



Koninklijke Notariële
Beroepsorganisatie

Policy Effects of peer reviews in the notarial profession

An inter-collegial assessment
tool to enhance quality in
notarial practice

September 2012

Contents

Chapter 1	The effectiveness of peer reviews	4
1.1	Introduction	4
Chapter 2	A professional group with a functioning moral compass	7
Chapter 3	Issues and findings	8
3.1	A focus on share transactions	8
3.2	Policy regulation on cancellations	8
3.3	Making clear offers	9
3.4	New legislation: introduction and effects	9
3.5	Refusal to provide services	9
3.6	The vulnerability of some smaller firms	10
3.7	Professional skills and training	11
Chapter 4	The peer review model	12
4.1	Development of the model	12
4.2	Interest from other professional groups	12
4.3	Points for attention	14
4.4	Auditors	15
4.5	Future developments	16

Chapter 1 The effectiveness of peer reviews

After three years, the time has come for the first impact assessment on the effectiveness and results of peer reviews in the notarial profession.

1.1 Introduction

Peer reviews are aimed at improving quality, and are conducted in the form of interviews with colleagues. Thanks to their experience, fellow notaries will be quick to identify successful practices, areas for attention and aspects in need of improvement. Assessments will be based on findings from interviews and the examination of case files and firms, rather than standard assessment lists. The notarial profession has thus opted for a genuinely substantive assessment method.

This was the basic assumption when developing the peer reviews. The reviews have now been conducted since 2009, and the system - previously enshrined in a regulation only - has been rooted in a legal framework since the introduction of the new Notaries Act on 1 January 2012.

The auditor prepares a report on the most important topics of conversation, listing the relevant firm's positive aspects and points for attention. By the time the firm is up for review in three years' time, the subsequent auditor will record the developments in each of these areas.

In around 20 percent of the cases, the auditor calls for an improvement procedure (to be conducted in writing). In most cases, this concerns administrative shortcomings or failure to implement legal or regulatory requirements in full. These aspects are generally minor issues.

In some cases, a re-audit will have to be conducted in six to nine months, in order to assess how the required improvements have been implemented in the organisation. In such cases, a coach may be deployed in consultation with the notary in order to help address the problems.

In exceptional cases, the auditors will find behaviour that justifies a complaint, or identify substandard practices that justify termination. In order to gain a more complete picture, an audit team will then conduct further assessments and issue a recommendation to the KNB board. In several cases, this procedure resulted in the resignation of a civil-law notary or a practice being offered for takeover.

All firms have now been visited by a fellow civil-law notary at least once. Initially, the reviews took some getting used to: auditors were often required to explain a great deal about the new system's background and purpose. However, firms have since become familiar with the phenomenon.

Most notarial firms take a positive view of the system. As most firms indicated, the announcement of an audit generally triggers an effort to resolve outstanding matters and tie up loose ends. Rather than searching for inadequacies or errors, auditors assess a firm's operations from the perspective of a 'critical friend', and provide useful tips and advice. As a result, many firms benefit from such visits.

Auditors determine which direction the peer review will take on the basis of the situation at hand. As a result, there are plenty of opportunities to discuss matters that genuinely require attention. This offers room to discuss aspects that may not be going well, doubts, or professional dilemmas. The open atmosphere also makes it easier to raise integrity issues. This non-threatening conversational environment offers room to think about improvements and discuss one's considerations without immediately labelling them right or wrong.

The procedure ensures the confidential nature of the conversations, since the reports are only accessible to a limited number of people. The complaints protocol will only have to be followed in exceptional cases. The KNB board will then decide on follow-up measures, based on the reports. These reports will be destroyed after five years. After all, an audit is merely a 'snapshot'.

The KNB will anonymise the reports before making them available to the official supervisor, the Financial Supervision Office (BFT). Twice a year, the BFT receives an overview report with accumulated data, trends and anonymised case descriptions. The peer reviews have thus significantly contributed to the BFT's efforts to monitor compliance with the Prevention of Money Laundering and Terrorism Financing Act (WWFT). The reviews were also of great use to the BFT while developing the new system of risk-based supervision set to be introduced in January 2013. Under the terms of the new supervision relationship, serious inadequacies that pose a threat to the notarial profession must be reported to the BFT. Systemic supervision would be incompatible with the current model, and is thus not under consideration.

