Fitness to Practise Rule 8E and Rule 10 Guidance for the Investigating Committee
A. Introduction

1. Under section 27A(8) and section 36O(8) of the Dentists Act (“the Act”), the Investigating Committee may review and if they consider it appropriate revise a determination made by them that an allegation or allegations ought to be considered by a particular Practice Committee, on an application made by:

(i) the Council (i.e. the GDC’s prosecutions team or external solicitors);
(ii) the Registrar (for these purposes, the Registrar’s powers are exercised by the GDC’s Casework team);
(iii) the person who is the subject of the allegation or allegations (“the Registrant”); or
(iv) any person making the allegation or allegations (“the Informant”).

2. For cases heard by the Investigating Committee on or after 1 November 2016, Rule 8E of the General Dental Council (Fitness to Practise) Rules 2006 (“the Rules”) provides that where the Investigating Committee receive an application for a review of a previous determination in accordance with section 27A(8)(b) or 36O(8)(b) of the Act, they must, before considering the applicant’s written representations in support of the application, satisfy themselves that any other person entitled to make such an application has been provided with a reasonable opportunity to submit written representations in response to the application.

3. For cases heard by the Investigating Committee prior to 1 November 2016, Rule 10 of the Rules provides that where the Investigating Committee receive an application for review of a previous determination in accordance with section 27A(8)(b) or 36O(8)(b) of the Act, the Investigating Committee shall consider the applicant’s written representations in support of the application, after satisfying themselves that any other person entitled to make such an application has been provided with a reasonable opportunity to submit written representations in response to the application.

4. The process by which the Investigating Committee is asked to review a previous determination to refer an allegation (or allegations) to a particular Practice Committee is thereby known as the “Rule 8E” or “Rule 10” process.

5. In addition, where (pursuant to section 27B(4) or section 36P(5) of the Act) a Practice Committee considers that any allegation should not have been referred to it by the Investigating Committee, it may refer that allegation back to the Investigating Committee. Rule 8E and Rule 10 do not apply to such referrals back, although the reason for the application, and the issues to be considered by the Investigating Committee, are likely to be similar.
B. Guidance to the Investigating Committee for considering Rule 8E or Rule 10 cases

General approach

6. Where a Rule 8E or Rule 10 application is made, it does not necessarily mean that the previous decision by the Investigating Committee was either wrong or flawed. For example, Rule 8E or Rule 10 applications are often made where either the circumstances of the original case considered by the Investigating Committee have changed, or additional evidence which is relevant to the case has been obtained.

7. The power to carry out a review is not, however, limited to cases where new evidence has emerged since the original decision and on occasion, a Rule 8E or Rule 10 application may be made as an alternative to a challenge by way of judicial review.

Listing of cases

8. As set out in the “Rule 8E and Rule 10 – Guidance for Applicants”, the Investigating Committee Manager will, upon receipt of an application, check that it:

(i) falls within the scope of those determinations which the Investigating Committee can review;

(ii) is accompanied by the applicant’s written submissions in support (and that those written submissions are complete, and include all supporting documentation);

(iii) the Practice Committee hearing has not yet commenced and that there is sufficient time before the scheduled commencement of the Practice Committee hearing for a Rule 8E or Rule 10 application to be listed and considered by the Investigating Committee; and

(iv) (in the case of a Council or Registrar Rule 8E or Rule 10 application only) that it has been appropriately authorised.

9. If those conditions are met, the Investigating Committee Manager will list the matter for consideration by the Investigating Committee. However, the Investigating Committee is also

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1 One exception would be an application made by the Registrar pursuant to Rule 8E or Rule 10: these will usually be limited to incidences where there is evidence to suggest that there has either been a serious procedural error or some other serious irregularity during the original Investigating Committee proceedings

2 The Investigating Committee can only review a determination made by them that an allegation or allegations ought to be considered by a particular Practice Committee, and not a determination that a matter should be closed with a warning, advice, or no further action, or a determination made by the Case Examiners

3 As section 27A/36O(8)(b)(i) & (ii) provide that the Investigating Committee may review a determination upon an application, but only if such review is carried out before the commencement of the Practice Committee hearing, or (where there is not to be a hearing) before that Practice Committee have begun to consider written statements or representations

4 bearing in mind the need to provide those entitled to comment with reasonable opportunity to provide written representations, as well as the time needed to create a bundle and to provide it to the Members of the Investigating Committee for consideration in advance of their meeting
entitled to consider for itself whether the conditions for submission of an application have been met. If the Investigating Committee concludes that these conditions are not met, it is not obliged to carry out a Rule 8E or Rule 10 review.

