

## Faculty Office

### Notaries (Conduct and Discipline) Rules – 2015 Revision

#### Explanatory Memorandum

##### Introduction

1. The existing rules governing complaints against notaries, investigations and disciplinary procedure are the Notaries (Conduct and Discipline) Rules 2011. In light of a number of recent disciplinary cases we consider that a revision of the rules is now needed. We bring forward amendments to the rules in order to achieve two main aims:
  - 1.1 To make provision for limiting the costs of the disciplinary cases, especially in light of a recent case where the costs were very high and had the effect of depleting the Contingency Fund and doubling the annual contribution to be made by each notary to it. This is to be achieved by introducing a table of costs to be applied by the judge, save in exceptional cases.
  - 1.2 To have a single disciplinary regime for notaries, as opposed to separate regimes for Scrivener and non-Scrivener notaries. At present, all disciplinary cases against Scrivener notaries must be investigated and prosecuted by a Scrivener notary and vice-versa. In removing this distinction, Scrivener notaries will be able to investigate a complaint against a general notary and a general notary will be able to investigate a complaint against a Scrivener Notary. This should help in finding a suitable notary to act as the investigatory and prosecutorial notary (called the "Nominated Notary") who is not personally acquainted with the notary complained against. This is presently difficult in a profession where most of the notaries are known to each other, especially amongst the Scriveners which are approximately 30 in number. At the same time, to remove the ambiguity over which body deals with various complaints against Scriveners. At present first tier-complaints against Scrivener notaries might be referred either to the Society of Scrivener Notaries or to the Incorporated Society of Scriveners. This is not sensible and there needs to be a single body designated to deal with such complaints.
2. The opportunity has been taken to consolidate the Notaries (Conduct and Discipline) Rules 2011 with the Appeals and Hearings Rules 2000, which govern appeals and certain other matters, and to make such other changes that are considered beneficial.

##### Structure

3. The architecture of the rules has been changed, including collapsing the schedules into the main body of the rules and embedding the provisions previously contained in the Appeals and Hearings Rules 2000 into these rules. There is a new definition for "Document" as this term will be used later.

### Interpretation (Rule 2)

4. Rather than cross-referring to the Practice Rules, the definition for "notarial act" the meaning is given in full. "Firm" is not actually used in these rules so the definition has been deleted.
5. "Notarial Misconduct" may also be found when or there has been a "persistent failure to provide the standard of service reasonably to be expected by a notary" on the basis that an individual event may in itself not be sufficient to prove a case of Notarial Misconduct but that the pattern of behaviour is such as to warrant punishment or admonishment.
6. The definition of "Registrar" has been widened to include an officer of the Court acting with the Registrar's authority (eg his Deputy or a Clerk).

### Permanent officers of the Court (Rule 3)

7. The permanent officers of the Court (ie the principal judge, styled the "Commissary", and the Registrar) are now identified.

### Composition of the Court (Rule 5)

8. In the Appeals Rules it is provided that certain powers of the Master contained in the 1993 Discipline Rules and in the 1991 Practising Certificate Rules, now both repealed and replaced, would be decided by the Commissary, and not the Master as those rules provided. There is also catch-all provision in the Appeals Rules allowing the Master to determine that decisions made by him under *any* rules or regulations can be given by him to the Commissary to make. It is this catch-all rule that has been transplanted into these rules. This is to enable the Master to recuse himself where appropriate.
9. It is provided that the Commissary may sit alone when assessing costs, or with Assessors.

### Nominated notaries and their functions (Rule 6)

10. A new power is given to the Nominated Notary to inspect documents in the possession of a notary in the course of an investigation into possible Notarial Misconduct subject to a duty not to disclose the document(s) or information without leave of the Court except in the detection, investigation or prosecution of a crime, to the law enforcement and prosecution authorities.

### Removal of separate disciplinary provisions for Scrivener notaries

11. The distinctions between Scrivener and General Notaries for the purposes of these rules have been removed except that the first-tier complaints procedure for Scrivener Notaries remains intact. The Society of Scrivener Notaries has requested that the Incorporated Company of Scriveners be the "Designated Society" responsible for dealing with these first-tier complains.

