

# Counsel for the Situation: The Latin Notary, A Historical and Comparative Model

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## I. Introduction

In the United States we have one kind of lawyer, and he is generally expected to be an advocate. Under our adversarial system, lawyers on each side of a dispute litigate a matter on behalf of their clients. Ethical rules rigidly enforce this system, although multiple client representation is allowed in certain narrow situations.<sup>1</sup> Additionally, legal specialization is a matter of custom and practice. There is

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1. Model Rule 1.7 of the Code of Professional Conduct, the general conflict of interest provision, allows multiple client representation so long as such representation is not "materially limited" by the firm's duty to another client." John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 763 (1992). Rule 2.2 of the Model Rules of Professional Conduct, the lawyer as intermediary provision, also allows multiple-client representation in specified instances. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1992).

nothing governmental about it.<sup>2</sup> The legal professional providing specialized services will always be a lawyer.<sup>3</sup>

The Europeans also believe in the adversary system of litigation and law practice.<sup>4</sup> However, they have recognized that such a system does not fit every situation, and have created different specialized legal professions to provide particular services. Each profession has its own educational and admission requirements, as well as particular duties within the legal system. A familiar analogy in the common-law world is provided by the British solicitor and barrister. But in addition to the advocacy professionals, even in those countries that have consolidated advocacy functions in a single profession, a particular legal specialist, generally located at the top of the legal hierarchy, acts as a nonadvocate (*i.e.*, impartial counsel who advises all parties to a transaction).<sup>5</sup> In Latin countries, this position is occupied by the legal professional referred to as the Latin notary; she receives from the State the exclusive authority to perform certain legal functions and to impart the required formality to specified legal transactions. The practitioner of the Latin *notariat* may be identified by the essential elements of this career. The typical Latin notary is: (1) a private legal professional performing a nonadvocacy counseling function; (2) to whom the state entrusts the exclusive power to take a private transaction and give it proper legal form and to authenticate it in a public act, by memorializing it in a public document that is publicly enforceable; (3) who must maintain a permanent record of these transactions and issue certified copies of the public documents he prepares to interested parties, upon request; and (4) who is subject to professional, civil, and criminal liability for miscarriage of his office.

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2. One rare example of a substantive law specialization that is governmentally enforced is the patent bar. See 35 U.S.C. § 31 (1994). Another exception is the limited number of federal courts that have enacted special admission requirements. The U.S. District Court for Puerto Rico, for example, has an examination requirement by local rule. This kind of exception is not determined by a substantive law specialty, but by the litigation forum.

3. I am aware that other professionals (accountants for example) provide what might be described as legal advice, but that is not the focus of this Article.

4. This may seem contrary to the traditional caricature of civil-law litigation, which is usually described as "inquisitorial," as opposed to our "adversary" approach. I discuss this label, and the misconceptions that can result from it, *infra* part I.B.3.

5. See 1 ENRIQUE GIMÉNEZ-ARNAU, DERECHO NOTARIAL ESPAÑOL 106 (1964). Professor Giménez-Arnau tells us that "Latin notary" ("*Notario Latino*") refers to the profession that has found the greatest acceptance and exposure in Latin countries; the designation, therefore, is not a reference to its origin in Roman law.

## A. *In General*

In his profession, the Latin notary combines the competence traditionally associated with a public official and the discretion and responsibility of a private legal professional. For this reason, the Latin notary is quite different from notaries public in the United States. The Latin notary owes a duty to the transaction, rather than to a party; he provides a service to "interested parties," not to "clients." Because of the nature of this legal specialization, the Latin *notariat* has long been used as a comparative model of impartial, multiple-party counseling. Despite its importance and relevance, this profession has never been thoroughly studied in our legal scholarship. This Article attempts to remedy that oversight.

## B. *Relevance of this Comparative Study*

### 1. *Introduction*

Comparative law is not a body of rules and principles. Primarily, it is a *method*, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.

Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms (*i.e.*, of "law" in the sense in which we speak of "the law" of torts or "the law" of decedents' estates). Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems.<sup>6</sup>

To the French, for example, comparative law (*droit comparé*) "is not a branch of the law, but very specifically a part of the science of law (*science du droit*)."<sup>7</sup> The distinction between comparative methodology and comparative legal science depends on the intended use of the comparative study. The practitioner of comparative legal science helps persons in other fields of the law to adopt the comparative method. The comparative method gives a national scholar "a better understanding of his own law, assists in its improvement, and . . .

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6. RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 1 (5th ed. 1988) (footnotes omitted).

7. JEAN-LUC AUBERT, *INTRODUCTION AU DROIT* 55 (5th ed. 1992) (P.A. Malavet trans., unofficial); *see also* RENÉ DAVID & JOHN E.C. Brierley, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 2-3, 11-13 (3d ed. 1985).

opens the door to working with those in other countries in establishing uniform conflict or substantive rules or at least their harmonization."<sup>8</sup>

Comparative legal analysis, at least initially, provides knowledge that can be useful on a purely informational level. Such a study should provide proper understanding of a foreign law model in ways that are relevant to local legal practice. On a more theoretical level, it can also be the starting point from which legal scholarship can proceed and contribute to domestic legal thought and development. I will look at each one of these categories in turn.

## 2. *Understanding a Foreign Legal Model*

On a fundamental level, comparative study prevents, or helps us solve, problems created by the misunderstanding of different legal cultures. It is, in a way, a sophisticated system of legal translation and education. In the following paragraphs, for example, I discuss how immigrants to the United States have been victimized by unscrupulous notaries who take advantage of the newcomers' assumption that the American notary public is the same legal professional that they knew in their home country. This in turn has prompted legislatures to adopt specific corrective legislation.

A comparative study is also relevant to foreign legal practice and international transactions, a market that accounts for more than one and one-half billion dollars in spending by American businesses and individuals. While American lawyers can and often do hire foreign legal professionals, a proper understanding of the Latin notary would help the American lawyer to pick the right professional. The lawyer would also be in a better position to advise her domestic clients about the work being performed on their behalf in a foreign jurisdiction.

Comparative legal analysis is essential in today's growing international market,<sup>9</sup> particularly when we consider the globalization of law practice. Many U.S. law firms have offices abroad.<sup>10</sup> The value of

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8. DAVID & BRIERLEY, *supra* note 7, at 11-12.

9. For a discussion of the practical importance of comparative law, see Hans W. Baade, *Comparative Law and the Practitioner*, 31 AM. J. COMP. L. 499 (1983).

10. "The increasing rate of interaction across national borders is one trend that is clearly correlated with certain aspects of growth in law." Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 283-90 (1992). "A survey appearing in the International Financial Law Review in October 1985 listed eight law firms with more than four offices in foreign countries, and listed over forty additional law firms with offices in at least three different countries." Roger J. Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 508 (1989). See also EUROMONEY PUBLICATIONS PLC,

international legal services performed by U.S. law firms has grown dramatically in recent years, as has the cost to U.S. businesses of purchasing legal services abroad.<sup>11</sup> A lawyer in international or transnational practice should provide her client with a full understanding of the law in its proper context.<sup>12</sup> "Law, taken alone and considered only in its strict theory, would give a false view of the way in which social relations, and the place therein of law, really operate."<sup>13</sup> The "cultural, social, political and economic systems" in which the law must be applied are an essential element to the full instruction of a client on the "relevant considerations" of international legal transactions.<sup>14</sup> Failure to take these factors into account can have disastrous effects.<sup>15</sup>

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3 THE INTERNATIONAL FINANCIAL LAW REVIEW at vii (PLC ed., Euromoney Publications 1993).

11. The value of legal services exported by U.S. firms jumped from \$147 million in 1987 to nearly \$1.2 billion in 1991, while during this same period purchases of foreign legal services by U.S. citizens increased from \$55 million in 1987 to \$222 million in 1991. INTERNATIONAL TRADE COMMISSION, INDUSTRY AND TRADE SUMMARY: LEGAL SERVICES 2-3 (Feb. 1993). The reason for the wide difference between purchases and exports is unclear. I have heard disturbing anecdotal evidence of U.S. firms' reluctance to hire foreign lawyers, preferring instead to delegate the job of researching foreign law to inexperienced American associates. I feel confident, however, that most firms must have proper safeguards to ensure the accuracy and quality of their advice. The numbers seem to indicate, however, that the bulk of legal advice related to international transactions is being given by American lawyers. These practitioners must be aware that their counterparts in other countries may be notaries, and, more importantly, that notaries may be essential to concluding their clients' transactions abroad. *Id.*

12. Goebel, *supra* note 10, at 447. Professor Goebel notes that this is not a universally accepted tenet, but concludes, in my opinion correctly, that this is an important, even essential requirement for properly carrying out our professional duties to our clients. *Id.* at 454. For a general discussion of the importance of understanding a legal system in its proper context, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 113-15 (1969) [hereinafter MERRYMAN, THE CIVIL LAW TRADITION]; JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978) [hereinafter MERRYMAN & CLARK]; MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL (1982); DAVID & BRIERLEY, *supra* note 7; KONRAD ZWIEGERT & HEIN KÖTZ, 1 INTRODUCTION TO COMPARATIVE LAW 68 (Tony Weir trans., 2d ed. 1987); SCHLESINGER ET AL., *supra* note 6, at 1.

13. DAVID & BRIERLEY, *supra* note 7, at 14.

14. Goebel, *supra* note 10, at 444-54.

15. "A trader faces a variety of special problems in carrying out business when that business is international. It is necessary to deal at long distance with people whom the trader may not know personally. If a conflict arises, the legal systems of the different parties may provide different answers. Moreover, each may regard the other's courts as likely to be unfair; even if a foreign court is fair, using it may be extremely expensive." JOHN H. BARTON & BART S. FISHER, INTERNATIONAL TRADE AND INVESTMENT 33 (1986). For a discussion of the legal problems related to foreign investment, see THE INTERNATIONAL AND COMPARATIVE LAW CENTER OF THE SOUTHWESTERN LEGAL FOUNDATION, SYMPOSIUM, PRIVATE INVESTMENTS ABROAD: PROBLEMS AND SOLUTIONS (1959-1993).

In this context, a proper understanding of the Latin notary is not a simple intellectual exercise. International legal transactions, particularly those involving real property and other capital investments, will often require the participation of a notary.<sup>16</sup> The importance of notarial work in international law practice should not be underestimated.<sup>17</sup> International trade in goods, services, and capital is increasingly important to our national economy,<sup>18</sup> as are the legal services associated with it.<sup>19</sup> An American practitioner should be aware that her counterpart in a foreign jurisdiction may be a notary, and more importantly, that the services of a notary may be essential or very useful for the completion of a particular legal transaction.<sup>20</sup> She should also be able to explain to her client what services the notary will provide.

Additionally, misconceptions about notaries and their functions here in the United States have allowed unscrupulous persons to take advantage of U.S. citizens of foreign origin and aliens seeking entry to or living in the United States.<sup>21</sup> A simple search of news reports dis-

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This collection is published in yearly volumes; currently available are those from 1959 through 1995.

16. See *infra* part III.B.4. Although it differs from the traditional Latin *notariat*, the Chinese *notariat*, for example, is considered an important part of "China's new open-door external policy and increasing external economic activities." Tung-Pi Chen, *The Chinese Notariat: An Overlooked Cornerstone of the Legal System of the People's Republic of China*, 35 INT'L & COMP. L.Q. 63, 64 (1986).

17. Compare Phillip Hamilton, *The International Notary Public*, L. INST. J. 746-47 (Aug. 1991) ("Judging by the number of documents returned as unusable from overseas, Victorian solicitors have little idea of the function and role of the [Latin] notary public") with Professor Goebel's dismissive references to notaries in his otherwise excellent article. Goebel, *supra* note 10, at 464, 489.

18. Exports of merchandise by the United States increased from approximately \$20.1 billion in 1961 to \$227 billion in 1986. BUREAU OF ECONOMIC ANALYSIS, U.S. DEPT OF COMMERCE, BUSINESS STATISTICS: 1986, at 78 (1987) [hereinafter BUSINESS STATISTICS: 1986]. Imports increased from \$14.7 billion to over \$366 billion during the same period. *Id.* at 81. In 1992 exports were \$636.3 billion and imports \$666.7 billion. U.S. DEPT OF COMMERCE, 73-4 SURVEY OF CURRENT BUSINESS 11 (April 1993). As of 1986 U.S. private citizens owned over \$94 billion in assets abroad and U.S. direct investment abroad totaled \$28 billion. BUSINESS STATISTICS: 1986, *supra*, at 248.

19. See *supra* notes 4, 9.

20. For example, a bank lending abroad might be interested in knowing that in many civil code jurisdictions, a real estate mortgage generally must be included in a notarial document *and* be registered for the mortgage right to exist. See *infra* part III.B.4. Additionally, it may be advisable to include certain agreements in notarial documents in order to benefit from the evidentiary value attached to such documents. See *infra* part III.B.2.a.

21. "In many Latin American countries a 'notario público' is a lawyer. Because immigrants are unaware that notaries in the United States simply certify documents [and are not legal professionals], they may be deceived by notaries who charge high fees for services they often cannot perform." Gail Appleson, *Unscrupulous Notaries Spur Chicago Probe*, 68 A.B.A. J. 1357, 1357 (1982). The Appleson article lists instances of immigrants being

closes many instances of fraud perpetrated by notaries who have taken advantage of foreign immigrants or would-be immigrants by misleading them into believing that they could provide legal services, or that their services had the same legal effect in the United States as in the home countries of the immigrants.<sup>22</sup> Successful prosecutions for illegal practice of law have also been instituted against persons who have used the title "*Notario Público*"<sup>23</sup> to mislead cli-

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defrauded by U.S. notaries who mislead them into believing that they are the same type of legal professionals that notaries are in the immigrants' countries of origin. But money is not the only thing that the immigrants could lose. "In some cases a notary may intend to help but can't because of his lack of legal knowledge. For example, if an alien has been here for seven years and can prove hardship, he can petition for a suspension of deportation. 'Notaries don't inform clients of proper procedure and the aliens are deported.'" *Id.* The article reported similar instances of abuse in Chicago and Los Angeles. *Id.*

22. See, e.g., Patrick McDonnell, *Victimized Brothers Help End Immigration Scam*, L.A. TIMES, San Diego County Ed., Aug. 4, 1991, Metro sec., at 1 (Latino immigrants defrauded in part by official-looking notarized documents and by advertisements by "immigration consultants" and "*notarios públicos*"); Alexander Peters, *Notaries Bilking Immigrants; Aliens Think They're Hiring Counsel, But Buy Trouble Instead*, S.F. RECORDER, Feb. 1, 1991, Alien Justice sec., at 1 ("Violations of advertising and pricing laws are readily apparent, and attorneys who handle asylum claims estimate that 50 to 80 percent of their cases have been prejudiced by the prior work of notaries and other nonlawyers, who often hold themselves out as attorneys . . . . Fortunate aliens lose only their money. In the worst cases, they can be ordered deported."); Constanza Montana, *New Immigration Laws Cause New Set of Problems for Aliens*, CHI. TRIB., Dec. 11, 1987, Chicagoland sec., at 14 (The Cook County state's attorney's office "has filed two 'class action-type' suits against two notaries who have committed fraud by posing as attorneys and handing out incorrect information to immigrants."); Bob Schwartz, *Protesters Say Notaries Are Defrauding Aliens*, L.A. TIMES, Orange County ed., Apr. 2, 1987, Metro sec., part 2, at 1 ("About 75 members of an immigrants' rights group marched in downtown Santa Ana Wednesday evening to protest what they said are fraudulent practices by notary publics [sic] purporting to help illegal aliens gain amnesty. 'Amnesty yes! Swindlers no!', shouted one protester in Spanish as he marched past the office of a notary public and immigration lawyer on Broadway. Others held signs with slogans such as 'Down with the despicable notaries' that were written in Spanish. A recent investigation by the newspaper turned up notaries who were: [1] charging up to 100 times what the state allows for filling out immigration forms. State law prohibits notaries from charging more than \$10 to fill out immigration forms. Notaries visited by the newspaper charged between \$300 and \$1,000 to process amnesty cases; [2] providing detailed, and often erroneous, advice that experts say could destroy legitimate amnesty cases; [3] practicing law without a license by preparing legal documents and giving detailed interpretations of the law; [4] advertising their services as both notaries and immigration consultants. Because the term 'notary public' carries such power with Hispanics, state law forbids notaries from also advertising immigration services.").

23. In Spanish, the Latin notary is referred to as "*notario público*," which would literally translate to "notary public" in English. In order to avoid confusion, except where the context makes it otherwise clear, I will generally make reference herein to the "Latin notary" when referring to the civil-law professional. Alternatively, I will refer to these professionals using their title in the language of their country of practice. I will refer to "notary public" when discussing the common-law functionary.



ents into believing they could deliver legal services.<sup>24</sup> State laws generally prohibit misleading advertising<sup>25</sup> and the practice of law by notaries.<sup>26</sup> However, this problem has become significant enough to lead several states to enact laws that specifically require notaries to indicate that they are not lawyers when advertising in a language other than English<sup>27</sup> and prohibit the literal

24. See, e.g., *Florida Bar v. Rodriguez*, 509 So. 2d 1111 (Fla. 1987) ("The [Spanish-language newspaper] advertisement indicated ABC General Services employed a 'Notario Publico,' and offered services in immigration, corporations, divorce, and income tax."); *Florida Bar v. Borges-Caignet*, 321 So. 2d 550, 551 (Fla. 1975) ("Respondent had represented himself to be a *Notario Publico* (which the witness related her understanding of same to be 'something with laws'), and in such position could act as her attorney for the purpose of obtaining legal permission to remain in the United States.") (emphasis added); *Florida Bar v. Fuentes*, 190 So. 2d 743, 750-51 (Fla. 1966) ("The use of the terms 'Notaria', 'Notario Publico' and 'Consultoria' indicated to the Cuban clientele of the Respondent and to his clientele native to other Spanish speaking countries, that he was an attorney authorized to provide the services generally provided by an attorney in the State of Florida. This was misleading and the misleading connotation was reinforced by the fact that the Respondent engaged in rendering legal services."); *Florida Bar v. Escobar*, 322 So. 2d 25 (Fla. 1975).

25. See, e.g., CAL. GOV'T CODE § 8214.1(f) (West 1993); COLO. REV. STAT. § 12-55-107(1) (1993); FLA. STAT. § 117.01(4)(e) (1993); IDAHO CODE § 51-112(c) (1993).

26. See, e.g., CAL. GOV'T CODE § 8214.1(g) (West 1995); FLA. STAT. ANN. § 117.01(4)(f) (West 1995); IDAHO CODE § 51-112(d) (1995); MO. ANN. STAT. § 486.390(1) (Vernon 1995); N.M. STAT. ANN. § 14-12-13(A)(5) (Michie 1995); W. VA. CODE § 51-1-4a (1993) ("A realtor or notary public, who prepares legal instruments for another, is engaged in the practice of law." 45 Op. Att'y Gen. 488 (1953).); WIS. STAT. ANN. § 137.01 (West 1995) ("If any notary public shall be guilty of any misconduct or neglect of duty in office he shall be liable to the party injured for all the damages thereby sustained.").

27. See, e.g., CAL. GOV'T CODE § 8219.5 (West 1995) ("Advertising services in language other than English"):

(a) Every notary public who is not an attorney who advertises the services of a notary public in a language other than English by signs or other means of written communication, with the exception of a single desk plaque, shall post with such advertisement a notice in English and in the other language which sets forth the following:

(1) This statement: I am not an attorney and, therefore, cannot give legal advice.

(2) The fees set by statute which a notary public may charge.

(b) The notice required by subdivision (a) shall be printed and posted as prescribed by the Secretary of State.

...

(d) The Secretary of State shall suspend for a period of not less than one year or revoke the commission of any notary public who fails to comply with subdivision (a), provided, that on the third offense the license of such notary public shall be revoked permanently.

See also NEV. REV. STAT. § 240.085 (1993) ("Advertisements in language other than English [must] contain notice if notary public is not an attorney."). I have not studied, however, the effectiveness and enforcement of these statutes. See also OFFICE OF PROFESSIONAL STANDARDS, STATE BAR OF CALIFORNIA, REPORT OF THE PUBLIC PRO-

translation of the title "Notary Public" to the Spanish "*Notario Público*."<sup>28</sup>

3. *A Comparative Model for Contemporary Law Practice: Is the Latin Notary Brandeis' "Counsel for the Situation"?*

I believe that this Article could provide the starting point for several studies concerning the practice of law. Notarial work reflects a different approach to particular problems in many legal areas including evidence, real property, inheritance, and contract law. Whether or not these approaches are better than those followed in the U.S. legal system is a subject open for debate could easily be the topic of several articles. The results of this research will ultimately depend on the relative economic efficiency of particular procedures.<sup>29</sup>

The reader will note that notarial transactions can fit into categories with which we are abundantly familiar. For example, the evidentiary treatment of documents under seal might be studied in order to determine if it lowers litigation costs without defeating the requirements of evidentiary reliability. The property registration system discussed below could be compared, in terms of costs and efficiencies, to property registries in the United States and the system of title insur-

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TECTION COMM. 8 (1989), cited in Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203, 221 n.91 (1990) (The authors of the report and Ms. Munro advocate, although not with equal enthusiasm, authorizing the lay practice of law, but both caution that special care needs to be taken to prevent unscrupulous notaries from misleading immigrants and non-English speakers. *Id.* at 244-45.).

28. See, e.g., CAL. GOV'T CODE § 8219.5 (West 1995):

(c) Literal translation of the phrase "notary public" into Spanish is prohibited. For purposes of this subdivision, "literal translation" of a word or phrase from one language to another means the translation of a word or phrase without regard to the true meaning of the word or phrase in the language which is being translated.

See also OR. REV. STAT. § 194.162(5) (1993) ("A person may not use the term "notario publico" or any equivalent non-English term, in any business card, advertisement, notice, sign or in any other manner that misrepresents the authority of a notary public."); TEX. GOV'T CODE ANN. § 406.017 (West 1994); *Florida Bar v. Fuentes*, 190 So. 2d 748, 750-51 (Fla. 1966) (Court enjoined the literal translation of "Notary Public" to the Spanish "Notario Público" or the use of the Spanish words "Notaría" (*i.e.*, a notary's office), because they were misleading persons into believing that the user was a legal practitioner).

29. For example, in Puerto Rico the Rules of Civil Procedure provide that in order to obtain a prejudgment attachment a litigant must post a bond sufficient to cover any possible damages to the defendant for wrongful attachment. P.R. R. CIV. P. § 56.3, P.R. LAWS ANN. tit. 32, app. III §§ 40.9, 56.3. However, if the transaction is reflected in a document authenticated before a notary, no bond has to be posted. *Id.* Similarly, in mortgage-execution actions, the property may be preventively attached without the posting of a bond. *Id.*; see also P.R. R. CIV. P. § 56.4, P.R. LAWS ANN. tit. 32, app. III § 56.4.

ance. The role of the notary in the prevention of disputes or as a model for alternative dispute resolution could also be considered. Other examples will probably become obvious to readers more knowledgeable than this author. The sheer number of possible avenues of exploration makes it impractical to pursue them in the context of this Article. In that sense, this piece is really only an exploratory or foundational essay which will hopefully lead to further study.

As an overview of the *notariat* and of notarial law generally, this Article, however, could provide an alternative, albeit complementary model for contemporary law practice. While it is an alternative to the adversarial ethic, it is complementary to law practice generally because it does not advocate that the United States abandon the adversary ethic altogether. The *notariat* is a nonlitigation, nonadvocacy model of legal counseling within an established system of legal specialization. Advocacy is still left to the great majority of legal professionals.<sup>30</sup> But, in particular transactions, the Latin notary intervenes as an impartial advisor to the parties. Ideally, he is, in the celebrated words of Justice Louis D. Brandeis, a "counsel for the situation."<sup>31</sup>

On a number of occasions Brandeis suggested to his clients that he might be of greater value as "counsel for the situation" rather than as an attorney for one faction or another. In such a role he attempted to strike a balance between the obligations of each party and work out a solution equitable to all. This judicial posture accurately reflected his efforts to create a new type of lawyer who could rise above partisan advocacy.<sup>32</sup>

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30. See *infra* table 1.

31. The phrase is generally attributed to Louis Brandeis as a description of how he viewed himself as a lawyer in particular cases. It appears that it was used in response to attacks on his professional ethics. The first reported instance in which Brandeis made a call for a different approach to the practice of law was a speech to the Harvard Ethical Society in 1905. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988) (the speech was entitled "*The Opportunity in the Law*"). The matter came up again during Brandeis' very contentious Senate Confirmation hearings for his appointment to the Supreme Court, and that appears to be the occasion when the phrase was coined. See Dzienkowski, *supra* note 1, at 742-43. For a careful study and defense as to each charge of unethical conduct raised against Justice Brandeis during the hearings, see John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965). But note that Frank, although generally sympathetic to the Justice, concludes that "the greatest caution to be gained from study of the Brandeis record is, never be 'counsel for the situation.'" *Id.* at 708. Some authors quote the phrase "*lawyer for the situation*," e.g., Luban, *supra*, at 721, and others use the term "counsel," e.g., Dzienkowski, *supra* note 1, at 743.

32. MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 112 (1981) cited in Dzienkowski, *supra* note 1, at 743 n.6.

In his book on legal ethics, Professor Hazard utilizes the Brandeis idea as an example of the lawyer as intermediary.<sup>33</sup> Rule 2.2 of the Model Rules of Professional Conduct specifically refers to the role of a lawyer as an intermediary.<sup>34</sup> But some commentators argue that the lawyer should act within client-based ethical constraints (*i.e.*, not be a "counsel for the situation"), and act as a general representative of the collective interests of several clients.<sup>35</sup>

The beginning of the modern American debate over the adversary ethic can probably be traced back to Dean Roscoe Pound's 1906 speech to the American Bar Association decrying the "sporting theory of justice,"<sup>36</sup> which has been described "as elevating the competitiveness of the adjudication system to the detriment of its value to society."<sup>37</sup> This subject has recently taken up a lot of ink in law reviews.<sup>38</sup> I would not suggest that we disregard adversarial advocacy as an ethi-

33. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW*, 58-68 (1978). Professor Hazard makes reference to "lawyer for the situation," rather than to "counselor." *Id.*

34. The Rule reads:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1992).

35. Professor Dzienkowski makes this argument in his very thorough article. His point is that there are some situations when single-client representation may not be necessary and becomes unduly expensive. Dzienkowski, *supra* note 1, at 815-16. But Professor Dzienkowski ultimately rejects the notion that the lawyer should be a counsel for the situation, instead advocating a modified ethical duty that balances the interests of multiple clients. *Id.*

36. See, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Paper Presented to the ABA (Aug. 29, 1906), reprinted in 40 AM. U. L. REV. 729 (1906).

37. BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW* 152-53 (1994).

cal model; that result strikes me as absurd.<sup>39</sup> But study of the Latin notary, as a specialized professional in a system that allocates legal responsibilities among separate advocacy and counseling professions, would appear to be relevant to the American search for alternative dispute-resolution methods. More generally, the notary model would be relevant to a reexamination and redefinition of the role of lawyers in our society, particularly in the area of multiple-client representation.

I must emphasize, however, that the *notariat* is one part of a professional structure that includes governmentally-defined specialties. In the typical European system, we find general legal counselors, litigators, and notaries. The legal counselors, for example the Spanish *abogado* or French *avocat*, owe a duty exclusively to their clients and are responsible for promoting their legal matters. The litigators, like the Spanish *procuradores*, are responsible for in-court advocacy. Both the counselors and litigators are governed by an adversary client ethic.<sup>40</sup> But there are times when advocacy is not what the parties need, when counseling is more appropriate. The legislators in the civil-law world have established that *some* legal transactions can be

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38. See, e.g., Dzienkowski, *supra* note 1; Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Luban, *supra* note 31; Mark Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009 (1989); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1259 (1994); Thomas L. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992).

39. Professor Thomas L. Shaffer strongly attacks the adversary ethic. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, *supra* note 38. I believe that *abandoning* the adversary ethic completely would be unsound, dangerous, and antidemocratic. Professor Shaffer seems to argue that there is an overriding "common good" that all lawyers should be pushing forward. Well, that begs the question of what the public interest is and who is going to determine it. The most important and socially constructive legal work of this century has gone against the desires of the establishment. Would the work of the NAACP Legal Defense Fund in desegregating schools be Kansas' idea of the "common good" in 1954? I think it more likely that Kansas found this work to be just as reprehensible as Professor Shaffer finds the work of lawyers working for the robber barons of nineteenth century America. Another example: who would determine "the public interest" in Nazi Germany, the Nazis or perhaps a board of law professors? The problem with morality-based systems is who picks the morality. See, e.g., *id.*; Luban, *supra* note 31. Naturally, laws and the legal system reflect societal moral judgments. But the system has a series of social "escape valves" that are essential to a free society. Advocacy within the marketplace of ideas strikes me as the most desirable system.

40. For a detailed discussion of legal specialization, see *infra* part III.B.3.

completed without following an adversarial approach to law.<sup>41</sup> The Latin notary is thus exclusively empowered to complete certain legal transactions, and in this context is allowed to be the parties' only legal advisor. The notary is the judge of the legality of the transaction under normal circumstances (*i.e.*, in the absence of litigation), and acts as the parties' expert legal advisor.<sup>42</sup> The notary impartially advises all sides in a matter—her ethical duty is not to the parties but to the transaction. Since the notary's competence is generally limited to specific transactions, it is more accurate to call her "counsel for the transaction," but she is indeed, in Brandeis' terms, a legal professional who "rises above partisan advocacy."<sup>43</sup>

### C. Conclusion

While I certainly hope that this work will be the foundation for further study, I will generally avoid value judgments in this Article. The models that I compare are substantively different even if sometimes structurally similar. But conclusions as to relative efficiencies and economic and transactional advantages must wait for empirical research, which is not now my focus. Therefore, regardless of the use

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41. Some observers, only marginally familiar with comparative legal models, might find it surprising that the adversarial ethic is alive and well in the civil-law world. In basic comparative terms, the American justice system is usually described as "adversarial" and the civil-law system sometimes as "inquisitorial." See, e.g., KUKLIN & STEMPEL, *supra* note 37, at 103-22. While this oversimplified categorization can be a useful comparative tool, it has an almost unlimited potential to be misleading. To begin with, I must take issue with the term "inquisitorial" itself, because it conveys images of arbitrary religious persecution and, in American culture, is almost an epithet. But more importantly, we must be careful in understanding that while civil-law judges may be more active by virtue of their written procedural rules, they do not walk the streets looking for cases. The parties initiate litigation and have the power to settle it. It is argued that this power is limited. *Id.* Well, it is limited by the rules of the legality of contracts generally. A case settlement is simply a specialized contract subject to general limitations on contracting. I think that American commentators too often confuse the de-emphasis of oral presentation and cross-examination in "civilian" procedure with the total absence of an adversary system. This is simply wrong. The civil-law lawyer and the party she represents must plead and present her case. The duty of each counsel is to represent her client. This is an "adversary" system, albeit one with stricter rules of procedure and a more officially activist judge—particularly in the area of discovery. For an illustration of this, see John H. Langhein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Officially, the judge is given this authority expressly in the procedural codes. Nevertheless, it is up for debate whether judicial *practice* in the United States is all that different. The limits created by civilian judicial practice are more often than not intended to limit the judge's activism in applying the law, not the parties' rights.