The KNB will conduct all peer reviews in a systematic and thorough manner. Sufficient attention will be devoted to all relevant issues. This has helped intensify the professional group's focus on the quality and integrity of their professional practice. The end result is less work for the supervisor: efforts to improve and guarantee the quality of the notarial process are structural over the course of the three-year cycle.

Participation is not optional and requires commitment. Both auditor and audit office actively monitor the progress of improvement processes. A fellow notary will recognise situations more readily and have greater understanding of the complications involved in the day-to-day practice. In most cases, notaries will prove willing to acknowledge areas for improvement if alerted to them by a colleague who is familiar with the same professional limitations and dilemmas.

In addition reports on individual firms, the peer reviews also yield a wealth of useful information that is applied by the KNB to adjust and develop its policies.

“The Royal Dutch Notarial Organisation (KNB) has been applying such quality assessment systems for some time now. As regards the notarial profession, these experiences were so successful that they have been enshrined in law. Peer reviews are conducted to test the quality awareness of individual practitioners and firms in the notarial practice by applying criteria in the area of the engagement cycle, the focus on quality and dealing with integrity issues.”

State Secretary F. Teeven, explanation regarding the proposed amendment of the Counsel Act/introduction of mandatory peer review system for the legal profession, Government Gazette, 1 August 2012, No. 15879.

Chapter 2 **A professional group with a functioning moral compass**

The assessments are aimed at improving quality, and focus on various aspects of the professional practice. Integrity-related issues are of equal importance. These aspects are discussed in various settings, on the basis of a wide range of examples.

In short, the profession greatly values due care, commitment and completeness. 'Is the client getting what he/she came for?' The answer to this question represents one of the profession's basic principles, namely ensuring the certainty of law. This societal role embodies one of the notarial profession's core values.

The conclusion that almost all firms under review have their moral compass pointed in the right direction does not diminish the fact that single person firms in particular would benefit from more frequent consultations with fellow notaries when confronted with dilemmas. This need is largely catered to by small regional networks, in which firms share knowledge and discuss cases on a voluntary basis. In some cases, this takes the form of peer supervision or joint case file analysis. Auditors reviewing one-person firms regularly suggest participation in such initiatives.

This constant focus on the issue - partly through peer reviews - helps to regularly recalibrate the moral compass.

However, there are always exceptions to the general standard of integrity and thoroughness. Over the past few years, several firms have failed to pass the strict scrutiny of the peer review system. In various cases, such firms opted for intensive supervision and achieved demonstrable improvements. In other cases, active intervention by the KNB helped ensure closure of the relevant firms.

Chapter 3 Issues and findings

We have summarised some of the key findings and trends from the last few years below.

3.1 A focus on share transactions

All peer reviews focus on WWFT-compliance. This study was conducted as a part of the supervision agreement with the BFT, which was concluded in 2006. Amongst other results, it yielded many dozens of reports on unusual transactions which were subsequently followed up. Crucially, the auditors saw the nature of these transactions change over time. The majority of money laundering activities seems to have shifted from real estate to share transactions. Share transactions, traditionally subject to a lesser degree of scrutiny, offer potential for such activities.

The KNB has repeatedly devoted attention to this issue in various ways, such as by providing extensive information on the subject to the professional group. These efforts have helped to increase the level of vigilance.

The auditors consistently focus on the issue during peer reviews. This has helped to significantly increase awareness of the relevant risks and pitfalls. Naturally, the KNB reported these findings to the BFT in an early stage in order to help the supervisor address the issue more effectively.

3.2 Policy regulation on cancellations

The following example clearly illustrates how peer reviews can yield adequate supplementary regulations.

There had been dissatisfaction about the slow handling of cancellations for some time. This issue was also frequently raised during peer reviews. Amongst other information, the interviews brought to light that banks are often slow to provide the documentation needed to cancel the mortgage.

Representatives of the banking sector pledged their cooperation in talks with the KNB. The KNB board then prepared a policy regulation and informed the professional group well in advance of its enactment. The interim period was used to address backlogs. The auditors also devoted structural attention to the issue. One year after introduction of the regulation, they rarely come across any outstanding cancellations.

