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THE FOREIGN NOTARIAL LEGAL SERVICES MONOPOLY: WHY SHOULD WE CARE?

PEDRO A. MALAVET*

I. INTRODUCTION

This Article is a succinct introduction to the often-found, but seldom-understood, foreign legal professional who enjoys a monopoly over important legal services, that in our country are traditionally performed by attorneys.¹ The notarial monopoly sometimes presents an insurmountable obstacle to foreign-country practice by American lawyers, in certain crucially important areas of the law. However, with a proper understanding of this legal profession, American lawyers can turn this exclusivity to their benefit. By working with foreign notaries, American lawyers can expand client-counseling and representation abroad, while ensuring that transactions are legally proper and more easily enforceable. In transnational practice, the Latin Notary should be seen as an ally to an American legal professional, not as a competitor.

This is the third in a series of articles about the notariat and the legal institutions related to it.² Shortly after finishing the first article on this subject,³ I was invited to speak at a conference ti-

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1. This paper was initially drafted for a conference presented during the Hispanic National Bar Association Annual Conference held in Puerto Rico in the Fall of 1995, and presented under the title: *The Latin Notary, the Comparative Method and the American Legal Profession in the Age of Globalization*. It is abstracted and modified from the more comprehensive piece, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP L. REV. 389 (1996)[hereinafter *Counsel*]. The second article, *The Non-Adversarial, Extra-Judicial Search for Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market-Driven System of Informed Contracting and Fact-Determination* is upcoming in 16 WIS. INT'L L. J. (1998) [hereinafter *Non-Adversarial*].

2. See *Counsel*, *supra* note 1; see also *Non-Adversarial*, *supra* note 1.

3. *Counsel*, *supra* note 1.

tled "The Legal Profession in the Age of Globalization." The presentation, subsequent experience with seminar students, and other discussions have suggested the need for an "executive summary" of my earlier piece. This, of course, implies a fair amount of repetition, albeit in much reduced form. However, in revisiting the notarial legal profession, this Article attempts to make a call to further study and understand the important theoretical implications of this practice and of the legal institutions related to it. This piece also suggests that this type of comparative study is an essential part of "mainstream" American legal scholarship.

II. THE IMPORTANCE OF COMPARATIVE METHODOLOGY

This discussion focuses on the foreign legal profession. This is, by definition, comparative legal analysis. These words invoke some trepidation, because, this all too often constitutes a guarantee that so-called general law reviews will not touch this piece. This is the result of two contrary trends: (1) the growth in number and prestige of comparative law reviews, and (2) the lack of interest in anything foreign among the "main" law reviews. Obviously, number two is troublesome. Comparative study ought not to be the bastard child of American legal scholarship.

Professor Schlesinger's definition of Comparative Law is excellent:

[C]omparative 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.⁴

More importantly, this comparison of laws and legal systems is an essential part of the proper development of legal theory.⁵ This is not to suggest that doctrinal uses of comparative methodology are unimportant. There is a strong need for both theoretical and doctrinal comparative analysis. The distinction between doctrinal comparative methodology and comparative legal science will depend on the purpose of the comparative study.⁶

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

5. 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*)." JEAN-LUC ALBERT, *INTRODUCTION AU DROIT* 55 (Pedro A. Malavet trans., 5th ed. 1992). See also RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 2-3, 11-13 (3d ed. 1985).

6. Quite often, there will be a great deal of overlap between the doctrinal and the theoretical. For example, the comparative method will give a national scholar "a better understanding of his own law, assist in its improvement, and ... open [] the door to working with those in other countries in establishing uniform conflict or substantive rules or at least their harmonization." DAVID &

Doctrinal comparative legal analysis is essential in today's growing international market, particularly when society considers the globalization of legal practice.⁷ A lawyer in international or transnational practice ought to provide her client with a full understanding of the law in its proper context.⁸ "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."⁹ Understanding the "cultural, social, political and economic systems" in which the law must be applied is essential when instructing a client on the "relevant considerations" of inter-

BRIERLEY, *supra* note 5, at 11-12.