42. PEDRO MALAVET-VEGA, *MANUAL DE DERECHO NOTARIAL PUERTORRIQUEÑO* 16 (1987).

43. See UROFSKY, *supra* note 32.

to which this comparative study might be put, my principal intent is to illustrate the role of the Latin *notariat* in ways that will be familiar to an American lawyer. I will not discount, however, that the *notariat* may provide a model for the nonadvocate "counsel for the situation" which might be relevant at a time when the role of lawyers in our society is being debated.

By way of introduction to this Article, I will first briefly explore the historical development of the Latin *notariat* and undertake a comparison from the perspective of the United States legal system. The more substantial part of the Article will describe the profession and practice as they generally exist today, also from an American legal comparativist perspective.

## II. Historical Development of the Profession

### A. Introduction

Legal institutions change over time as new laws are enacted in response to relevant developments. "It follows that the comparative legal historian who practices 'vertical' comparative law will hit upon different legal families, depending on the period under review, from the comparativist who looks only to living systems of law."<sup>44</sup> There are different views regarding the historical ancestry of the modern notary.<sup>45</sup> The concept of a specialist dedicated to writing documents is as old as writing itself, for we find scribes or note takers in most ancient cultures. But can today's Latin notary institution really be compared to the ancient scribes?<sup>46</sup>

By modern standards, the Latin notary is a: (1) private legal professional, (2) who advises and drafts legal documents for private par-

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44. ZWIEGERT & KÖTZ, *supra* note 12, at 68. Regarding the importance of historical studies in comparative law, see SCHLESINGER ET AL., *supra* note 6, at 39-40.

45. For a general discussion of the historical debate, see GIMÉNEZ-ARNAU, *supra* note 5, at 63-102. See also *infra* note 68. For a general discussion of the importance of conducting comparative analysis of the ancient roots of modern law, see GABOR HAMZA, *COMPARATIVE LAW AND ANTIQUITY* (Ferenc Mádi ed., Ferenc Mádi & József Szabo trans., 1991).

46. Some commentators suggest that certain ancient scribes are complete predecessors of the modern notary. For a discussion of this argument, see GIMÉNEZ-ARNAU, *supra* note 5, at 64. However, there is no clear evidence that the earliest scribes provided legal advice, and thus they cannot accurately be compared to the modern notary. We do find in the ancient documents historical precedents for the modern acts and functions included within the competence of the contemporary Latin notary. Later, we find legal advisors who could be called the *notariat*'s predecessors, but who lack some the essential attributes of the Latin notary. It is not until the late middle ages that an official appears in Europe who can truly be called a notary in the modern sense of the term.

ties, (3) maintains a permanent record of the transaction, and (4) has the authentication power of the state delegated to him. All definitions of legal professional in the United States include both giving legal advice and, when necessary, representing a client in judicial or administrative proceedings.<sup>47</sup> However, as anticipated above and as will be discussed below,<sup>48</sup> the legal professions in Europe generally separate legal counsel and advocacy functions. Even in the United Kingdom, a common-law jurisdiction, we find the barrister and the solicitor. In this context, advocacy is not an essential element of a legal profession; indeed, it has generally been incompatible with the notarial function. The pattern of legal specialization and the separation of advocacy and counseling functions can also be identified in ancient European professional history. Thus, in order to describe these early scribes as legal professionals, one should determine whether or not they gave legal advice to clients and drafted legal documents on their behalf, including keeping a record of the transaction and authenticating the juridical act performed before them.

The historical process that produced such a professional is comprised of the following elements: (1) the meeting of the minds, (2) the written contract, and (3) the legal professional who drafts public documents. As one expert has written:

"In the beginning there was the document. This cannot be forgotten. The document made the notary, even if now the notary writes the document" . . . [but], before the document and the notary, there was the meeting of the minds.<sup>49</sup>

The Latin *notariat* is inexorably linked to legal transactions. Therefore, the historical progression at issue here starts with the meeting of the minds (*i.e.*, the contract). Over time, agreements come to be memorialized in writing. The seal is used as a guarantee of documentary authenticity. The document under seal as a guarantee of legality is clearly identifiable among the earliest legal writings. But

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47. For example, an "attorney at law" is a "person admitted to practice law in his respective state" and "authorized to perform both civil and criminal legal functions for clients, including drafting of legal documents, giving legal advice, and representing such before courts, administrative agencies, boards, etc." BLACK'S LAW DICTIONARY 118 (5th ed. 1979). A counselor is a member of the legal profession who gives legal advice and handles the legal affairs of a client, including, if necessary, appearing on his or her behalf in civil, criminal or administrative actions and proceedings. *Id.* at 314.

48. See *infra* part III.B.3.

49. MALAVET-VEGA, *supra* note 42, at vii, quoting RAFAEL NÚÑEZ-LAGO, HECHOS Y DERECHOS EN EL DOCUMENTO PÚBLICO, Partida III, Title XIX (1950) (P.A. Malavet trans., unofficial) (emphasis omitted).



my focus in this Article is on the individuals who produce these documents. In the beginning, these individuals were merely skilled writers. As legal forms developed, so did the level of required expertise. Liberal professionals assumed these tasks, at least where legal agreements were concerned. Professional legal specialization is clearly identifiable in ancient Rome, with a pattern that continues today in Western Europe and in those systems thereby influenced. That is why we find separate legal professionals—some involved in litigation or general representation and others charged with drafting certain legal agreements in proper form. But these liberal professionals initially lacked the state power to authenticate, for they did not have an official seal. This state monopoly was only dispensed by judicial authority, in proceedings following the drafting of the agreement. Then, during the Middle Ages, the liberal professionals, while retaining their private character, were given the authentication power of the state. The Latin notary was born.

### **B. Pre-Roman Civilizations**

The legal document appeared long before the notary. In pharaonic Egypt, "[t]here have been since the third dynasty [during the Old Kingdom, about three millennia B.C.], papyrus deeds (the *house document*) for sales and gifts of valuable property."<sup>50</sup> Two to three millennia before Christ, we find another ancient legal document: the will. During the Old and Middle Kingdoms, between 3100 and 1770 B.C., Egyptians could leave property to their survivors using a document which, although not considered a formal will, nonetheless memorialized a gift of property upon death. This document usually bore the seal of a functionary of some importance, such as a priest, whose seal gave the document public status.<sup>51</sup> In the New Kingdom, between 1573 and 712 B.C., scribes could write and witness documents which were given public character when the official seal was placed upon them in Thebes, the capital of the empire.<sup>52</sup> Scribe-priests "were charged with the correct drafting of contracts," and magistrates could, by using their seal, authenticate and give public status to otherwise

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50. A.S. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* 11 n.1 (1971).

51. EDUARDO BAUTISTA PONDÉ, *ORIGEN E HISTORIA DEL NOTARIADO* 10 (1967). For a translation of an Egyptian will dated to the Fourth Dynasty, circa 2900-2750 B.C., see 1 *SOURCES OF ANCIENT AND PRIMITIVE LAW* 665-80 (Albert Kocourek & John H. Wigmore eds., 1979). The document was prepared by the Priest of Ammon Horpnetter, son of Smin. *Id.*

52. PONDÉ, *supra* note 51, at 12.

private documents,<sup>53</sup> as could lower level officials employed by them.<sup>54</sup> The scribe's work throughout this period appears to have been mostly ministerial (*i.e.*, it was limited to drafting and acting as a witness) and nonadvisory.<sup>55</sup> It was undoubtedly an important job, as these officials were charged with documenting and accounting the wealth of the empire. Additionally, one sees here the origin of an official document bearing the seal and accompanying certification of the state, which, in some instances, memorialized a private legal transaction.

Hammurabi's Code, the ancient tablet dated to at least two millennia B.C.,<sup>56</sup> makes reference to some of the oldest written contracts on record, which were memorialized by Babylonian judicial scribes in the presence of witnesses and, as judgments of the court, had public status and probative value.<sup>57</sup> These contracts usually related to the transfer of real or personal property among individuals.<sup>58</sup>

The Hebrews, in Old Testament times, had the *scribae*—royal scribes, law scribes, popular scribes, and state scribes. All except the

53. GIMÉNEZ-ARNAU, *supra* note 5, at 67 (P.A. Malavet trans., unofficial); PONDÉ, *supra* note 51, at 10.

54. GIMÉNEZ-ARNAU, *supra* note 5, at 70. Record-keeping by scribes was of fundamental importance in ancient Egyptian society. PONDÉ, *supra* note 51, at 7. Their work was associated with the God Thoth—known as the “heart of Ra” (a reference to thought, since ancient Egyptians regarded the heart and not the brain as the organ related to thought). *Id.*; see also WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1983) (“Thoth” is Greek, “Tehuti” is the Egyptian term; it describes the “Egyptian god of learning and magic, the measurer of time and inventor of numbers.”). The scribe was generally a government bureaucrat, but priests and magisterial scribes could authenticate documents using their official seal, and their underlings could do the same with their masters' seal. PONDÉ, *supra* note 51, at 6-9.

55. The reference to the correct drafting of contracts appears to mean only that they were responsible for the accuracy of the facts, although some knowledge of formal legal drafting, beyond mere writing, would appear to have been required.

56. DIAMOND, *supra* note 50, at 15.

57. PONDÉ, *supra* note 51, at 15. Tablets of even older works of codification, in this same region, still survive. WILLIAM SEAGLE, MEN OF LAW: FROM HAMMURABI TO HOLMES 23 (1971) (“Hammurabi was not the first king in the land of the Two Rivers who conceived the idea of written law. Fragments of very ancient Sumerian and Akkadian laws still survive. Hammurabi had an important predecessor in Urukagina of Lagash . . . . There could have been no country of the ancient world where resort to writing for the purpose of consummating legal transactions was more common than in Babylonia.”); see also DIAMOND, *supra* note 50, at 14-15. However, we should not ignore the important Egyptian and Hebrew systems.

58. PONDÉ, *supra* note 51, at 15. See also *The Code of Hammurabi*, in 1 SOURCES OF ANCIENT AND PRIMITIVE LAW, *supra* note 51, at 441-42. (Laws 278-281, purchase of slaves). There is evidence of old and firmly established Babylonian commercial transactions using “contract-tablets” during the period immediately preceding and following the code. DIAMOND, *supra* note 50, at 20.

popular scribes had the power to authenticate documents. This power was not directly delegated to them, but rather emanated from the power of their employers. Thus the popular scribes had a limited quasi-public function; they were merely skilled in writing, and offered this service generally to the public.<sup>59</sup> Nevertheless, the popular scribes wrote legal documents such as marriage contracts, deeds of purchase, and leases.<sup>60</sup> The royal scribe authenticated the King's acts and resolutions; the state scribe was the secretary to the crown and to the courts of justice.<sup>61</sup> Thus, one sees the development of ministerial functions related to legal documents. However, the law scribes were interpreters of the law, and their function was also religious in character, giving them a status similar to that of the priests.<sup>62</sup> The royal, state, and law scribes were state employees and their functions related exclusively to state business. It was the lower-level popular scribe who performed services for individuals involved in private transactions.

In Classical Greece there were "public officials charged with drafting the citizens' contracts" as mentioned by Aristotle in 360 B.C.<sup>63</sup> These officials were known as *singraphos* and *apographos*.<sup>64</sup> There were also officials said to be predecessors of the modern notary.<sup>65</sup> The *Mnemon*, for example, was "in charge of formalizing and registering public treaties and conventions and private contracts."<sup>66</sup> There is however, considerable debate and inexact information about the full attributes of each of these professions, and conclusions as to their contribution appear mostly anecdotal.<sup>67</sup>

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59. GIMÉNEZ-ARNAU, *supra* note 5, at 66. Regarding the importance of the scribes, see also DIAMOND, *supra* note 50, at 128-29.

60. PONDÉ, *supra* note 51, at 21.

61. *Id.*

62. *Id.* at 21-22. Pondé indicates that the dispute between Jesus and the Pharisees, who were law scribes, could be seen as a dispute regarding the jurisdiction of these legal professionals. *Id.* at 22. This is probably one of the earliest recorded attacks against lawyers in human history. It is also important to note that civil and religious society, and their laws, were not clearly separated until much more recent times. The importance of religious laws and their impact on daily life cannot be underestimated.

63. GIMÉNEZ-ARNAU, *supra* note 5, at 68 (P.A. Malavet trans., unofficial).

64. *Id.*

65. These were known as the "*Mnemon*, *Promnemon*, *Sympromnemon* and *Hieromnemon*." *Id.* at 68-69.

66. *Id.* (P.A. Malavet trans., unofficial).

67. For a complete discussion of the Hellenic influence in the history of the *notariat*, see generally PONDÉ, *supra* note 51, at 24-30. Pondé also points out that there are some intriguing connections between the Macedonian, Hellenic, and Egyptian cultures during the years immediately prior to and following Alexander the Great's reign which have yet to be fully explored. In fact, one of the principal sources of Greek law is the "still growing

Many public officials with the power to certify the acts of the State with an official seal existed in pre-Roman history. One can even find scribes who drafted legal documents for private persons. But there was no single professional who possessed *both* the power of the State to authenticate private acts and the responsibility to act as legal advisor to private parties. Moreover, the legal professional was not yet the custodian of the original document and issuer of copies to the parties. During these early years, the legal document was much more important than its drafter.

### C. Rome

Despite these precedents, and although today the two institutions are quite different, the notary public in the United States and the Latin *notariat* most often trace their origin similarly to Ancient Rome.<sup>68</sup> "Writing was not widespread in that region during those times. As a result, trusted souls were needed to write out important documents such as contracts and wills and retain them, all for a small fee. Such an individual was imparted with the public trust in office."<sup>69</sup> But again—at least initially—the legal document appeared to be much more identifiable than the notary function. Nevertheless, over several centuries of Roman law, one finds different officials who perform what today are notary functions.<sup>70</sup> The most important of these were the *tabularii* and the *tabelliones*.<sup>71</sup>

But let me begin with the *scribas* and *notarii*. The *scribas* were government employees responsible for custody of judicial documents<sup>72</sup> used by the *praetores* (the Roman judges charged with resolv-

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body of *papyrus* documents which are found especially in Egypt." STIG STRÖMHOLM, A SHORT HISTORY OF LEGAL THINKING IN THE WEST 22 (1985). This author points to the strong Greek influence in the science and philosophy of law, but indicates that it is often overshadowed by the more technical and systematic Roman codes. *Id.*

68. Compare GIMÉNEZ-ARNAU, *supra* note 5, at 106, BERNARDO PÉREZ-FERNÁNDEZ DEL CASTILLO, DERECHO NOTARIAL 3-9 (4th ed. 1989) and PLANIOL, 2 CIVIL LAW TREATISE, ch. IV, § 134, 79 n.1 (English translation by the Louisiana State Law Institute, 1959) with Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873-96 (1992), PONDÉ, *supra* note 51, at 37-45; RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES AND GLOSSARY 1-2 (1978) and LAWRENCE G. GREENE, THE LAW OF NOTARIES PUBLIC 1 (1955). See also MERRYMAN, THE CIVIL LAW TRADITION, *supra* note 12, at 113-15.

69. Closen & Dixon, *supra* note 68, at 875 (footnotes omitted).

70. See generally GIMÉNEZ-ARNAU, *supra* note 5, at 69.

71. PONDÉ, *supra* note 51, at 31.

72. *Scriba* or *scribae* were "clerk[s] in a court or in an office." ADOLF BERGER, ENCYCLOPEDIA DICTIONARY OF ROMAN LAW 692 (1953).

ing civil lawsuits).<sup>73</sup> They also drafted official resolutions.<sup>74</sup> Their work appeared in the court record and therefore had public document status. The *notarius* was a person skilled in shorthand writing.<sup>75</sup> They took notes from oral dictation or discussions, much as a court reporter does today.<sup>76</sup> The *tabularii*<sup>77</sup> were in their origin public officials charged with the census and responsible for the custody of the census documents. Over time, they became custodians of private wills, contracts, and other juridical acts.<sup>78</sup> The documents themselves, however, were not authenticated by their delivery to the *tabularii*; rather the fact of their delivery was certified.<sup>79</sup> "This variety of designations does not prove, definitively, anything but that the notary function is dispersed and attributed to a multitude of various public and private officials, without originally accumulating all the attributes in a single person."<sup>80</sup> Additionally, the *scribae*, *notarii*, and *tabularii* were all public officials. Thus, the development towards a liberal professional had begun.

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73. PH. J. THOMAS, *INTRODUCTION TO ROMAN LAW* 7 (1986); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 5-6 (1991).

74. PONDÉ, *supra* note 51, at 32.

75. Defined as "[a] person, usually a freedman or slave, skilled in shorthand writing; in the later Empire *notarius* is [a synonym of] *scriba*. In the imperial chancery of the later Empire there was a confidential secretariat of the emperor, called *schola notariorum*, headed by the *primicerius notariorum*. His deputy had the title *tribunus et notarius*. Both were among the highest functionaries of the state." BERGER, *supra* note 72, at 599. "The word '*notarius*' designated in antiquity a scribe who made use of abbreviations, *note*." PLANIOL, *supra* note 68, § 134, at 79 n.1. *Notarii* is the plural of *notarius* in Latin. PONDÉ, *supra* note 51, at 30.

76. PONDÉ, *supra* note 51, at 32.

77. This is the plural of the term; *tabularius* is the singular. Initially, they were charged with tax documents. They later become generally connected with archives and records. BERGER, *supra* note 72, at 729. The term is derived from the wax-covered stone tablets, *tabulae ceratae*, that were used for writing, since the Romans did not start using papyrus until the third century. Hans A. Ankun, *Les Tabellions Romains, Ancêtres Directs des Notaires Modernes*, in *ATLAS DU NOTARIAT* 5, 9 (1989).

78. GIMÉNEZ-ARNAU, *supra* note 5, at 70-71. Pondé adds that they kept tax, birth and marriage records, and that they acted as provincial and municipal treasurers and record-keepers. PONDÉ, *supra* note 51, at 33-34.

79. GIMÉNEZ-ARNAU, *supra* note 5, at 71.

80. *Id.* at 69.

*Tabelliones*,<sup>81</sup> on the other hand, were private professionals<sup>82</sup> who wrote and kept wills<sup>83</sup> and other legal documents.<sup>84</sup> Although they were private professionals, they were carefully regulated and scrutinized by the state to ensure the honesty of their work.<sup>85</sup> They developed sufficiently by the time of Emperor Justinian's rule<sup>86</sup> to be mandatory drafters of contracts, required to prepare minutes of the transaction called the *scheda*.<sup>87</sup> Justinian's Constitution of 528 A.D. required parties to the juridical act to request the *tabellio*'s participation. During this meeting, the *tabellio* produced the *scheda* (notes reflecting the agreement the parties wished to reach). The transaction was then transcribed by hand by the *tabellio* alone *in mundum* (in its entirety), a process known as the *absolutio*. The document was written on paper known as *protocolum*, and it eventually acquired status similar to that of a *publica monumenta* (i.e., a public document drafted by an official of some importance). After the meeting, the document was turned over to the parties and the *tabellio* was not required to keep the *scheda* as a record. Judges treated the documents with great deference when the *tabellio* testified to having drafted them.<sup>88</sup> The

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81. *Tabellio* is defined as a Latin term for "a scrivener under the Roman Empire with some notarial powers." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2324 (1986). It is not unusual to see the form "*tabellion*," but it appears that the correct term is *tabellio*, in singular, and *tabelliones* in plural. BERGER, *supra* note 72, at 727.

82. See Novella LXXII. PONDÉ, *supra* note 51, at 578-82.

83. Some scholars have indicated that the *tabularii* initially provided the services of drafting and recording contracts on behalf of the public, but that this created such demand for their services that it interfered with their official functions. Thus was born the private professional who took over these tasks. The *tabelliones* wrote documents such as contracts, wills, and legal complaints. PONDÉ, *supra* note 51, at 34-35. However, *tabularii* could substitute for *tabelliones* in provinces where the latter were not available. Slowly, the distinction between the two completely disappeared. *Id.* at 89.

84. Ankun, *supra* note 77, at 13-14.

85. They were required to obtain official authorization to perform their duties. BERGER, *supra* note 72, at 728. They are clearly designated in Roman codes; for example, Novella XLIV and Constitution XLV, provide that the *tabellio* shall work in a *statio* and shall not leave the place while a document is being prepared, upon penalty of the loss of his office. Ankun, *supra* note 77; see also PONDÉ, *supra* note 51, at 52-53.

86. Justinian was Emperor of the Eastern Roman or Byzantine empire from 528 to 565 A.D. THOMAS, *supra* note 73, at 3. While his rule took place after the fall of Emperor Romulus Augustulus in 476 A.D.—traditionally considered to mark the fall of the Western Roman Empire and the beginning of the Middle Ages in Western Europe—from a legal science standpoint, his reign falls squarely in the realm of Roman law. For a historical chronology, see WATSON, *supra* note 73, at xv.

87. GIMÉNEZ-ARNAU, *supra* note 5, at 71-72 (quoting Novella LXXVI, Chap. V). See also Ankun, *supra* note 77, at 26-27, 44.

88. The preceding description of the *tabellional* transaction is abstracted from PONDÉ, *supra* note 51, at 545-46. The *scheda* is sometimes described as a draft of the document.

only substantial obstacle to considering these Roman officials true notaries is the absence of the power to authenticate a document.<sup>89</sup> This is because the *tabelliones* drafted *instrumenta publica confecta*, which only acquired public and authentic status upon judicial intervention, known as the *insinuatio*.<sup>90</sup> *Tabelliones* did, however, draft legal documents on behalf of private parties. Because they also provided legal advice to the parties, they had to follow strict rules imposed by the *corpus juris* in drafting the document.<sup>91</sup> They can, therefore, rightly be called one of the direct predecessors of the modern notary.<sup>92</sup> The most important factor that supports this conclusion is the distinction between the *tabellio* and the general legal profession, the *juriconsultus* or *jurisperitus*.<sup>93</sup> While the jurists "advised their clients about legal problems, the *tabelliones* assisted them in writing legal documents . . . and applications . . . to be addressed to the emperor or higher officials."<sup>94</sup> Thus, we have a liberal professional within a system of specialized professionals. Still missing, however, is the public power to authenticate.

#### D. Europe During and After the Middle Ages

What might be the notary profession as such initially appeared in Western Europe during the late Middle Ages. European law developed from a foundation of Roman law, affected by the customary law of the invading *barbarians*, mostly Germanic tribes. The fall of Emperor Romulus Augustulus in 476 A.D. marked the fall of the Western Roman Empire and the beginning of the Middle Ages.<sup>95</sup> But that was Western Europe; Roman law and institutions were alive and well in the Byzantine Empire in the East, where Justinian's Code, Digest and Institutes of 529 to 534 A.D. were written.<sup>96</sup> The combination of Roman and Germanic laws in Western Europe eventually produced the modern notary.

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See, e.g., BERGER, *supra* note 72, at 691. *Mundum* is translated as "a fair copy (original) of a document." *Id.* at 589. A *publica monumenta* is generally defined as public record. *Id.* at 586.

89. GIMÉNEZ-ARNAU, *supra* note 5, at 74.

90. *Id.* at 72, 74. The *insinuatio* was the process of presenting a document drafted by the *tabellio* to a magistrate in a public hearing and having it registered in the public record. The document then became a public document. PONDÉ, *supra* note 51, at 64-66.

91. PONDÉ, *supra* note 51, at 57-62. See also Ankun, *supra* note 77, at 5.

92. Ankun, *supra* note 77, at 44.

93. See BERGER, *supra* note 72, at 523, 727-28.

94. *Id.* at 727.

95. See WATSON, *supra* note 73, at xv.

96. *Id.*

Under Justinian in the sixth century, the *tabelliones* were in their heyday. Moreover, officials known as *tabularii* were active in the Eastern Empire during the reigns of Basil I and his son Leo VI, who ruled from 886 to 912 A.D.<sup>97</sup> Scholars have concluded that by this time the names *tabelliones* and *tabularii* had become synonymous in popular usage,<sup>98</sup> and the designation applied to private legal professionals skilled in writing who were required to be knowledgeable about Roman law, to keep a record of their work, and to follow a set form in drafting legal documents.<sup>99</sup> The *tabularii* or *tabelliones* often employed a scribe known by the generic term of "*notarius* in their establishments."<sup>100</sup>

The Gothic invasions and the fall of the Western Empire were the starting point in the development of the modern European nations and their law. The *notarii* were instrumental in the survival of Roman law in Western Europe.<sup>101</sup> But written law and scholarly compilations prior to the twelfth century often did not adequately reflect actual legal practice because they "were replaced by a *popular* or *vulgar law* spontaneously applied in fact by the people. No one bothered to reduce these laws to writing since their sphere of application was strictly local."<sup>102</sup> Only "the *Edict of Theodoric* (500 [A.D.]) in Italy, and the *Fuero Juzgo* in Spain"<sup>103</sup> are considered to be important compilations of customary law as it was applied.<sup>104</sup> Also influential were the Germanic Lombard codes, such as the edicts of Rothari, Liutprand, and Ratchis, written between 643 and 749 A.D. and later the Franks' capitularies of Charlemagne and Lothar.<sup>105</sup> It appears that the more general terms scribe and notary were used by the early Europeans, instead of *tabularii* or *tabelliones*.<sup>106</sup>

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97. PONDÉ, *supra* note 51, at 82-91.

98. See Novella *supra* note 82.

99. PONDÉ, *supra* note 51, at 82-91. The law was included in the *Procheiron*, known as "the convenient book." WATSON, *supra* note 73, at xv.

100. PONDÉ, *supra* note 51, at 89.

101. CHARLES M. RADDING, *THE ORIGINS OF MEDIEVAL JURISPRUDENCE* 30 (1988). "Notarial documents also reveal a diffusion of technical, often Roman, terminology throughout Lombardy and Tuscany." *Id.* at 113. "The work of notaries in the early Middle Ages was recognizably derived from Roman models, although their conception of their responsibilities had been more thoroughly transformed." *Id.* at 23-24.

102. DAVID & BRIERLEY, *supra* note 7, at 36-37.

103. This last one was "compiled in 654 and revised in 694 at the Eighth and Seventeenth Councils of Toledo." *Id.* at 37.

104. *Id.*

105. RADDING, *supra* note 101, at 19-20, 41, 79; GIMÉNEZ-ARNAU, *supra* note 5, at 75.

106. In Visigothic Spain, for example, we find *scriba publicus* and *notarii publicus* in legislation of the early Middle Ages. José Bono y Huerta, *Evolución Medieval del*



Whether medieval notaries can be considered legal professionals is not clear. As I have indicated before, we should determine whether or not the medieval notaries gave legal advice to clients and drafted legal documents on their behalf, authenticating the document and keeping a record of the transaction.

"Notaries" drafted "written documents as evidence of legal transactions" following traditional Roman forms, which continued to influence the Germanic Lombard codes of medieval Italy.<sup>107</sup> The office was a private profession: "[t]hey can be considered public notaries in the sense that they could write documents for anyone, but not yet in the sense of a public office in a public function and with *publica fides*."<sup>108</sup> The medieval Germanic legal document that the notary would draft was generally referred to as the *chartae*, *charta*, or *carta*, now known as charters.<sup>109</sup> If the proper formalities were followed, the charters had public character.<sup>110</sup> But while they were involved in what can only be regarded as legal work, some scholars ponder whether the notaries who drafted them were mere transcribers, students, or practitioners of the law.<sup>111</sup>

The number of charters and pleas that survive points to one kind of legal expertise that existed in early medieval Italy: the ability to draw up a charter. Drafting of legal instruments is always repetitive and highly formulaic work, and the work of the notary was no exception; indeed, it was doubtless this repetitiveness that, by making the skills of a notary relatively easy to teach and to learn, contributed both to the survival of the notaria as an occupational class and to the continued use of written documents after the Germanic invasions. The amount of knowledge involved, however, should not be overestimated. Although a notary would have had to know, for example, the phrases that would achieve transfer of certain kinds of titles, it would not have been necessary for him to understand the

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*Notariado en España y Portugal*, in *ATLAS DU NOTARIAT* 59 (1989). It is important to remember that *scribae* and *notarii* became synonymous in Roman usage. BERGER, *supra* note 72, at 599.

107. RADDING, *supra* note 101, at 23 n.4 (citation omitted) ("Not all documents were prepared by notaries, of course, though there was great pressure in that direction by the eighth and ninth centuries.").

108. *Id.* at 24, NOTE DIPLOMATICHE SULLE CARTE LONGOBARDE: I NOTARI NELL'ETA LONGOBARDA, *ARCHIVIO STOR. ITAL.* 90 (1932).

109. PONDÉ, *supra* note 51, at 72, 229-32, 549-50; see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 378 (1986).

110. Bono y Huerta, *supra* note 106, at 62.

111. See, e.g., RADDING, *supra* note 101, at 30-31.

legal theories on which the distinctions between different titles were based.

The constant need to prepare documents meant that the law codes as written documents were consulted more often and circulated more widely than were those in northern Europe. The kings insisted that charters be drawn up in accordance with Lombard law, and courts would indeed throw out improperly prepared charters. The result was that notaries knew the Lombard laws well enough to be able to cite specific laws in justification for the documents they prepared. In some cases, indeed, they copied the whole text of the relevant law into the charter—clear proof of the circulation of manuscripts of the code. Whether notaries could do more than cite the law, of course, may reasonably be doubted; the charters show no examples of legal reasoning. But even such limited expertise was valuable in the early Middle Ages, and early Pavese judges had their principal training in notarial techniques.<sup>112</sup>

In Ratchis' Edict one finds a public document used to memorialize private contracts. The professional designated to draft these documents in the early medieval codes was identified alternatively as "*scriba*" and "*notarii*," which later became "*escribano*" and "*notario*."<sup>113</sup> One of Charlemagne's Capitularies, dated circa 805 A.D., is entitled "*de scribiis e notariis* [sic]."<sup>114</sup> Later, Lothar defined *notarii* as a royal official, similar to a judge, who was entitled to use the *tabellionatus* sign.<sup>115</sup> This commingling of the notarial function, associated with the *tabelliones* under Roman law, with judicial activity was typical of early medieval Germanic legislation.<sup>116</sup>

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112. *Id.* (footnotes omitted). It is obvious why pre-literate societies needed those skilled in writing to memorialize their legal transactions. However, there are some modern carry-overs of this phenomenon. Immigrants, literate in their native language, may need experts in the language of their new country in order to conduct business and memorialize their transactions.

113. PONDÉ, *supra* note 51, at 75. The *Fuero Juzgo* was originally drafted in Latin, but its Spanish translation refers to *escriuanos del rey* and *escriuanos del pueblo*. *Id.* at 96, 98. "Lombard kings also had notaries in their service who were described by various titles: *notarius noster*, *notarius regis*, *notarius regiae potestatis*, and—in the laws of Liutprand—*notarius sacri palatii*." RADDING, *supra* note 101, at 46 (footnotes omitted).

