

Our Ref: EG/DEO

30 April 2015

Mr Stephen Borton, Chief Clerk
The Faculty Office
1 The Sanctuary
London SW1P 3JT

Dear Stephen,

Review of Notaries (Conduct & Discipline) Rules 2011

The Society of Scrivener Notaries makes the following response to the proposed revision of the Notaries (Conduct & Discipline) Rules 2011.

A Memorandum has been enclosed with the draft Rules. For ease of reference we make use of the numbering scheme used in the Memorandum.

General observations. The Society notes the suggestions made by Jonathan Coutts in his report made to the Master in October 2014 following the conclusion of the *Imison* case ("the Imison report"). The Society also notes the assessment made by the Legal Services Board of the Faculty Office's regulatory arrangements: *Regulatory standards 2014/15 - An update report on the performance of legal services regulators*, published in February 2015 ("the LSB comments").

Enforcement. The LSB commented that "*the low number of notifications does not mean that the scale of potential misconduct and consumer detriment is similarly low*". Enforcement is an area that needs attention. We feel that the Faculty Office could do more to identify misconduct sooner and draw your attention to the suggestions contained in sections 2 and 3 of the Imison report. The public interest is not best served when disciplinary action is responsive and only occurs after a sustained pattern of misconduct.

The Society welcomes the draft Rules insofar as they consolidate secondary rules of procedure into a single code. The Society also agrees with the objective that there needs to be control of costs in disciplinary cases. Our submission is however, that costs are best kept down by ensuring that a strong case is presented to the Court.

The role of the Scriveners Company. The Society notes the Faculty Office's wish to have a single disciplinary regime for notaries as opposed to separate regimes for Scrivener and non-Scrivener notaries.

The Society's view is that complaints arising out of the distinctive nature of much of the specialised international work undertaken by scrivener notaries are best investigated by notaries practising in that environment. Scrivener notaries are routinely instructed in a range of complex cross-frontier transactions which are rarely encountered outside central London and it is submitted that the pool of notaries outside the Company with the requisite expertise to investigate these complaints is perhaps limited.

The Society submits that in the event of a complaint being made against a scrivener notary the most cost-effective and expedient investigative process is by way of the current procedure, that is to say a Professional Conduct Committee, consisting of two senior scrivener notaries and a person of good standing who is not a

notary. It can reasonably be expected that such committee would contain the necessary expertise, including linguistic, to carry out the investigation process without recourse to costly external advice. The recent disciplinary proceedings involving the Scriveners Company have demonstrated the effectiveness of the current Scrivener's complaints procedure in investigating allegations of notarial misconduct. The LSB commented: "*We are pleased that the Faculty Office pursued this case to its conclusion.*"

In the event that the Scriveners Company is to continue in its present role of investigating allegations of notarial misconduct against scrivener notaries, all scrivener notary firms will support the establishment of a contingency fund to cover all irrevocable costs arising during the investigation stage of any complaint against a scrivener notary.

If the Scriveners Company is not to continue its role in the investigative stage of allegations of notarial misconduct against scrivener notaries then the Society is anxious, in the interests of both scrivener notaries and those who use their services, to ensure that the process of appointing a sole non-scrivener Nominated Notary to investigate such allegations is as effective and expeditious as the recourse to a Professional Conduct Committee as currently provided for under the Scrivener Notaries Complaints Procedure.

The Society also notes the Faculty Office's desire to remove the ambiguity over which body deals with various complaints against scrivener notaries, the Society submits that the appropriate body to deal with first tier and any other complaints and therefore be defined as a "Designated Society" is the Incorporated Company of Scriveners and not the Society. The Incorporated Company of Scriveners has an effective approved complaints procedure in place to handle first tier and other complaints and it is submitted that it is the appropriate body for complaints to be referred to.

Comments on the proposals – with reference to the Memorandum

5. **Definition of notarial misconduct.** We welcome the extended definition of notarial misconduct. We believe that there is scope for the Registrar to issue a rebuke to a notary for "persistent failure" to provide a reasonable service. A comparable sanction is operated by the SRA, subject to an appeal to the Solicitors Disciplinary Tribunal. A rebuke could be therefore be issued by the Registrar, subject to appeal by the notary to the Court of Faculties.

8. We would like clarification of the scenarios under which the Master would seek to recuse himself. The Master has significant investigatory powers that cannot be passed to the Commissary without compromising the Court's independence. The Commissary's responsibility is to hear the evidence and not to manage the investigation.

10. **New powers of inspection.** The new power to inspect documents is "by order of the Master". We are concerned as to how expeditious it would be to obtain such an order. Moreover, we are concerned that this power will come to be regarded as a cheaper alternative to the powers set out in the Notaries Accounts Rules.

11, 12. Please refer to the comments made above on the superiority of the current procedure.