Preliminary issues

10. Before considering an application, the Investigating Committee must be satisfied, as a preliminary matter, that any other person entitled to make such an application has been provided with a reasonable opportunity to submit written representations in response to the application.5

11. What amounts to a “reasonable opportunity” is likely to depend on all of the circumstances of the case, which will include (but are not limited to):

(i) the length and complexity of the application for review;

(ii) the number and complexity of the allegations to which the application for review relates; and

(iii) the quantity of documentary evidence in the case.

12. As a general rule, the Investigating Committee Manager will provide all those entitled to comment (“relevant persons”) with 14 days in which to submit written representations in response to the application.

13. The Investigating Committee may consider that in general, this is a reasonable opportunity, but that there may be exceptional circumstances in which an extended period should be provided to a relevant person or persons, or on occasion (including where the scheduled Practice Committee hearing of the case is imminent) where a shorter period may be appropriate.

14. Following receipt of written representations from any relevant person, the Investigating Committee Manager will circulate these to other relevant persons for their information.

15. On occasion, the Investigating Committee Manager will then receive further comments from a relevant person or persons, commenting on the comments of others. Any such “comments upon comments” which are received by the Investigating Committee Manager will be circulated to the other relevant persons and will then be tabled on the day of the Investigating Committee meeting, for the Investigating Committee to decide whether to take them into account.

16. In making that assessment, the Investigating Committee should note that what is required is that other relevant persons must have a reasonable opportunity to submit written representations in response to the application for review. Comments upon comments are not responses to the application for review and therefore the Investigating Committee is not ordinarily required to consider them.

17. However, if a relevant person or persons puts forward comments on comments before the application is considered by the Investigating Committee and:

5 See Rule 8E and Rule 10
(i) those comments would be likely to have an impact on the outcome of the application, and

(ii) there is good reason why the point relied on was not raised previously,

the Investigating Committee should consider them.

18. In practice, this may arise (inter alia) whereby further material, prepared in connection with the Practice Committee hearing, is served by the Council or the Registrant as part of their comments on the Rule 8E or Rule 10 application, and the other party to the proceedings wishes to respond to that further material. On such occasions, the Investigating Committee may consider that such comments should be taken into account when it is reaching its decision on the case.

Substantive decision

19. Once it is satisfied that all relevant persons have been provided with a reasonable opportunity to submit written representations in response to the application, the Investigating Committee should go on to consider whether to review and, if appropriate, revise, its previous determination that an allegation or allegations ought to be referred to a Practice Committee.

20. As such, the Investigating Committee is considering whether it should maintain the referral of the allegation or revise the determination of the original referring Investigating Committee by determining that the allegation:

(i) ought to be referred to a different Practice Committee; or

(ii) ought not to be referred to a Practice Committee.

21. The Investigating Committee should approach this by determining:

(i) whether or not, on the basis of the information before it, there is a real prospect of the facts (as set out in the Notice of Hearing or draft charges if the case has reached that stage, or as originally referred if not) supporting the allegation of misconduct, deficient professional performance etc. being established;

(ii) (if so) whether there is a real prospect of a Practice Committee finding that the statutory ground (misconduct, deficient professional performance etc.) is established; and

(iii) (if so) whether or not there is a real prospect of a finding of current impairment being made.

22. In conducting this exercise, the Investigating Committee should not re-open any particulars of allegation which the initial referring Investigating Committee did not consider met the real prospect test.

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6 The Investigating Committee has no power under section 27A(8)/36O(8) or Rule 8E/10 to review a determination that a matter should be closed with a warning, advice, or no further action.

7 the matters listed in section 27(2)/36N of the Act by which a registrant’s fitness to practise may be regarded as impaired, including misconduct, deficient professional performance, adverse physical or mental health, conviction, caution etc.
23. Instead, one of the aspects which the Investigating Committee should examine is the current state of the case as identified within the Notice of Hearing (if issued) or draft charges (if available) and the evidence collated since the original referral, as this will have a bearing on whether or not there is a real prospect of the facts supporting the allegation of misconduct, deficient professional performance etc. being established.

24. If the Investigating Committee determines ultimately that the allegation(s) of misconduct, deficient professional performance etc. should not be considered by a Practice Committee, then the Investigating Committee should go on to consider whether it is appropriate to dispose of the matter by way of advice or warning. Further guidance on the issuing of advice or a warning can be found in the Investigating Committee Guidance Manual.

25. When articulating the reasons for its decision in a Rule 8E or Rule 10 case, the Investigating Committee should make clear reference to any previous determination(s) so that all relevant persons are able to understand whether the Investigating Committee is adopting or distinguishing the previous determination(s) and the reasons given by the previous Investigating Committee(s).

26. The Investigating Committee considering the Rule 8E or Rule 10 application is of course entitled to adopt the previous decision made by the Investigating Committee, however clear justification will need to be provided when adopting this approach. The Investigating Committee will also need to make specific reference to both submissions made in support of the application and evidence obtained since the initial Investigating Committee decision.