114. PONDÉ, *supra* note 51, at 75.

115. *Id.* at 546.

116. *Id.* at 136-38. See also RADDING, *supra* note 101:

As the personal scribes of the [Lombard] king, the royal notaries had as their principal responsibility the preparation of royal documents. The legal codes, then, were drawn up by notaries, as were a variety of other royal diplomas. . . . But in an age when familiarity with the law was rare, even the rather narrow expertise of the notaries became increasingly valuable and the kings soon pressed them into other kinds of service. By the eighth century, they were also occasion-

The link between judges and notaries is more informative than it might appear, because the Latin in documents prepared by the royal notaries, and by the judges when they acted as notaries, is generally of a higher quality than that found, for example, in pleas prepared by other persons. It is fair to assume, therefore, that the *iudices domini regis* were meaningfully literate and not—as was obviously the case with many local judges—literate only to the point of barely being able to sign their name. Although it is certain that the royal judges and notaries received a basic education, it is impossible to say where that took place.

But even if it could be shown that script and notation were taught in the palace, that does not tell us anything about the judges' legal science. Handwriting is not jurisprudence nor, for that matter, is literacy.<sup>117</sup>

True legal professionalism for the medieval notary came only when the Europeans returned to the traditional Roman model of the *tabellio*. Nevertheless, the Germanic law's commingling of the limited notarial function with the judicial *publica fides* filled the only void that separated the Roman officials from the contemporary notary.

This was a gradual process. During the tenth, eleventh, and twelfth centuries, the notary returned to its Roman roots as a private legal professional who was not a judicial officer. Through the influence of Germanic peoples, the development of the essential powers of the notary culminated; he retained the power to authenticate (the *publica fides*) not as a judicial officer, but as a private professional empowered by the State. First, the notaries acted as royal magistrates or judges, as indicated above. Like the Roman *insinuatio*, a legal proceeding before a judge-notary produced a public document with the authentication power of the state. The custom of holding mock trials in which legal transactions were put into the public record also developed. The parties would reach an agreement, then the creditor would pursue a mock action, in conjunction with the debtor, which would result in a judgment of the court. The resulting document had the full faith and credit of the State.<sup>118</sup> Over time, the judicial pretense was

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ally employed as royal *missi* and in that capacity undertook some judicial assignments on the king's behalf. After 774, the notaries had pretty much the same responsibilities under the Carolingians as they had had under the Lombards. Often they accompanied royal *missi*, and occasionally they held the title of *missus* themselves, hearing pleas on the king's behalf and rendering judgments.

*Id.* at 46 (footnotes omitted) (italics added).

117. RADDING, *supra* note 101, at 53-54.

118. PONDÉ, *supra* note 51, at 136.

dispensed with and the notary became a private official without a judicial function, but endowed with the *publica fides* (the public authority to authenticate).<sup>119</sup>

Codification of laws and the return of Western Europeans to Roman legal science by the thirteenth century clarified matters considerably.<sup>120</sup> The *instrumentum* drafted by the notary "must have gained

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119. *Id.* at 136-38. It is also believed that the *publica fides* given to notaries was influenced by the Church notaries who had originally been appointed by the Pope to record the experiences of early martyrs. This information was later used for canonization and, with the considerable power of the Church, the clerical notary acquired the power to authenticate, although his function was limited to church matters in order to avoid conflicts with the political sovereign. *Id.* at 142-46.

120. DAVID & BRIERLEY, *supra* note 7, explain this process as follows:

As time passed, the Roman law scholarship emerged more and more as the science of law itself; Roman law, as taught in the universities, became the "written reason" of the Christian world. Its growing influence is even more evident in the revised versions of the customs. In France, as in Germany, the later reform of the customs or municipal (i.e., local) laws brings this out even more clearly. The only exceptions were the codifications which occurred in Norway (1683), Denmark (1687), and in Sweden and Finland (1734); exception must also be made in the case of the orthodox Christian countries which at this time were without universities and cut off from the rest of the Christian world.

In France, from the close of the twelfth century, royal justice was organized at the local level through the bailiffs' and seneschals' courts (*bailliages, senechaussees*) and, from the middle of the thirteenth century, a specialization in judicial affairs developed within the *Curia Regis*. The *Parlement* of Paris and, later, those of the provinces, were at one and the same time royal courts and involved in the government of the kingdom. They were not bound to observe either immemorial custom or Roman law. Their place in the organization of things, linked as it was to royal prerogative, enabled them to depart from the application of strict law and draw on other sources in order that equity be made to prevail. French judges thus considered themselves not bound by the university teaching tradition of Roman law. Legal scholarship and governing the country were not seen as one and the same thing. The French *parlements*, in their efforts to modernize French law, took all kinds of sources into account. Roman law exercised its influence in some respects, in the law of contract for example, but while it was admitted to be "written reason" it was never taken to be a *droit commun* or "common law"—that, in France, was the role of the *jurisprudence* or judicial decisions of the *parlements*, the many published collections of which reveal the importance that was attached to them. And especially in the sixteenth and seventeenth centuries, their *arrets de reglement*, that is to say decisions having a general authority and revealing how the *parlement* would dispose of a future case, were frequent. These touched upon matters of procedure and judicial administration for the most part but they also settled many questions of private law. Judicial "precedents," often cited, played a role in France no less and probably more important than they did in England at this time. The *jurisprudence* of the *parlements* became, in eighteenth century France, a "customary common law" (*droit commun coutumier*) distinct in many respects from Roman law.

In Germany the situation was altogether different. The breakup of the Holy Roman Empire (Austria, Germany, the Netherlands) and the social decline of the

growing prestige, since only this would explain that already in the thirteenth century we find a notary as representative of the public authority to authenticate and his intervention gives authenticity to the documents."<sup>121</sup> *Las Partidas* of Alfonso X, *El Sabio*, of Castille,<sup>122</sup> re-

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thirteenth century brought about a disintegration of centralized judicial organization. The imperial court (*Reichshofgericht*) that remained in place was very limited in its effectiveness because of the many immunities to its jurisdiction conceded by the emperor; it had no fixed seat, no permanent judges, no means of enforcing its judgments. A new imperial court, the *Reichskammergericht*, set up in 1495 by the Emperor Maximilian (1493-1519), was also only partially successful. Thus, while judicial decisions in the different German states, in other words at a wholly local level, had some importance, a German legal system never really evolved on the basis of decided cases—and the way was open for the reception of Roman law.

A "German" private law (*Deutsches Privatrecht*) only developed in relation to a much more limited number of subjects than in France. Before reception there was, however, some growth in the new law of the towns which, especially with the organization of the Hanseatic league, had expanded significantly. This might conceivably have produced a common German private law, in commercial matters for example, because it was established usage for one town to adopt the statutes of another and, when a question of their interpretation arose, to seek consultation of the court (*Oberhof*) of such town. But the practice was abandoned in the sixteenth century when the German princes, each in his own principality, exerted a monopolistic control over judicial administration. Moreover the *Oberhofs* at this time fell under the control of academics.

In the eighteenth century a number of German writers attempted to systematize "German" law and thereby rival the *ius commune* or *Gemeinrecht* which Roman law then was. But this effort came too late; Roman law was solidly implanted and the sphere of the *Deutsches Privatrecht* remained limited to sundry institutions. German law as such was never "de-Romanized" and then "nationalized" as a whole.

The positive laws closest to Roman law were to be found in countries where the populations had always lived according to Roman law established as a general custom and quite apart, therefore, from any reception. Roman law thus became, quite naturally, the "common law" of Italy, Spain and Portugal and, to some extent, of the south of France (although French legal historians have lately realized that very little is known about the law actually applied in the *pays de droit écrit*). On the Iberian peninsula the *Siete Partidas* contributed to the authority of Roman law, at the expense of local custom which derogated from it. But the danger in these countries was that through too great an attachment to the teachings of the post-glossators the law itself would atrophy. A reaction, therefore, set in under the influence of the Natural Law School against the excessively mechanical techniques of the earlier period which had required a strict observance of the *communis opinio doctorum*.

*Id.* at 54-57 (footnotes omitted).

121. GIMÉNEZ-ARNAU, *supra* note 5, at 75 (P.A. Malavet trans., unofficial) (emphasis added).

122. The *Código de las Siete Partidas* has been described as "a work generally known as a medieval legal treatise and called 'the first extensive compilation of western secular law since Justinian.'" MARILYN STONE, *MARRIAGE AND FRIENDSHIP IN MEDIEVAL SPAIN* 1 (1990), quoting Charles Sumner Lobinger, *Introduction*, in ALFONSO EL SABIO, *Las Siete*

flect the interest in codification, a scientific approach to the law, and the rebirth of Roman law that prospered during the twelfth and thirteenth centuries, which was promoted by the great European universities of France and Italy,<sup>123</sup> and, to a lesser extent, Salamanca, Spain.<sup>124</sup>

The definitive moment in the development of the modern *notariat* occurred when the *Scuola di Notariato* appeared in Bologna in 1228,<sup>125</sup> and influenced all of Europe.<sup>126</sup> Its founder, Ranieri di Perugia, most likely published his *Summa Artis Notariae* early in the thirteenth century.<sup>127</sup> But the most influential notary of this period

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*Partidas* lvi (1931). They were drafted under the patronage and probably the supervision of King Alfonso X, *El Sabio*, of Spain during the thirteenth century. *Id.* at 1-22. Some experts believe that the *Partidas* did not become effective law until the 1348 *Ordenamiento de Alcalá*, see, e.g., DAVID & BRIERLEY, *supra* note 7, at 57, but others maintain that they "were being used extensively as a book of reference by royal judges before 1348." STONE, *supra*, at 10, citing EVELYN S. PROCTER, ALFONSO X OF CASTILLE PATRON OF LITERATURE AND LEARNING 51 (1980). "Francisco Martínez Marina, author of a prominent essay about the history of Spanish legislation, claimed that the large number of *Partida* manuscripts with marginal notes in existence during the eras of Alfonso X, Sancho IV, Fernando IV and Alfonso XI suggests that the provisions of the *Siete Partidas* were discussed in universities and debated by lawyers and judges prior to 1348." *Id.*, citing Martínez Marina, *Ensayo histórico-crítico sobre la legislación y principales cuerpos legales de los reinos de Leon y Castilla especialmente sobre el código de las Siete Partidas de don Alfonso el Sabio*, in OBRAS ESCOGIDAS DE DON FRANCISCO MARTÍNEZ MARINA 194 (1966). There is strong historical evidence that the Spanish nobility objected to the *Partidas* because they appeared to limit their power and importance, both during the reign of Alfonso X and that of Alfonso XI, two generations later. STONE, *supra*, at 17. The noblemen appeared to regard some of the objectionable rules as the product of non-Spanish thinking imported from the Paris and Bologna schools. *Id.* This may account for the debate regarding their effective date.

123. "Centered at the *studium* of Bologna [Italy], the jurists of the twelfth and thirteenth centuries constituted one of the principal sources for change in medieval society." RADDING, *supra* note 101, at 1.

124. STONE, *supra* note 122, at 7; RADDING, *supra* note 101, at 1. Richard Kagan describes the matter as follows:

The first university to teach law in Spain was Salamanca. By the mid-thirteenth century it had two law faculties, one to teach Roman law, the other canon law, and the existence of both was recognized in the *Siete Partidas*. Valladolid, the kingdom's second university (founded in 1243) also had two legal faculties, although, despite royal encouragement, neither of these institutions had much of a reputation until the end of the fifteenth century. Consequently, most students seriously interested in jurisprudence went abroad, either to southern France, to study in Toulouse, Montpellier, or Avignon, or to Bologna, where the creation of the Spanish College in 1369 by Cardinal Gil de Albornoz provided both lodgings and financial support.

RICHARD L. KAGAN, *LAWSUITS AND LITIGANTS IN CASTILLE, 1500-1700*, at 140-41 (1981) (footnotes omitted).

125. PONDÉ, *supra* note 51, at 152.

126. GIMÉNEZ-ARNAU, *supra* note 5, at 78.

127. PONDÉ, *supra* note 51, at 153.

was Rolandino,<sup>128</sup> who in 1234 published his work entitled *Summa Artis Notariae*—like Perugia's—and the *Summa Aurea*, *Diadema*, *Summa Rolandina* also known as "*Summa Orlandina*," *La aurora*, *Flos testamentorum* or *Flos ultimarum voluntatem*, and *De officio Tabellionatus in villis vel castris*.<sup>129</sup> It is important to note that Rolandino used both "*notarius*" and "*tabellio*" in his works, suggesting that the terms had become synonymous in their reference to a specific professional.<sup>130</sup> Additionally, the birth of the notarial school implied real professionalization. It was thus the conclusion of the process begun by the Roman *scholars* and later continued by the corporations or guilds of the Byzantine Empire, and also followed in medieval Italy, Spain, and France.<sup>131</sup>

The *bolognesi* produced a strictly structured notarial document. This form included a request for the notary's intervention, a description of the juridical act to be performed—based upon a meeting or an "audience" with the notary—the factual background of the document, its reading, signature, and absolution, or delivery of the document to the parties.<sup>132</sup>

In Italy, notaries were regulated by legislation in the various city-states between the thirteenth and sixteenth centuries. France also had notary legislation, such as Charlemagne's Capitularies and the notarial laws of the city of Paris in the times of St. Louis in 1270, which were later modified during the reign of Philip in the early fourteenth century. In Portugal, notarial laws were enacted in the thirteenth century under Alfonso II and then under Don Denis and the laws of 1315, and

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128. Rolandino has become known by his first name and there is some doubt as to his real last name because some call him Rolandino Rodulfo and others Rolandino Passaggeri. *Id.* at 156.

129. GIMÉNEZ-ARNAU, *supra* note 5, at 79. For a detailed explanation of each publication, see PONDÉ, *supra* note 51, at 162-68. Pondé also indicates that Rolandino's work became widely read after Guttenberg made publishing relatively easy, thus ensuring his lasting influence in the development of the *notariat*. *Id.* at 166.

130. The difference appears to mirror the Roman legal experience when the *Tabularii* substituted for the *tabelliones* in far-off provinces that lacked the latter. In fact, Rolandino's *Officio tabellionatus* was intended to educate isolated rural notaries about the latest developments in the law, particularly the introduction of classical Roman law, as updated by Justinian. PONDÉ, *supra* note 51, at 165. The term *notarius* was used in the cities, and *tabellio* survived in the countryside, but they refer to similar professions. It should also be pointed out that language was a problem in these times. In the Byzantine empire it was not uncommon to find legal texts written originally in Greek, rather than Latin. In Western Europe, vulgar Latin was generally used, but legal scholars preferred a return to classical Latin. *Id.* at 157-58.

131. *Id.* at 159-60.

132. *Id.* at 548.

later slightly modified. In Spain,<sup>133</sup> Catalonia had excellent notary legislation towards the end of the thirteenth century, culminating with the Courts of Pedro III in 1331 and Alfonso III in 1333. During the reign of Jaime I in 1238, notary colleges were created and notary legislation enacted in Aragón and Valencia.<sup>134</sup> Castille had *Las Partidas* in the thirteenth century, and notary colleges appeared there in the sixteenth century.<sup>135</sup>

*Las Partidas* defined the royal notary and the *escribano público*. The latter was a private professional appointed by the King whose services were available to the general public in his locale.<sup>136</sup> *Las Partidas* specifically required that certain legal transactions be formalized

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133. One important question regarding the Spanish *notariat* is to what extent it might have been influenced by Moslem law. Under Moslem law the notary is an important official who acts as an official witness and reduces important transactions to writing. See, e.g., LAURENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AND CULTURE IN ISLAMIC SOCIETY* 24-26, 29-30 (1994). Given the long Moslem presence in Spain during the period in which the *notariat* was developed, a connection might exist. The matter is not extensively covered by Spanish notarial historians.

134. Except as otherwise indicated, the preceding part of this paragraph has been abstracted from GIMÉNEZ-ARNAU, *supra* note 5, at 81.

135. Notaries:

[o]rganized into "colleges" in 1502, the profession flourished in the sixteenth century owing to the spread of written contracts and other legal documents they themselves helped introduce. Traditionally, many agreements among merchants, peasants, itinerant tradesmen, building workers, and many artisans were verbal, sealed with a handshake and a shared drink of wine. But although evidence suggests that this customary way of doing business survived into later centuries, it was gradually displaced by sophisticated contracts which, owing to the proliferation of printed formularies, even a humble village *escribano* could prepare. Admittedly, Castille's increasingly complex economy required such contracts, but they might not have proliferated so rapidly were it not for the efforts of notaries to augment their own importance, incomes, and prestige.

KAGAN, *supra* note 124, at 139-40 (footnotes omitted).

136. Partida II, Title IX, Law VII; Partida III, Title XIX, Law I ("A notary means a man who is skilled in writing, and there are two kinds of these. First, those who draw up privileges and royal ordinances, and the judicial decisions of the palace of the king, and others who are notaries public, and draw up bills of sale, purchases, contracts, and agreements which men enter into among themselves in cities and in towns."). The original text of the Partida law quoted above uses the word "*escriuano*" an old form of the Spanish word "*escribano*" which today is considered a synonym of "*notario*," and the translation is thus correct. The distinction between the royal notary and the public notary dates back to the *Fuero Juzgo* in the seventh century. PONDE, *supra* note 51, at 98-99. I have compared this English translation, which appears in the excellent volume *LAS SIETE PARTIDAS* (Samuel Parsons Scott trans., 1931), with the old Spanish version appearing in *LAS SIETE PARTIDAS DEL SABIO REY D. ALONSO EL IX [sic]* (Gregorio López, ed., 1844). Hereinafter, I will only give the citation to the appropriate Partida Law, citing from the English translation, but, as here, when pertinent, I will compare the English and Spanish texts.



in a document prepared and authenticated by a notary,<sup>137</sup> and established that the document would have authentic status and probative value.<sup>138</sup> The notary met with the parties and produced an *imbreviatura*, a summarized version of the juridical act being completed, which was later included in the *charta* or public document. Unlike the *scheda*, the notary had to keep the *imbreviaturas* in a permanent register.<sup>139</sup> Strict standards of professional conduct were also imposed. For the offence of lying, the royal notary paid with his life, and the *Escribano Público* had his writing hand cut off.<sup>140</sup> The *Partidas* constituted a full set of regulations for the notary profession and related matters that were substantially in effect until the middle of the nineteenth century in Spain and its colonies.

Later, in the Statute of Count Amadeus VI of Savoy (the "Green Count," 1334-83), a definitive distinction was made between the extrajudicial *publica fides* of the notary, and the judicial authority of the judge. Although not universally followed, this is a clear indication of the total separation of the notarial and the judicial function that had existed in the early Middle Ages,<sup>141</sup> which is the rule that has survived into modern times.<sup>142</sup> In 1400, Amadeus VIII, ruler of Savoy and Piedmont (*Piemonte*), issued a statute that defined the *protocol*, the collection of documents kept by the notary which substituted for what had been known before as the *imbreviatura*. This legislation also included the notarial functions of *audiencia*, a meeting with the parties. Notes from the meeting were kept and were later transcribed into the *protocol*, a register in which a chronological summary of the entire notarial document was permanently maintained.<sup>143</sup> Over time, the permanent register became more important than the *chartae* issued to the parties, which were transformed into mere copies of what was written in the register.<sup>144</sup> During the *audiencia*, the notary was also required to listen to the parties and to give them pertinent advice so

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137. E.g., Partida III, Title XVIII, Law LVI. ("How a Conveyance Should Be Drawn Up.")

138. Partida III, Title XVIII, Introd. ("Antiquity is something which makes men forget past events. For this reason it was necessary for writing to be invented, so that what had been formerly accomplished might not be forgotten."); Partida III, Title XVIII, Law I ("A written document, admissible in evidence, is any instrument drawn up by the hand of the notary public of a council.").

139. PONDÉ, *supra* note 51, at 229-32, 549-50.

140. Partida III, Title XIX, Law XVI.

141. PONDÉ, *supra* note 51, at 550.

142. For a discussion of the *publica fides*, see *infra* part III.B.2.

143. PONDÉ, *supra* note 51, at 550.

144. *Id.* at 232.

they could properly conclude their transaction.<sup>145</sup> In 1512, Emperor Maximilian I of Austria issued a constitution with very detailed notarial regulation, which for the first time made clear that the *protocol* was the property of the state, not the notary.<sup>146</sup>

No fundamental changes in notary legislation occurred until the French revolutionary laws of the late 1700s and the notarial law of 1803, the *Loi Ventôse*.<sup>147</sup> The most important characteristics of this law were that it thoroughly legislated notarial work, incorporating long-established practice and eliminating unregulated areas, and was immediately applied and implemented as written.<sup>148</sup> The French law defined notaries as "*public functionaries* designated to receive all acts and contracts to which the parties must or wish to impart the authentic character of a public act and to guarantee the date, keep it deposited and issue copies and testimonies."<sup>149</sup> This is considered important because the notary profession, due to its quasi-public function, was distinguished from both other liberal professions and even other legal professions.<sup>150</sup> The French law also codified matters, tasks, and other professions that were incompatible with notarial practice. It made notarial practice wholly incompatible with being a judge or any other type of judicial functionary.<sup>151</sup> It reiterated the distinction between the judicial and notarial *publica fides*. The law also codified and systematized prior practice, requiring specific form in notarial documents and declaring that the notarial seal gave authentic status to the document issued by the notary, and validity anywhere in the country.<sup>152</sup>

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145. *Id.* at 550.

146. *Id.* at 240. Pondé attributes this legislation to the growing problem of the transfer of offices, whereby notaries would sell their practice to someone else, *protocol* and all. This created a problem for the parties in trying to track down the originals when they needed new copies of notarial documents. *Id.*

147. Despite the very good and clear notarial legislation—discussed above—as one might expect, the profession was not universally the same. I have merely concentrated on its most important aspects and in the stronger historical precedents. Additionally, the profession suffered some highs and lows after the heady days of the High Middle Ages and during the Renaissance. *See generally id.* at 235-52. It is clear, however, that the most important characteristics embodied by earlier legislation which I have discussed, survived and contributed to the modern definition of the profession.

148. *Id.* at 554.

149. *Id.* at 267 (P.A. Malavet trans., unofficial) (emphasis added).

150. This designation was somewhat misleading because the notary practices as a liberal professional. The Italian law, discussed below, clarified the matter. *See also infra* part III.B.2.

151. PONDÉ, *supra* note 51, at 553.

152. *Id.*

The French also established their traditional system of having two types of notarial documents: the *minute*, the principal document subscribed by notaries which they were obliged to keep and only issue copies of, and the *brevet*, a simple document that the notary delivered to the parties.<sup>153</sup> The notary's practice was also limited to an assigned region, which the State designated to ensure the official proportion of one notary for every 6,000 inhabitants. The notary's register of minutes—known elsewhere as *protocol*—was the express property of the state. The notaries were regulated and disciplined by the Chambers.<sup>154</sup> Notaries were required to be French citizens; be over 25 years old; take an oath; provide security; prove their good moral character and "good habits;" and have completed military service.<sup>155</sup> The French also codified a six-year period of apprenticeship in an established notarial office, which could be reduced to four if the work had been performed in "a notarial office considered superior in class to the one being sought."<sup>156</sup> Although the French model has been "considerably improved upon," its importance and influence is widely acknowledged.<sup>157</sup> The "*Loi 25 Ventôse Année XI*" [Law 24 Ventôse Year XI] of March 16, 1803 remained, well into the twentieth century, the fundamental French notarial law,<sup>158</sup> and the starting point of the modernization to existing legislation in other countries employing the Latin *notariat*.<sup>159</sup>

The two notarial laws that bring us to the twentieth century were the Spanish enactment of 1862 and the Italian law of 1913.<sup>160</sup> The Spanish Notarial Law of 1862 replaced the traditional Spanish term

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153. *Id.*

154. The Chambers are mandatory bar organizations which the *notaires* were obliged to join. See also *infra* part IIIC-D.

155. PONDÉ, *supra* note 51, at 554. The military service requirement practically excluded women from becoming notaries, and judicial intervention was required to admit them later. *Id.*

156. *Id.* at 553.

157. GIMÉNEZ-ARNAU, *supra* note 5, at 100-01; PLANIOL, *supra* note 68, § 132, at 79; José Guglietti, *La Comisión de Asuntos Americanos (CAA) y los Notariados de América Latina*, in ATLAS DU NOTARIAT 334a (1989); Alain Moreau, *Le Notariat Français*, in ATLAS DU NOTARIAT 109-14 (1989).

158. PLANIOL, *supra* note 68, § 132, at 79; Moreau, *supra* note 157, at 109-14.

159. However, given the long history of the profession and of notary legislation throughout Europe, dating back to the Middle Ages, particularly on the Iberian Peninsula and in Italy, Planiol's statement that "[t]he *notariat*, with the importance as we know it, is thus an institution essentially French," seems nothing more than a wild, and incorrect, boast. PLANIOL, *supra* note 68, § 135 at 81. Planiol's discussion of the *notariat* in foreign countries mentions England and Germany, which have taken a different path in this area, but totally ignores his neighbors Italy, Spain, and Portugal. *Id.* at 80.

160. PONDÉ *supra* note 51, at 560.

"*escribano*," used in the *Partidas* with the term "*notario*."<sup>161</sup> The law also referred to the notary as a "public functionary."<sup>162</sup> It required the notary to have a specified post-secondary education or be a lawyer.<sup>163</sup> Mere legal knowledge is not enough; a formal education is mandatory so the notary can perform his duties as a trusted counselor and advisor to the parties.<sup>164</sup> Prior to the enactment of the new law, notarial offices were limited to particular regional jurisdictions. The Spanish law added a new hierarchy—based on the office's location and the volume of notarial business transacted there—within which notaries were promoted based upon seniority and merit.<sup>165</sup> The law also established a unified, mandatory bar system for notaries. They were required to be members of professional associations known as the *colegios* (colleges), which had the power to discipline its members.<sup>166</sup> The *protocolo* was defined as "the organized collection of master deeds authorized during one year and it shall be formalized into one or more volumes bound, with individual page numbers written in words."<sup>167</sup>

The Italian Notarial Law of 1913, like the French law, distinguished between the public document to be permanently maintained by the notary, who then issues certified copies to the parties, and the lesser unrecorded document that is delivered to the parties.<sup>168</sup> Not unlike his Spanish counterparts, the Italian notary is required to obtain a law degree, practice for at least two years, and pass an exam.<sup>169</sup> The Italian law essentially recognizes that instrumental witnesses (*i.e.*, nonparties who observe and witness the transaction) have become obsolete.<sup>170</sup> Italy also gives the notary authority to appear in court on behalf of clients in noncontentious matters related to documents subscribed before her.<sup>171</sup> Finally, the Italian law also recognizes modern technology and allows the use of telegraphs and telephones to trans-

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161. *Id.* at 300; see also *supra* note 136 and accompanying text.

162. *Id.* at 298.

163. *Id.* at 301-02.

164. *Id.* at 556.

165. *Id.*

166. The State retained the power to evaluate applicants and to oversee their practice. This latter function was performed by judicial authorities. *Id.* at 306-08.

167. *Id.* at 557 (P.A. Malavet trans., unofficial).

168. *Id.* at 330.

169. *Id.* at 324.

170. *Id.* at 561.

171. As we might expect, this is a very controversial rule, particularly with lawyer-advocates. *Id.* at 319-23.

mit notarial information.<sup>172</sup> The important novelty of the Italian law is that it states that notaries are “public *officials* designated to receive the inter-vivos acts and those of last will, to give them *publica fides*, to keep them on deposit, and to issue copies and extracts.”<sup>173</sup> This designation of the notary as a public *official* (i.e., someone authorized by the state to hold a *private* office, not a public employee) is an important refinement.<sup>174</sup>

### E. *England and the Americas*

English common law, for the most part, developed independently of the trends in mainland Europe and the notary was not introduced there until the late thirteenth century. The first notaries arrived in England from continental Europe and acted on imperial or papal authority. In 1279, the Archbishop of Canterbury received authority from the Pope to appoint notaries and a truly English *notariat* first appeared. In 1533, following the Reformation, the British Parliament transferred the power to appoint notaries to the crown. In 1801, the Public Notaries Act became “the first attempt by Parliament to regulate the notarial profession, although it did so only in part.”<sup>175</sup> Initially, the ecclesiastical and secular functions of the notaries were not clearly separated, but as jurisdictional conflicts between the Church and the monarch were resolved, and as commercial matters became more complex, the purely secular notary appeared.<sup>176</sup> “In the domestic sphere they acted as conveyancers, and were employed in attesting the execution of wills, deeds, contracts and other documents.”<sup>177</sup> After the authority to designate notaries was entrusted to the crown, the Court of Faculties was created and given the authority to appoint notaries, which it continues to do today.<sup>178</sup> The Court began to require

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172. *Id.* at 330-32. From here, the use of the fax and the Internet is just a matter of time.

173. *Id.* at 319 (P.A. Malavet trans., unofficial) (emphasis added).

174. *Id.* at 317-19, 560. Pondé recognizes that the Italian law is often criticized as not being sufficiently modern for the twentieth century, but he argues that its refinements were important and that they were, after all, the first to do so. *Id.* The distinction between the official and functionary as it relates to the notarial function is discussed more fully below. See *infra* part III.B.2.

175. The preceding part of this paragraph was abstracted from N.P. READY, BROOKE'S NOTARY 1, 8-9 (11th ed. 1992) [hereinafter BROOKE'S NOTARY].

176. *Id.* at 12-14.

177. *Id.* at 14 (footnotes omitted). The use of the term attest, based on the examples given by the author, appears to mean that they acted as witnesses and not as holders of the *publica fides*.

178. *Id.* at 15.

that notaries be "over 21 years of age, of sober life, conformed to the doctrines of the Church of England, . . . loyal subjects of the king, and [have] practical training . . ."<sup>179</sup> It appears that, at least during the seventeenth century, these officials were referred to as *tabelliones*.<sup>180</sup> Their work had some probative value and they were described as "attesting" and "certifying" documents for use domestically and in international trade.<sup>181</sup> Under nineteenth century legislation, notaries had to serve a seven-year apprenticeship and the Scrivener's Company had exclusive authority to "control the profession in London."<sup>182</sup> Nevertheless:

[T]he Notary never obtained the same prominence in the English legal system as that enjoyed by his counterparts in continental Europe. The importance of the English Notary resides not in the functions which he performs within his own legal system, but rather in the link that he provides between the institutions of the common law and those of the civil law. It is for this reason that the office of the English Notary has been so jealously safeguarded in a legal system where, in many ways, he is an anomalous figure.<sup>183</sup>

Meanwhile, in the North American colonies, where today each state has its own notary legislation,<sup>184</sup> the occupants of the colonies that would become the United States of America:

. . . had little use for the services of a Notary Public . . . Most agreements for the purchase and sale of land were made public in open court. The buyer and seller met before an official, such as a judge, to advise him of their intention to make an agreement. The judge would make the agreement official and in full force and effect

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179. *Id.*

180. "As a seventeenth-century reporter noted, in ecclesiastical practice *fides tabellionis aufert omnem suspicionem falsitatis* (the reliability of the tabellion eliminates any suspicion of falsity)." *Id.* at 16.

