC did not comply with its own Act or Rules during the decision-making process;
 - there was failure to provide all relevant evidence to the decision-maker, for example observations provided by the registrant (or informant) or records;
 - inaccurate information was provided to the decision-maker, for example in relation to the registrant’s fitness to practise history¹⁵;
 - there are allegations of actual bias, or the appearance of bias;
 - there was failure to give adequate reasons; and/or
 - the case proceeded on an erroneous basis, for example upon the assumption that the registrant has been convicted of a criminal offence (or has an adverse finding from another

¹⁵ for further guidance on the relevance of fitness to practise history, see for example the Case Examiner Guidance Manual, paragraphs 51 - 54

Regulator) when this is not in fact the case¹⁶.

The public interest

26. As set out above, a review can only be conducted if the Registrar, as well as having reason to believe that the determination may, for any reason, be materially flawed in whole or in part or that there is new information which may have led, wholly or partly, to a different determination, also has reason to believe that such a review is necessary for the protection of the public, necessary for the prevention of injustice to the registrant, or is otherwise necessary in the public interest.
27. In terms of whether a review is necessary for the protection of the public, the Registrar should consider whether there is a real risk of harm to the health, safety or well-being of a patient, colleague or other member of the public if a review is not conducted.
28. When considering whether a review is otherwise necessary in the public interest, the Registrar should bear in mind that (as well as public protection) the public interest encompasses the maintenance of public confidence in the dental and dental care professions and their regulation and the declaring and upholding of proper standards for the dental and dental care professions.
29. However, the public interest also encompasses the need for proportionate decision making with reference to the risks posed by the particular case, and this may be an important factor for the Registrar to consider when determining whether the public interest - as opposed to the private interests of an informant or other person with an interest in the decision - is served by a review being conducted.

Process

30. Having given the request for review initial consideration, the Registrar should give written reasons for his or her decision to review or not to review the original decision.
31. If the Registrar decides not to review the original decision, the applicant and registrant will be informed of the outcome and no further action will be taken by the Registrar.
32. If the Registrar decides to conduct a review of all or part of a determination, the Registrar must in writing:
 - (i) notify the registrant, the informant (if any) and any other person who, in the opinion of the Registrar, has an interest in that determination, of the decision to review and give reasons for that decision¹⁷;
 - (ii) notify the registrant, the informant (if any) and any other person who, in the opinion of the Registrar, has an interest in that determination, of any new information and, where appropriate, provide them with that information¹⁸; and

¹⁶ this potential ground for review overlaps with the principle established in *Fajemisin v General Dental Council [2013] EWHC 3501 (Admin)* i.e. that in addition to correcting 'slips', a regulatory body can revisit a decision that was made in ignorance of the true facts when the factual basis on which it proceeded amounted to a fundamental mistake of fact

¹⁷ see Rule 9(6)(a) of the Rules

¹⁸ see Rule 9(6)(b) of the Rules. NB it will not be appropriate for the informant (or other person with an interest in the determination) to be provided with any evidence which the registrant or a third party has provided relating to the health or private and family life of the registrant or a third party, and such information should not be disclosed by the Registrar

(iii) seek representations from the registrant, the informant (if any) and any other person who, in the opinion of the Registrar, has an interest in the determination regarding the review of that determination¹⁹. In most circumstances, a period of 28 days will be provided for any such observations to be submitted by the relevant persons.

33. Where representations are received the Registrar will disclose these to all other parties with the final determination.
34. The Registrar may also carry out any investigations which, in his or her opinion, are appropriate to facilitate the making of a final decision²⁰. In practice, these will be carried out by the GDC's Casework Team, and may include obtaining further factual or expert evidence, or obtaining legal advice on any of the issues raised. However, the investigations conducted should be limited to those which will assist the Registrar in making a decision on whether the grounds have been met at the ultimate review stage, rather than re-investigating the case itself.
35. If any further relevant information is obtained as a result of the Registrar's enquiries, that information should be disclosed to the registrant, the informant (if any) and any other person who in the opinion of the Registrar has an interest in that determination, and comments sought as per the procedure set out at paragraph 32(ii) and (iii) above.

Disclosure

36. The Rule 9 Legal Adviser will set out the documents considered as part of the initial review (see paragraphs 14-16 above). If the Rule 9 Legal Adviser determines that the Registrar will conduct a review, as stated above at paragraph 32(iii) the parties have the opportunity to submit representations.
37. The Rule 9 Legal Adviser will disclose all documents deemed necessary to enable the parties to make effective representations in respect of the issues to be determined.