### Complaints resolution procedures (Rule 7)

12. These provisions were revised for the 2011 Rules and they are unchanged except that the Society of Scrivener Notaries is no longer a "Designated Society" for the purposes of these rules which means that it is not to have its own first-tier complaints resolution procedure under these rules (that is to be operated by the Incorporated Company of Scriveners instead). It also means that Rule 10 will not apply to it (referral of allegations by Designated Societies). This removes the ambiguity over which body deals with first-tier complaints. Nothing in this would prevent any professional membership body from exercising discipline over its members, but that would not be under these rules. Additionally, the wording in Rule 7.3 has been altered to make the meaning clearer.

### Handling of allegations (Rule 8)

13. It has been made clear that a nominated notary may be appointed by the Registrar to investigate evidence of Notarial Misconduct in addition to allegations of such.
14. The principal duties of the nominated notary have been set out for the first time: to diligently and expeditiously investigate evidence of or an allegation of Notarial Misconduct, report in writing to the Registrar, and to make a complaint and prepare and prosecute disciplinary proceedings against a notary in the Court if, after investigation, the Nominated Notary reasonably believes that there is a *prima facie* case of Notarial Misconduct to be answered.
15. In the event that a Nominated Notary is failing to do his duty it is now provided that the Master on the application of the Registrar may discharge a Nominated Notary from his investigatory and prosecutorial functions with respect to a specific allegation or evidence of Notarial Misconduct if the Registrar considers that the Nominated Notary is not acting uprightly, diligently or expeditiously in fulfilling his duties in the matter and appoint another Nominated Notary to discharge the same in his place.

### Interim suspensions by the Registrar (Rule 9)

16. The rule concerning interim orders (ie suspension orders) has been put into a section of its own.
17. Currently when the Registrar receives evidence concerning a notary which amounts to *prima facie* evidence of gross misconduct, the Registrar, if he is satisfied that it is required for the protection of the public, may make an interim order to suspend the notary from practice or restrict or limit or impose conditions on the notary's practice pending the conclusion of disciplinary proceedings. "[G]ross misconduct" has been changed to "Notarial Misconduct" (as defined by the rules). It is still required that such an order be for the protection of the public. It is also subject to appeal to the Master. If the public are at threat it may be that the Registrar will need a power to suspend whether the misconduct is "gross misconduct" or something less than that.

18. Currently suspension by the Registrar (as opposed to by the Court – see Rule 21) cannot be made after the 21 day period for replying to a complaint has lapsed. It is now provided that this bar also applies when reply to the complaint has been received by the Registrar (which may be earlier than 21 days). After that time only the Court (ie the Commissary) can suspend.
19. It is provided that the interim suspension will lapse if proceedings are not to be brought or are at an end. There is also a time limit of three months for each suspension. The suspension may be renewed for any number of times.
20. The a reference to the endorsement on a Solicitor's Practising Certificate has been removed as endorsement is no longer a method that the Faculty Office uses to certify that a solicitor notary has authorisation to practice.
21. The contents of Form 2 (statement in support of complaint) are now prescribed to contain "the allegations and the facts and matters supporting the complaint and each allegation".
22. The contents of Form 4 (answer to complaint) now give the opportunity for the respondent to contest the proceedings in part, as well as in whole.

#### Respondent's reply to complaint (Rule 12)

23. It has been stipulated that the statement filed with the respondent's reply shall state which facts in the complaint are agreed and which are not.

#### Further statements or allegations (Rule 13)

24. The provision allowing the complainant to file further statements in support of the complaint (potentially alleging further misconduct) is new. Further statements or allegations can only be admitted with the leave of the Court. In practice such matters will be dealt with by the Commissary's directions during the pre-trial management process. Any supplementary statement containing further allegations against the respondent shall be treated as though it were a complaint for the purpose of giving a right of reply and shall be served on the respondent.

#### Agreed statements (Rule 14)

25. The new proposed Rule gives greater security to the parties to the complaint that they may enter into "without prejudice" negotiations between themselves with a view to settling the complaint or agreeing upon facts and issues which are part of it. Any agreement may be presented to the Court for the Court to take notice of and may include an admission of Notarial Misconduct and propose a sanction to be imposed or an offer of redress to be made by the notary. However, whatever the parties may agree between themselves under this proposed Rule, the Court retains full discretion to find whether or not the notary is guilty of misconduct and, if so, what order should be made by penalty or otherwise in consequence of the finding.

#### Withdrawal of complaints (Rule 15)

26. An express provision to withdraw complaints with the leave of the Court has been added.

#### Hearing and case management directions (Rule 16)

27. In the list of (non-exhaustive) matters for which the Commissary may issue directions, the filing of skeleton arguments has been added.