181. *Id.* at 16-17. Whether this means that they had *publica fides*, however, is unclear. Today, the British notary public authenticates signatures on documents destined for use abroad and subscribes letters of protest in international trade. But domestically a "certificate of a notary is not received as evidence of the facts certified." Cornelis Arij Kraan, *Les Pays Anglo-Saxons*, in *ATLAS DU NOTARIAT* 169, 173 (1989) (footnote omitted).

182. BROOKE'S NOTARY, *supra* note 175, at 17. Although being a notary was not incompatible with being a solicitor, attorney or proctor, these professionals were nonetheless kept away by the apprenticeship requirement. *Id.*

183. *Id.* at 1. The British notary today is discussed further in section III below.

184. See generally WESLEY GILMER, JR., *ANDERSON'S MANUAL FOR NOTARIES PUBLIC* (Supp. 1979); GREENE, *supra* note 68; RAYMOND C. ROTHMAN, *CUSTOMS AND PRACTICES OF NOTARIES PUBLIC AND DIGEST OF NOTARY LAWS IN THE UNITED STATES* (1966); ROTHMAN, *supra* note 68, at 2-3. See also 66 C.J.S. *Notaries* (1990); 58 AM. JUR. 2D *Notaries Public* (1989).

simply by recording the terms in his court record.<sup>[185]</sup> During the colonial period notaries public were elected or appointed in the same way as judges in each colony.<sup>[186]</sup> However, their duties were of a ministerial rather than a judicial nature.

The increase in trade between the colonies and Europe highlighted the need for an official of high moral character, such as the notary public, who could witness, as well as draw up, simple agreements for the purchase and sale of merchandise. Colonists used a bill of exchange to pay for merchandise received from Europe and gave it either to the captain of the ship or to another colonist who had sold merchandise to the business house in Europe. Thus, the bill of exchange was a kind of check, or more generally, a negotiable instrument that could be transferred from one person to another by endorsement. In England the presentment, demand, protest, or notice of dishonor of such negotiable instruments was handled by a notary public and thus these duties became the province of the notary public in America.<sup>187</sup>

In the United States the notary developed into a purely clerical position.<sup>188</sup> Even in the former French and Spanish colonies, the notary was a simple clerk. The civil code *notaire* arrived in Louisiana by order of Louis XIV in 1717, and notaries were appointed there by the Spanish and French monarchs.<sup>189</sup> "[N]otarial work and records survived into the mid-19th century," a central office for these records was created after the Civil War, and "gradually, the notarial and legal profession fused."<sup>190</sup> Although "Louisiana, originally a pure civil-law jurisdiction, still retains much of its civilian tradition, . . . the function of the notary has diminished in importance over the years. Indeed, the truly civilian notary has substantially disappeared."<sup>191</sup> Despite the fact that some substantive law still requires the notarial form, the important aspects of the notarial function, such as legal advice and quality control, have been abandoned.<sup>192</sup>

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185. It is interesting to note the use of the traditional Germanic system of using an uncontested judicial proceeding to publicly record private agreements.

186. "Tabellion" is defined, intriguingly, as "an official scribe or notary public esp[ecially] in England and New England in the 17th and 18th centuries." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2324 (1986).

187. ROTHMAN, *supra* note 68, at 2-3.

188. See *infra* part III.

189. D. Barlow Burke, Jr. & Jefferson K. Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 TUL. L. REV. 318, 328 (1976).

190. *Id.* at 328-29.

191. *Id.* at 329 (footnote omitted).

192. See generally *id.*; Kraan, *supra* note 181, at 175-79. See also *infra* part III.

*Notarios*, on the other hand, arrived in the Americas with the European *conquistadores*. Columbus' first crew included the *escribano* Rodrigo de Escobedo;<sup>193</sup> another notary, Diego de Peñalosa, was with him when he discovered Puerto Rico during his second voyage on November 19, 1493.<sup>194</sup> In Latin colonies Spain imposed its special legislation regarding the appointment of notaries.<sup>195</sup> There were two kinds of *escribanos*, the *escribanos reales* who exercised a ministerial function, and the professional *escribano público* who was the holder of a title (*título*) of *notario público* and the accompanying status of *notario de reynos*.<sup>196</sup> Candidates for the office were carefully screened and tested for competence.<sup>197</sup> But the institution itself, and the duties, obligations, and responsibilities of the notaries were still defined by the same substantive legislation applicable in Castille,<sup>198</sup> fundamentally, the rules of the *Partidas*.<sup>199</sup>

## F. Conclusion

These historical highlights constitute the *evolution* of the modern *notariat*.<sup>200</sup> Roman institutions particularly influenced the development of the *notariat* in Western Europe during the Middle Ages,<sup>201</sup> until its definitive consolidation there in the nineteenth century.<sup>202</sup> Roman law supplanted all prior legal cultures in Europe. Because Roman law superseded them, little has been said about the influence of older Hebrew, Egyptian, and Hellenic cultures in modern studies of the historical development of the institution.

In ancient times the public document was much more important than its drafter. We see documents that memorialize legal transactions such as wills and contracts. These writings were given authenticity and certified by the state through the placement of an official seal.

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193. PONDÉ, *supra* note 51, at 337.

194. SALVADOR BRAU, *LA COLONIZACIÓN DE PUERTO RICO* 28 (1969), *cited in* MALAVET-VEGA, *supra* note 42, at 2-3.

195. Bono y Huerta, *supra* note 106, at 97-108; MALAVET-VEGA, *supra* note 42, at 8.

196. Bono y Huerta, *supra* note 106, at 98. The designation was considered so important that the viceroys of the Indies were not authorized to give; only the Council of the Indies could award a notarial office. *Id.*

197. Mulattos and persons of mixed race were unacceptable, as were the children and grandchildren of those "burned" by the Inquisition, and the children of those "reconciled" by the Inquisition. Notaries could not offer their services to Native Americans. *Id.* at 99.

198. *Id.* at 100.

199. *Id.* at 97-108; MALAVET-VEGA, *supra* note 42, at 8.

200. GIMÉNEZ-ARNAU, *supra* note 5, at 63.

201. PONDÉ, *supra* note 51, at 45.

202. GIMÉNEZ-ARNAU, *supra* note 5, at 80-83.



While one can see the beginning of what can rightfully be called a notarial document, no evidence exists that the functionaries who drafted them performed anything more than a ministerial function until the end of the Western Roman Empire and in the Byzantine Empire, when the *tabelliones* were private legal professionals closely regulated by the State.

After the fall of the Western Roman Empire, the profession was slowly incorporated into the early medieval codes. As European law developed, so did the *scribas* and *notarii*. Initially Germanic judges, they soon became private professionals following Roman legal forms but retaining the power of the *publica fides*.

The notary profession as such appeared during the late Middle Ages and is clearly identifiable in the Spanish and Italian codes of the thirteenth century. The notary was a private, closely regulated legal professional with the power to attest. Contemporaneously, the *bolognesi* produced clearly structured notarial documents and transactions. Late medieval legislation, particularly the statutes of Savoy and Piedmont, created the *protocollo*, or permanent record of the juridical acts subscribed before the notary.

The Anglo-Saxon countries followed the Germanic system of the judge-notary as the official before whom private legal transactions were entered into the public record. But when the notarial and judicial functions separated in the United States, the extra-judicial power to attest was deposited upon a lay person whose intervention was strictly clerical. Even in the American states in which French and Spanish *notariats* once existed, the substantive law often still requires notarial form. However, the notary is, like his counterparts in all the other fifty states, a nonprofessional. In England, the notary remains a conduit for business between the British and their civil-law European counterparts. The notarial function remained a professional institution in the countries on the Western European mainland and their former colonies.

The modern characteristics of the *notariat* were later comprehensively codified by the French Law Ventôse of 1803, the Spanish Notarial Law of 1862, and the Italian Notarial Law of 1913. Although modified and amended, these laws are still substantially in effect, and from them one can identify the following important characteristics of the *notariat*, which are explored in detail in the remaining sections of this Article:

1) A private, liberal profession. Legal education and/or apprenticeship are required. The applicant must pass an examination. Membership in a professional association or college is mandatory.

2) Exclusive jurisdiction. As the depository of the *publica fides* delegated by the State, he performs a unique public function, which gives him exclusive subject-matter jurisdiction. Geographic exclusivity is also common.

3) The notary is required to keep a *protocolo* or permanent register of all public documents subscribed before him. Typically, he produces public documents (*minutes, escrituras*) and lesser documents that are delivered to the parties (*brevets, affidávits*).

4) The notary is a legal advisor to the parties and is closely supervised by governmental and professional bodies.

### III. The Contemporary Latin Notary

#### A. Relevant Comparison

While their roots are common, the notary public in the United States today and the Latin notary are quite different. "National legal systems are frequently classified into groups or families. Thus the legal systems of England, New Zealand, California, and New York are called 'common law' systems, and there are good reasons to group them together in this way. But it is inaccurate to suggest that they have identical legal institutions, processes, and rules. On the contrary, there is great diversity among them, not only in their substantive rules of law, but also in their institutions and processes."<sup>203</sup> I must also caution that the Latin *notariat* is, by definition, found in non-English-speaking countries; thus we find the Spanish *Notario Público*, the French *Notaire*, the Italian *Notario*, the Dutch *Notaris*, and the German *Notär*. The comparativist must tread carefully when translating. I will attempt to explain translated terms as much as possible. I hope to achieve what Professor Peter W. Schroth describes when he states that "the differences between languages are such that something is always lost in translation, but for most purposes, most of the time, a good translator can arrange to make what is lost the part that does not matter to the particular audience."<sup>204</sup> With these considerations as general guidelines, I will try to identify (to paraphrase Professor Merryman's eloquent introduction) the qualities that the Latin notary in-

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203. MERRYMAN, THE CIVIL LAW TRADITION, *supra* note 12, at 1.

204. Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47, 48 (Supp. 1986).

stitutions, as implemented in different countries, have in common, as well as those qualities which set them apart from other systems.<sup>205</sup>

The International Union of the Latin *notariat*,<sup>206</sup> the organization that groups Latin notaries, defines the *notario latino* generally as "a legal professional specially designated to attest the acts and contracts that persons celebrate or perform, to draft the documents that formalize the latter and to give legal advice to those who require the services of his office."<sup>207</sup> In contrast, some scholars refer to the classification of the *Saxon notary*. European comparativists indicate that the Saxon notary, in the United States and England for example, is not really a public officer in the traditional sense of being an employee of the state having special faculties and functions. The state does establish the requirements for becoming a notary, but she is still a private person. The acts of notaries are exclusively limited to the authentication of signatures (*i.e.*, they generally attest only to the identity of the par-

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205. MERRYMAN, *THE CIVIL LAW TRADITION*, *supra* note 12, at 2. Some comparativists prefer the term "juristic style" rather than "legal family." ZWIGERT & KÖTZ, *supra* note 12, at 68 ("In our view the critical thing about legal systems is their *style*, for the styles of individual legal systems and groups of legal systems are each quite distinctive. The comparativist must strive to grasp these *legal styles*, and to use distinctive stylistic traits as a basis for putting legal systems into groups."). For a general discussion of legal "families" or "traditions" or "styles" in comparative law, see generally DAVID & BRIERLEY, *supra* note 7, at 1-29; GLENDON ET AL., *supra* note 12, at 1-12; MERRYMAN, *THE CIVIL LAW TRADITION*, *supra* note 12, at 1-6; MERRYMAN & CLARK, *supra* note 12, at 1-23; SCHLESINGER ET AL., *supra* note 6, at 31-43; ZWIGERT & KÖTZ, *supra* note 12, at 63-75.

206. Hereinafter I will refer to this organization by its initials in Spanish and French: UINL or by its full title in those languages, respectively, *Unión Internacional del Notariado Latino* or *L'Union Internationale du Notariat Latin*.

207. *Principes du Notariat Latin*, tit. 1, art. 1, in *ATLAS DU NOTARIAT* 321-22 (1989). I have used my own rather than the official translation, because the latter, although functional, is not sufficiently precise. The official translation reads that a Latin notary is "a lawyer authorized to grant authenticity to acts and contracts which contracting parties execute, to draw up documents which are valid and in due form of law, and advise persons who seek his professional assistance." BROOKE'S NOTARY, *supra* note 174, at 71 n.47 (quoting *Guidelines or Fundamental Principles of the Latin Notariat System*, tit. 1, art. 1 (Annex 1 to the Statutes of the UINL (1989) (emphasis added)). The original as it was adopted was drafted in Spanish and made reference to "*profesional del derecho*" (*i.e.*, a legal professional, not to a lawyer), "*especialmente habilitado*" (*i.e.*, specially designated or empowered), "*para dar fe de los actos y contratos que otorguen o celebren las personas*," (*i.e.*, to attest the parties' contracts). The original also made clear that the documents that the notary drafts in proper legal form are those related to the parties' contracts, a proviso that is lost in the translation. Finally, the original indicates that the parties may *require* the notary to offer the services of his professional office, "*asesorar a quienes requieran la prestación de su ministerio*."

ties).<sup>208</sup> In the United States, "[t]he notary public is a sworn *public officer* with the power to perform a number of official legal acts . . . . The office of notary public is technically classified as a *ministerial* office, meaning *it does not involve significant judgment or discretion of the notarial acts being performed*. As such, it is similar to a county, city or township clerk. It is not a judicial or legislative position."<sup>209</sup> The Latin notary, on the other hand, is a legal professional, with considerable responsibility and discretion.

As for the British notary public:

Generally speaking, a notary public in England may be described as an officer of the law appointed by the Court of Faculties whose public office and duty it is to draw, attest or certify under his official seal, for use anywhere in the world, deeds and other documents, including wills or other testamentary documents, conveyances of real and personal property and powers of attorney; to authenticate such documents under his signature and official seal in such a manner as to render them acceptable, as proof of the matters attested by him, to the judicial or other public authorities in the country where they are to be used, whether by means of issuing a notarial certificate as to the due execution of such documents or by drawing them in the form of public instruments; to keep a protocol containing originals of all instruments which he makes in the public form and to issue authentic copies of such instruments; to administer oaths and declarations for use in proceedings in England and elsewhere; to note or certify transactions relating to negotiable instruments, and to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.<sup>210</sup>

Comparing the Latin *notariat* only to the notaries public in the United States or England today, or the classification of Saxon notary generally, would clearly be an incomplete analysis. The function of the notary includes matters that are traditionally the province of lawyers in the United States and solicitors in England. She is a trained professional. Professor John Henry Merryman explains that:

any similarity between the civil-law notary and the notary public in common-law countries is only superficial. . . . Our notary public is a

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208. GIMÉNEZ-ARNAU, *supra* note 5, at 132. Although the British notary public has other functions as well, their most important task is authentication and certification in documents related to international trade. BROOKE'S NOTARY, *supra* note 175, at 1.

209. ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK: A GUIDE FOR NEW YORK 1 (1993) (emphasis added).

210. BROOKE'S NOTARY, *supra* note 175, at 20-21.

person of very slight importance. The civil-law notary is a person of considerable importance. The notary in the typical civil-law country serves three principal functions. First, he drafts important legal instruments . . . . Second, the notary authenticates instruments. An authenticated instrument . . . has special evidentiary effects: it conclusively establishes that the instrument itself is genuine, and that what it recites accurately represents what the parties said and what the notary saw and heard . . . . One who wishes to attack the authenticity of a public act must institute a special action for the purpose, and such an action is rarely brought. Third, the notary acts as a kind of public record office. He is required to retain a copy [generally the original] of every . . . [public document] he prepares and furnish authenticated copies [to interested parties—as defined by law—] on request. An authenticated copy usually has the same evidentiary value as an original.

Unlike advocates, who are free to refuse to serve a client, the notary must serve all comers. This, added to his functions as record office and his monopoly position, tends to make him a public as well as private functionary. Access to the profession of notary is difficult because the number of notarial offices is quite limited. Candidates for notarial positions must ordinarily be graduates of university law schools, and must serve an apprenticeship in a notary's office. Typically, aspirants for such positions will take a national examination, and if successful, will be appointed to a vacancy when it occurs . . . .<sup>211</sup>

The rest of this Article will be dedicated to a study of the modern Latin notary and his function. Whenever the Saxon notary public performs a similar task, I will point it out. I will additionally identify those functions of a Latin notary that can properly be compared to the advice of a lawyer.

## ***B. The Nature of the Latin Notary Profession and its Function Today***

### ***1. The General Concept***

The Latin notary institution must be understood in its proper context, by considering: (1) its nature as a liberal profession performing a public function, (2) its location within established systems of legal specialization, and (3) its place within a unified code-based legal

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211. MERRYMAN, *THE CIVIL LAW TRADITION*, *supra* note 12, at 113-15. Professor Merryman's description is excellent, but I have inserted in brackets certain corrections that more accurately reflect the profession as it is currently defined.

system in which notarial law interacts closely with other areas of the law, particularly mortgage and registry law.

## 2. *A Liberal Profession Performing a Public Function*

"The *Notario Latino* [Latin notary] is the *legal professional* [exclusively] charged with the *public function* of receiving, interpreting, and giving legal form to the intent of the parties, preparing the documents pertinent to the desired end, giving them authenticity; and conserving the originals and issuing copies that attest to their content. This function includes the authentication of facts."<sup>212</sup>

Is the Latin notary then, a public officer, an administrative functionary, or a professional in "private" practice? The notary *function* is a public one, by virtue of the delegation of the state's sovereign authority to authenticate; but the notary *profession* is a liberal private profession, subject to the same type of governmental regulation that the state imposes, for example, on lawyers, doctors, and pharmacists.<sup>213</sup> The person occupying the office is a private legal professional, to whom the state entrusts exclusively the public function of giving proper legal form and authenticating what would otherwise be a private transaction, making it a public act by memorializing it in a public document. The Latin notary combines in his acts the competence traditionally associated with a public official with the discretion and responsibility of a private legal professional.

In simple terms, notaries are liberal professionals who allow *private* parties to give legal effect to their transactions. But because they do so by exercising both professional judgment and a sovereign power, their status can be confusing.

As discussed above, both the Spanish and French notarial laws define notaries as "public functionaries," which generally means "one

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212. EDICIONES REPERTORIO NOTARIAL DE COLEGIO DE ESCRIBANOS DE LA PROVINCIA DE BUENOS AIRES, CONGRESOS Y JORNADAS 37 (1969), *cited in* MALAVET-VEGA, *supra* note 42, at 14 (P.A. Malavet trans., unofficial).

213. One important exception to this rule is the socialist approach to the profession. "As with the Chinese legal profession, the notarial offices are state organs and individual notaries are government employees who are paid a state salary. Therefore, unlike their western counterparts, the applicants for notarization in China are 'clients' of the state and not of the individual notary, as is also the case in the Russian system." Tung-Pi Chen, *supra* note 16, at 67. Portugal follows a similar system in which notaries are state employees. The former Soviet Union did so as well. Prior to the fall to Communism, the civil-law tradition was "the dominant legal tradition in most of the countries of Eastern Europe (including the Soviet Union)." MERRYMAN, *THE CIVIL LAW TRADITION*, *supra* note 12, at 3.

who serves in a government or political party.”<sup>214</sup> The designation is justified because “notaries receive from the State the power to give authenticity to their acts and to deliver executory titles.”<sup>215</sup> The notary profession, because of its quasi-public function, is thus distinguishable from other liberal professions, even from other *legal* professionals.<sup>216</sup> Enrique Giménez-Arnau defines the Spanish *notario* as: “a legal professional who carries out a public function to strengthen, with a presumption of truthfulness, the acts in which he participates, in order to assist in the correct formation of the legal transaction and to impart upon private legal transactions the proper legal form and required solemnity.”<sup>217</sup> According to DeVries, “the [French] *notaire* is a trained lawyer, who performs numerous and important nonlitigation functions in law administration. He is empowered to import the quality of ‘*acte authentique*’ to certain writings which must be executed before a public officer.”<sup>218</sup> The Italian law changed the classification to state that notaries are “public *officials* designated to receive inter-vivos acts and those of last will, give them *publica fides*, keep them on deposit, and to issue copies and extracts.”<sup>219</sup> “The notary function is a public function that the notary carries out independently without being hierarchically included among the functionaries employed by the State Administration or other public corporations.”<sup>220</sup> In this context, the description of the

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214. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 498 (1988).

215. PLANIOL, *supra* note 68, § 130, at 78. In France today, the *notaire* is described as “a public officer charged with giving authentic character to the acts and contracts of individuals.” JEAN YAIGRE & JEAN-FRANÇOIS PILLEBOUT, *DROIT PROFESSIONNEL NOTARIAL* 1 (1991) (P.A. Malavet trans., unofficial).

216. Some critics of the profession suggest that this “ambiguity” and the government’s failure to set clear standards are a disservice to the client and to society at large. EZRA N. SULEIMAN, *PRIVATE POWER AND CENTRALIZATION IN FRANCE: THE NOTARIES AND THE STATE* 33-59 (1987). In a relentlessly negative view of the French *notariat*, Suleiman argues that “[n]either the notaries nor the state have ever arrived at an acceptable understanding of where the public interests end and the private ones begin.” *Id.* at 38. He feels that the transfer of offices and self-policing make the profession too liberal, particularly for one that depends upon the delegated power of the State for its monopoly. I think that the validity of this criticism depends on the real effectiveness of admission requirements and professional liability schemes, matters that I discuss below.

217. ENRIQUE GIMÉNEZ-ARNAU, *INTRODUCCIÓN AL DERECHO NOTARIAL* 44 (1944) (hereinafter GIMÉNEZ-ARNAU, *INTRODUCCIÓN*).

218. HENRY DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 61 (1976) (footnotes omitted). The French *notaire* thus falls under the general category of “*officier ministériel*” (i.e., a person designated “by the state to occupy an office to which is delegated a public function.”). SULEIMAN, *supra* note 216, at 33-34.

219. PONDÉ, *supra* note 51, at 319 (P.A. Malavet trans., unofficial) (emphasis added).

220. *Principes du Notariat Latin*, *supra* note 206, tit. 1, art. 2 (P.A. Malavet trans., unofficial).

notary as a public *official* means that he is authorized by the state to hold a *private* office; he is not a public employee.<sup>221</sup>

To the extent that he receives a license to practice his profession from the state, the Latin notary is not different from any other liberal professional. The only difference lies in the delegation and exercise of the *publica fides* in addition to the grant of a professional license.<sup>222</sup>

A notary public in the United States is a public officer who performs certain ministerial public functions and is not an employee of the state.<sup>223</sup> Notaries public are not required to have any particular educational or practical training.<sup>224</sup> While the notary public's status as a private citizen performing a public function is similar to that of the Latin notary, the former cannot in any sense be called a legal professional, and any comparison to the latter would be misleading.

The best comparative analogy of the *notario's* status as a public official could be made, not to the notaries public, but rather to American lawyers' and British solicitors' status as "officers of the court." The solicitor is statutorily designated an "officer of the Supreme Court."<sup>225</sup> "The summary jurisdiction of the court over solicitors exists for the maintenance of their character and integrity."<sup>226</sup> In the United States, the matter is not quite as clear because the term "officer of the court" is used in many different contexts that are not relevant here,<sup>227</sup> and because a specific definition of the term is not easily

221. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 820 (1988).

222. Because of the *publica fides* the state also imposes numerical and territorial limitations on notaries that it does not impose on other professions. See also *infra* part III.C.

223. See *supra* notes 207-08 and accompanying text.

224. See *infra* part III.C.

225. FREDERICK T. HORNE, CORDERY'S LAW RELATING TO SOLICITORS 104, 365 (8th ed. 1988), citing Solicitors' Act, 1974, § 50 ("Any person duly admitted as a solicitor shall be an officer of the Supreme Court.").

226. *Sittingbourne and Sheerness Rly. Co. v. Lawson*, 2 T.L.R. 605 (1886), reprinted in HORNE, *supra* note 225, at 104. As an officer of the court, the solicitor may not do anything "which in any way deceives or misleads the court. Similarly, counsel must not be instructed to make any allegation which is without foundation or the sole purpose of which is merely to insult, degrade or annoy the opposing party or a person giving evidence." *Id.* at 273. The solicitor is also required to appear or arrange for counsel to appear at hearings. *Id.* As an officer of the court, the solicitor is liable for contempt, for not performing his duties to the client, for professional misconduct or malpractice, for retaining or misusing client funds, and for losses caused by his professional conduct. *Id.* at 104-22.

227. The phrase is used, naturally, to refer to court employees, such as judges, clerks, and marshals. See, e.g., ILL. ANN. STAT. § 705-205(9) (Smith-Hurd 1995); KAN. STAT. ANN. § 38-1552 (1994); MO. ANN. STAT. § 511.260(14) (Vernon 1993); OR. REV. STAT. § 4117.01(8) (1993). It is used to refer to prosecutors. See, e.g., ALA. CODE § 15-13-149 (1994) ("prosecuting officer of the court"); *Dickerson v. State*, 414 So. 2d 998 (Ala. Crim. App. 1982) (prosecutor, as an attorney, was an officer of the court). Even persons tempo-



found.<sup>228</sup> Court decisions sometimes use the label officer of the court without much explanation,<sup>229</sup> leading one comprehensive study of the

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rarily involved in judicial proceedings, such as jurors and grand jurors, are sometimes designated officers of the court. *See, e.g.*, ALA. CODE § 12-1-3 (1994); ILL. ANN. STAT. § 725-5 112-6(d) (Smith-Hurd 1995) (grand jurors). "Officers of the court" are protected from interference during judicial proceedings, particularly in criminal and contempt statutes. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 222(1) (West 1993); V.I. CODE ANN. tit. 14, § 551 (1995); W. VA. CODE § 61-5-26 (1994), *State v. Little*, 94 S.E. 680 (N.C. 1917). Officers of the court are also expressly subjected to the contempt power of the court. *See, e.g.*, ALA. CODE § 13A-13-130(a)(3) (1994); HAW. REV. STAT. § 710-1077(1)(c) (1994). It is also often used to impose a duty of confidentiality. *See, e.g.*, ALA. CODE § 16-83-403(b)(1) (1994) (nondisclosure of indictments until after defendant arrested); MISS. CODE ANN. § 97-9-53 (1993); MO. ANN. STAT. § 545.090 (Vernon 1995).

228. The designation of an attorney as an officer of the court, more often than not, is found in judicial opinions or legislative statements of purpose and authority, and not in statutes or rules. Nevertheless, I should point out that "officer of the court" is an often used, but seldom defined phrase in the United States. I can tell you from personal experience that if you conduct a "Lexis search" for the term "officer of the court," the system will interrupt your inquiry because it is likely to find over one thousand citations. When I added a limitation trying to find a definition, however, the search produced only a few cases and none directly on point. I am concerned here with the power of the court to impose duties upon or to discipline attorneys which is generally justified by the "officer of the court" label, as well as the legislative power to impose certain duties upon attorneys. *See, e.g.*, *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978) (state authority to discipline attorney as officer of the court); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193 (9th Cir. 1979); *In re Vann*, 136 B.R. 863 (D. Colo. 1992), *aff'd*, 936 F.2d 1431 (10th Cir. 1993); *Lindh v. O'Hara*, 325 A.2d 84 (Del. 1974) (appointment to pro bono criminal defense); *In re Fite*, 228 Ala. 4, 152 So. 246 (1933) (discipline); *Carlton v. State Bar of Cal.*, 640 P.2d 1106 (Cal. 1982); *Ex parte Piedmont* 82 So. 513 (Miss. 1919); *Siverstein's Case*, 236 A.2d 488 (N.H. 1967); *State v. Easterling*, 553 P.2d 1293 (N.M. Ct. App. 1976), *Burger v. Brindle*, 10 A.2d 353 (R.I. 1940); *In re Hosford*, 252 N.W. 843 (S.D. 1934) ("since attorney is an officer of the court, the power to admit applicants to practice law is judicial and not legislative"); *McWhirter v. Donaldson*, 104 P. 731 (Utah 1909); V.I. Bar Assoc. v. Dench, 2 V.I. 331 (1953); *Daily Gazette Co. v. Comm. on Legal Ethics*, 326 S.E.2d 705 (W.Va. 1984), *rev'd*, 346 S.E.2d 341 (1985); *see also* ALA. CODE § 15-12-21 (1994) (counsel subject to appointment to represent indigent defendants because he is an officer of the court); N.D. CENT. CODE § 27-13-01(3) (1993); OR. REV. STAT. § 9.010(1) (1993); KAN. SUP. CT. R. 202 (1987); LA. CODE CIV. PROC. R. 371 (1993).

229. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947) ("Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients . . . . [T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (the trial court has power, even in the absence of statute, to appoint an attorney for the accused; and the attorney, as an officer of the court, is bound to serve.).

The Supreme Court also uses the reference to describe the status and accompanying responsibilities of the members of its bar. *See, e.g.*, *In re Thomas A. Howard*, 1985 U.S. LEXIS 2841 (July 1, 1985); *In re James J. Caplinger*, 49 U.S.L.W. 3862 (May 18, 1981). The lower federal courts also have supervisory power over attorneys based on their status as officers of the court. *In re Snyder*, 472 U.S. 634 (1985).

"officer of the court" concept in the United States to conclude that it is too often used to justify judicial supervision of attorneys, without really analyzing the basis of the underlying rule.<sup>230</sup> It is nevertheless apparent that the label reflects the notion that attorneys are an essential part of the administration of justice and that "certain duties flow" from this status.<sup>231</sup> In its classic case on this subject, *Ex parte Garland*,<sup>232</sup> the Supreme Court explains the attorney's special status as a private professional:

The profession of an attorney and counsellor [*sic*] is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character . . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power . . . .<sup>233</sup>

Courts are therefore entitled to establish qualifications for entry into the bar and legislators may also establish admission rules—but this does not remove the courts' supervisory powers.<sup>234</sup> The rationale for the close supervision of attorneys is their essential role in the administration of justice. The Supreme Court has more recently explained:

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230. "The title is used almost as an incantation with little or no analysis of what the title means or why a particular result should flow from it." Robert J. Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C. L. REV. 541, 570-72 (1984).

231. *Id.* at 572.

232. 71 U.S. 333 (4 Wall. 1866).

233. *Id.* at 378-79 (footnotes omitted).

234. *Id.* at 379; see also *In re Snyder*, 472 U.S. 634, 642-44 (1985).

Courts have long recognized an inherent authority to suspend or disbar lawyers. *Ex parte Garland* . . . . This inherent power derives from the lawyer's role as an officer of the court which granted admission . . . .

Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed: "Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. *People ex rel. Karlin v. Culkin*."

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.<sup>235</sup>

The Latin notary, like the lawyer, is a private legal professional who holds his office permanently while in good standing. However, generally speaking, notarial supervision is not an inherent judicial function, but rather it is normally exercised by the legislative authority and sometimes delegated to professional groups. In addition, notaries do not traditionally participate in judicial proceedings.<sup>236</sup> Nevertheless, the notary is closely supervised—not by the judiciary, but rather by the state or its designees—as he has had a sovereign power delegated to him: the *publica fides*. There is in effect a special type of implied contract between the state and the notary. While the latter is not a public employee, the state nonetheless jealously guards the power delegated to him by regulating admission to and practice of the profession, thus guaranteeing the special status of notarial acts.<sup>237</sup> The notary, like the American lawyer, is an "officer" or "official" who performs an essential professional function in a specific process. The

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235. *In re Snyder*, 472 U.S. at 642-44 (citations omitted) (alteration in original).