14, 15. **Complainant's duties.** We agree that it is sensible to specify the Nominated Notary's duties but we oppose the insertion of the adverbs "diligently and expeditiously". A ticking clock will be exploited by a respondent to obstruct an investigation for tactical advantage. These words should be deleted from proposed Rule 8.3, as the power given to the Registrar to dismiss a Nominated Notary is sufficient (draft Rule 8.5).

24. **Amending complaints.** Draft Rule 13 is vague, particularly when compared with draft Rule 14. We do not see any distinction between *filing further statements containing further allegations* and *making a new/amended complaint*. The first part of draft Rule 13.1 seems to imply that the further allegations should be in support of the complaint. However, the second part of this Rule suggests that this supplementary statement shall be treated as though it were a [new and/or separate?] complaint. What is the intention?

28. **Public hearings.** We welcome the express provision for hearings to be held in public, although if this provision is to have any significance the Faculty Office will need to ensure that hearings are publicised.

33. **Standard of proof.** The Society agrees with the proposed standard of proof. ✓

36. **Sanctions.** We encourage the Master to consider the recommendation for guidelines on penalty (Imison report section 6.6). The Society agrees with the conclusions drawn by the LSB on the matter of sanctions and utility. We note the following LSB conclusions: *"If cases are perceived to be too expensive then the Faculty Office may be reluctant to pursue them. Additionally, if the sanctions are too lenient then they are unlikely to punish (or even disgorge profits) or deter others. ... We encourage the regulator to consider our report on best practice in sanctions and appeals to assist in this review"*.

We query whether anyone would be willing to undertake a prosecutory role in the absence of guidelines on penalty. The responsibilities of bringing proceedings are significant. Practitioners will want some indication on whether the effort and expense are going to be justified.

Guidelines on penalty will also encourage respondents to approach disciplinary proceedings realistically.

Negotiation. The Rules do not make any provision for the "without prejudice" scenario considered at paragraph 6.4 of the *Imison report*. Guidelines on penalty (with discounts for early admissions), will reduce the number of contested cases.

In the absence of any guidelines on penalty we think the LSB will decline to approve the draft Rules.

38. **Costs of the investigation.** We presume (but would welcome your clarification) that the proposed Rule 22.1.6 is intended to allow the Court to require respondent notaries to pay for the costs of an investigation. The profession needs to be reassured unambiguously that delinquent notaries will pay for the cost of an investigation that leads to a finding of misconduct. The deterrent value of this provision may assist in ensuring that a strong case is not contested *ad absurdum* by a respondent.

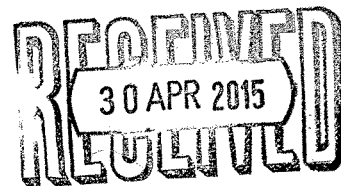
39. We note this new provision but refer the Master to the cost-benefit analysis made in section 7 of the *Imison report*. A willingness to spend a little when there is evidence of misconduct is likely to result in savings for the profession at a later stage. We do not think that anyone will be willing to assume the responsibilities of being a Nominated Notary in the absence of Faculty Office resources or support, and we would not advise our members to do so.

Please do not hesitate to contact the Society if you require any clarifications of the matters contained in these submissions or for any further assistance in this important matter.

Yours sincerely,



Edward Gardiner,
Chairman



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6th July 2015

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Chairman
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Dear Edward

REVIEW OF NOTARIES (CONDUCT & DISCIPLINE) RULES 2011

Thank you for your letter of 30 April 2015 responding to the consultation on the proposed revision of the above named rules. The comments of the Society have been discussed with the Master who is grateful for the points made. Our replies are:

General Observations – These are noted and the Imison Report is helpful.

Enforcement – This is noted.

The role of the Scriveners Company – We are aware of the distinctive and specialised nature of the work of the Scriveners Notaries and regard will be had to this when the Registrar is appointing a Nominated Notary. However we remain convinced that there is a need to include non-Scrivener Notaries in the pool of individuals eligible to be appointed as Nominated Notaries. It is key that the Nominated Notary is not personally acquainted with the notary complained against as such a level of connection between Nominated Notary and the respondent could compromise the independence of the Nominated Notary or convey the impression that he or she is not an independent person. For the same reason it is difficult to see how the Scriveners Company acting through its Professional Conduct Committee could not be conflicted when investigating and prosecuting a case against one of its members, or at least where the perception of conflict might not arise.

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However, nothing should prevent a Nominated Notary, whether a Scrivener or not, from seeking the advice and assistance of the Scriveners Company or the Society of Scrivener Notaries when investigating and prosecuting a case. Additionally, the Company and the Society would be entitled to make a complaint against a Scrivener notary, either following investigation by them, or having received evidence or an allegation of misconduct against one of their members. In the unlikely event that the Registrar did not appoint a Nominated Notary to investigate a complaint made, Rule 11.2 enables any notary to act as the "Competent Complainant" and to bring the case to Court.