#### Procedure (Rule 18)

28. It is now the practice in both the Civil Procedure Rules and the Criminal Procedure Rules to give written evidence in the form of a statement containing a statement of truth, as opposed to affidavit form. The revised rules now provide for evidence to be given in statement of truth rather than in affidavit form. The advantage is that statements of truth need not be administered by a solicitor, notary or other commissioner for oaths.
29. It is provided that hearings should be in public, unless this would cause exceptional hardship or exceptional prejudice to a party, witness etc. or it would be prejudicial to the interests of justice.
30. There is an express power for the Court to issue practice directions concerning the practices and procedures of the Court.
31. A specific provision that a hearing may be held in the absence of a respondent when the Court is satisfied that notice of the hearing was validly served on the respondent has been added.
32. There is an express provision that the Court may dispense with any requirements of the rules in respect of notices, Statements, witnesses, service or time in any case where it appears to the Court to be just so to do.
33. It is expressly provided that the decision of the Court shall be made in public/be publicly available.

#### Standard of proof (Rule 19)

34. The Court shall make findings of facts on the balance of probabilities. However, if the allegation made against the notary involves directly or by implication a finding of fraud, dishonesty or criminal activity on the part of the notary, the Court must be satisfied on the evidence beyond reasonable doubt.

#### Service of documents (Rule 20)

35. Service of documents by the Registrar has hereto needed to be by first class post or document exchange. This has been expanded to include personal service (ie hand delivery) and Special Delivery.

### Interim suspension by the Court (Rule 21)

36. The present rule 8.3 (suspension in case of striking-off or suspension by another professional body) has been relocated and placed with the present paragraph 11, part II of the First Schedule (application to Court for respondent to be suspended from practice) and the new cluster has been renamed "Interim suspension by the Court".

### Disciplinary Sanctions (Rule 22)

37. Presently the Court may issue an "unless" Order that "unless" the notary pays a fine or indemnifies the client who has suffered loss, he will be struck-off. This has been changed to a direct power to fine or require that the notary indemnifies the client.
38. It is specifically provided that the respondent may make submissions by way of mitigation in respect of any sanction (including any order for costs) which the Court may impose.
39. There is a new power for the Registrar to advertise a sanction imposed against a notary found guilty of Notarial Misconduct. Should, for instance, limitations have been placed on the notary's practising certificate, this is one way of helping to ensure that fellow notaries in particular are aware of this.

### Costs (Rule 23)

40. There is a provision for the Court to order either party to pay into the Contingency Fund for monies paid out to a Nominated Notary acting in the exercise of his functions.
41. There is a new provision for the Master to approve by Order, after consultation with the Commissary, a table of costs to be applied in proceedings under these rules, save in exceptional cases. The Master may, after consultation with the Commissary, issue directions or guidance about the application of such costs.
42. It is made explicit that an order for costs may be made in relation to costs incurred at any time after the earlier of the making of a complaint under Rule 11.1 or the appointment of the Nominated Notary (in the absence of a complaint having been made). This is principally to ensure that the costs of an investigation by a Nominated Notary may be recovered should the respondent be found blameworthy.

### Reviews (Rule 25)

43. The power of the Registrar to direct that the application by a notary who has been struck off, suspended or who is subject to limitations on his practice, be advertised in a newspaper circulating in the area of the applicant's practice or former practice, and the provision for an objector to oppose the grant of the application before the Court is new, and is based upon the provisions of the Solicitors (Disciplinary Proceedings) Rules 2007.

### Savings (Rule 26)

44. There is a saving provision that extant references to old rules shall be deemed to refer to the corresponding rule in these new rules. For a similar reason reference to any other rules or regulations made by the Master is defined to include any rules and regulations made in substitution therefor.

### The Schedule – Specified Professions and Relevant Bodies

45. The "Chartered" Institute of Legal Executives are now styled as such and a catch-all category has been included for any other person authorised to conduct reserved legal services under the Legal Services Act and the disciplinary body for such person.

### Appendix – Forms

46. These forms are now in the form of statements of truth rather than affidavits for the reason given above, and Forms 3 and 4 have been modified to reflect the additional information to be given (see paragraphs 21 and 22 of this memorandum).

**Faculty Office**

**29th June 2015**