236. See *infra* part III.D.1.

237. YAIGRE & PILLEBOUT, *supra* note 215, at 86.

difference lies in the fact that the Latin notary's public function is more administrative than judicial, and in the fact that the notary has an express delegation of a specific governmental power, the *publica fides*, to the notary.

a. *The Publica Fides*

The *publica fides* or *fe pública* is, in essence, the governmental power to authenticate or to certify. The concept would be literally translated as "public trust" or "public faith." "Faith" is used in this context to mean "[b]elief; credence; trust. Thus, the Constitution provides that 'full faith and credit' shall be given to the judgments of each state in the courts of the others."<sup>238</sup> One can also analogize to *bona fides*, defined as "in or with good faith . . . without deceit or fraud . . . without simulation or pretense . . . the attitude of trust and confidence, without notice of fraud."<sup>239</sup> The *fe pública* gives the notary the public trust and authority to attest.<sup>240</sup>

Originally, only two kinds of *publica fides* were recognized: the judicial and administrative authority to attest.<sup>241</sup> But over time, as discussed above, the state delegated this administrative authority to private notaries. This means that when he certifies and attests, the *notario* always "gives faith"—in Spanish "*da fe*"—of the contents of the document subscribed before him, and thus witnesses the instrument and imparts upon it a presumption of authenticity. Therefore, the *Fe Pública Notarial* "is the legal acceptance of the certainty that comes from the presumption of truth that accompanies the notarial document."<sup>242</sup>

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238. BLACK'S LAW DICTIONARY 538-39 (5th ed. 1979).

239. *Id.* at 160 (citations omitted).

240. "Attest" is defined as:

To bear witness to; to bear witness to a fact; to affirm to be true or genuine; to act as a witness to; to certify; to certify to the verity of a copy of a public document formally by signature; to make solemn declaration in words or in writing to support a fact; to signify by subscription of his name that the signer has witnessed the execution of the particular instrument. Also the technical word by which, in the practice of many states, a certifying officer gives assurance of the genuineness and correctness of a copy. Thus, an 'attested' copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it." *Id.* at 117 (citations omitted). Attestation of will is defined as an "[a]ct of witnessing performance of statutory requirements to valid execution."

*Id.* (citation omitted).

241. PONDÉ, *supra* note 51, at 188.

242. MALAVET-VEGA, *supra* note 42, at 23 (P.A. Malavet trans., unofficial).

The juridical act, authorized by the *fe pública* is deemed to be authentic, the word is derived from the Greek term and means that which is truthful, that which must be believed, what is genuine . . . . The *fe pública* originates with the State . . . it is one of the attributes of sovereignty, which is delegated to different officials . . . . The *fe pública notarial* consists of the certainty and effectiveness that the public power gives to otherwise private acts and contracts through authentication by a notary.<sup>243</sup>

Both the American notary public and his British counterpart have the power to certify. But is this power really comparable to the notarial *publica fides*? No. Even though the authority to attest comes from the state in both instances, the fundamental difference between the notarial *publica fides* and the notary public's power to certify lies in their evidentiary effect. A duly certified notarial document under the Latin system is endowed with the strongest possible presumption of truth, and the party trying to counter this presumption bears the heavy burden of rebutting it. A document subscribed by a notary public, on the other hand, has very limited probative effect.

In Britain, "a notarial certificate is not per se accepted within the jurisdiction of the high court as evidence of the facts expressed in the certificate and . . . these facts must be proved in the usual way."<sup>244</sup> The "usual way" means that facts must be proved through oral testimony by a sworn witness in court. Any deviation would violate the hearsay rule. The notary is thus required to testify in court about transactions occurring before him, although some statutory exceptions specifically allow the admission of some documents. Finally, English judicial opinions have taken an "ambiguous" attitude towards internal notarial documents by enforcing the general common-law rule, but allowing the admission of documents without testimony by way of exception in certain instances.<sup>245</sup> In the United States, the notary's seal and certificate are presumed authentic (*i.e.*, it is presumed that the person who used them was a duly empowered notary, and the person

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243. *Id.* at 23-24 (quoting Manuel González Enríquez et al., *Comprobación notarial de hechos* 8 (Ponencia presentada ante el X Congreso Int. del Not. Latino, Montevideo, 1969)).

244. BROOKE'S NOTARY, *supra* note 175, at 65. Brooke's illustrates with a case in which the court held that "although a [notarial protest under seal on a bill of exchange] may be sufficient evidence to prove the presentment of such an instrument in foreign countries, the presentment of a foreign bill in England must be proved in the same manner as if it were an internal bill." This required the notary's testimony, the document alone was not sufficient. *Id.* (citing *Chesmer v. Noyes*, 4 Camp. 129 (1815)).

245. BROOKE'S NOTARY, *supra* note 175, at 60-71.

opposing admission into evidence must rebut them, generally by clear and convincing evidence).<sup>246</sup> The certificate attests only to the acknowledgment by the subscriber and the genuineness of the signature.<sup>247</sup> The notary public's certificate is taken to be "*prima facie* evidence of the facts stated [in the certificate only], such as the fact of execution by a person who purports to be the subscriber[.]" and this presumption may, usually, only be countered by clear and convincing evidence.<sup>248</sup> Another *prima facie* presumption is that the person subscribing the affidavit does so under oath, subject to the penalty of perjury.<sup>249</sup> Finally, and most importantly, the notary public's certificate is

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246. See generally 58 AM. JUR. 2D *Notaries Public* § 43 (1989); JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2165 (seal) and §§ 736(3), 1675 (certificate) (3d ed. 1974); see, e.g., *United States v. Aikens*, 946 F.2d 608, 614 (9th Cir. 1991) (notary certificate is an example of a certificate that is admissible to prove facts included therein without violating confrontation clause); *Cousin v. Cousin*, 192 F.2d 377, 382-83 (8th Cir. 1951) (notary certificate presumed truthful but clear and convincing evidence by handwriting experts proved that signature was forged); *Brooks v. State*, 11 S.E.2d 688, 691 (Ga. Ct. App. 1940).

247. *Ryan v. Bank of Italy*, 289 P. 863 (Cal. Ct. App. 1930) ("[t]he purpose of the certificate of acknowledgment is to establish the identity of such person and the genuineness of the signature attached to the instrument, and the certificate is *prima facie* evidence of the truth of the facts states therein.") (alteration in original), cited with approval in *Transamerica Title Ins. Co. v. Green*, 89 Cal. Rptr. 915, 919 (Cal. Ct. App. 1970). See also PIOMBINO, *supra* note 209, at 73-76.

248. 58 AM. JUR. 2D *Notaries Public* § 45 (1989) (citations omitted). There are statutes so providing in several states. See, e.g., IND. CODE ANN. § 33-16-2-6 (West 1995); MICH. COMP LAWS § 5.1047 (1993). It is also the overwhelming majority rule found in judicial opinions. See, e.g., *Kindred v. State*, 524 N.E.2d 279, 301-02 (Ind. 1988); *Central Bank of the South v. Dinsmore*, 475 So. 2d 842, 845 (Ala. 1985); *In re New Concept Realty & Dev.*, 107 Idaho 711, 712, 692 P.2d 355, 356 (1984); *Ardis v. State*, 380 So. 2d 301, 304 (Ala. Crim. App. 1979); *McMurray v. Crawford*, 3 Kan. App. 2d 329, 332-36, 594 P.2d 1109, 1112-15 (1979); *Furness v. Park*, 98 Idaho 617, 621, 570 P.2d 854, 858 (1977); *Dart Assocs. v. Rosal Meat Mkt.*, 331 N.Y.S.2d 853, 854-55 (1972); *Prewitt v. Prewitt*, 397 Ill. 178, 73 N.E.2d 312, 315 (1947) ("evidence to impeach a [notarial] certificate must be clear and convincing and should do more than produce mere preponderance against the integrity of the certificate."); *Krueger v. Dorr*, 22 Ill. App.2d 513, 528, 161 N.E.2d 433, 440 (1959) (only clear and convincing evidence, given by a disinterested party, may overcome presumption of execution of the instrument created by the certificate); *Nichols v. Schutte*, 75 N.D. 207, 26 N.W.2d 515 (1947); but see *Picetti v. Orcio*, 57 Nev. 52, 67 P.2d 315 (1937) (certificate is only *prima facie* evidence of acknowledgment and "may be overcome by satisfactory evidence").

249. The subscriber is deemed to be under oath even if they do not "raise their hands." It is enough that the notary recites that the proof was sworn before her. *Thompson v. Home Insurance Co.*, 62 N.C. App. 562, 303 S.E.2d 209, review denied, 309 N.C. 324, 307 S.E.2d 169 (1983). But this presumption may at times be easily overcome by "some evidence to counter the notion that the oath was actually taken." *Rogers v. Colorado*, 161 Colo. 317, 325, 422 P.2d 377, 381 (1967). In this context, the "notary is not required to vouch for the truth of the affidavits which he takes. He commits no crime in merely administering the oath of another even if he thinks it is false any more than does the Clerk [of the court does] when he swears a witness to a deposition which the Clerk might have

not "deemed to certify or guarantee the facts stated" in the document to which it is attached.<sup>250</sup> Subject to the exceptions already discussed,<sup>251</sup> hearsay concerns and the general common-law preference for in-court testimony justify the inadmissibility of notarized documents as proof of the matter therein asserted.<sup>252</sup>

By contrast, the Latin notary's "mission which gives authenticity to the act, meaning a particular probative force, is an essential aspect of [notarial] law."<sup>253</sup> As a general rule, the Latin notarial document is deemed to be authentic and executory and constitutes proof of the facts asserted therein. It can only be invalidated by judicial order. "In civil law jurisdictions, notarial instruments fall into the category of public documents, (*i.e.*, documents drawn up by a notary or other public official which are automatically evidence of their origin and of the facts and statements they record). This is so whether they relate to a

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reason to believe is false." *Adams v. United States*, 156 F.2d 271, 275 (5th Cir. 1946) (Waller, J., dissenting), *aff'd*, 330 U.S. 801 (1947). In the civil context, the notary public is liable for false statements made in affidavits subscribed before him only upon a showing of negligence, based on a duty of due care. *See, e.g., Commercial Union Ins. v. Thomas Aitken Constr. Co.*, 54 N.J. 76, 80, 253 A.2d 469, 471 (1969).

250. 58 AM. JUR. 2D *Notaries Public* §§ 45, 75 (1989). *See also Kansas Reins. Co. v. Congressional Mortg. Corp.*, 20 F.3d 1362, 1375 (5th Cir. 1994) (notarization is a certification by the notary only that the persons whose signatures appear on the affidavits swore before a notary that the statements contained in the documents were true.); *cf. Red Rooster Constr. Co. v. River Assocs.*, 224 Conn. 563, 579, 620 A.2d 118, 126 (1993) (not necessary to decide whether notarial certification included the facts in the documents, because declarant did not sign statement swearing to truth of the facts). Some states have introduced a rebuttable presumption of authenticity of notarized documents, but this does not change the rule as to statements contained therein. *See, e.g., NEV. REV. STAT. § 55.165* (1993) ("Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic."); *but see In re Donald J. Leifheit, Jr.*, 53 B.R. 271 (Bankr. S.D. Ohio 1985) (notary certificate could not authenticate document).

251. One possibly important exception in addition to those discussed in the previous footnote is that the notarial certificate will be taken as *prima facie* proof of certain facts in real property deed transactions. As to deeds generally, *see, e.g., 765 ILL. ANN. STAT. ch. 165, para. 5/37* (Smith-Hurd 1994) (deeds for real property must be sworn before public officer, including, but not exclusively, a notary); *IND. CODE ANN. § 32-1-2-18* (West 1995) ("To entitle any conveyance, mortgage or instrument of writing to be recorded, it shall be acknowledged by the grantor, or proved before [certain public officials including notaries public, judges or court clerks].").

252. *See generally* WIGMORE, *supra* note 246, §§ 1237, 1274, 1276, 1287 & 1288. Wigmore indicates that the general rule requires testimonial proof of attestation by the attesting witness, in our case the notary. *Id.* § 1288. The origin of the rule is traced to the old Germanic mock trials where the attester would testify about the agreements and thus put it into the public record. *Id.* § 1287. *See, e.g., D'Ambrosio v. D'Ambrosio*, No. 3097, 19 Phila. 347, 1989 Phila. Cty. Rptr. LEXIS 35 (Aug. 15, 1989).

253. YAIGRE & PILLEBOUT, *supra* note 215, at 3 (P.A. Malavet trans., unofficial).

public or private matter.”<sup>254</sup> In France, a notarial document and the facts included therein, are automatically admissible into evidence and only upon judicial declaration of invalidity does the document lose its executory nature.<sup>255</sup> In Spain, a notarial document constitutes proof of the facts that motivated its subscription, and of the statements made by the contracting parties.<sup>256</sup> In Mexico, a notarial document has the strongest possible evidentiary value, subject to none of the exceptions normally applicable to document interpretation.<sup>257</sup> Even when notarial intervention is not required for an agreement to be valid, the notarial document “reinforces, with a presumption of validity, the juridical act performed.”<sup>258</sup> The UINL distinguishes two types of presumptions: truthfulness and legality. The facts included in the notarial document are presumed to be true. The legality and proper form of the juridical act it reflects are likewise presumed.<sup>259</sup> Even though it reflects a private juridical act, a notarial document is nonetheless given the same probative effect as a duly certified document produced by a governmental agency or instrumentality.<sup>260</sup> Generally speaking, only upon a judicial declaration of invalidity does the notarial document lose its probative effect.<sup>261</sup> Depending on the jurisdiction, the document may be attacked collaterally, or in a special action directed specifically at invalidating the document may be instituted.<sup>262</sup>

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254. BROOKE'S NOTARY, *supra* note 175, at 71, citing CODE CIVIL [C. CIV.] (Fr.) arts. 1317, 1319; Ordinance No. 45-2590 of 2.11.1945, art. 1; law of 25 Ventôse year XI, art. 19; C. CIV. (Belg.) arts. 1317, 1319; law of 25 ventôse year XI, arts. 1, 19 (Belg.); Italy C.c. (Italy), arts. 2699, 2700; Notarial Law (1913), art. 1 (Italy); C. CIV. (Spain) arts. 1216, 1218; Civil Procedure Law, art. 596 (Spain); Notarial Law (1862), art. 1 (Spain); Notarial Regulations (1944), arts. 1, 2 (Spain); Civil Procedure Ordinance, ZPO, arts. 415(1), 418(1), 437 (F.R.G.); Notarial Ordinance (1961), art. 1 (F.R.G.).

255. Law 25 Ventôse art. 19, C. CIV. art. 1317, notes (Dalloz 1994) (Fr.).

256. C. CIV. arts. 1216, 1218 (Civitas 1991) (Spain).

257. PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 86-87.

258. MALAVET-VEGA, *supra* note 42, at 74. The general rule is that a contract is formed once there is a meeting of the minds among the parties—no particular form is required. *Id.* But the notarial document, as a practical matter, makes evidentiary matters easier.

259. *Principes du Notariat Latin*, *supra* note 206, tit. 2, art. 9.

260. JAIME GUASP, I DERECHO PROCESAL CIVIL 396 (1968).

261. See, e.g., *Principes du Notariat Latin*, *supra* note 207, tit. 2, art. 10 (the presumptions of article 9 “may only be contradicted by judicial proceedings.”) (P.A. Malavet trans., unofficial). But the notarial document may suffer from certain defects that might cause its inadmissibility into a public registry, thus depriving it of effect.

262. GUASP, *supra* note 260, at 404-05.



It is upon the moving party to prove the invalidity of the notarial document, generally by clear and convincing evidence.<sup>263</sup>

The presumptions favoring the notarial document are even more important in civil-law countries because, unlike their common-law counterparts, they express a general preference for documentary evidence over testimonial matter. By contrast, both England and the United States, through the hearsay rule, which justifies exclusion of documents certified by a notary public to prove the truth of the matter asserted therein, express a preference for in-court testimony. This is one of those areas where issues might superficially appear similar, but where close scrutiny discloses an important difference in the way the two systems approach a particular legal problem. The civilians see testimonial evidence as temporary and susceptible to many subjective factors that might affect its value. Documentary evidence, on the other hand, is seen as objective and more reliable because it is contemporaneous with the act or accord among the parties and because it is prepared prior to the inception of litigation (*i.e.*, because it is not subject to the weaknesses of human beings).<sup>264</sup> Moreover, the notarial document is prepared and certified by a qualified legal professional. In a system in which the written word is paramount in judicial proceedings, the notarial document is singled out for its special probative value.

*b. The Protocolo, the Collection of Public Documents  
Subscribed Before a Notary*

As part of his public function, the notary is the permanent archivist of the original documents subscribed by him. "The *protocolo* is the organized collection of master public documents and *actas*<sup>265</sup> sub-

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263. See, e.g., L.E.J. art. 597 (Spain), C. Pr. Civ. arts. 303-16 (Fr.); YAIGRE & PILLEBOUT, *supra* note 215, at 86-87; CÓDIGO CIVIL DE PUERTO RICO art. 1172 (Equity 1984, supp. 1993); Hernández v. Fernández, 17 P.R. Dec. 112 (1911); Finlay v. Finlay Brothers, 8 P.R.R. 389 (1905). In France, the challenger who fails to disprove the presumption faces civil action in addition to the damages and interest that can be claimed in the original proceedings. YAIGRE & PILLEBOUT, *supra* note 215, at 87.

264. See, e.g., YAIGRE & PILLEBOUT, *supra* note 215, at 5.

265. A notarial minute, known in Spanish as an *acta*, "is the public document that contains the exact narration of a fact capable of having influence in the rights of the private parties, drafted by a Notary upon request of a person or of his own initiative." MALAVET-VEGA, *supra* note 42, at 102-03 (P.A. Malavet trans., unofficial). It will include "facts and circumstances that the Notary personally witnesses or of which he is personally aware, and which by their nature do not constitute a contract or juridical act." P.R. Notarial Law, 1987 P.R. Laws 75, art. 30 (P.A. Malavet trans., unofficial). It is a public document that must be treated in the same manner as any other public deed. I have seen them used, for

scribed by a notary . . . including those documents that are attached to the public document."<sup>266</sup> A public document, for example, may be supplemented by attaching either the certificate of its inscription in the property registry, or the certificate of the legal notice of subscription of wills and powers of attorney required by some jurisdictions.<sup>267</sup> Typically, the Latin notary will issue certified copies to be used by the parties to give effect to their transactions.

The *protocolo* or register is generally required to be bound into yearly volumes, not exceeding a particular number of pages. It must be kept in a safe place. In Puerto Rico, when it is kept inside a wooden structure it must be placed in a fire-proof cabinet. The *protocolo* may not be removed from the notary's office, except pursuant to a court order. In jurisdictions such as Puerto Rico where the *notariat* is a free and open profession without territorial or numerical restrictions, upon death, suspension, disbarment, mental or physical incapacity or retirement of the notary, the *protocolo* is turned over to the inspector of notarial offices. This office is thereafter responsible for its protection and for issuing copies of the public documents to interested parties.<sup>268</sup> The system is different in those states that have territorial or numerical restrictions.<sup>269</sup> The register is the property of the state, but its custody is entrusted to the notary holding that particular notarial seat. The notarial office is the day-to-day custodian, as long as it stays open, regardless of the identity of the resident notary,

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example, to certify the contents of safety deposit boxes opened pursuant to a court order or to certify a translation of a public document. They can also be used to correct minor errors in form in prior public documents. An example of such a correction is an *acta* used to provide the surnames of both parents when they are left out of the original public document. MALAVET-VEGA, *supra* note 42, at 105-06. Puerto Rico notarial law, and the laws of most Latin American countries, require the parties to use both their parents' surnames in official documents. This sometimes causes problems in the United States because Americans incorrectly take the mother's surname, which is written after the father's, as the person's last name, and records are incorrectly alphabetized.

266. MALAVET-VEGA, *supra* note 42, at 117 (P.A. Malavet trans., unofficial).

267. Under Puerto Rico law, for example, a notary is obliged to notify the Supreme Court registry of powers of attorney within 72 hours of its subscription, Art. 76 of the Notarial Law and the Law of Registry of Powers of Attorney of 1937, P.R. LAWS ANN. tit. 4, § 922 (1937), and of the subscription of a will within 24 hours after its subscription. *Id.* art. 73. The notice must be delivered personally to the registries or by certified mail, return receipt requested. *Id.*

268. See generally MALAVET-VEGA, *supra* note 42, at 117-30.

269. See *infra* part III.C.

until the documents become "old documents" that must be turned over to public archives.<sup>270</sup>

As the *protocolo* belongs to the State, the notary is merely its designated custodian.<sup>271</sup> In France, the notary's register of minutes—known as *protocolo* elsewhere—is designated to be the express property of the state by the Law Ventôse.<sup>272</sup> In the Spanish Notarial Law of 1862, *protocolo* is defined as "the organized collection of master deeds authorized during one year and it shall be formalized into one or more volumes bound, with individual page numbers written in words."<sup>273</sup>

The State, generally through the inspector of notary offices, has absolute, unobstructed access to the *protocolo*.<sup>274</sup> Its contents are confidential and may not be shown or otherwise divulged to third parties. Copies of public documents in the *protocolo* may be issued only to interested parties as discussed below. Likewise, information from the *protocolo* may be read or divulged only to interested parties, as provided by law.<sup>275</sup> Notarial wills, however, must remain totally confidential until the death of the testator.<sup>276</sup> Violation of the secrecy of the *protocolo* may result in criminal prosecution.<sup>277</sup>

The secrecy of the *protocolo* could be compared to the attorney-client privilege with respect to third parties not involved in the juridical act contained in the public document. For example, a notary has an obligation to notify a buyer of a defect in the seller's title, and of any encumbrances on the property. The notary is also allowed to inform nonparties to a transaction of defects in title and encumbrances that should be reflected in a public registry, even if he acquired such knowledge from a party to a notarial transaction.<sup>278</sup> Even more im-

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270. For example, in France, the notary retains documents in his notarial office until they are one hundred years old. They must then be turned over to the public archives. YAIGRE & PILLEBOUT, *supra* note 215, at 106-07.

271. MALAVET-VEGA, *supra* note 42, at 121-22 (footnotes omitted).

272. PONDÉ, *supra* note 51, at 554.

273. *Id.* at 557 (P.A. Malavet trans., unofficial).

274. MALAVET-VEGA, *supra* note 42, at 121-22. There is a famous war story among practitioners in Puerto Rico to the effect that a notary kicked the notarial inspector out of his office, claiming that a search warrant was required to inspect his *protocolo*. The notary was promptly suspended. I have been unable to find a case citation for this fact pattern, but not all disciplinary decisions are published.

275. *Id.* at 121.

276. *Id.* The one exception to this rule is that the notary may divulge the admission of paternity of a "natural child." *Id.*

277. *Id.*

278. See, e.g., YAIGRE & PILLEBOUT, *supra* note 215, at 134-36.

portantly, the notary has an affirmative obligation to search the public registry for information relevant to the transaction, and to disclose such information to the parties.<sup>279</sup>

Since a notary is required to retain the original copies of all public documents he subscribes, certified copies are issued as needed or upon request. "Copies issued by the notary may be, by virtue of their formality, certified or simple; and by virtue of their content, they may be partial or total."<sup>280</sup> A certified copy bears a certificate subscribed by the notary attesting that they are true and correct copies of the originals in his *protocolo*;<sup>281</sup> informal copies may lack the notary's certification.<sup>282</sup> Certified copies are valid for all applicable legal purposes,<sup>283</sup> including registration in the property registry.

Because the *protocolo* is protected by secrecy requirements, the number of persons who have a right to obtain copies is limited. Accordingly, only the following persons may obtain copies: [1] The subscribing parties; [2] representatives of the subscribing parties; [3] heirs of the subscribing parties; [4] every person who is given any right by virtue of the document; . . . [5] those who prove that they have a legitimate interest.<sup>284</sup>

In sum, the Latin notary is a private professional performing the public function of authentication and archival of public documents. Because she is the custodian of an important sovereign power, a notary is often referred to as a public officer or official, despite practicing the profession in a free and private manner. This is similar to the American lawyer's status as an "officer of the court." A notary public's certification has very limited probative effect, while, under the Latin system, the *publica fides* imparts upon a duly certified notarial document the strongest presumption of truth. The document is generally admissible into evidence without any accompanying testimony, and is considered proof of the facts contained therein, with a strong, albeit not irrebuttable, presumption of truth. The party trying to rebut this presumption bears a heavy burden of proof. The notarial seal

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279. See, e.g., *In re Ramos Meléndez y Cabiya Ortiz*, 120 P.R. Dec. 796 (1988) (notary who failed to make his own title search, relying instead on a three-month-old certification, violated professional ethics standards).

280. MALAVET-VEGA, *supra* note 42, at 131-32 (P.A. Malavet trans., unofficial) (emphasis omitted).

281. *Id.* at 138-39.

282. *Id.* at 131.

283. *Id.* at 139.

284. *Id.* at 133 (P.A. Malavet trans., unofficial). The French system of copies is somewhat different. See PLANIOL, *supra* note 68, § 149, at 88-89.

is thus a certification of truth, and, as will be discussed below, of legality and good faith.

### 3. *Legal Specialization*

The Latin notary is part of an integrated system of legal specialization. The division of the legal profession into separate specialties is common, particularly in Western Europe.<sup>285</sup> "Civil law systems have traditionally differentiated between functions performed by law professionals. Even in countries where a single practitioner can perform all incidents of legal counseling and litigation, the persistence of the law-trained *notaire* has maintained the division."<sup>286</sup> Because of the special public function they perform, *notarios* continue to enjoy a special place among legal professionals.

This kind of mandatory legal professional specialization will seem quite foreign to an American. In the United States, people are used to having only one kind of lawyer, although de facto specialization in practice is quite common; however, there is nothing governmental about the position. The closest common-law analogy might be the distinction between solicitors and barristers made in the United Kingdom. "A solicitor acts as a legal adviser to his clients and conducts legal proceedings on their behalf, instructing a barrister to advise and to conduct cases in court when necessary."<sup>287</sup> The barrister, generally speaking, serves as legal expert and litigator; he "is to act as legal consultant and as an advocate in court."<sup>288</sup> Solicitors do not have a mandatory monopoly over legal advice, but merely their status as certified legal professionals.<sup>289</sup> In litigation, both solicitors and barristers may draft pleadings.<sup>290</sup> The barrister is sometimes given the exclusive right to appear in court, although solicitors may also appear in certain lower courts or on appeals.<sup>291</sup> The barrister must usually be brought in to represent a client by a solicitor, but he may also be retained by a foreign attorney in certain cases.<sup>292</sup> Except for the foreign lawyer ex-

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285. See generally HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* (1992).

286. DeVRIES, *supra* note 218, at 54.

287. STEPHEN O'MALLEY, *EUROPEAN CIVIL PRACTICE* 1456 (1989).

288. *Id.* at 1458. Barristers, who are increasingly specialists in particular fields of law, advise solicitors and present cases in court. Zahd Yaqub, *The Barristers in England and Wales*, in *THE LEGAL PROFESSION IN THE NEW EUROPE* 300, 303 (Allan Tyrell & Zahd Yaqub eds., 1993).

289. Leslie Lawrenson, *Solicitors in England and Wales*, in *THE LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 288, at 325.

290. Yaqub, *supra* note 288, at 311.

291. *Id.*

292. O'MALLEY, *supra* note 287, at 1458-59.

ception, however, the solicitor effectively acts as a barrier between the barrister and the general public by bringing clients and barristers together, since the barrister may not approach clients directly.<sup>293</sup>

Among the members of the European Union:

*[w]hat particularly characterises the Civil Law system . . . is the maintenance of a notarial regime which requires a wide range of formal documents to be authenticated or notarized. This has consolidated the position of a separate profession of Notary . . . the notarial profession has remained quite separate from the other legal professions: its members are not permitted either to practice in partnership with them or to practice at the same time as a member of the other profession.*<sup>294</sup>

This distinction is still true today among the Member States of the European Union, where only Denmark,<sup>295</sup> Great Britain, and Ireland do not have a notary system.<sup>296</sup>

Spain has the classic civil-law professional structure of *abogado*, *procurador*, and *notario*; it has "a General Council of the Spanish *notariat* for the country as a whole." Belgium has the traditional civil-law legal professions, including Latin-type notaries, organized in Regional Chambers and a National Federation, and the "ancillary profession of '*huissier*' or bailiff." France has a classic but unusually fragmented organization for legal professionals, which was revamped in 1992.

A large share of the . . . legal market in France is held by the profession of Notary (*notaire*). . . . They fulfill the classic role of the Latin Notary, together with a considerable proportion of general advisory work. Thus the bulk of legal work relating to real property transfer and to family succession and property matters (*'patrimoine'*) is dealt with by notaries. In some parts of France notaries also negotiate sales of real property, in effect acting as estate agents.<sup>297</sup>

Germany has a modified Latin-type system with the *Rechtsanwalt* as the main legal profession. It has a separate *Notär* who is akin to the Latin notary, but specific regional variations survive thanks to historical influence. Greece has the *simvolaioiographos* who are in most aspects similar to Latin notaries. Italy has the *notaio* who may also

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293. Lawrenson, *supra* note 289, at 317.

294. ADAMSON, *supra* note 285, at 7-8 (emphasis added).

295. "Denmark has the distinction of being the only Member State with a single legal profession (title: advokat)." *Id.* at 12.

296. *Id.* at 17-18 (Ireland), 23-24 (Great Britain).

297. *Id.* at 11-15.

furnish legal advice. In the Netherlands, unlike other countries, partnerships between *notaris* and *advocaten* are allowed. In Portugal notaries are essentially state employees.<sup>298</sup>

In Spain, which has a very traditional structure, the *abogado* is the general legal advisor. The *procurador de los tribunales* is the courtroom advocate. *Abogados* are allowed to form partnerships of fewer than twenty lawyers, all of whom must belong to the same regional *colegio de abogados*. One person may be both a *procurador* and an *abogado*, provided he meets the eligibility requirements for each profession. *Notarios* are a separate profession.<sup>299</sup>

Austria, the Vatican, and Switzerland are non-EU European states which also follow the Latin *notariat*.<sup>300</sup> Turkey also follows the Latin *notariat*.<sup>301</sup> In the United States, the Commonwealth of Puerto Rico maintains a Latin notary system, modeled after the Spanish *notario*.<sup>302</sup> The Canadian province of Quebec also follows the Latin *notariat*, and its current form "is directly inspired by the French model from which it originates."<sup>303</sup> In Latin America, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, México, Paraguay, Perú, and Uruguay practice the Latin *notariat*.<sup>304</sup> Venezuela had a substantially Latin *notariat* until 1953, when dictator General Marcos Pérez Jiménez changed it to its present form, a state-run system where notaries are public employees.<sup>305</sup> Japan has a Latin-type<sup>306</sup> *notariat*, initially introduced at the end of the nineteenth century and patterned

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298. This paragraph, including citations, has been abstracted from *id.* at 11-23 (emphasis added).

