NOTARIES (CONDUCT & DISCIPLINE) RULES 2015

GUIDANCE FOR NOMINATED NOTARIES

ISSUED BY THE MASTER OF THE FACULTIES

Introduction

1. Under rule 8.2 of the Notaries (Conduct and Discipline) Rules 2015 ("the Rules"), where the Registrar receives evidence of or an allegation concerning the conduct or practice of a notary which appears to him to amount to an allegation of Notarial Misconduct he must refer it to a Nominated Notary to investigate the allegation pursuant to rule 8.

2. A Nominated Notary is defined in rule 2.1 as a notary appointed by the Registrar under rule 6 who must be a notary who holds a Notarial Practising Certificate and has held such a Certificate for not less than five years.

3. Under rules 8.2 and 8.3 a Nominated Notary may be appointed by the Registrar to investigate an allegation of Notarial Misconduct referred to him by the Registrar and, if he thinks fit, to prepare and prosecute disciplinary proceedings against a notary in the Court of Faculties ("the Court") and to carry out such other functions as may be provided by the rules. Rule 6.3 requires the Nominated Notary to be independent of, and not personally acquainted with, the notary who is the subject of the investigation.

4. Under rule 24.4 where it comes to the attention of the Registrar that a Relevant Body as defined in rule 24.1 and the Schedule has found a complaint against a notary to be substantiated, the Registrar must appoint a Nominated Notary to investigate it and if he thinks fit, prepare and prosecute disciplinary proceedings as if he were acting under rule 8.

5. Where a notary applies to the Court under rule 25.1 for a review of an Order made under the Rules (or the rules which they replaced) rule 25.4 requires the Registrar to appoint a Nominated Notary to act as respondent to the application. Although it is not so stated the requirement of independence imposed by rule 6.3 must apply equally to a Nominated Notary appointed under rule 25.4

6. Rules 11 to 18 lay down the detailed procedure governing the determination by the Court of complaints of Notarial Misconduct and rule 25 governs the determination of any application by the notary for review of an Order. However, they do not seek to prescribe the manner in which the Nominated Notary should exercise his functions.

7. Experience suggests that it would be helpful to provide Nominated Notaries with some guidance as to the manner in which they should investigate allegations of Notarial Misconduct which have been referred to them under rule 8.2 and the criteria governing their decision whether to institute disciplinary proceedings.

8. It must be emphasised that the guidance which follows is intended to be precisely that. It has no legal status and there may be cases where it is appropriate to depart from it to some extent. It is not intended to fetter the discretion of the Nominated Notary to perform his functions in whatever manner he considers to be fair and just in a particular case. It is not a Practice Direction issued by the Court under rule 18.3. It is believed, however, that it will provide helpful guidance in the large majority of cases.

The status of the Nominated Notary

9. His functions under rule 8.3 are (a) to investigate diligently and expeditiously the allegation of Notarial Misconduct which has been referred to him, (b) to decide whether to make a formal complaint of Notarial Misconduct to the Court, (c) if he decides to do so, to prepare and make such a complaint and (d) to prosecute any such complaint.

10. The role of the Nominated Notary is that of an independent investigator and prosecutor. The need for him to be independent of the notary who is the subject of the investigation is expressed in rule 6.3. He must equally, however, act independently of the Faculty Office. Once the Registrar has referred an allegation to him all decisions about its investigation, the making of a complaint and the manner of its prosecution are made by the Nominated Notary. He should not seek advice from, or consult with, the Faculty Office on these matters. He should not communicate with the Faculty Office except for the purpose of obtaining information or documents necessary for his functions or for purely administrative or procedural purposes. Copies of any such communications should be sent to the notary under investigation.

11. The Registrar is bound by rule 8.2 to refer to a Nominated Notary any evidence or allegation concerning the conduct or practice of a notary "*which appears to him to amount to an allegation of Notarial Misconduct*". The Registrar's role is limited to deciding on the apparent nature of the allegation. He is not concerned with the question whether it is well founded. The Nominated Notary should not, therefore, assume that, because the allegation has been referred to him, there is necessarily any substance in it. He must approach his investigation with an entirely open mind.

Notarial Misconduct

12. Since the first function of the Nominated Notary is to determine whether an allegation of Notarial Misconduct is well founded the definition of that phrase is obviously critical.

13. It is defined in rule 2.1 as meaning:-

"(i) Fraudulent conduct,

(ii) Practising as a notary without a valid Practising Certificate or in breach of a condition or limitation imposed on a Practising Certificate, or

(iii) Other serious misconduct which may inter alia include failure to observe requirements of these rules or of the Notaries Practice Rules 2014 or falling seriously below the standard of service reasonably to be expected of a notary or persistent failure to provide the standard of service reasonably to be expected of a notary."