3.3 Making clear offers

This issue has also been at the centre of attention for some time now. A number of disciplinary cases have shed some light on the matter. The conclusion of these cases was clear: notaries must provide clients with clear information on their rates in advance. The practice of applying ambiguous low rates as an incentive and subsequently increasing the amount through exorbitant charges for additional services is unacceptable. The auditors have devoted a great deal of attention to this issue. This was done so in order to safeguard the interests of clients, who are not in a position to determine whether these increased rates are realistic and thus run into unpleasant surprises at the end of the process. Like the disciplinary court, the KNB feels there should be a 'level playing field' with no room for unfair competition due to a lack of legal compliance.

3.4 New legislation: introduction and effects

As a matter of course, auditors devote attention to the introduction of new legislation. An early example would be the 'Compulsory Identification Act/Office for the Disclosure of Unusual Transactions (WID/MOT) Own Statement' in 2007 which preceded the WID/MOT audits in the period between 2007 and the first half of 2009.

More recently, the Investigation of Property Subject to Registration Regulation was the focus of attention. Prior to its implementation in 2011, auditors had been drawing attention to the investigation procedure and would advise firms about anchoring the legal obligation in their working procedures where necessary. The issue has also been discussed extensively since implementation of the regulation. Subsequent reviews have shown that most firms have made adequate provisions to ensure compliance. However, there is still room for improvement in terms of actual implementation in some cases. Here too, the auditors provide firms with tips and recommendations where necessary.

3.5 Refusal to provide services

Tightened regulations in the area of refusal to provide services are currently the focus of attention. A regulation currently under preparation will provide further clarity regarding the term 'reasonable suspicion', which has been applied as a criterion for refusal to provide services since introduction of the amended Notaries Act in 2012. This aspect was previously formulated in a less binding manner. Further experience will have to be gained in this area. However, the auditors have been

highlighting the issue in order to find out where additional support should be provided and determine how to do so in the most effective manner. In view of the high degree of complexity, it will probably be impossible to provide complete clarity from the outset. However, findings can be shared in the interim in order to determine the necessary first steps.

3.6 The vulnerability of some smaller firms

A substantial number of single-person firms operate in a niche, focusing on specific groups of clients. They are experts in their particular field. As a result, they are sought out by clients, who they are able to retain. Such firms - often recently established and in the process of expanding - are increasingly focused on specific consultancy services rather than on drawing up deeds. They deal with highly complex subject matter.

Other small firms are facing major declines in revenue, to the point where their continuity is under threat. These are often firms specialising in traditional notarial services, a shrinking market suffering from great pressure on prices. Such firms are less and less focused on developing the professional skills of both the civil-law notary and other staff members. Cost-cutting efforts are detrimental to the level of in-house expertise, forcing such firms to turn down complex cases. Collaborations are generally regarded as unrealistic, and most notaries feel closure would be unfeasible due to a lack of resources.

As auditors often find, the latter is partly a financial issue but is also largely determined by emotional arguments. After all, civil-law notaries tend to regard closure as a sign of personal failure. However, it is merely a fact of economic life that some firms flourish while others see their market position dwindle. Furthermore, financial problems also tend to put pressure on relationships within a firm. This will make it more difficult to assess the situation clearly and make crucial decisions.

The KNB now aims to develop initiatives in support of civil-law notaries seeking to shut down their practice. In addition to benefiting the notaries themselves, this will also have a positive effect on the professional group as a whole. Such initiatives do not need to be costly. There is already a pool of notarial experts - often former auditors - willing to act as supervisors. The civil-law notary and supervisor could then develop a realistic plan over the course of various sessions, which can then be implemented by the firm. This will also demonstrate that the notarial profession is not willing to settle for a culture of mediocrity.

Some have also called for active support for more cooperative alliances. This would help embed consultations - and, in some cases, cooperation - between peers in a permanent structure, without any limitations in terms of professional autonomy or the obligations associated with a partnership.

3.7 Professional skills and training

The economic decline over the past few years has prompted many reorganisations - a process that is still ongoing - forcing thousands of people working in the notarial profession to find other work. A large number of junior civil-law notaries have also been forced to leave the profession. As a result, a great deal of professional knowledge and experience has been lost. The auditors devote ample attention to this issue. Amongst other aspects, they discuss strategies for safeguarding knowledge development within the organisation and the available options for maintaining in-house knowledge at a satisfactory level despite disappointing operating results. In some cases, this will result in a mandatory improvement programme.