299. Luis Algar-Calderón, *The Legal Profession in Spain*, in *THE LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 288, at 281-99.

300. GIMÉNEZ-ARNAU, *supra* note 5, at 111.

301. See S. Halis Tokdemir, *La Situation Juridique des Notaires et des Notariats en Turquie*, in *ATLAS DU NOTARIAT* 149-53 (1989).

302. MALAVET-VEGA, *supra* note 42, at 2-12; Guglietti, *supra* note 157, at 334g-h.

303. Julien S. Mackay, *Histoire du Notariat au Canada*, in *ATLAS DU NOTARIAT* 184 (1989) (P.A. Malavet trans., unofficial).

304. GIMÉNEZ-ARNAU, *supra* note 5, at 112; Guglietti, *supra* note 157, at 334a-fk.

305. Guglietti, *supra* note 157, at 334f-g. Generally speaking, only in totalitarian regimes—left and right-wing—do we find the Latin notary as a state employee.

306. I indicated above that the term "Latin *notariat*" is a reference to the profession's acceptance in Latin countries, which Japan, of course, is not (their love of *tango*, *salsa*, and Latin *trio* music notwithstanding). However, the term is generally accepted and used, mostly because of the influence of the International Union, even by non-Latin countries which follow the system. It reflects a recognition of the origin of the profession in Latin countries, even though its current extension across national boundaries is much wider.

after the French model, and the profession is still in existence today.<sup>307</sup> In Africa, colonial rulers imposed their organization of the legal profession. Moreover, some of the newly independent African states, including Zaire<sup>308</sup> and Senegal,<sup>309</sup> retain Latin notary professions. South Africa also has a substantially Latin *notariat*.<sup>310</sup> *L'Union Internationale du Notariat Latin* was founded in 1948 in order to bring together all countries who have the Latin notary institution, and to promote the incorporation into the different national systems of the basic characteristics that distinguish the Latin *notariat*.<sup>311</sup>

The most powerful current illustration of the enduring nature of the particular professional function reserved for the Latin notary is that they are not included in the list of professionals entitled to provide legal services throughout the European Union.<sup>312</sup> The European Court of Justice has encouraged transnational practice by professionals within the Member States through a series of decisions regarding mutual recognition of professional diplomas.<sup>313</sup> This has caused a great deal of controversy, but, interestingly, not with respect to notaries. Member States have sought to use the "public service" exceptions included in articles 48 and 55 of the Treaty of Rome to justify reserving law practice for their nationals.<sup>314</sup> But the Court of Justice has taken a narrow view of the exception.<sup>315</sup> The Lawyers' Services

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307. See L'Association Nationale des Notaires du Japon, *Le Notariat Japonais*, in *ATLAS DU NOTARIAT* 207 (1989).

308. Following the Belgian model, Zaire retained the notary system after independence in 1966. Georges Ntumba-Kashala, *L'Organisation du Notariat au Zaire*, 1 *PATRIMOINE X: NOTARIATS D'EUROPE DU QUÉBEC ET DU ZAIRE* 329-49 (1991).

309. Daniel Sédar Senghor, *Etude Historique et Structures Contemporaines du Notariat d'Afrique Noire d'Expression Francophone*, in *ATLAS DU NOTARIAT* 195 (1989).

310. See M.J. LOWE ET AL., ELLIOTT: THE SOUTH AFRICAN NOTARY (6th ed. 1987).

311. Guglietti, *supra* note 157, at 334a; see also Anton Gerard Lubbers, *Histoire de l'Union Internationale du Notariat Latin 1948-1977*, in *ATLAS DU NOTARIAT* 265 (1989); Federico Guasti, *Activités et Développement de l'Union Internationale du Notariat Latin au Cours de la Période 1978-1988*, in *ATLAS DU NOTARIAT* 301 (1989).

312. Goebel, *supra* note 10, at 489; To Facilitate the Effective Exercise by Lawyers of Freedom to Provide Legal Services, Council Directive 77/249, 1977 O.J. (L 78) 17.

313. See generally JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* 184-202 (2d ed. 1990) and LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 137-71 (1987).

314. Article 48(4) allows Member States to impose a restriction "which prevents an employed worker from taking up 'employment in the public service[.]'" and article 55 one which "excludes self-employed persons from 'activities connected, even occasionally, with the exercise of official authority.'" SPEDDING, *supra* note 313, at 168-69.

315. In *Sotgiu*, case 2/74, the court, interpreting article 48(4) the same way it interpreted article 55, wrote that "the exceptions made by article 48(4) cannot have a scope going beyond the aim in view of which the derogation was intended." See *id.* at 171.



Directive of 1977 (77/249/EEC) provides that "[n]otarial functions may still be reserved to enrolled lawyers, as with Services. This is because notaries deal with national matters of public law, especially the transfer and ownership of immovable property within State boundaries."<sup>316</sup> An excellent study of the Community rules concludes:

In . . . *Commission v. Belgium* [Case 149/79] . . . the test laid down was whether or not such [protected] posts were typical of public service posts in having powers conferred on them by public law, and responsibility for safeguarding state interests vested in the holders. There is still some ambiguity for some posts . . . . The test, however, applies to some activities of the legal profession. *There is, it should be noted, no controversy over the activities of notaries. Much of their work in transfer and ownership of property is incontrovertibly a public law matter, and can therefore be reserved for nationals.*<sup>317</sup>

As illustrated by the European Union's treatment of notaries, despite the Latin *notariat*'s wide area of influence, the profession is practiced as a fundamentally national or regional institution. For example, France, which has "a generally benevolent view towards" foreign law firms providing legal advice within its territory,<sup>318</sup> nonetheless prevents them from performing duties reserved for a *notaire*.<sup>319</sup> Similar rules apply in other countries that reserve the notarial profession and its duties for their nationals.<sup>320</sup> In the United States, by contrast, although some states require residence, citizenship is not a requirement to be a notary public.<sup>321</sup>

But, in addition to their attesting function, notaries often serve as legal advisors to the parties. "Since the *avocat* is generally limited to

316. *Id.* at 193. Although the contract to transfer the land is a private transaction, it cannot be separated from the public law function of the *publica fides* or of property registration. See also *supra* part III.A.2.

317. SPEDDING, *supra* note 313, at 171 (footnotes omitted) (emphasis added). Interestingly, the decisions made by the Union regarding the *notariat* do not appear to be based on extensive empirical and legal studies, and it seems that none exist. Perhaps this can be attributed to the familiarity of most Member States with the institution. The most recent action by the Union regarding the *notariat* however, calls for an assessment of notarial work. The European Parliament, while recognizing that the profession is covered by the public service exception of article 55, nonetheless calls for a detailed study of the *notariat* in order "to ensure the mutual recognition without formalities of notarial acts" and to harmonize regulation among the member states. European Parliament, Resolution A3-0422/93, 1994 O.J. (C 44/36).

318. Goebel, *supra* note 10, at 465.

319. *Id.*

320. See, e.g., PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 172; YAIGRE & PILLEBOUT, *supra* note 215, at 24; Algar-Calderón, *supra* note 299, at 294.

321. See *infra* section III.C.

litigation practice, it is the *notaire*, who fulfills many of the counseling functions of American lawyers relating to property transfers, title, tax decedents' estates and business organizations."<sup>322</sup>

Similarly, for the Spanish *notario* mere legal knowledge is not enough; a formal legal education is mandatory so the notary may perform his duties as a trusted counselor and advisor to the parties.<sup>323</sup> As a general rule, while a notary may provide legal advice relevant to the juridical acts performed before him, even in one's own country, practice of law as an advocate and as a notary is generally considered to be legally incompatible.<sup>324</sup> Even in jurisdictions that allow notaries to practice as lawyers, they may not act as both notary and lawyer in the same contentious matters.<sup>325</sup> Additionally, professional associations with both notaries and other professionals are not allowed.<sup>326</sup> The Latin notary's work is personal and not delegable; he must personally witness the entire notarial transaction pertaining to the document sub-

322. DEVRIES, *supra* note 218, at 61 (footnotes omitted).

323. PONDÉ, *supra* note 51, at 556.

324. As to France, see DEVRIES, *supra* note 218, at 61. As previously discussed, the French law Ventose codified matters, tasks, and other professions that were incompatible with notarial practice. It made notarial practice wholly incompatible with being a judge or any other type of judicial functionary. PONDÉ, *supra* note 51, at 553. The Spanish *notario* may not be a public employee or judicial officer. 1 JOSÉ MARÍA SANAHUJA Y SOLER, *TRATADO DE DERECHO NOTARIAL* 292-94 (1945). See also PEDRO AVILA-ÁLVAREZ, *DERECHO NOTARIAL* 202-04 (7th ed. 1990); GERMÁN FABRA-VALLE, *CÓDIGO DE LEGISLACIÓN NOTARIAL* 20, 63, 69 (1990). See also PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 184 (the Mexican notary may give legal advice, he may not be a public employee, and may not act as an *abogado*, i.e., a lawyer in contentious matters).

Notaries public also have certain incompatibility limitations, generally that they may not hold any other paid public office to which they are appointed "under any civil authority, or school, city, or town of state." 58 AM. JUR. 2D *Notaries Public* § 8 (1989). One of the examples given in the note is *Moser v. Board of County Comm'n*, 201 A.2d 365, 368 (Md. 1964) (appellant "upon accepting the appointment as a notary public and qualifying as such by taking the oath of office, thereby vacated his office as a member of the Metropolitan Commission"). An exception to this rule is that judges may act as notaries and do not lose their positions upon taking the notary oath. 58 AM. JUR. 2D *Notaries Public* § 8 (1989).

325. See, e.g., PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 184. Italy gives the notary authority to appear in court on behalf of clients in noncontentious matters related to documents subscribed before her. PONDÉ, *supra* note 51, at 319-23. As we might expect, this is a very controversial rule, particularly with lawyer-advocates. In Puerto Rico a notary may not subscribe affidavits by his clients for use in contentious litigation. MALAVET-VEGA, *supra* note 42, at 146. In the Netherlands the *notaris* may act as *advocaat*, a legal advisor, but not as a *procureur*, a litigator in the same transaction. But they may wear the different hats, since the *advocaat* is automatically sworn as a *procureur*. Hans Hoegen Dijkhof, *The Legal Professions in the Netherlands*, in *THE LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 288, at 225-28.

326. See, e.g., O'MALLEY, *supra* note 287, at 1243.

scribed before him.<sup>327</sup> In some cases, this means that notaries may not even practice in partnership with other notaries.<sup>328</sup> At any rate, with respect to notarial transactions, notaries "enjoy a monopoly for giving authenticity to acts and contracts made by individuals: no other public officer can compete with them."<sup>329</sup> In fact, no other person, professional or not, may compete with the notary in the performance of his duties. The only individual entitled to perform these duties is the notary.<sup>330</sup>

#### 4. *Unified Code-Based Legal System*

The Latin notary performs his functions within a unified legal system. "Notarial Law is the set of legal norms and doctrines that regulate the notary function and the formal requirements of notarial documents."<sup>331</sup>

It is a *set of legal norms* because Notarial Law is supplemented by various rules included within the legal system—specific legislation, Civil, Registry or Mortgage, Penal and Evidentiary Codes, etc.—and, at the same time, it constitutes a defined and identifiable branch of the legal tree, with its own characteristics.

Because of the very special function involved within the legal organization of a country, in which the State delegates upon a private individual one of the attributes of sovereignty (*i.e.*, the *publica fides*), it is logical that Notarial Law will regulate this function. Finally, the scope of the notarial function includes both the public document—which contains a juridical act—and the notary minutes and affidavits. Regarding the document, it includes the formal requirements that determine its validity and effect.<sup>332</sup>

Notaries hold the exclusive power to authenticate two general categories of private transactions: (1) mandatory notarial transactions

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327. PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 6S, at 177-78.

328. This is the case in Puerto Rico, where lawyers may practice in professional partnerships, but *notarios* must always keep their work separate. MALAVET-VEGA, *supra* note 42, at 32-33, 147. But in France, notaries are allowed to form professional partnerships among themselves, but not with other professionals. YAIGRE & PILLEBOUT, *supra* note 215, at 33-40. Additionally, the French Civil code expressly allows more than one notary to officiate over particular juridical acts, such as wills. See C. civ. art. 971 (Fr.) (two notaries may receive a public open will).

329. PLANIOL, *supra* note 6S, § 138, at 81-82.

330. See THE LEGAL PROFESSION IN THE NEW EUROPE, *supra* note 2SS, at 96 (Belgium), 129 (France), 143 (Germany—as to notarizing, but not drafting, documents), 209 (Italy), 227 (The Netherlands).

331. MALAVET-VEGA, *supra* note 42, at 1-2 (P.A. Malavet trans., unofficial).

332. *Id.* at 2 (P.A. Malavet trans., unofficial).

(i.e., those that the law requires be completed by public document), and (2) voluntary notarial transactions (i.e., those for which notarial form is not essential, but which the parties voluntarily memorialize in notarial form to obtain the protection of the presumptions associated therewith).<sup>333</sup> *Notarios* are required to be experts in the substantive law applicable to each of the transactions they certify. For example, a notary must take into consideration the Civil Code's Title on Succession, found in the Book on the Acquisition of Property, when preparing a will; the Book on the Family, generally entitled "About Persons," the Title on Community Property found in the Book on Property Rights and Modifications thereof, and the Title on the Matrimonial Economic Regime in the Book of Obligations and Contracts, when preparing pre-nuptial agreements; the Chapter on agency when preparing a power of attorney; the Book of Obligations and Contracts when preparing a generic contract; and the Books on Property and Obligations and Contracts, and the mortgage and registry law when preparing a real estate conveyance. This is a perfectly natural characteristic of the profession in a civil-code system, in which laws are expected and required to interact; when the general rule is clear, specific laws directly on point control, but when the law is not specific or is unclear, there is a pre-determined hierarchy of secondary legislation that must be used to fill any voids.<sup>334</sup>

The most common mandatory notarial transactions are nonholographic wills, emancipation of minor children by public document, real and movable property mortgages, pre-nuptial agreements, inter vivos gifts, property sales agreements (that must be registered in order to bind third parties), powers of attorney, contracts for transfer of receivables, mortgages over movable property, partnership agreements, adoptions, and acknowledgments of natural children.<sup>335</sup> Some of these transactions, together with the most important applicable rules of which the notary must be aware, are:

- NONHOLOGRAPHIC WILLS. Holographic (*ológrafo* in Spanish, *olographe* in French) wills are those hand-written by the testa-

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333. See generally *id.* at 73-76; YAIGRE & PILLEBOUT, *supra* note 215, at 90-92.

334. See, e.g., C. Civ. arts. 1(2) (Sp.) (higher ranking law controls), 1(4) (general principles will only apply in the absence of law or custom), 13(2) (the Civil Code is supplementary in absence of specific rules in special and regional laws); C. Civ. P.R. art. 12 (the Civil Code is supplementary to specific legislation).

335. Compiled from PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 71; YAIGRE & PILLEBOUT, *supra* note 215, at 12-13; MALAVET-VEGA, *supra* note 42, at 24-28.

tor.<sup>336</sup> Nonholographic wills can be divided into open (*abierto* in Spanish, *par acte public* in French) or closed (*cerrado* in Spanish, *mystique* in French). Open wills must be prepared and certified by the notary and signed by the testator and witnesses (generally three, but the French code requires only two witnesses, in addition to the notary, or two subscribing notaries); the notary certifies the testator's capacity to subscribe the will.<sup>337</sup> A closed will may be prepared by the testator or by someone else at his request.<sup>338</sup> To be effective, the closed will must be placed in a sealed container that must be broken in order to extract the document. It must then be brought before a notary for the preparation of a notarial document attesting to the existence of the will. During this act, in the presence of the notary and witnesses (generally five, but the French code requires only two, and the Mexican code only three), the testator must state that the document is his last will and testament. The notary then prepares a document describing the appearance of the sealed container. The testator, witnesses, and notary must sign the notarial document and certify the testator's testamentary capacity.<sup>339</sup>

The most important limitations on testamentary disposition are the forced heirship rules that require the testator to leave most of the inheritance to his legal heirs,<sup>340</sup> and leaves only a small proportion of the inheritance, usually one third, for free disposition (*i.e.*, to

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336. CODE CIVIL FRANÇAIS art. 970 (Dalloz 1994); CÓDIGO CIVIL DE PUERTO RICO art. 627 (Equity 1984, supp. 1993); CÓDIGO CIVIL ESPAÑOL art. 688 (Civitas 1991); CÓDIGO CIV. MEXICANO art. 1550 (Porrúa 1991) (Because it might prove confusing, I have not used the "bluebook" form for these citations. Hereinafter, I will use the following for the respective civil codes of France: "C. Civ. FRAN. art. \_\_\_\_"; Puerto Rico: "C. Civ. P.R. art. \_\_\_\_"; Spain: "C. Civ. ESP. art. \_\_\_\_"; and Mexico: "C. Civ. MEX. art. \_\_\_\_"; Mexico is a federal state and each state has its own code; however, the code I use here, that of the Federal District of Mexico City, is the most influential and is binding nationally in federal matters.).

337. C. Civ. FRAN. arts. 971-75; C. Civ. P.R. arts. 644-55; C. Civ. ESP. arts. 694-705; C. Civ. MEX. arts. 1511-20.

338. C. Civ. FRAN. art. 976; C. Civ. P.R. art. 656; C. Civ. ESP. art. 706; C. Civ. MEX. art. 1521.

339. C. Civ. FRAN. arts. 976-80; C. Civ. P.R. arts. 657-65; C. Civ. ESP. arts. 707-15; C. Civ. MEX. arts. 1522-26.

340. In the Spanish and Latin American systems, the part of the inheritance that must be left to legal heirs is called the *legítima* (legitimate) in Spanish. C. Civ. ESP. art. 806; C. Civ. P.R. art. 735. It is divided into the *legítima estricta*, usually one third of the inheritance, to be divided equally among all heirs, and the *mejora*, usually one third of the inheritance, which the testator may use to "improve" one or more heirs, at the others' expense. C. Civ. ESP. art. 823; C. Civ. P.R. art. 751. The French also have a mandatory "reserve" for heirs that must be followed in testamentary disposition; the reserve starts at one half of the inheritance when there is only one heir, and increases with the number of heirs to 2/3, if there are only two, and 3/4 if there are three or more. C. Civ. FRAN. arts. 913-14; *see also* AUBERT, *supra* note 7, at 268-69. The Mexican Civil code has adopted a liberal social approach and eliminated forced heirship. *See* C. Civ. MEX. *Motivos* 25-27.

be left to whomever the testator wants, regardless of legal heirship, e.g., leaving your Bentley to the cat).<sup>341</sup> The only way to avoid forced heirship is to disinherit the legal heirs, which is very hard to do.<sup>342</sup>

- **EMANCIPATIONS.** Generally, minors are subject to parental authority, *parens patriae* or *patria potestas*,<sup>343</sup> and responsibility<sup>344</sup> until they reach the age of majority. By way of exception, some civil codes allow parents to emancipate their child (*i.e.*, give them the rights and obligations of adults), by public document, after they reach a particular age.<sup>345</sup> Emancipated minors are sometimes subject to certain limitations not otherwise applicable to adults.<sup>346</sup>

- **PRE-NUPTIAL AGREEMENTS.** These contracts are used to opt out of the default legal regime,<sup>347</sup> generally community property.<sup>348</sup> Usually, they must be made in a public notarial document unless the

341. In France, whatever is left after the applicable reserve is called the *quotité disponible*, which may be freely disposed of by will. AUBERT, *supra* note 7, at 269. A similar common-law rule might be the imposition of limits on charitable bequests.

342. Heirs are entitled to the *legítima* or reserve. C. Civ. ESP. art. 813; C. Civ. P.R. art. 741. Disinheritance laws exist in Spain and Puerto Rico. C. Civ. ESP. arts. 848-57; C. Civ. P.R. arts. 773-81.

343. Parents have authority over their minor unemancipated children, including the authority "to correct and punish them moderately or in a reasonable manner." C. Civ. P.R. art. 153(2); *see also* C. Civ. ESP. art. 154; C. Civ. FRAN. art. 371-1; C. Civ. MEX. arts. 411-24. They also control and administer the children's property. C. Civ. P.R. arts. 154-62; C. Civ. ESP. art. 162-68; C. Civ. FRAN. arts. 382-87; C. Civ. MEX. arts. 425-42.

344. Parents are generally responsible for child support. C. Civ. P.R. art. 153(1); C. Civ. ESP. art. 110; C. Civ. FRAN. art. 203; C. Civ. MEX. art. 303. Parents are also liable to third parties for damages caused by torts committed by their minor children *who live with them*, absent proof of proper supervision. C. Civ. P.R. art. 1803, para. 2; C. Civ. ESP. art. 1903, para. 2; C. Civ. FRAN. art. 1384 (parents jointly and severally liable for torts of children they supervise); C. Civ. MEX. art. 1903. The reason for this last rule is that parents are directly liable to third parties for their failure to supervise their children. *See Alvarez v. Irizarry*, 80 P.R.R. 63 (1957).

345. Puerto Rico, where the age of majority is 21, allows parents to emancipate their minor children who have reached the age of 18 by public document subscribed before a notary. C. Civ. P.R. arts. 233, 247. Spain, where majority is 18, allows this emancipation after the child reaches 16. C. Civ. ESP. arts. 315, 317. Mexico eliminated this provision from its Civil Code. C. Civ. MEX. arts. 642, 644, 645 (*repealed*). France does not include emancipation by public document in its pertinent provisions. *See* C. Civ. FRAN. arts. 476-80.

346. *See* C. Civ. P.R. art. 237 (minor cannot incur obligations whose value exceeds his income for one year, and he must be represented by his parents in judicial proceedings); C. Civ. ESP. arts. 323-24.

347. C. Civ. FRAN. art. 1387; C. Civ. P.R. art. 1267; C. Civ. ESP. art. 1315; C. Civ. MEX. art. 179.

348. C. Civ. FRAN. art. 1393, para. 2; C. Civ. P.R. art. 1267, para. 2; C. Civ. ESP. art. 1316; C. Civ. MEX. art. 178.

property involved is of little monetary value.<sup>349</sup> Normally, they must be made prior to marriage and have no effect if the couple does not marry.<sup>350</sup>

- INTER-VIVOS GIFTS OF PROPERTY (*donaciones*, in Spanish, *donations* in French). It is a "liberal act through which one person freely disposes of a thing in favor of another who accepts it."<sup>351</sup> For these to be valid, they must appear in a public notarial document.<sup>352</sup> The most important limitation on these is that a person may not receive by gift more than they would be entitled to by inheritance.<sup>353</sup>

- CONVEYANCES OR ENCUMBRANCES ON REAL PROPERTY THAT MUST BE ENTERED INTO THE PROPERTY REGISTRY IN ORDER TO BIND THIRD PARTIES. As a general rule, an agreement among the parties is valid if the required elements for a contract are present, regardless of its form.<sup>354</sup> However, as a practical matter, notarial form makes proof of the agreement easy and allows the transaction to be entered into the public registry, thus binding all third parties. For example, A may orally agree to sell a farm to B for 100,000 pesetas; B accepts the offer and delivers the money, and A gives him the keys to the property and allows him to occupy it. A and B have a perfectly valid contract. However, A then sells to C, who has no knowledge of the contract with B, and they appear before a notary, who conducts a registry search and finds nothing regarding B, since there was no notarial document between A and B. If C purchases by notarial deed and registers this transaction, he can evict B. B has a claim against A, but C owns the land.<sup>355</sup>

- REAL ESTATE MORTGAGE AGREEMENTS. Real estate mortgages must be made by notarial document *and* registered as prereq-

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349. C. CIV. FRAN. art. 1394; C. CIV. P.R. art. 1273; C. CIV. ESP. art. 1327; C. CIV. MEX. art. 185 (applicable only to property whose transfer would normally require notarial form).

350. C. CIV. FRAN. art. 1395; C. CIV. P.R. arts. 1267, 1273. But the Spanish code allows them before or after marriage. C. CIV. ESP. art. 1326.

351. C. CIV. P.R. art. 558 (P.A. Malavet trans., unofficial). See also C. CIV. ESP. art. 618.

352. C. CIV. FRAN. art. 931; C. CIV. P.R. art. 1273; C. CIV. ESP. art. 1327; C. CIV. MEX. art. 185.

353. C. CIV. FRAN. art. 931; C. CIV. P.R. art. 1273; C. CIV. ESP. art. 636; C. CIV. MEX. art. 185. See also the discussion of forced heirship, *supra* note 340.

354. See generally MALAVET-VEGA, *supra* note 42, at 74; see also C. CIV. P.R. art. 1230; C. CIV. ESP. art. 1278; C. CIV. MEX. art. 1832.

355. C. CIV. P.R. art. 1362, para. 2; C. CIV. ESP. art. 1473, para. 2. See also *United States v. V & E Eng. & Constr. Co.*, 819 F.2d 331, 333-34 (1st Cir. 1987) (under Puerto Rico law, seller who fraudulently sells twice not entitled to protection, only good-faith purchasers). As I mentioned in the introduction, I do not consider here our system of property registration. However, the common-law analogy in this area is obviously the U.S. property registries and the application of the Statute of Frauds.

uisites for their validity; unlike other contracts, failure to follow the proper form negates the mortgage right.<sup>356</sup>

I will now present three extended illustrations of specific transactions that show the interaction of different laws in the notarial transaction, in a form more common to a text or casebook. However, I think it important to contextualize the notary's performance within his legal system.

First, consider the Spanish Registry system:

Spain operates a registry system, whereby *certain acts must be notarized and registered* at a Public Registry in order to have legal effect. The Registry issues a public certificate of registration which constitutes prima facie evidence of validity and prevails over all unregistered documents relating to the same act or transaction.

(1) Public Registries. There are three Public Registries in Spain:

(a) The Land Registry (*Registro de la Propiedad*) is where rights over real property are registered. Each sale of real property, and any mortgages, liens, or other encumbrances relating thereto, must be duly registered. There is a Land Registry in most major provincial capitals or municipalities.

(b) The Commercial Registry (*Registro Mercantil*) is where legally significant information relating to companies and businesses must be registered. There is a central Commercial Registry in Madrid and others in most provincial capitals.

(c) The Civil Registry (*Registro Civil*) is where personal data regarding Spanish nationals are registered (e.g. births, deaths, and marriages). Most major municipalities keep a civil registry.<sup>357</sup>

Second, note how a purchase and sale of real property in France involves the notary function at many different levels, as well as property law provisions of the Civil Code and the registry and mortgage law.

All interests in land in France must be registered to be binding on third parties, . . .

The transfer of title to land is effected by an authentic document (*acte authentique*) *executed before a Notary*. One Notary may act for both sides or each may instruct his own. The transfer must

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356. C. Civ. Esp. art. 1875; C. Civ. P.R. art. 1774; United Fed. Sav. & Loan Assn. of P.R. v. Nones, 283 F. Supp 638, 639 (D.P.R. 1968); PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 71; YAIGRE & PILLEBOUT, *supra* note 215, at 13.

357. FABREGAT & BERMEJO, BUSINESS LAW GUIDE TO SPAIN 6-7 (1990) (emphasis added).



deal with all aspects of the transaction and the purchaser's *Notary has a strict liability to obtain good title* for his client. Similarly, mortgages of land must be executed before a Notary and contained in an *acte authentique*. . . .

A contract for the sale of land does not need to be by *acte authentique*. It usually takes the form of a unilateral contract for sale (*promesse unilaterale de vente*) whereby the purchaser agrees to buy for a price within a fixed period and the vendor agrees to sell. It is more like an option . . . . The period, usually about three months, between signature of the contract and completion is used by the *Notary to investigate title and purge the various rights of pre-emption that exist* . . . .

The *Notary* will also obtain a statement from the local council concerning the planning status of the property . . . [which] . . . will confirm, *inter alia*, that planning permission exists for any proposed development and states the existing use of the property. The vendor must produce an extract from the mortgage register (*état hypothécaire*) showing what, if any, registered mortgages there are or other encumbrances such as claims for arrears of tax, planning restrictions and such statutory matters . . . .

The fees of the Notary or notaries and expenses of the sale are usually all paid by the purchaser, although the parties are free to share them if they so agree. Registration duty is payable on completion in addition to the registration, search and notaries' fees . . . .

. . . the French courts have considerable reservations as to the fair and honest dealings between individuals and companies, there is much formality which is designed to avoid the transaction being subsequently called into question. The *Notary dealing with the completion* will be careful to verify the identity of the parties and ensure that they fully understand the transaction which usually involves laboriously reading through the transfer document which will generally be quite long. Payments will pass through the *Notary's client account* (which is guaranteed by the profession) including, in most cases but not as a legal requirement, the deposit that was paid upon exchange of contracts. Care should be taken to ensure that all financial transactions are dealt with through the *Notary's account*. This should include transfers of money from outside France as it will be proof of the foreign origin of the funds if this is later a material fact. The virtual abolition of Exchange Control has made such considerations less critical.

Real property in France may be subject to easements and other incorporeal rights which require registration to be binding on third parties, they are either statutory, legal or consensual.

. . .

*France has strict formal requirements in [respect to real estate mortgages] and failure to observe them renders the mortgage void . . . . In order to be valid, [mortgages] must:*

- (i) *be contained in [a] notarial deed,*
- (ii) *be signed in France,*
- (iii) *describe the exact nature and location of the mortgaged property.*

. . .

*Mortgages in France are registered in the mortgage registry by a special official (conservateur des hypothèques) . . . . They are only binding on third parties if properly filed and published.*<sup>358</sup>

The interaction between the public registries, and the civil code's express preference for registered rights over unregistered ones, produces a governmental guarantee and assurance of good title. This is the result of what Spanish-speaking notaries call the *fe pública registral*.<sup>359</sup> The State provides to the parties the protection of the registry system as a guarantee of their property rights, using the registered notarial document as the conduit for registration.

Third, Professor Rudolph Schlesinger noted the importance of the Latin notary profession, as part of the overall scheme of regulation of inter vivos gifts, and concluded that it could not be duplicated in the United States. He described the problem in his Comparative Law textbook as follows:

At common law, a promise not supported by sufficient consideration could be made binding by the use of a seal. This ancient rule was invoked by the New York Court of Appeals, as late as 1937

. . . .

In 1941, the New York Law Revision Commission recommended, and the Legislature adopted, a statute reading as follows:

"Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect."

358. ALEXIS MAITLAND HUDSON, *FRANCE: PRACTICAL COMMERCIAL LAW* 110-15 (1991) (emphasis added); as to Spain, see also FABREGAT & BERMEJO, *supra* note 357, at 6.