14. The three specific examples of serious misconduct given in (iii) are not intended to be exhaustive. Any serious misconduct will constitute Notarial Misconduct. The meaning of "serious misconduct" in this context was considered by the Court of Faculties in the case of **In the Matter of F (a notary)** [2011]. The Court held at paragraph 35 of its decision that serious misconduct includes *"conduct connected with the notary's profession in which the notary has fallen seriously short of the standards to be expected of notaries".*

The investigation

15. In many cases referred to the Nominated Notary the nature of the allegations will be clear and the facts will appear from the documents to be undisputed. In some cases, particularly where the allegations are made by clients of the notary or other members of the public, it may be less clear what the precise allegations are. Where this is so, it will be useful to try to agree with the complainant a summary of the issues before the notary is asked to address them. Where this has been done, the complainant should be asked to set out this agreed summary in a written statement.

16. There may also be cases where it is clear that other evidence supporting the allegations is likely to be available, either written evidence from witnesses other than the complainant or other documentary evidence. Where this is so, it may save time to try to obtain this evidence before writing to the notary so that he is aware of the full case which he has to address.

17. When he is in a position to do so the Nominated Notary should write to the notary setting out the nature of the allegations made and summarising the evidence on which they are based. Copies of any evidence, including not only formal statements, if any, but also letters from the complainant, and any other documents which may be relied on in support of the allegations, should be sent to the notary.

18. The notary should be required to respond to each allegation, making it clear which facts he admits and which he does not. If there are particular factual issues which the Nominated Notary considers as being of obvious importance he should specifically identify them. He should ordinarily require the notary to provide a copy of his file relating to any transaction giving rise to the allegations and copies of any other documents on which the notary may rely. If appropriate, the notary should be asked to supply any evidence from other witnesses on which he may rely. The time allowed for the notary to respond should be reasonable and realistic, having regard to the complexity of the case, but not unduly relaxed. It is suggested that 28 days should be

ample in most cases but it may be reasonable to accede to a request for a short extension of time if a good reason for it is shown.

19. The notary should be warned that, if he fails to respond within the stipulated time (including any extension allowed), the Nominated Notary will proceed to review the case on the evidence before him and reach a decision whether or not to make a formal complaint based on that evidence.

20. The Nominated Notary may wish to raise further queries with the notary arising out of his response or clarify it in some respects. In particular, if the notary has admitted facts which appear to constitute Notarial Misconduct, it may be appropriate to invite him to state any mitigating features or other reasons why a formal complaint should not be made.

21. If, following the notary's response, the basic facts are reasonably clear the Nominated Notary should be in a position to decide whether to make a formal complaint. If the response shows that there may be significant factual issues the Nominated Notary may wish to raise these with the complainant and obtain his comments on them.

22. It may happen that during the investigation evidence emerges which would support an additional or different allegation of Notarial Misconduct. If so, the notary must of course be given a full opportunity to deal with it before a decision is made to make a formal complaint which is based on it.

23. There is no obligation to send a proposed complaint in draft to the notary for his comments but there is no objection to this being done and it will be desirable to do this if the Nominated Notary feels any doubt whether the notary has had a full opportunity to deal with it. It is not appropriate to send the draft complaint to the original complainant or the Faculty Office.

24. In the vast majority of cases this process should be able to be conducted by letter or e-mail but in exceptional cases the Nominated Notary may consider it necessary to interview the complainant, the notary or conceivably others either by telephone or in person. If he does, exceptionally, interview the complainant or other witnesses he should also offer an interview to the notary.

25. The Nominated Notary has power in the course of an investigation to inspect relevant documents of the notary, under rule 6.5, but subject to the restriction of the use of such documents set out in rule 6.6.

The decision to make and prepare a complaint

26. Before deciding to make a complaint the Nominated Notary should be satisfied that (a) it is more probable than not that the court would make a finding of Notarial Misconduct, (b) it would be in the public interest for a complaint to be made and (c) there is nothing which would make it an abuse of process to make a complaint. The Nominated Notary should always have at the forefront of his mind the costs involved in

any investigation and any subsequent hearing before the Court of Faculties. He should consider not only the costs which he incurs as the Nominated Notary but the costs which may be incurred in defending the complaint. He has a duty to ensure that his investigation is at all times focussed and he should avoid being side-tracked into areas which may not add in any significant way either to the strength of the case or to the seriousness of the conduct complained of against the notary.

27. The standard of proof to be adopted by the Court is dealt with in rule 19. Where 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 applies the higher criminal standard of proof when adjudicating on a complaint. In all other cases the Court applies the lower civil, standard of proof.