27. Proximity of the Practice Committee hearing may prevent a Rule 8E or Rule 10 application from being listed by the Investigating Committee Manager. However, once a case has been listed and is before the Investigating Committee, proximity of the Practice Committee hearing will not ordinarily be a relevant consideration for the Investigating Committee when it is considering whether to review, and if appropriate revise, its original determination as a result of a Rule 8E or Rule 10 application.

28. The Investigating Committee will need to consider any GDC (or other) standards in place at the time the events allegedly took place. The Investigating Committee will also need to consider any changes to standards or accepted practices that are relevant particularly when looking at current impairment.

29. The Investigating Committee should make clear which standards it is applying and should identify how its decision has been affected by any changes in standards. It should also make clear the weight applied to different evidence and the effect that has on its decision.

30. The Investigating Committee’s powers of investigation cannot be utilised when considering a Rule 8E or Rule 10 application. This means that the Investigating Committee is unable to adjourn a case for specific further enquiries or investigations. However, the Investigating Committee is entitled to adjourn for other reasons which could include:

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8 The power to issue advice or a warning in these circumstances is provided by section 27A(9) of the Act, which refers back to section 27A(2)/36O(2)

9 bearing in mind the need to provide the other relevant persons with reasonable opportunity to provide written representations in response to the application, as well as the time needed to create a bundle and to provide it to Members for consideration in advance of their meeting
(i) to obtain legal advice;
(ii) requesting further clarification on particular evidence;
(iii) requesting further clarification in relation to a specific point or points made in the submissions of a relevant person or persons; and/or
(iv) other administrative reasons.

31. The Investigating Committee does not, however, have the power upon review to adjourn for further enquiries to be conducted. Nor does the Investigating Committee have the power upon a Rule 8E or Rule 10 review to agree undertakings with the registrant.

Linked cases

32. Where two or more Rule 8E or Rule 10 applications are made in respect of linked cases, e.g. those regarding different Registrants but which arise out of the same initial complaint, or otherwise from the same circumstances; or those regarding the same Registrant, but where the allegation or allegations were originally considered at two or more separate IC meetings, these will ordinarily, and unless there is good reason not to do so, be listed for Rule 8E/10 consideration at the same IC meeting.

33. However, it is not usually appropriate to reference anywhere in the application (i.e. letter requesting a Rule 8E or Rule 10 review and supporting information):

(i) the outcomes of cases relating to other Registrants, even where the facts may be linked; or
(ii) other ongoing fitness to practise issues relating to the same Registrant.

If this information is included in the material submitted by any party, it will not, in the absence of an explanation as to why it is relevant, be incorporated in papers presented to the IC considering the Rule 8E or Rule 10 application.

Interim Orders Committee (IOC)

34. Prior to 13 April 2016, the relevant legislation (i.e. section 27A(8)/36O(8) of the Act and Rule 10) did not make any reference to a power to review or revise a decision to refer (or not to refer) a case to the Interim Orders Committee.

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10 i.e. those which may be considered for joinder at a PC hearing pursuant to Rule 25 of the Rules

11 Section 27A(8) makes clear that the power to review and if appropriate revise a determination applies to a determination made by the Investigating Committee that an allegation or allegations ought to be considered by a particular Practice Committee – “Practice Committee” being defined in section 2(3) of the Act as meaning “the Professional Conduct Committee, the Health Committee or the Professional Performance Committee”
35. However, since 13 April 2016, the Investigating Committee, when considering a Rule 8E or Rule 10 application, now “may refer an allegation or allegations to the Interim Orders Committee”\(^{12}\), when the Investigating Committee determines that the allegation or allegations ought to be considered by a Practice Committee and maintains the referral. However, it continues to remain the case that the Rule 8E and Rule 10 process cannot be used to request that the Investigating Committee reviews, and if appropriate, revises, on a stand-alone basis its decision to refer a case to the Interim Orders Committee.

36. In any event, as was the position prior to 13 April 2016, if the Investigating Committee determines that an allegation (or allegations) against the Registrant should not be considered by a Practice Committee, and there is an interim order in place, the Investigating Committee must, *if that interim order was imposed as a consequence of the allegation (or allegations) which have now been closed*, revoke the order with immediate effect.

37. If, on the other hand, the interim order was imposed:

(i) as a consequence of a different allegation or allegations, or

(ii) on the basis of the current allegation or allegations in conjunction with another separate (and as yet unresolved) allegation or allegations, which is/are not also being closed by the Investigating Committee at that meeting,

the Investigating Committee should not revoke the interim order. Instead, the order may be reviewed at the next IOC hearing\(^{13}\).

\(^{12}\) See section 27A(8A) and 36O(8A), and (in relation to the circumstances in which it may be appropriate for the Investigating Committee to refer a case to the IOC), the Investigating Committee Guidance Manual

\(^{13}\) In accordance with the provisions of Section 32(5) of the Act