359. See, e.g., *United States v. One Urban Lot*, 865 F.2d 427, 429 (1st Cir. 1989) ("Lienholders of properly recorded property interests will thus have priority over all others. This presumption is the basis for the 'fe registral,' the public faith in the Registry of Property, which allows reliance by all parties engaging in real property transactions." (citations omitted)). See generally FABREGAT & BERMEJO, *supra* note 357, at 6-7; MALAVET-VEGA, *supra* note 42, at 22-23.

[The Commission considered the prevailing formal requirement that a promise without consideration be included in a notarized document.]

The civil-law notary is under a duty to use the utmost care in examining the legality, and generally the validity, of the transaction; this includes, of course, diligent inquiry into the identity and legal capacity of the parties. If the transaction requires approval by a third party or by a public authority, he must so inform the parties. Generally, he is bound to advise the parties as to the legal significance of the contemplated act, including the tax liabilities arising therefrom. If one of the parties to the transaction appears to be of insufficient experience, he must try to avoid overreaching. Intentional or negligent violation of any of these duties may subject the notary to disciplinary proceedings and to civil liability for damages.

When this comparative information concerning the status and functions of notaries had been submitted to the New York Law Revision Commission and its consultant, it became clear that in a civil-law country the requirement of a "notarial" document truly assures informed deliberation on the part of those who enter into the transaction. In addition, the parties are prevented from acting without legal advice, and are compelled to have the document embodying their transaction drawn up by a properly qualified person. At the same time, the requirement of notarial form protects the public, by making it more difficult for agents without proper authority and for persons lacking legal capacity to create the semblance of a valid legal transaction.

The Commission concluded that in New York the adoption of a requirement of notarization would produce none of these beneficial effects. Except for the name, a "notary public" in New York, and generally in the United States, has little in common with the civil-law notary. The *institution* of the notary, as developed in the civil-law world in the course of many centuries, was found by the Commission to have no counterpart in this country. Without such an institution, which cannot be created by a mere stroke of the legislative pen, it is very difficult, if not impossible, to subject the execution of certain types of instruments to formal requirements more effective and more solemn than a simple signed writing. From this it followed, in the Commission's view, that it would be impracticable for the New York legislator to fashion a satisfactory *formal* requirement as a substitute for the seal.<sup>360</sup>

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360. See SCHLESINGER ET AL., *supra* note 6, at 17-23; Rudolph B. Schlesinger, *The Notary and the Formal Contract in Civil Law*, in STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1941, at 345 (1941). I have chosen to cite from Professor Schlesinger's casebook rather than from the original studies, because the originals are a bit

Thus, the notary is a specialized legal professional, who is required to be an expert on the law applicable to the juridical act over which he officiates. This requires him to become an expert in a wide range of subjects in private law and to know the public law applicable to registration requirements. The notarial seal constitutes a certification by the notary that the juridical act has been properly completed. This assurance is backed up by the notary's professional training and status, and by the full power of the legal presumption of authenticity and legality previously discussed.

### C. *Education, Admission and Territoriality*

Latin notaries generally need to complete specified post-secondary legal education, pass relevant professional examinations, and complete a period of apprenticeship. For example, in Spain:

Admission to the profession is regulated by the State. Notaries must be law graduates (*licenciados en derecho*) and they must pass a highly competitive examination, held annually, in order to be awarded one of the limited number of posts available. Appointments are made within a specific area, and a notary may not practice outside the district to which he is assigned.<sup>361</sup>

A recent survey of other European Union countries found the following requirements for becoming a notary:

In [France] [t]he Notary, like the *avoué*, was an *Officier Ministeriel* and after passing notarial examinations was appointed by the Minister of Justice. Although a land registrar, the Notary was able to practice privately . . . [Notaries] are *Officiers Ministeriels*, appointed by the government on the presentation of a retiring Notary, and their numbers are therefore restricted. . . .

In [Italy] [a]pplicants [for the position of *notaio*] must have the degree of *Dottore in Giurisprudenza*, and serve under a practicing *notaio* for four years. The number of appointments is limited, and candidates must sit for a competitive examination after training. Anyone with marks too low to secure appointment may become a *coadiutore*, assistant to a *notaio*. He can then exercise all the functions of a *notaio* but may not use the title. He may be in partnership with, or employed by, a *notaio*.

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unwieldy and the casebook provides a very succinct and complete description of the comparative law problem. See also STATE OF NEW YORK, SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION 65-374 (1936) (Acts and recommendation relating to the Seal and Consideration and Studies relating to the Seal and Consideration).

361. FABREGAT & BERMEJO, *supra* note 357, at 6.

In [Belgium] [t]he notaire is also important. In Belgium, where he is also known as *notaris* . . . . The qualification is a *Licence en Notariat* or *Licenciaat in het Notariaat*, which takes four years.

In [Luxembourg] [t]here are no Law Schools in the country, so practitioners are usually qualified in France, Belgium, or Switzerland, a fact which has influenced the development of the national law. The title of *avoué* has been retained, and a practitioner whose name is entered in the *Tableau des Avocats Inscrits* is then known as an *avocat-avoué*. Notaries have the same qualification, but are appointed by the government as a separate profession. . . .

In [The Netherlands] [t]he *notaris* must hold the special degree in notarial science, the *advocaat* and *procureur* that of *Meester in de Rechten*. That degree takes four to five years' study.<sup>362</sup>

In the American continents, "Uruguay has an unlimited number of notaries, [with] the highest level of study at universities, which issue the title of 'notario público' the holders of which have the right to practice the profession in the entire territory of the Republic"; notaries are supervised and disciplined by the Supreme Court of Justice; the voluntary "Asociación de Escribanos" includes ninety-five percent of all practicing notaries in the country.<sup>363</sup> In Puerto Rico, notaries are required to be duly admitted lawyers, members of the *Colegio de Abogados de Puerto Rico*—a unified bar—and to have passed the notary bar examination.<sup>364</sup> In order to be eligible to take the notary examination "the applicant must have passed a Notarial Law course 'in any law school in Puerto Rico that is accredited by the Higher Education Council or approved by the Supreme Court.'"<sup>365</sup>

By contrast, although they are often described as "persons of high moral character,"<sup>366</sup> notaries public in the United States are generally only required to be over eighteen years old, be able to read and write the English language, not be a convicted felon, and have filed an application and taken an oath of office.<sup>367</sup> Notaries public are usually

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362. SPEDDING, *supra* note 313, at 103-19 (footnotes omitted).

363. Guglietti, *supra* note 157, at 334e.

364. MALAVET-VEGA, *supra* note 42, at 29. The requirements for becoming a lawyer are discussed below. Not all *abogados* choose to become *notarios*. Fewer persons take the notarial bar examination than the attorney bar examination. Additionally, if you have studied law in the United States, as was my case, the candidate must take a notarial law course before being allowed to take the notarial bar examination. Some candidates simply choose not to do so.

365. *Id.*

366. Closen & Dixon, *supra* note 68, at 873.

367. See generally *id.* at 878-81. As to general requirements, see ALASKA STAT. § 44.50.020 (1994) (19, Alaska resident); CAL. GOV'T CODE § S201.1 (West 1994) (honesty,

appointed by the Governor, the state Secretary of State or Lieutenant Governor, or by judges or county clerks.<sup>368</sup> Appointments are generally for a specific term.<sup>369</sup> A certificate or identification card as proof

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credibility, truthfulness and integrity, not guilty of disqualifying crime); CONN. GEN. STAT. § 3-94B (1992) (18, state resident); DEL. CODE ANN. tit. 29 § 4301 (1993) (good character, legal residence, reasonable need for commission). As to oaths, see ALASKA STAT. § 44.50.130(b) (1994); ARIZ. REV. STAT. ANN. § 41-311(B) (1994); CAL. GOV'T CODE § 8213(A) (West 1994); COLO. REV. STAT. § 12-55-105 (1994) (affirmation); CONN. GEN. STAT. § 3-94C(c) (1992); D.C. CODE ANN. § 1-803 (1994); HAW. REV. STAT. § 456-2 (1994).

368. See, e.g., ALA. CODE § 36-2-30 (1994) (judge must notify secretary of state); ALASKA STAT. § 44.50.010 (1994) (lt. governor); ARIZ. REV. STAT. ANN. § 41-311(A) (1995) (lt. governor); ARK. CODE ANN. § 21-14-101 (1993) (secretary of state); CAL. GOV'T CODE § 8200 (West 1995) (secretary of state); COLO. REV. STAT. § 12-55-103 (1995) (secretary of state); CONN. GEN. STAT. ANN. § 3-94a(5) (West 1995) (secretary of state); DEL. CODE ANN. tit. 29, § 4301 (1993) (governor); D.C. CODE ANN. § 1-801 (1995) (mayor); FLA. STAT. ANN. § 117.01 (West 1995) (governor); GA. CODE ANN. § 45-17-1.1 (1994) (clerks of the superior court); HAW. REV. STAT. § 456-1 (1994) (attorney general); IDAHO CODE § 51-103 (1995) (secretary of state); ILL. ANN. STAT. ch. 5, para. 312/2-101 (Smith-Hurd 1995) (secretary of state); KAN. STAT. ANN. § 53-101 (1994) (secretary of state); KY. REV. STAT. ANN. § 423.010 (Baldwin 1995) (secretary of state); LA. REV. STAT. ANN. § 35:1 (West 1995) (governor, with the advice and consent of the senate, and upon certificate of competency by the appropriate district court); ME. REV. STAT. ANN. tit. 5, § 82 (West 1995) (secretary of state); MD. CODE ANN. art. 68, § 1(a) (1995) (governor, "on approval of the application by a senator representing the senatorial district and subdistrict in which the applicant resides" or on approval of the Secretary of State for nonresidents); MASS. GEN. LAWS ANN. ch. 222, § 1 (West 1995) (the Commonwealth); MASS. CONST. Art. 4, § 106 (by the governor); MICH. COMP. LAWS ANN. § 55.107 (West 1995) (governor); MINN. STAT. § 359.01 (1993) (governor); MISS. CODE ANN. § 25-33-1 (1993) (governor); MO. ANN. STAT. § 486.205 (Vernon 1995) (secretary of state); MONT. CODE ANN. § 1-5-401 (1994) (secretary of state); NEB. REV. STAT. § 64-101 (1994) (governor); NEV. REV. STAT. § 240.010 (1993) (secretary of state); N.H. REV. STAT. ANN. § 455:1 (1994) (governor, "with advice and consent of the executive council"); N.J. STAT. ANN. § 52:7-11 (West 1995) (secretary of state); N.M. STAT. ANN. § 14-12-4 (Michie 1995) (governor, upon approval of application by secretary of state); N.Y. EXEC. LAW § 130 (McKinney 1994) (secretary of state); N.C. GEN. STAT. § 10A-4 (1994) (secretary of state); N.D. CENT. CODE § 44-06-01 (1995) (secretary of state); OHIO REV. CODE ANN. § 147.01 (Baldwin 1995) (governor); OKLA. STAT. ANN. tit. 49, § 1 (West 1994) (secretary of state); OR. REV. STAT. § 194.010 (1993) (secretary of state); 57 PA. CONS. STAT. ANN. § 148 (1995) (secretary of the commonwealth); R.I. GEN. LAWS § 42-30-3 (1994) (governor); S.C. CODE ANN. § 26-1-10 (Law. Co-op. 1993) (governor); S.D. CODIFIED LAWS ANN. § 18-1-1 (1995) (secretary of state); TEX. GOV'T CODE ANN. § 406.001 (West 1995) (secretary of state); VT. STAT. ANN. tit. 24, § 441 (1994) (superior court judges); V.I. CODE ANN. tit. 3, § 771 (1994) (lt. governor); VA. CODE ANN. § 47.1-3 (Michie 1995) (governor); WASH. REV. CODE ANN. §§ 42.44.010, 42.44.020 (West 1995) (director of licensing of the state of Washington); W. VA. CODE § 29C-2-101 (1994) (governor); WIS. STAT. ANN. § 137.01 (West 1995) (governor).

369. See, e.g., CAL. GOV'T CODE § 8204 (West 1995) (four years); COLO. REV. STAT. ANN. § 12-55-103 (West 1995) (four years); DEL. CODE ANN. tit. 29, § 4306 (1994) (two years, renewable for an additional four); D.C. CODE ANN. § 1-802 (1995) (five years); FLA. STAT. ANN. § 117.01 (West 1995) (four years); HAW. REV. STAT. § 456-1 (1994) (four years).

of office is generally issued by the state.<sup>370</sup> Most states also require the payment of a small application fee and the posting of a bond.<sup>371</sup> A minority of jurisdictions require the applicant to pass an examination "to determine [her] understanding of general legal and business terminology, and fundamental principles and procedures."<sup>372</sup> The notary public is not required to have any particular substantive training or educational level in order to take the examination (if only one).<sup>373</sup> Beyond literacy, the notary is required to show an "elementary" knowledge of matters related to notarial practice. While the requirement is not even close to what is expected of a lawyer, the notary is held to *some* knowledge of the law, a matter that will be discussed below in the professional liability section. However, these exams cannot really be compared to a bar exam, as they appear to be more analogous to a driver's license test.<sup>374</sup> These requirements are obvi-

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370. PIOMBINO, *supra* note 209, at 27. *See, e.g.*, CONN. GEN. STAT. § 3-94b(d), 29 DEL. CODE ANN. tit. 29, § 4313 (1993).

371. *See generally* Closen & Dixon, *supra* note 68, at 878-81; as to bonds, *see, e.g.*, ALA. CODE § 36-20-31 (1994) (\$10,000); ALASKA STAT. § 44.50.120 (1995) (\$1000); ARIZ. REV. STAT. ANN. § 41-311(B) (1995) (\$1,000); ARK. CODE ANN. § 21-14-101(d) (1994) (\$4000); CAL. GOV'T CODE § 8212 (West 1995) (\$10,000); D.C. CODE ANN. § 1-502 (1995) (\$2000); MICH. COMP. LAWS ANN. § 55.110 (West 1995) (\$10,000).

372. PIOMBINO, *supra* note 209, at 15. *See, e.g.*, CAL. GOV'T CODE § 8201(c) (West 1995) (written exam based on California law applicable to notaries); LA. REV. STAT. ANN. § 35:191 (West 1995); OR. REV. STAT. § 194.022(7) (1993) (written, open book examination). *See generally* 58 AM. JUR. 2D *Notaries Public* § 17 (1989).

373. The only exception to this rule that I have found in the United States is in V.I. ANN. CODE tit. 3, § 772(2) (1994) (applicant must "[b]e a graduate of an accredited high school or have passed the high school equivalency test."). There are courses that can be taken, and the notary is encouraged to take them because his office does involve some liability for failure to follow prescribed standards, as will be discussed below. As to courses, *see, e.g.*, PIOMBINO, *supra* note 209, at 17. Additionally, at least two states that do not appear to have a statutorily-mandated exam nonetheless require the publication of a handbook for notaries public. VA. CODE ANN. § 47.1-11 (Michie 1995) ("The secretary of state shall prepare a handbook for notaries public which shall contain the provisions of this chapter and such other information as the secretary of state shall deem proper."); IDAHO CODE § 51-120 (1995).

374. *See, e.g.*, CAL. GOV'T CODE § 8201(c) (West 1995) ("All questions shall be based on the law of this state as set forth in the booklet of the laws of California relating to notaries public distributed by the Secretary of State"); CONN. GEN. STAT. ANN. § 3-94b(3) (West 1995); OR. REV. STAT. § 194.022 (1993) (open-book, "Answers to the questions shall be discernible from a review of the application materials furnished to the applicant."). Piombino, who writes a very complete and serious guide that should probably be used by anyone interested in practicing, gives a sample examination from New York State in his book at pages 152-79. This examination is a 40-question multiple-choice exam, with a one hour time limit, PIOMBINO, *supra* note 209, at 18, reminiscent of driver's license written examinations.

ously quite different from those for the Latin notary, as one might expect, given that the latter is a legal professional.

The only reasonable comparison to a Latin notary's admission requirements is that of an American lawyer who must typically complete a three-year law school degree—after obtaining his undergraduate college degree—and pass a state bar examination.<sup>375</sup> A survey of fifty-five United States jurisdictions—the fifty states, the District of Columbia and the territories of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—disclosed the following:

1. PUBLISHED ADMISSIONS REQUIREMENTS: All U.S. jurisdictions have specific written requirements for bar admissions, promulgated by the state's highest court, its legislature, or both.<sup>376</sup>

2. PRELEGAL EDUCATION: Thirty of the fifty-five jurisdictions require some form of pre-legal education, generally the equivalent of a college Bachelor's degree.<sup>377</sup>

3. LEGAL EDUCATION: Forty-nine of the fifty-five jurisdictions require graduation from an "ABA-approved law school;" thirteen jurisdictions allow graduation from "in-state school[s] approved by state authority;" eight allow graduation from "out-of-state school[s] approved by state authority;" three allow graduation from "unapproved in-state school[s];" two from "unapproved out-of-state school[s]."<sup>378</sup> California does not require graduation from an ABA-approved school, and allows graduation from unapproved state schools and correspondence schools—the only state to do so—and permits, together with Wyoming, "law office study."<sup>379</sup> It appears that Virginia also allows a form of law office study.<sup>380</sup> Only thirteen

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375. See generally SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR OF THE AMERICAN BAR ASSOCIATION, THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1993-94 (1993) [hereinafter GUIDE TO BAR ADMISSION].

376. *Id.* at 2-5 (Chart I and accompanying text).

377. *Id.* The ABA also requires the law schools it accredits to have certain minimum admissions requirements. *Id.*

378. *Id.* at 10-12 (Chart III and accompanying text).

379. *Id.* at 2-5 (Chart I and accompanying text). However, "[a]pplicants who obtain legal education by attending unaccredited law schools, through correspondence or by law office study must take an examination after their first year and pass before continuing their law study." *Id.* at 11.

380. Virginia allows "law readers" (*i.e.*, persons choosing to "spend 25 hours a week for four years reading case-books, observing court cases, and helping out in local law offices" under the supervision of a practicing attorney). Bar-passage results of such students are less than stellar. "Law Readers" Take an Unusual Road to the Virginia Bar, WASH. POST, Aug. 10, 1994, Metro Section, at B1.



of the fifty-five jurisdictions allow applicants to take the bar examination prior to graduating from law school.<sup>381</sup>

4. BAR EXAMINATION(S): All fifty-five jurisdictions have a bar examination.<sup>382</sup> Only five of the fifty five jurisdictions—Indiana, Iowa, Louisiana, Washington, and Puerto Rico—do not administer the Multistate Bar Examination.<sup>383</sup> Thirty-one of the fifty-five jurisdictions require the applicant to pass the Multistate Professional Responsibility Examination (MPRE).<sup>384</sup> Different rules apply to lawyers and attorneys in one state seeking admission to the bar of another. Some states also allow, under special circumstances, “admission on motion.”

5. MORAL CHARACTER: All jurisdictions have “moral character” requirements, but only twenty-four have specific “published character and fitness standards,” in all but seven jurisdictions a felony conviction disqualifies the applicant from admission; six jurisdictions “grant conditional admission to applicants with chemical dependencies.”<sup>385</sup>

6. RESIDENCY: Only thirteen of the fifty-five jurisdictions require that the bar applicant be a resident.<sup>386</sup>

Latin notaries in general are preliminarily required to: (1) be nationals; (2) have “good moral character,” including not having being convicted of a crime for acts against honor, probity or good mores; and (3) to have a proper educational degree, usually university or post-graduate.<sup>387</sup> As discussed before, under the Law Ventôse French *notaires* were required to: be French citizens, over 25 years old, take an oath, provide security, prove their good moral character and “good habits,” and have completed military service. The French also had a six-year period of apprenticeship in an established notarial office, which could be reduced to four if the work had been performed in “a

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381. GUIDE TO BAR ADMISSION, *supra* note 375, at 10-12 (Chart III and accompanying text).

382. *Id.* at 18-23, 24-28 (Charts V and VI, and accompanying text). The survey never expressly questions “does your jurisdiction have a bar examination,” however the questions in charts V and VI *assume that* an examination is required. The first question in chart V, “how soon prior to the first day of the bar exam must an applicant submit a completed application?,” *id.* at 19, and the answers thereto, clearly indicate that all fifty-five jurisdictions have a bar exam.

383. *Id.* at 18-23 (Chart V and accompanying text).

384. *Id.* at 24-28 (Chart VI and accompanying text).

385. *Id.* at 6-8 (Chart II and accompanying text).

386. *Id.* at 2-5 (Chart I and accompanying text).

387. See generally YAIGRE & PILLEBOUT, *supra* note 215, at 24; PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 172; 1 GIMÉNEZ-ARNAU, *supra* note 5, at 275-77.

notarial office considered superior in class to the one being sought.”<sup>388</sup> The Spanish Notarial Law of 1862 requires the notary to have a specified post-secondary education or to be a lawyer.<sup>389</sup> Today, *notarios* must have a law degree (*licenciados en derecho*) or be doctors of law.<sup>390</sup> The *notario* must also pass a notarial examination that includes both written and oral parts. The first consists of drafting a notarial document, the second of drafting a judicial opinion about Spanish civil law, and the last of answering questions on notarial law or related substantive law subjects.<sup>391</sup> Under a 1913 law, the Italian notary was required to obtain a law degree, practice for at least two years, and pass an examination.<sup>392</sup> As discussed above, these requirements have not changed; the *notaio* is still required to have a law degree, to complete an apprenticeship, and to pass a competitive examination.

I would like to take a detailed look at the complex French system. Generally, a French *notaire* is required to follow a professional or academic path to become eligible for appointment. After 1990, the French *notaire* on the professional track, *voie professionnelle*, is required to obtain a university law degree, *maîtrise en droit*, or an equivalent professional degree. Passing a special admission exam allows entry into a one-year notarial education program. Upon completion of the course, the student must take an examination on the substantive law applicable to notarial transactions. The candidate then moves on to two years of professional practice as a *notaire stagiaire*, a notary in training. Upon completion of the apprenticeship, the notaire becomes a *notaire assistant*, if he continues to work in a notary's office. He only becomes a full notary upon appointment, as discussed below. After 1992, a candidate can become *notaire salarié*, a lesser-level notary employed by a full notary. Alternatively, a notarial candidate can follow the academic track, *voie universitaire*, by earning a *diplôme supérieur du notariat* from one of the universities specially designated to provide such an education. After obtaining a *maîtrise*, the candidate earns a *Diplôme d'Etudes Supérieures Spécialisées de Droit Notarial*, which takes about nine months. Afterwards, the candidate—who is known as a *notaire stagiaire*, like those in post-*maîtrise* apprenticeships—takes intensive courses for four semesters, subject to

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388. PONDÉ, *supra* note 51, at 553.

389. *Id.* at 301-02.

390. *Id.* See also 1 SANAHUJA Y SOLER, *supra* note 324, at 276.

391. 1 SANAHUJA Y SOLER, *supra* note 324, at 282-84.

392. PONDÉ, *supra* note 51, at 324-25.

examinations, and prepares a written work. A final examination with a written and an oral component is required. Then, if the written work is approved, he earns the *Diplôme Supérieur du Notariat* and the accompanying title of “*notaire assistant*.” Professional education thus replaces the apprenticeship in a notary’s office. By way of exception, France allows practice to substitute for education. Thus, notarial clerks who have had a diploma for at least six years and practiced in a *notaire’s* office for at least nine, or had some other form of professional experience, are allowed to take a special examination, passage of which entitles them to be appointed as notaries. Finally, the French allow “parallel recruitment” (*i.e.*, university professors, magistrates, lawyers, and others, because of their legal education, are not bound by the traditional professional requirements).<sup>393</sup>

The Latin notary’s educational and admission requirements are most nearly comparable to the pertinent requirements for bar admission in the United States. The most important difference, in my opinion, is the level of educational specialization required of a notary. This is accomplished through direct or indirect means. Direct, express requirements imposing specific notarial education, are not uncommon. This is the French *voie universitaire*, discussed above. Indirect specialization requirements are imposed by the admission examinations themselves, which are specifically designed to determine the applicant’s ability to become a specialized legal professional. The difference between the specific notarial education and examination, on the one hand, and American legal education and bar examination, on the other, is not surprising. American lawyers are trained and tested, at least at the initial juris doctor level, as generalists. There is only one type of bar admission in each state, and there are no subcategories of attorneys for initial admission. Notaries, on the other hand, are appointed to a legislatively-created office. Another significant difference is the apprenticeship requirement, and the series of specialized exams that candidates must take to become *notaire stagiaire* and *notaire assistant*. The notary public, whose ranks require no particular education beyond literacy and who are rarely even required to take an elementary written exam, do not constitute an adequate measuring stick in this area.

But, in stark contrast to American lawyers, even after all the education and exams the Latin notary *may not have a position to occupy*, because geographic and numerical limitations of the *notariat* are parts

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393. YAIGRE & PILLEBOUT, *supra* note 215, at 25-29.

of the traditional model. The Mexican system provides a clear illustration of the two-step process for becoming a notary *candidate* and then an *appointee*. In Mexico, the applicant must have a law degree and have completed a period of apprenticeship in a notarial office of at least eight months. He must then apply for and pass an examination on substantive law subjects related to notarial practice. He then becomes a notarial *candidate*, eligible for *another* examination when a notarial office becomes vacant.<sup>394</sup>

So-called *numerus clausus* rules impose limits on the absolute number of notarial positions in a country or state, usually in proportion to population. They are said to be intended "to preserve the freedom of choice of inhabitants in relation to *notaires*, and ensure a minimum income for *notaires*."<sup>395</sup> Some Mexican states limit notary offices proportionally to population.<sup>396</sup> In France, under the Law Ventôse, the notary's practice was limited to an assigned region, which the State designated to ensure the official ratio of one notary for every 6,000 inhabitants.<sup>397</sup> In Spain, notarial offices were limited to particular regional jurisdictions by the Law of 1862; the Spaniards, however, added a specified system of hierarchy—based on the office's location and the volume of notarial business transacted there—within which the notary would be promoted based upon seniority and merit.<sup>398</sup> Today in France, the number of notaries is fixed for each district of a court of first instance.<sup>399</sup> In Belgium there is a sliding scale that avoids leaving less densely populated areas without notaries and large population centers with too many. The ratio ranges from a low of one notary for every 5,000 persons to a high of one for every 9,000.<sup>400</sup> Notaries must be appointed to one of the specific positions in order to

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394. PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 172-77.

395. Denis-M. Phillipe & Helen Roberts, *The Legal Professions in Belgium*, in *THE LEGAL PROFESSION IN THE NEW EUROPE*, *supra* note 288, at 94. There is a modern trend towards liberalizing the profession by allowing all law graduates who pass the notary bar to practice as notaries. This trend has been most prevalent in Central America. See Guglietti, *supra* note 157, at 334g-334i. Puerto Rico also allows all lawyers who pass the notary bar exam to practice both professions at the same time, and they may do so throughout the island. MALAVET-VEGA, *supra* note 42, at 29.

396. PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 170. One Mexican lawyer has recently informed me that in one state the ratio is one notary for every 50,000 inhabitants.

397. PONDÉ, *supra* note 51, at 554. The military service requirement practically excluded women from becoming notaries, and judicial intervention was required to admit them later. *Id.*

398. *Id.* at 556.

399. YAIGRE & PILLEBOUT, *supra* note 215, at 19.

400. Phillipe & Roberts, *supra* note 395, at 94.

be able to practice. In France, this usually entails nomination by the old *notaire*, or his surviving heirs. The candidate is required to pay for this privilege.<sup>401</sup> If the position is a newly created one, the candidate may have to indemnify notaries whose practice is affected by his appointment; however, this is uncommon, as new appointments usually reflect increases in population. Finally, the candidate's eligibility is evaluated by various governmental and professional bodies, and, if approved, he is appointed by the Ministry of Justice.<sup>402</sup> In Mexico, the system is a bit different. Notarial candidates are allowed to compete for vacant or newly created notarial offices when they register for their second notarial exam after public announcement of the examination. The exam consists of a written section and an oral examination by a professional jury. The candidate with the highest score earns the notarial office.<sup>403</sup> In Spain, the candidate's grade on the examination determines his eligibility for appointment to one of four categories of notarial offices.<sup>404</sup> The candidate is designated by the Ministry of Justice.<sup>405</sup>

Finally, *notaires* are generally limited to practicing in a specified geographic area. This rule goes hand in hand with the *numerus clausus* limitations, but has been retained even after specific notary-to-population ratios have been eliminated, thus producing much the same effect of limiting competition. As Table 1 illustrates, the number of notaries relative to population is quite low, as is the ratio of notaries to lawyers. In France, notaries used to practice within limited districts known as *cantons*, "subdivisions of the *arrondissements*" (i.e., subdivisions of the *département* into which the country is divided for political administration).<sup>406</sup> Swiss notaries are ruled by Cantonal regulations.<sup>407</sup> In Mexico, each state has its own notarial law, although

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401. Interestingly, even a suspended notary retains the right to present a successor in France, YAIGRE & PILLEBOUT, *supra* note 215, at 32, but one that has been removed does not. *Id.* at 75. The sale of notarial offices is one of the most controversial aspects of the profession. The accusation is that the *title* of notary is for sale. The profession's response has been to point out that the candidate pays for the office, the clientele—in effect the goodwill of that office. But the candidate must still meet all eligibility requirements. *Id.* at 30-31. It is undeniable, however, that the limitations placed on notarial nominations make it a very valuable commodity.

402. *Id.* at 30, 32-33.

403. PÉREZ FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 174, 177.

404. In descending order the categories are: (1) Madrid and Barcelona; (2) First Class; (3) Second Class; and (4) Third Class notarial offices. 1 SANAHUJA Y SOLER, *supra* note 324, at 277-78.

405. *Id.* at 285.

406. DEVRIES, *supra* note 218, at 72 (footnotes omitted).

407. 1 GIMÉNEZ-ARNAU, *supra* note 5, at 120.

many are modeled after that of the Federal District of Mexico City.<sup>408</sup> The notaries in France were sometimes limited to subscribing documents for their own territories only, but today they have national competence, although it is limited in special cases. The notary must, however, maintain his office at the situs designated for that notarial seat by the government.<sup>409</sup> As a general rule, the notary may only subscribe documents within the national or state territory, never outside of it.

**Table 1**

COUNTRY	NUMBER OF LAWYERS <sup>410</sup>	POPULATION <sup>411</sup>	NUMBER OF NOTARIES <sup>412</sup>
Belgium	9,000 +	10,016,000	1,225
France	21,952 <sup>413</sup>	57,287,000	7,500
Italy	53,000	57,904,000	4,500
Netherlands	6,500	15,112,000	1,000
Spain	60,076 <sup>414</sup>	39,118,000	2,100

Superficially, we might compare some of the prerequisites for becoming a notary in either system, such as being an adult, having good moral character, and being appointed by State authority. This comparison is, however, really only skin-deep. In fact, education and bar admission requirements in Europe and in the United States may be, within limits, more roughly comparable to those of the Latin notary. However, what really characterizes the Latin *notariat* and sets him apart from the American lawyer, and even the Latin notary's national counterparts, is the governmentally enforced specialization of the profession and the limitation in the number of notarial offices and positions. Even after all the studying, examinations, and hard work, the Latin notary candidate may simply not have a position to occupy, and may be relegated to an assistant's position in someone else's office.