It is noted that the Society is anxious that the process of appointing a sole non-scrivener Nominated Notary to investigate such allegations is as effective and expeditious as the recourse to a Professional Conduct Committee of the Company.

It is noted that Society would prefer for the Scriveners Company to be the "Designated Society" for Scrivener Notaries. We have no objection to this but there is no Approved Procedure for the Scriveners Company so one would need to be put in place.

Comments on the proposals – with reference to the Memorandum:

5. **Definition of notarial misconduct.** We do not consider that the Registrar should be in a position to issue a rebuke, subject to appeal to the Court. To issue a rebuke the Registrar would have determined that there had been a failure on the part of the notary to conduct his or her practice in the right way and that this would be a matter of official record. We do not consider that the Registrar should be making findings of this nature, especially as the Registrar is clerk to the Court. This may or may not be sensible in the solicitors profession but the SRA is constituted differently and is much larger than the Faculty Office and the Solicitors Disciplinary Tribunal is separate from the SRA. There is however a provision in the existing and proposed rules (see 21.1.5) for the Court to admonish a notary.

8. Although the Master considers applications made by the Registrar and/or Nominated Notary at the investigatory stage, the Master is only involved in the investigation to the extent that he is responding to initiatives of either the Registrar or Nominated Notary. Should the Master consider it necessary to recuse himself from considering such an application, there is nothing essentially inappropriate about the Commissary or Deputy Commissary hearing those applications instead. Indeed it may be better for a judge to consider the application. It may however be necessary for the Commissary or Deputy Commissary not to hear the substantive case and for the other to do so. The provision for the Master to direct that an application be heard by the Commissary him or herself is not new (see Notarial Appeals and Hearing Rules 2000).

10. **New powers of inspection.** We do not know whether your concern relates to the order being overly expeditious or not enough, but if the Master was unavailable to deal with the application, the Registrar could seek the Master's direction that the Commissary hear the application instead. As to the possibility that this power might be used as a cheaper alternative

to the power in the Accounts Rules, this is unlikely. For this power to be used there needs to be a complaint or evidence of notarial misconduct and a Nominated Notary appointed. It is not a standalone provision for the Registrar to use at will.

11,12. See our comments above.

14., 15. **Complainant's duties.** Clearly if a respondent is obstructing an investigation and it is not in the power of the Nominated Notary to make things go quickly, the Nominated Notary will not be at fault. It appears to us to be sensible and in the interests of justice that the Nominated Notary be under a duty to act diligently and expeditiously whatever circumstances might mitigate against that.

24. **Amending complaints.** The purpose of Rule 13.1 is to allow further allegations, facts, matters etc. to be made in support of the original complaint with the leave of the Court. However, in order to ensure a Statement containing further allegations is properly tested, it "shall be treated as though it were a complaint for the purposes of rule 12", that is to say that the respondent shall have the opportunity to respond to it. On reflection a slight change is needed to rule 13.1 as follows:-

"With the leave of the Court the Complainant may file supplementary Statements with the Registrar containing additional facts or matters on which the complainant seeks to rely in support of the complaint or containing further allegations and facts or matters in support of ~~the complaint~~ further allegations. Any supplementary Statement containing further allegations against the Respondent shall be treated as though it were a complaint for the purposes of rule 12."

28. **Public hearings.** We don't consider that an express provision for hearings to be held in public necessitates publicity. If members of the public wish to attend, they would not be prevented, but members of the public don't need to be present for it to be held in public. We would be happy to place a notice on our website and if one of the societies wanted to do that as well, they could.

33. **Standard of proof.** Noted.

36. **Sanctions.** We don't propose to issue guidance on penalties at this time, and any such guidance would need to come from the Commissaries. We shall keep this under review.

Negotiation. We have considered this in light of the Imison Report and have now included a provision which enables the parties to submit an agreed statement to the Court following without prejudice discussions. See the new proposed Rule 14.

38. **Costs of the investigation.** Although ultimately it is for the Court to decide whether it is just for the respondent to pay for the costs of the investigation when there has been a finding of misconduct, rule 22.1.6 does enable the Court to do exactly that.

39. It will remain the case that a Nominated Notary will always be entitled to his or her costs but there does need to be a way of placing limits on these. The table of costs and fees which will set out what the nominated notary will be paid will be the subject of a separate consultation and I will be writing to you in due course with that.

I enclose a copy of Christopher Vaughan's letter to me of 30 April and my response to that and a copy of the revised Rules.

With kind regards

Yours sincerely,

STEPHEN BORTON
Chief Clerk

Encs.