The emphasis of professional training programmes has shifted from knowledge of the rules to the considerations involved in applying these rules in practice, and the resulting dilemmas. This development reflects the needs of an increasingly complex legalised reality.

Chapter 4 The peer review model

4.1 Development of the model

The peer review was designed to function as a dynamic model that can change to reflect needs and findings. New themes have been explored on the basis of current developments. Efforts have also been made to ensure more targeted peer reviews based around the day-to-day practice. Where reviews previously emphasised organisational structure as a basis for the professional practice, the topic of conversations has been increasingly shifting to more practical legal aspects. This includes discussion of the considerations underlying a decision to opt for a specific solution. For example, an auditor may draw attention to a specific case file, or the auditee may highlight a specific dilemma or case file. Disciplinary rulings or controversial cases may serve as an impetus for conversations with the fellow civil-law notary.

4.2 Interest from other professional groups

The notarial peer review system serves as an exemplary quality system in various other sectors.

For example, Peter Noordhoek's publication 'Branchebrede kwaliteit'⁽¹⁾, a study on the extent to which various sectors are developing and implementing quality policies and the effectiveness of these policies (November 2011), offers a critical but ultimately positive assessment of the notarial peer review system. As Noordhoek justifiably concludes: with the system now functioning properly, it is time to take structured measures on the basis of the audit findings. The KNB has already started doing just that, as evidenced by the aforementioned examples in which reviews focus on specific issues and themes, new legislation, and support for or the closure of vulnerable firms. The KNB will be continuing and expanding this structured approach on the basis of audit findings in future.

In early 2013, the Employee Insurance Implementation Agency will be implementing a peer review system for staff members charged with the handling of case files. In preparation, the organisation discussed the relevant points for attention with the KNB and various auditors. The system is not based on the use of a checklist, making it more demanding for auditors. In addition to the identified potential for improvement, the opinions issued on the basis of these peer reviews also focus on positives and aspects that are difficult to quantify, such as integrity awareness.

(1) P. Noordhoek, Branchebrede kwaliteit, VM uitgevers, Lelystad, 201, pages 114-115

In August 2012, the government submitted a draft bill to the Council of State amending the Counsel Act. The issue of quality assessments featured prominently in this document. The proposed changes include the introduction of a mandatory peer review system in the legal profession. The notarial peer review system is repeatedly mentioned as an example of an effective system.

Professor Alan Paterson of the Scottish Law Society is one of the initiators behind the current peer review system for the UK legal profession. He referenced the efforts by the Dutch notarial profession as an example of an effective peer review system at a Finnish conference on the subject.

“This example is effective because it illustrates that a conscious effort was made to look beyond the use of standard checklists. [...] By applying intuitive judgement as a starting point, we have developed a system that is far closer to our members than the mere formulation and monitoring of a code of conduct could ever be. [...] Any changes in terms of a professional association’s position should keep equal pace with the way in which its quality is monitored. This will ensure that intuition and common sense always win out over checklists.”

Hans Peter Lassche, ‘Toetsen in woelige tijden’, quote by Peter Noordhoek, from: Verenigingsmanagement, April 2012, issue 10, page 39.

4.3 Points for attention

Naturally, there have also been critical comments. Where possible, the KNB has applied these critiques to further improve the system.

For example, there was initial scepticism regarding the fact that the peer reviews were to be carried out by fellow civil-law notaries. Some felt that a fellow notary could never take a sufficiently critical attitude and would be likely to shield colleagues from criticism. This criticism has since been repudiated in practice.

Although quality improvement is the main objective, the auditors' thorough approach may identify methods or practices that are sufficiently unacceptable to warrant a complaint. In various cases, reviews have led to the resignation of practitioners deemed to be in breach of professional standards or a coach was appointed to help the notary make the necessary improvements.

In the wake of discussions with a firm that contested the accuracy of a report, the audit office decided to apply more stringent editing procedures to all reports. Due to the decision to opt for a descriptive report rather than a checklist, the manner in which findings are described tends to vary. The issue of reporting methods has been discussed repeatedly with auditors during evaluation meetings. This has helped to structurally improve the quality of reports.