28. There may be matters which suggest that the public interest, which in this context primarily means the interest in achieving the proper regulation of notaries, does not require a complaint to be made even though it appears more probable than not that the Court would find it proved. Examples of such matters, which are by no means exhaustive, are:-

    (a) the availability of other means of disposing satisfactorily of the dispute which gave rise to the allegations;

    (b) that the conduct in question resulted from a mistake or misunderstanding rather than any deliberate wrongdoing;

    (c) the age and state of health of the notary and any possible impact of the prosecution of a complaint on his health;

    (d) that the notary is no longer in practice and does not intend to practise again; and

    (e) that the notary has promptly put right any consequences of his misconduct.

29. Even if some of these factors are present they may of course be outweighed by the seriousness of the allegations. In deciding whether it is in the public interest for a complaint to be made the Nominated Notary may take into account any previous findings of Notarial Misconduct which have been made against the notary by the Court but not previous allegations or complaints which have not resulted in such findings.

30. In exceptional circumstances delay in making the allegations of misconduct may render it unfair and consequently an abuse of process to prosecute a complaint, particularly if the delay has made it more difficult for the notary to contest the allegations. In considering whether he should decide not to make a complaint on this ground the Nominated Notary should take into account the length of the delay, the reasons for it (including in particular the extent to which the notary is responsible for it) and the seriousness of the allegations.

31. If the Nominated Notary decides not to make a complaint to the Court he should give brief reasons for the decision. Such reasons should in particular indicate (a) which one

or more of the requirements set out in paragraph 26 above are not satisfied and, in each case, why they are considered not to be satisfied and (b) in cases falling within paragraphs 32 or 33 below, why a departure from the usual presumption that a complaint will be made is considered to be justified.

32. Where a Nominated Notary has been appointed to investigate a matter under rule 24 and the notary has been struck off or suspended from practice by the Relevant Body, a complaint to the Court shall be made unless there are wholly exceptional circumstances which justify not doing so. This is because such a penalty will ordinarily result from serious misconduct.

33. In other matters referred to a Nominated Notary under rule 24.4 a complaint should ordinarily be made to the Court unless there are special reasons for not doing so.

The prosecution of the complaint

34. The form of the complaint is prescribed in Form 1 in the Appendix to the Rules. Only a very brief summary of the allegations of Notarial Misconduct should be set out in the complaint itself. The supporting evidence exhibiting all documents relied on should be contained in the witness statement in support.

35. In the conduct of the proceedings the Nominated Notary should not regard himself as representing a party and he should not press for a finding of Notarial Misconduct at all costs. His duty is to place before the Court fairly and impartially all the facts on which the complaint is based and ensure that all relevant evidence is either presented by him or made available to the notary.

36. The procedure adopted for the hearing of a complaint has some similarities to that of a criminal trial. The Nominated Notary should therefore be fully prepared to make an opening statement outlining the case against the notary, call any witness in support of the complaint (see paragraph 41 below) and re-examine the witness where necessary, to cross-examine the notary and any witnesses called on his behalf and to sum up the case after all the evidence has been heard.

37. The Nominated Notary should keep under constant review during the proceedings the question whether he should continue to prosecute the claim. In particular he should review the position when the notary has delivered an answer to the complaint and any witness statement in reply to it. If at any stage he considers that the probability of a finding of Notarial Misconduct has been reduced to below 50% or that it is no longer in the public interest to pursue the complaint he should seek the leave of the Court to withdraw it under rule 15.

38. Subject to obtaining leave of the Court, it is open to the Nominated Notary to amend the complaint at any stage, so long as it does not cause unfairness to the notary against whom the complaint has been made (see the Court of Faculties' ruling on abuse and privilege In the matter of Imison (a notary) [2014] at paragraph 6).

Evidence

39. Rule 14 enables the Nominated Notary to have "without prejudice" discussions with the notary with a view to reaching an agreement on facts and issues which can be placed before the Court in the form of an agreed statement. Once the notary has delivered an answer to the complaint and a witness statement in reply to it the Nominated Notary should always consider what scope there may be for reaching agreement on facts and issues. Rule 14 also enables the Nominated Notary and the notary to place before the Court an agreed statement which contains an admission by the notary of Notarial Misconduct and a proposed sanction and/or offer of redress. When the evidence is complete the Nominated Notary should also consider, particularly in less serious cases where it appears unlikely that the notary would be struck off or suspended from practice, whether it would be appropriate to explore the possibility of proposing to the Court such an agreed disposal.

40. It is not appropriate for the Nominated Notary to express any view about the sanctions which should be imposed upon a notary who has been found guilty of Notarial Misconduct. However, it is not inappropriate for him if the Court requests it, to provide to the Court factual information, including information about possible practice conditions and training courses, which may assist the Court in its decision on sanctions.

41. Where evidence in support of the complaint is to be called, the Commissary is likely, save in exceptional cases, to direct that the written statement of the witness shall be taken as his evidence-in-chief and thereafter the witness can be cross-examined.