Stage 3: review

38. After any appropriate investigations have been carried out, and comments sought, the Registrar will make a final review decision.
39. At this stage, the Registrar must consider²¹ whether the original decision was, for any reason, materially flawed, or that there is new information which would probably (i.e. on the balance of probabilities) have led to a different decision. This is ultimately a question of judgment for the Registrar, taking into account all the relevant information, including representations provided by those entitled to comment, and new material obtained during the course of any further investigations conducted.
40. Where the Registrar concludes that a reviewable determination was for any reason, materially flawed in whole or in part, or that there is new information which would probably have led, wholly or partly, to a different determination, he or she should go on to consider whether a fresh determination is:
- (i) necessary for the protection of the public;

¹⁹ see Rule 9(6)(c) of the Rules

²⁰ see Rule 9(7) of the Rules

²¹ in accordance with Rule 9(8) of the Rules

- (ii) necessary for the prevention of injustice to the registrant; and/or
- (iii) or is otherwise necessary in the public interest.

41. If so, the Registrar may decide, in relation to an original determination that an allegation against a registrant is not one to which section 27/36N applies, to substitute for all or part of that determination any other determination which the Registrar could have made (for example, to refer the allegation to a Caseworker for investigation, or to the Case Examiners, or to a Practice Committee as joinder²²).
42. Alternatively, if the original determination was by the Case Examiners or the Investigating Committee that an allegation referred to them ought not to be considered by a Practice Committee (including cases which are closed with a warning, advice, or no further action), the Registrar may determine that the allegation should be referred for reconsideration by the Case Examiners or the Investigating Committee (as the case may be)²³.

Outcome

43. Where the Registrar has reviewed a decision, he or she must notify the registrant, the informant (if any) and any other person who, in the opinion of the Registrar, has an interest in that determination. The notification should include the decision made and the reasons for it²⁴.
44. If the Registrar's decision is that the allegation should be referred for reconsideration by the Case Examiners or the Investigating Committee (as the case may be), the matter will be listed for reconsideration as soon as possible.
45. The GDC will then, depending on the circumstances of the case, and in particular where the issue relates to the determination which was made rather than any new information which has come to light subsequently, endeavour to ensure that the matter is reconsidered by different personnel to those who made the original decision. However this may not always be necessary, or possible for operational reasons.
46. When the matter is reconsidered by the Case Examiners or the Investigating Committee (as the case may be), they will be provided with the bundle supplied to them originally and their original determination, together with the application for review, any new information gathered as part of the review process²⁵, any comments on the application²⁶ and the Registrar's final determination as provided under Rule 9(10).
47. The decision-making process for the Case Examiners or the Investigating Committee (as the case may be) covers five elements:
 - preliminary issues
 - Stage 1 Facts
 - Stage 2 statutory ground
 - Stage 3 current impairment
 - Case disposal

²² in accordance with Rule 25(2) and (3) of the Rules

²³ under rules 5 and 7 respectively

²⁴ see Rule 9(10) of the Rules

²⁵ provided by the applicant, obtained in accordance with Rule 9(7) or otherwise

²⁶ provided in accordance with Rule 9(6)

48. The Case Examiner or the Investigating Committee (as the case may be) will reconsider those elements which made the original decision materially flawed and/or those elements which are affected by the new information.
49. The Rule 9 determination will set out which elements require reconsideration.
50. The fresh determination may result in a different case disposal.
51. At the fresh consideration stage, the informant will be given 7 days from the date of the final Rule 9 determination in which to provide further representations. Any representations received from the informant will be sent to the Registrant, who will have seven days in which to provide representations. All representations received from the parties will be put before the Case Examiners for consideration.

Withdrawal of Rule 9 application

52. The applicant may withdraw their application at any stage prior to service of the Registrar's final determination. However, save in exceptional circumstances, the applicant will not be permitted to make a further application.
53. This does not preclude another party from making a Rule 9 application.

Limit on number of applications

54. Other than in exceptional circumstances each party will be permitted to submit one application only.

What if I am not happy with the outcome of the review?

55. Where, at the initial stage, the Registrar determines that the grounds for a Rule 9 review are not satisfied, the Registrar has no legal power to conduct a review. The GDC has no power to overturn such a determination. The only way in which a party may challenge this determination is to submit an application for judicial review.
56. Where, at the final stage, the Registrar determines that:
 - (i) the original decision was not materially flawed; and/or
 - (ii) there is no new information which probably would have led to a different determination; and/or
 - (iii) that a fresh determination is not necessary,

this amounts to a final determination, and the Registrar has no legal power to overturn it. A party may challenge such a determination through judicial review.

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