The principle that reports are confidential and are only to be shared with select KNB staff and board members in cases where this is warranted has not always been interpreted correctly. This approach was mainly introduced to protect the legal position of the civil-law notaries under review.

Although the sharing of knowledge is important, it must serve a clear purpose and be applied within a predetermined framework in order to prevent arbitrariness. Where necessary, the appropriate individuals will be allowed to review the findings so that they can take action.

Knowledge is shared in various ways. The audit office prepares an overview report of each series of reviews, including an appendix with case descriptions. This overview report identifies trends, and reports on findings of a general nature. This information can also serve as input for the introduction of new measures in other policy areas.

At an individual level, the sharing of reports with the supervisor does not offer any added benefits. Nor does access to the report yield any added value in terms of the BFT's new supervisory role. However, cases where an auditor identifies a high-risk situation that will require intervention by the supervisor will be reported. The BFT will then require access to the report in order to accurately assess the situation and take appropriate action.

Prior to each round of audits, the audit office will consult with the enforcement secretary in order to determine whether any complaints have been filed against the firm over the recent period. If so, the office will determine whether it would be more effective to conduct or postpone the assessment.

According to the complaints protocol, reports may be shared if an assessment results in a complaint. The unconditional sharing of information however would have a detrimental effect on the sense of confidentiality. As a result, auditors would have greater difficulty in obtaining relevant information.

In future, the KNB will report specific findings pointing to high-risk professional conduct to the BFT. The supervisor will thus be informed of specific aspects of the report when this is justified in connection with its supervisory duty. Concrete provisions to this end are yet to be developed.

Information yielded by the peer reviews is also expected to be made available to a future working group that will consist of representatives of the KNB, BFT and Ministry of Security and Justice. This working group will reorganise firms with substandard performance levels according to a fast-track procedure, in an effort to ensure a 'healthy sector'.

4.4 Auditors

Auditors are appointed for a three-year period. In some cases, these appointments are extended by a further three years in order to ensure continuity and retain the required level of knowledge and experience. Very few auditors resign before the end of their term, and a total of six to eight new auditors are trained each year.

There is a great deal of interest in the position of auditor. All training posts up to and including 2014 have already been filled, and we have repeatedly been forced to turn down candidates due to lack of capacity. The original idea behind this high circulation rate was to ensure that reviews would not become a matter of routine while helping the notarial profession gain experience in the area of quality improvement activities. Both objectives seem to be yielding results.

4.5 Future developments

The first series of peer reviews focused extensively on the firms' organisational structure. The emphasis is now shifting towards a more substantive assessment of actual cases. Auditors already frequently discuss cases or dilemmas with the notaries under review, and will be doing so more often in future.

Various firms have indicated that this form of review meets their needs and offers the greatest amount of added value. The discussion of legal aspects will focus on the considerations underlying specific recommendations. As we know from experience, this form of evaluation and reflection is an effective way of expanding the palette of available options. It can benefit both civil-law notaries and the parties purchasing their services.

The development of new assessments will also depend on current social trends. Some issues can be anticipated, others cannot. Keeping the model open and remaining in close contact with the auditors will allow for rapid adjustments where necessary. Specially-themed research is also a valuable option in this regard.

Theoretically, the model is gravitating towards the system of 'based on appreciative auditing' used by organisations such as the Government Audit Agency. The basic principle involves focusing on successful processes and procedures, and assessing whether the underlying mechanisms can be applied to improve other processes.

The recent initiative to introduce the concept of Highly Reliable Organisation (HRO) in the Netherlands is also in line with the principles behind the peer review system. In addition to clearly-defined, standardised working processes, this concept is also based around professional expertise and constant awareness and promotion of individual responsibility and vigilance.

The process of European integration is continuing at a steady pace, and we expect to see new EU-level activities in the area of notarial quality assessment. The autumn of 2012 will see the start of consultations with the quality assurance departments of Belgian and French professional organisations, as an initiative to discuss the potential for cooperation and the exchange of experiences.

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This brochure was designed by Zwart op Wit, Delft

The wordcloud image on the cover was created by using www.wordle.net

Translation: Metamorfose Vertalingen, Utrecht

Publication: KNB, September 2012



Koninklijke Notariële
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