42. If the evidence is relevant and admissible, the Nominated Notary may seek to call evidence of previous complaints or prior conduct whether or not the complaint has been proved in disciplinary proceedings. Such evidence is likely to be admissible in, but not restricted to, the following circumstances:- if the parties to the proceedings agree to the evidence being admissible, or it is important explanatory evidence, or it is relevant to an important matter in issue in the instant complaint. For the general principles which will apply, see s.101 etc of the Criminal Justice Act 2003. See also the Court of Faculties' ruling In the matter of Robert JH Ward, a Notary [2015] at paras 4-9.

43. The prior conduct will ordinarily be proved by adducing evidence of the finding of the Court together with an agreed statement of facts. If the previous conduct has not been proved against the notary, then the Nominated Notary will have to call admissible evidence of the prior conduct (see R. v. Z (Prior Acquittal) [2000] 2 A.C.483).

44. In either case, if the Nominated Notary wishes to adduce such evidence he should proceed in the following way. He should inform the notary or his representative and the Court of his intention to adduce such evidence at the earliest opportunity and before the Commissary has given directions under rule 16. If the need for such evidence becomes apparent after directions have been given by the Commissary further directions should be requested. If the notary does not consent to the evidence being adduced, then the Nominated Notary should provide a skeleton argument setting out the

evidence and any arguments in favour of its admission and provide it to the notary or his representative and the Court. He should invite the notary to submit a skeleton argument if he wishes to do so. The Commissary will usually decide its admissibility by giving directions in advance of the hearing of the complaint and notify both sides of his decision. It should be understood that this till not prevent the notary from addressing the Court on its admissibility at the hearing if the preliminary ruling went against him. Only in exceptional circumstances would it be right for the Nominated Notary to seek to re-open the issue of admissibility at the hearing.

45. It will not be competent for the Nominated Notary to make unspecific and/or unsupported allegations of previous misconduct at a hearing or to adduce evidence of prior misconduct which bears no relevance to the issues to be decided in the instant complaint.

Reviews under rule 25

46. Where a Nominated Notary is appointed as respondent following an application by a notary for a review of an Order his functions are described in rule 25.9 as being *"…to ensure that the applicant is put to proof of his case and to bring to the attention of the Court all such facts and matters as the Respondent thinks should be before the court…"*. He need not lodge a written statement but, if he wishes to do so, under rule 25.9, he must do so at least 28 days before the hearing. He clearly should present a written statement if he intends to rely on facts not contained in the applicant's evidence.

47. What is said above about the general role of the Nominated Notary in relation to complaints applies equally to applications for a review. It is his function to ensure that any such application is scrutinised thoroughly and critically and to consider whether the notary has proved that there has been a relevant change in circumstances since the Order was made and it would not be contrary to the public interest for the Order to be reviewed, see rule 25.2. He needs to take into account in addition to evidence of changes of circumstances all the evidence which was before the Court which made the Order, see rule 25.10. If he considers at any stage that there is no ground for objecting to a review he should inform the Court of this.

Professional advice

48. In the great majority of cases the Nominated Notary will have the experience and expertise to perform all his functions without other professional assistance. There may, however, be rare cases where he needs help from a solicitor in interviewing witnesses or assembling the evidence. There may also be rare cases where he needs specialist advice from a solicitor or barrister on questions of law which have arisen during his consideration of the case.

49. The Rules permit any party to be represented at the hearing by a notary, a solicitor or counsel. There could be rare cases of sufficient complexity to justify the Nominated

Notary instructing a specialist advocate, whether a solicitor or counsel, to represent him at the hearing, but this requires leave of the Court.

50. The instruction by the Nominated Notary of other professionals to advise or represent him will have financial implications which are mentioned in the following paragraphs.

Costs

51. Rule 23.3 provides that an order for costs will not be made against the Nominated Notary who is always entitled to an order for costs to be paid out of the Contingency Fund. The amount of such costs is prescribed in Part IV of the Notaries (Conduct and Discipline) Fees and Costs Order 2015 ('the Fees and Costs Order'). The Nominated Notary should provide the Court at the end of the hearing with a schedule of the costs claimed by him.

52. Where an investigation does not lead to the issue of a complaint, rule 23.5 provides that the Nominated Notary is entitled to be paid out of the Contingency Fund such fixed fee as has been previously authorised by the Registrar or such fee as the Registrar may determine should be paid for work properly done after considering a bill and other representations by the Nominated Notary.

53. Rule 4.2 of the Fees and Costs Order requires the Nominated Notary to obtain the leave of the Court before instructing a litigator or advocate to assist him in his functions or representing him at the hearing. If he incurs expenditure under rule 4.2 in instructing such persons without authority it will not be recoverable by him out of the Contingency Fund. If leave of the Court is given, rule 4.2 of the Fees and Costs Order provides that the fees of persons instructed are those prescribed in Part V.

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Master of the Court of Faculties

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