408. *Id.* at 126-27.

409. YAIGRE & PILLEBOUT, *supra* note 215, at 22-23.

410. Unless otherwise indicated, from THE LEGAL PROFESSION IN THE NEW EUROPE, *supra* note 288, at 69, 118, 194, 232, 281.

411. Unless otherwise indicated, from WORLD ALMANAC (1994).

412. Unless otherwise indicated, from ADAMSON, *supra* note 285, at 11-23.

413. *Avocats* and *conseils juridiques*.

414. Includes only practicing *abogados* (legal advisors) and *procuradores* (litigators).

## D. Professional Liability

### 1. Introduction

A Latin notary has written that:

[over time the Notary has become the custodian of the *publica fides* and] adviser to the contracting parties, this responsibility is personal, nondelegable and not transferable.

The Notary constructs the document acting in a very special capacity. In a world in which everything rapidly becomes massive, this remains one of the few instances in which a person can affirm authoritatively that others *appear before me*. It is not before us. It is the ultimate individual role. The legal world views it with respect . . . . But in order to earn this respect it is imperative that we realize that the profession deserves the utmost dedication from those of us who form the national *notariat* and from those who aspire to become part of it. It is a jealous profession that does not admit deviation.

In our attesting function, we constantly subject our honor and reputation to public scrutiny. Even though the disposition of Law XVI of Title [XIX] of the Partida III, which punished a Notary guilty of making false statements in a notarial document with amputation of the hand with which he wrote it, and if he was a Royal Notary, with the death penalty, are no longer in effect, those of us who carry out the public trust and those who hope to do so, must practice every day a healthy and delicate vocation for the continuing study of the law.<sup>415</sup>

Most criticism of the *notariat* profession is directed toward the self-disciplinary aspects of the profession<sup>416</sup> found in many countries and its general lack of proper quality control.<sup>417</sup>

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415. MALAVET-VEGA, *supra* note 42, at vii (P.A. Malavet trans., unofficial).

416. I come from a jurisdiction where the notary is subject to the strictest supervision by the Puerto Rico Supreme Court, the Bar Association, and the Solicitor General's office of the Puerto Rico Department of Justice. In my experience, this is a responsibility that is taken very seriously by these authorities. One need only look at the published disbarment opinions of the Puerto Rico Supreme Court—most of which are titled *In re [name of notary]*—to be aware that notarial errors or misconduct can have the most devastating professional effects. I am well aware that the most important safeguard of the guarantee of truth, legality, and good faith of the notarial transaction is a proper disciplinary system. I also come from one that works well. Nevertheless, I am mindful that this may not be the case everywhere. I only have personal knowledge and clear information about the effectiveness of the Puerto Rico system. While I will discuss here how other systems are designed, I do not have the empirical evidence to evaluate their true effectiveness, a matter that I must leave for another day.

417. This is the case made by Professor Suleiman's book. SULEIMAN, *supra* note 216. The studies and conclusions of this work must necessarily be limited to France because this

Notaries are generally subject to three types of liability in the practice of their profession: (1) professional-ethical liability; (2) civil liability for damages; and (3) criminal liability.<sup>418</sup> Similarly, the notaries public are subject to removal by the authority that appoints them, to civil liability for damages, and to criminal liability. In France, Planiol explains:

[t]he responsibility of notaries is triple: penal, disciplinary and civil. The first two are punitive in nature; they inflict on notaries who are found guilty, either the penalties imposed by the general law, or other disciplinary measures . . . . [T]he pecuniary responsibility of notaries for damages to the injured party pertains naturally to the civil law.<sup>419</sup>

"All the duties of the notary, examined in general, can be condensed into two categories: to be a good official and to exercise the notary function well."<sup>420</sup> "The civil-law notary is under a duty to use the utmost care in examining the legality, and generally the validity, of the transaction; this includes, of course, diligent inquiry into the identity and legal capacity of the parties. If the Notary is not satisfied concerning any of these points, he must refuse his services."<sup>421</sup> My "golden rule" in the practice of notarial law is "when in doubt, don't do it."

## 2. *Disciplinary Authorities*

The first type of notarial responsibility is imposed by the professional-ethical rules applicable to the *notariat*, as implemented by the relevant disciplinary authorities. Professional ethics for the Latin notary might be defined as follows:

It is the set of rules that regulate the professional practice of the *notariat* in accordance with a fundamental criterion of probity, including herein a righteous attitude, integrity and honesty in its per-

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is where the sale of offices—which in my view is the reason for most of the problems of the French *notariat*—still survives. Additionally, I have heard complaints from Mexican lawyers about the political method of appointment that exists in certain Mexican states. See PEREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 170 (in addition to admission by "opposition," (i.e., by examination), a candidate may be appointed by political authority; the qualifications of these appointees might leave something to be desired.).

418. See generally MALAVET-VEGA, *supra* note 42, at 45-72; PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 347-78.

419. PLANIOL, *supra* note 68, § 150, at 89.

420. 3 GIMÉNEZ-ARNAU, *supra* note 5, at 261.

421. SCHLESINGER ET AL., *supra* note 6, at 19 n.12 and accompanying text. Professor Schlesinger cites, for example, the German Beurkundungsgesetz of August 28, 1969 (BGBl I 1513).



formance, having as a basis adequate professional development and abilities, and concentrating in a diligent, truthful, impartial and just exercise of the profession. Proper professional conduct can be reduced to a few words: in both his private life and in discharging his function, the Notary must conduct himself in a dignified and honorable manner.<sup>422</sup>

Notaries may be reprimanded, censured, fined or temporarily suspended or both, or permanently disbarred by the authority charged with admitting them to the profession,<sup>423</sup> or by professional organizations. In Puerto Rico, the Supreme Court has the authority to discipline notaries either *sua sponte* or upon request from the Bar Association, the Notarial Inspector—the officer designated by the Supreme Court to supervise notaries—or the Solicitor General.<sup>424</sup> In Belgium “[p]rofessional discipline is regulated by the local chamber of notaries in the area of each *tribunale de première instance*.”<sup>425</sup> A similar system is followed in Luxembourg.<sup>426</sup> In France, notaries may be disciplined by the Chamber, the professional college to which they are required to belong, or upon complaint by a client to the Attorney General or the President of the Chamber.<sup>427</sup> Professional bodies with supervisory powers are common in the Latin *notariat*. The Spanish law of 1862 also establishes a unified, mandatory bar system for notaries. Notaries are required to be members of the *colegios* (colleges) and these professional associations have the power to discipline them.<sup>428</sup> The Minister of Justice has the ultimate power to appoint and remove notaries. Supervised by the Minister, the *Dirección General de los Registros y del Notariado* (General Directorate of Registries and the Notariat) supervises notarial colleges and notaries and issues notarial regulations. The *colegios notariales* are private corporations to which notarial law and regulations confer the authority to supervise and discipline notaries, at least initially. Each college has a board of directors, which governs the organization and decides mat-

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422. MALAVET-VEGA, *supra* note 42, at 49, quoting *DICCIONARIO DE DERECHO PRIVADO* 353-54 (1963) (P.A. Malavet trans., unofficial) (emphasis and footnotes omitted).

423. In Puerto Rico, the Supreme Court has this authority pursuant to P.R. LAWS ANN. tit. 4 § 926 (1937). See generally MALAVET-VEGA, *supra* note 42, at 54-57.

424. MALAVET-VEGA, *supra* note 42, at 54-57.

425. O'MALLEY, *supra* note 287, at 1173.

426. *Id.* at 1391.

427. YAIGRE & PILLEBOUT, *supra* note 215, at 74-75.

428. The State retained the power to evaluate applicants and to oversee their practice. This latter function was performed by judicial authorities. PONDE, *supra* note 51, at 306-08.

ters within its competence, and a Dean who is the head of the organization.<sup>429</sup>

The remedies available against notaries range from reprimands, fines, or temporary suspensions to permanent disbarment as notaries and, if they hold both titles, also as lawyers. In Puerto Rico, the Supreme Court, our highest tribunal, may reprimand, fine, suspend or permanently disbar a notary.<sup>430</sup> In France, the *notaire* is subject to a call to order, private and public censure, a prohibition from repeating the offense, temporary suspension, and removal from office. The first three sanctions may be imposed by the Chamber, but the last three only by a *tribunal de grande instance*.<sup>431</sup> In Spain, the notary may be reprimanded, fined, or involuntarily transferred to another notarial office of equal hierarchy.<sup>432</sup> Reprimands and fines may be imposed by the Boards of the *colegios* and by the Directorate; the boards are subject to appeal to the directorate, and the latter to appeals to the Minister of Justice. Only the Minister may impose a transfer.<sup>433</sup> The notary may only be removed by an Honor Tribunal, composed of seven notaries selected at random. The tribunal may absolve the notary or may recommend his removal. This decision is sent to the State Council, which determines if the proceedings were properly conducted. If they were, the judgment is forwarded to the Minister of Justice for immediate execution.<sup>434</sup>

"Any violation of law or regulation, all infractions of professional rules, any act contrary to probity, to honor or to [courtesy or good manners] by a public officer, even related to extra-professional acts, exposes him to disciplinary action."<sup>435</sup> In Puerto Rico, in most cases, notaries are subject to discipline for errors in public documents, errors in making mandatory notifications (e.g., notaries are required to notify the Supreme Court within 24 hours of subscribing an open will), or error in the facts certified by the notary.<sup>436</sup> Errors in the facts are the most serious, since they go to the very foundation of the notarial system. In Puerto Rico, such errors will result in suspension at a minimum, and if intentional, in disbarment.<sup>437</sup> Examples include improp-

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429. 1 SANAHUJA Y SOLER, *supra* note 324, at 411-19.

430. MALAVET-VEGA, *supra* note 42, at 55.

431. YAIGRE & PILLEBOUT, *supra* note 215, at 75.

432. 1 SANAHUJA Y SOLER, *supra* note 324, at 349.

433. *Id.*

434. *Id.* at 351-52.

435. YAIGRE & PILLEBOUT, *supra* note 215, at 73 (P.A. Malavet trans., unofficial).

436. MALAVET-VEGA, *supra* note 42, at 57-66.

437. See generally *id.* at 61-66.

erly identifying a person, failing to ask for a certificate of marriage when a notary knows one spouse but not the other, or failing to ascertain a corporate officer's representative capacity.

The notary public can be removed from office by the appointing authority for failing to comply with the requirements of the office, misconduct, or upon conviction for certain crimes.<sup>438</sup> The person is usually entitled to be informed of the charges against him in writing and to a hearing.<sup>439</sup> However, in the notary public's case, removal does not result in the loss of one's livelihood. A disbarred Latin notary has lost a valuable professional position that is very difficult to obtain, and with it, his capacity to earn a living. In addition, serious notarial errors are likely to destroy the professional's future career. For example, a French *notaire* has been barred from becoming an *avocat* after being disbarred from his position as a notary, and this was found not to violate the European Union's Freedom to Practice Directive.<sup>440</sup>

### 3. Civil

The concept of civil liability for notaries is simple and straight forward: they are liable for the damages they cause through acts of professional malpractice. Planiol describes the history of the civil liability of the French *notaire* as follows:

To determine . . . civil responsibility, it is necessary to take into consideration the nature of the functions which the Notary performs when he commits the fault of which he is accused.

. . .

As a public officer charged with the drafting of private acts, the Notary is liable to commit errors, which can cause considerable

438. See, e.g., ARK. STAT. ANN. § 21-14-102 (1993); CAL. GOV'T CODE § 8213(b) (West 1995); CONN. GEN. STAT. ANN. § 3-94f (West 1995) (notary may not refuse to perform lawful notarial acts); CONN. GEN. STAT. ANN. § 3-94n (West 1995) (change of address).

439. See, e.g., CAL. GOV'T CODE § 8214.1 (West 1995) (Secretary of State may remove notary for: (a) substantial and material misstatement or omission in the application, (b) felony conviction), COLO. REV. STAT. § 12-55-107(1) (1995) (crimes or misconduct) 12-55-107(3) (notice required), CONN. GEN. STAT. ANN. § 3-94c(a) (West 1995); CONN. GEN. STAT. ANN. § 3-94m (West 1995) (suspension or removal for misconduct); DEL. CODE ANN. tit. 29, § 4301(d) (1993) (for cause); HAW. REV. STAT. § 456-1 (1994); IDAHO CODE § 51-113 (1995) (misconduct, criminal conviction, misstatement in application); ILL. ANN. STAT. ch. 5, para. 312/7-108 (1994) (felony conviction or official misconduct); IOWA CODE ANN. § 9E.7 (West 1995) (secretary of state must give notice of revocation of appointment, person has right to a hearing).

440. Case 292/86, *In re Gullung*, 34 E.C.R. 113 (1988), discussed in Goebel, *supra* note 10, at 496.

losses to his clients. In what measure is he responsible? In our ancient law the jurisprudence was very benevolent to notaries: it often exonerated them from all responsibility. Art. 68 of the Law of Ventôse seems to be conceived in the same spirit: it enumerates a certain number of cases of nullity which can cause the allocation of damages, "if there is occasion for them." The jurisprudence interprets this article as rendering possible the allocation of an indemnity to the parties; the Notary who has committed the nullity is not necessarily responsible to the injured party; the courts have the power either to excuse the Notary, or to restrain the amount of the sum due as an indemnity . . . . That judgment established the jurisprudence. However, the courts have become more and more severe in the appreciation of the facts; they have no doubt adopted this course by the spectacle of so many abuses and by the inexcusable conduct of certain notaries; but there is much complaint among notaries of the sometimes excessive severity of the courts which tend to render impossible the exercise of a profession already delicate and dangerous. See notably the complaints formulated in the thesis of M. Pierre Vincent (*Responsabilité de notaires en matière de testament*, Paris, 1905); a judgment of the court of Angers annulled a testament in which the Notary wrote "major" instead of "age of 21 years . . . ."

The question as to which principle of responsibility should be applied to notaries is a subject of much discussion: are they responsible as agents even for slight faults? Are they responsible for all sorts of faults by virtue of Arts. 1382 and 1383? Or does Art. 68 of the Law of Ventôse establish the sole basis of their responsibility? . . . The jurisprudence does not appear to take these controversies into consideration which disappear in the arbitrary appreciation of facts.

Notaries are responsible for errors of law which they commit . . . except where it concerns a controversial point, as to which the jurisprudence was not fixed at the time of the drafting of the act . . . They are equally responsible for the nullity of acts passed in their offices by spendthrifts not assisted by their guardians . . . .<sup>441</sup>

Modern civil liability decisions involving the Latin notary continue to take a strict view of professional malpractice by notaries. Henry DeVries gives as an example of this strict professional responsibility the case of a notary who "failed to advise [the purchaser] . . . that the property was encumbered by six mortgages," and was held

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441. PLANIOL, *supra* note 68, §§ 150-51, at 89-90 (citations omitted).

"jointly liable with the seller for the damage suffered by" the purchaser.<sup>442</sup>

The notary public is also subject to civil liability. "The standard of liability of a notary public is one common to tort law. The notary must act as a reasonably prudent notary would act in the same situation. Thus, the notary cannot act negligently, recklessly, or willfully and escape liability. The burden is on the plaintiff to show that the notary acted below his or her job's standard of performance."<sup>443</sup> The existence of a bond does not affect either the notary's or the surety's liability.<sup>444</sup> The notary is only responsible for diligently ascertaining the underwriter's identity, or, on occasion, to have personal knowledge of the underwriter's identity.

The important difference in this case is that the Latin notary acts as a legal expert for the parties. He is required to know the proper legal form for the juridical act, and his failure to do so constitutes malpractice. The Latin notary is also required to diligently ascertain certain facts. But the notary public is held to only one duty; proper identification of the underwriter.

#### 4. *Criminal*

The Latin notary is criminally liable "for the commission of crimes related to his professional practice . . . ."<sup>445</sup> Examples of these crimes would be:

[the] resale of previously sold property, removal or transfer of property given as warranty, destruction or removal of mortgaged goods, fraudulent disposal of property of a married person, crimes related to the destruction of evidence or [preparation of] false documents, . . . revealing privileged information, preparing or using false documents or preparing false annotations in public registries, authorizing division or distribution of property when the pertinent taxes have not been paid . . . .<sup>446</sup>

Some authors categorize the last crime separately as an administrative tax matter, rather than under the general category of criminal liability for the notary.<sup>447</sup> This distinction, however, appears to be

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442. DEVRIES, *supra* note 218, at 62 (footnotes omitted).

443. Closen & Dixon, *supra* note 68, at 888-89.

444. See, e.g., LA. REV. STAT. ANN. § 35:198 (West 1995).

445. MALAVET-VEGA, *supra* note 42, at 68.

446. *Id.*

447. See, e.g., PÉREZ-FERNÁNDEZ DEL CASTILLO, *supra* note 68, at 363-71.

strictly formalistic, made solely because it is the tax laws that are violated and not the penal code.

More commonly, the notary may be subject to perjury, forgery, and fraud charges related to intentional misstatements in public documents. In France, for example, it is a crime to certify a false signature or to alter a public document in any way. The destruction or suppression of a public document is, likewise, a criminal act.<sup>448</sup> The notary public is also held criminally liable for certifying facts they know to be false.<sup>449</sup> The only significant difference likely to arise in this area is the Latin notary's substantial duty to maintain permanent records of documents and to ensure that the proper tax stamps have been used. Otherwise, their liability for certification of false facts is quite similar.

## *E. Conclusion*

### *1. The Status of the Profession*

In my introduction to this part of the Article, I referred to Professor John Henry Merryman's description of the Latin notary as a person of great professional importance who is only superficially similar to the notary public. In the pages that followed, we have seen how regulation of notaries public in the United States is often structured in ways similar to notarial law, with the result that it is possible to fit regulation of both trades under the same headings. But the similarities are clearly only skin-deep; the substance and content of these categories are quite different for the Latin notary, on the one hand, and the notary public on the other.

I have already discussed how once appointed, notaries public and Latin notaries may be subjected to similar kinds of liability. In fact, civil and criminal liability may produce very similar results for both, even if the standards for their imposition might differ. But one very large difference distinguishes the overall scheme of professional liability for notaries and notaries public: the stakes. At stake for the Latin notary is his title, his livelihood, a professional status that requires very painstaking education, professional qualification, and appointment to one of the limited number of positions available. While this loss might be comparable to the disbarment of an attorney, it is much harsher than the loss of position of a notary public. Even a lawyer does not hold an office so jealously protected and carefully regulated.

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448. YAIGRE & PILLEBOUT, *supra* note 215, at 72-74.

449. See generally 58 AM. JUR. 2D *Notaries Public* § 73 (1969).

Generally speaking, notarial supervision is not an inherently judicial function, since such supervision is normally exercised by legislative authority, or occasionally by delegated professional groups. In addition, notaries do not traditionally take part in judicial proceedings. Nevertheless, the notary is closely supervised—not by the judiciary, but rather by the State or its designees—because a sovereign power is delegated to him: the *publica fides*. There is, in effect, a special type of implied contract between the State and the notary. While the latter is not a public employee, the State nonetheless jealously guards the power delegated to him by regulating admission to and practice of the profession, thereby guaranteeing the special status of notarial acts. This special status underlies the careful system of ensuring proper education, selection, and appointment to the *notariat*.

The first significant difference between the *notario* and the notary public lies in the importance and effect of their delegated sovereign power. Even though their authority to attest comes from the state in both instances, the fundamental difference between the notarial *publica fides* and the notary public's power to certify is their respective evidentiary values. A duly certified notarial document under the Latin system is endowed with the strongest possible presumption of truth, and the party trying to counter this presumption bears a virtually insurmountable burden of proof. The document subscribed by the notary public, on the other hand, has very limited probative value. Moreover, the notarial seal is a certification of truth, legality, and good faith. The *notaire* is a specialized legal professional, who is required to be an expert in the law applicable to the juridical act over which she officiates. This requires her to become an expert in a wide range of subjects in private law, and to know the public law applicable to registration requirements. The notarial seal constitutes a certification by the notary that the juridical act has been properly completed. The notary is thus able to be the expert advisor to the parties because of this highly specialized education and professional position.

Notaries public are not really qualified as legal experts or advisors. They are only subject to limited elementary examinations and generally to no specific educational prerequisites beyond literacy. Superficially, one might compare some of the other prerequisites for becoming a notary public with those required of Latin notaries, such as being an adult, having good moral character, and appointment by state authority. But this is as far as the comparison can go. On the other hand, the Latin notary, like the American lawyer, is a private legal professional who holds his office permanently while in good

standing. Both are "officers" or "officials" who perform an essential professional function in a specific process. The difference lies in the fact that the Latin notary's function is more administrative than judicial, and in the express delegation of a specific governmental power—the *publica fides*—to the notary. Even legal education and bar admission requirements in Europe and in the United States are, within limits, generally comparable. But the Latin notary is set apart from the American lawyer, and even his national counterparts, because of the governmentally enforced specialization of the profession, produced by educational or testing requirements, and the limitation in the number of notarial offices or positions.

As illustrated in Table 1 above, there is a very limited number of notaries, relative to other legal professionals and to population. The limited supply of notarial services, together with the monopoly they enjoy over particular legal transactions, places them at the top of the professional and economic scale. "As a family counselor, and thus often an informal arbiter of disputes, [the *notaire*] is, especially in smaller towns, a solidly established, eminently respectable institution."<sup>450</sup>

The Law of Ventôse gives only a very incomplete idea of the real role of notaries. They are not only drafters of acts, a kind of official scribe; but they have, quite naturally, also taken a very important function, that of unofficial counselors for families. They are consulted and their advice is followed on financial and family matters, and questions having to do with marriages, successions, division of property, investments, buying and selling of houses and of land, etc. With all of this they are familiar, and know about it, and their opinions have naturally great weight.<sup>451</sup>

And this is not something new. When the notarial school at Bologna was established in the Middle Ages, notarial practice was known as a "*summa artis*," hence the title of various medieval works was "*Summa Artis Notariae*." This identified notarial work not as an art in the modern sense of the term, but rather an important scientific function in a time when professional skills were divided into major and minor "arts." There were seven major arts and judges and nota-

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450. DEVRIES, *supra* note 218, at 61 (footnotes omitted).

451. PLANIOL, *supra* note 68, § 132, at 79. However, Planiol points out that abuses of this special status led to new French laws restricting *notaires'* management of their clients' funds and mandating the avoidance of conflicts of interest. *Id.* at 80.



ries were at the very top of the list<sup>452</sup> on the social scale.<sup>453</sup> The profession is still highly regarded in modern times—although it is certainly not universally loved. The *notario*'s monopoly on legal transactions, along with the substantial barriers to full entry into the profession which keep so very low the number of notaries relative to other professions and to overall population, ensure that the *notario* is a legal professional that should not be ignored. Even the European Union, a free trade area and customs union, on the march toward internal professional compatibility, has maintained among its member states the *notarios*' national and regional monopolies. In this world of increasing international trade, American companies will find themselves in need of notarial services. In fact, recent statistics show a steady increase in the number of notarial transactions in the open-internal-trade European Union, a clear sign of the profession's continued relevance and vitality.

## 2. *The Latin Notary, Counsel for the Transaction*

In addition to its practical significance as a profession with which American lawyers will have to do business, the Latin *notariat* can provide a working model for implementation of new ethical rules. In his excellent article, Professor Dzienkowski identifies three possible ethical models in multiple-client representation. "The Lawyer can represent (1) each client individually, (2) the clients as a distinct group, or (3) the situation or transaction as distinct and apart from the clients."<sup>454</sup> He advocates using the second category as the ethical guideline for implementation of Model Rule 2.2 and rejects the notion of the lawyer for the transaction.<sup>455</sup> The Latin notary however, falls clearly in the third category. The Latin notary does not represent the parties, he does not have any clients, he represents the *publica fides* and the law for all the parties.<sup>456</sup>

The notary is expected to advise multiple parties, but he is very much a counsel for the transaction. The notarial ethic is defined substantively (*i.e.*, it is established by the elements of the juridical act to

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452. They were followed, in this order, by: (1) merchants trading in foreign textiles; (2) bankers; (3) doctors; (4) pharmacists; (5) silk producers; and (6) peltiers.

453. PONDÉ, *supra* note 51, at 153-54.

454. Dzienkowski, *supra* note 1, at 780.

455. *Id.* at 783-86.

456. Puerto Rico Notarial Law, Motives, in MALAVET-VEGA, *supra* note 42, at 260. *See also In re Lavastida*, 109 P.R. Dec. 45 (1979); *In re Colón-Ramery*, 93 J.T.S. 91 (P.R. Sup. Ct. 1993). The instructions given by a party to a notary are not privileged information. *Lugo Ortiz v. Ferrer*, 85 P.R. Dec. 862 (1962).

be subscribed by him). It is not defined in terms of duty to a client. The Latin notary must give to the parties the correct legal advice and the proper warnings regarding the legal consequences of their acts. He is not obliged, however, to judge the fairness of the deal, but only its legality—provided that he is sure that the parties fully understand the agreement into which they are entering.

Communications between the notary and the parties to a transaction are not privileged.<sup>457</sup> Therefore, the parties *may not* preclude that notary from disclosing those conversations. In fact, although a notary may disclose information pertaining to such conversations, the more interesting question is whether the notary *must* disclose information from a previous transaction that becomes relevant to a current transaction.

“The notary does not represent any clients. He represents the *publica fides*. He is the witness *par excellence* who must give form to the transaction that has been agreed to, and who must advise the parties of the legal aspects of the instrument that they subscribe and which he authorizes.”<sup>458</sup> The notary must be impartial and must advise all parties accurately and equally. This obligation includes a duty to counsel parties who are not well informed. In other words, the notary must counteract the effect of the differences in the legal sophistication of the parties, in order to produce a balanced, well-informed result. The notary represents the law for all the parties to the transaction.<sup>459</sup> In order to maintain this impartiality, the Latin notary must not become an advocate for any of the parties in litigation involving a transaction which he subscribed in his capacity as a notary. In jurisdictions in which there is no blanket incompatibility between the *notariat* and advocacy, since there is no privilege involved in the notarial transaction, there is no *technical* conflict of interest when the notary later becomes an advocate for one of the parties. However, the required level of impartiality demands that the notary remain com-

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457. P.R. R. EVID. § 25(C)(4), P.R. LAWS ANN. tit. 32, app. IV, § 25(C)(4). The French approach the matter differently. They regard notarial communications as generally privileged (*i.e.*, there is a notarial professional privilege on communications, but this privilege, the courts have ruled, may be waived by any of the parties to the transaction). The notary may be compelled to testify as to such conversations by one of the parties. YAIGRE & PILLEBOUT, *supra* note 215, at 134-38. The professional secret does not protect communications reflected in a document that must be registered, nor communications that reflect a violation of penal or tax laws, or laws related to internal state security. *Id.*

458. *In re Colón Ramery*, 93 J.T.S. 91, at 10797, *quoting* *In re Lavastida*, 109 P.R. Dec. 45, 86 (opinion of Justice Irizarry-Yunque) (P.A. Malavet trans., unofficial).

459. *Id.*

pletely neutral as to the parties to a transaction. This precludes his participation as an advocate in any legal action related to a notarial transaction subscribed before him.<sup>460</sup> I would characterize this as a *transactional incompatibility* between the role of an advocate and the duty to the *notariat*. To hold otherwise, the Supreme Court of Puerto Rico has reasoned, would allow the appearance of impropriety to exist.<sup>461</sup> The notary is further enjoined from becoming an advocate in such a case because he is the best qualified *witness* to the facts of the case.<sup>462</sup>

The more difficult question is what happens with information obtained from the parties during the course of one transaction that may be relevant to another transaction. In the *Colón-Ramery* case, the Puerto Rico Supreme Court did not draw any distinction among the five separate deeds involved in that matter. In fact, the mortgage over movable property being executed by the notary who subscribed it was signed five months after the first four documents. However, all the public documents related to a single loan.

The matter becomes even more complex when information obtained in one transaction is relevant to another agreement involving some, but not all, of the parties to the prior public document. In his concurring opinion in the *Colón-Ramery* case, Justice Negrón-García emphasized the notary's obligation to the public trust he enjoys. The notary, he pointed out, has a high duty to make sure that the parties are well informed.<sup>463</sup> Given the absence of a privilege, and the special nature of the notary's obligation to attain each party's fair and educated consent to the transaction, I believe that the notary is obliged to make such a disclosure. True professional impartiality and the affirmative duties imposed on the notary make this the only logical conclu-

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460. *Id.* at 10798. Of course, this only applies in those countries in which, like in Puerto Rico, the notary may also be a lawyer.

461. *Id.* at 10799.

462. *Id.* In fact, the notary may be compelled to testify about the facts related to a transaction in a court of law. *Tomás Cano & Co. v. Robles*, 32 P.R. Dec. 643, 64S (1924). The only exception applies to the contents of a closed will, prior to the death of the testator. P.R. LAWS ANN. tit. 4 § 2065 (1987). The absence of the privilege extends even to criminal proceedings, where a notary may testify against a party to the notarial transaction. The notary is allowed to relay any otherwise admissible evidence based on the party's statement to him in his capacity as a notary. *Pueblo v. Denis-Rivera*, 98 P.R. Dec. 704, 710-11, 98 P.R.R. 691, 697 (1970). If there is a suspicion that a criminal act has been committed after a legitimate examination of the *protocolo*, the competent authorities must be notified. P.R. LAWS ANN. tit. 4 § 2072 (1987).

463. *Id.* at 10801, quoting Pedro Malavet-Vega, *El Notariado Puertorriqueño* (unpublished manuscript on file with the author).

sion. The notary is certainly obliged to check for relevant information available in the public registries.<sup>464</sup>

With respect to implementation of multiple-client-representation rules in the United States, the Latin notary can serve as a model for the type of disclosure that must be made to the client. In the American system, the lawyer must be responsible for explaining her job to the client. Ethical duties are often carried out through required levels of *disclosure*. The Latin notary system works because its users are aware that they are going to a particular legal specialist, whose function as an impartial legal counselor they understand. This is the result of both the long history of the institution and the traditional role of legal specialization within that system. In other words, the users of the notary's services are aware that the notary is a particular specialist in a system of legal specialists. They also know that this particular specialist owes a duty to the legality of the transaction.<sup>465</sup> The only way for an American legal professional to achieve a similar level of duty to the transaction would be through disclosure. American attorneys are responsible for educating clients about their role. The Latin notary institution can provide examples of the level and content of the required disclosure in those special cases in which American lawyers wish to rise above advocacy by creating a absence of partisanship in the transactional context.

Although the Latin *notariat* has never been studied this thoroughly in American legal scholarship, I have only scratched the surface of the ethical issues involved. I hope to explore this area in more detail in a future piece. My purpose in this Article has been to introduce the American legal profession to the Latin notary, and to do so in a way that, hopefully, does justice to this civil-law professional. With this foundation, I hope that other authors will also look at this institution as a possible comparative model in the future. I will continue to do so.

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464. See *supra* notes 278-79 and accompanying text.

465. This is why immigrants to the United States are such easy prey for unscrupulous notaries public here, as I discussed in the introduction to this Article.