7. See Hans W. Baade, *Comparative Law and the Practitioner*, 31 AM. J. COMP. L. 499 (1983) for a general discussion of the practical importance of Comparative Law. This occurs in the context of many U.S. law firms representing clients with offices abroad. "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, 288-90 (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. J. 443, 508 (1989). See also EUROMONEY PUBLICATIONS PLC, 3 INT'L FIN. L. REV. vii (1993). Additionally, the value of international legal services by U.S. law firms has grown dramatically in recent years, as has the cost to US businesses of purchasing legal services abroad. 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 US citizens increased from 55 million in 1987 to \$222 million in 1991. INT'L TRADE COMM'N, INDUSTRY AND TRADE SUMMARY: LEGAL SERVICES 2, 3 (Feb. 1993). The reason for the wide difference between purchases and exports is unclear. However, disturbing anecdotal evidence has surfaced regarding U.S. firms' reluctance to hire foreign lawyers, preferring instead to delegate to inexperienced associates the job of researching foreign law. However, most firms will have proper safeguards to ensure the accuracy and quality of their advice. But the numbers seem to indicate 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 client's transactions abroad.

8. Goebel, *supra* note 7, at 447. Professor Goebel notes that this is not a universally accepted tenet. *Id.* at 454. Goebel correctly concludes that this is an important, even essential requirement for properly carrying out the attorney's professional responsibility to their clients. *Id.* See generally JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 33-35 (1978); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 9-12 (1982); DAVID & BRIERLEY, *supra* note 5; KONRAD ZWIEGERT & HEIN KÖTZ, 1 *INTRODUCTION TO COMPARATIVE LAW* 68 (Tony Weir, trans., 2d ed. 1987); SCHLESINGER ET AL., *supra* note 4 for a general discussion of the importance of understanding a legal system in its proper context

9. DAVID & BRIERLEY, *supra* note 5, at 14.

national legal transactions.¹⁰

In this context, accurate familiarity with the Latin notary is not a simple intellectual exercise, because, as discussed below,¹¹ international legal transactions, particularly those involving real property and other capital investments, will often require the participation of a notary.¹² The transnational legal practitioner or student who fails to take these factors into account, does so at great peril.¹³ Additionally, comparative analysis can help achieve social justice in the United States. One illustration is how comparative law can enable the protection of our immigrant communities.

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 or living in the United States.¹⁴ A simple search of news reports dis-

10. Goebel, *supra* note 7, at 444-54.

11. See *infra* section III(B)(3).

12. International trade in goods, services and capital is increasingly important to our national economy, as are the legal services associated with it. Exports of merchandise by the United States increased from approximately \$20.1 billion in 1961 to \$227 billion in 1986. BUREAU OF ECON. ANALYSIS, U.S. DEPT. OF COMMERCE, BUSINESS STATISTICS: 1986, 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, 73-74 SURVEY OF CURRENT BUS. 11 (April 1993). U.S. private citizens owned, as of 1986, a total of over \$94 billion in assets abroad and U.S. direct investment abroad totaled \$28 billion. BUSINESS STATISTICS: 1986, *supra*, at 248. The importance of notarial work in international law practice should not be underestimated. Compare Phillip Hamilton, *The International Notary Public*, L. INST. J., Aug. 1991, at 746-47. ("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 Goebel, *supra* note 7, at 464-89 (Professor Goebel's dismissive references to notaries in his otherwise excellent article).

13. When conducting international affairs, traders often encounter difficulties in accomplishing their business objectives due to long distances and the sometimes impersonal nature of the trading business. JOHN H. BARTON & BART S. FISHER, INT'L TRADE AND INV. 33 (1986). When conflicts arise, traders face the dilemma of legal systems of different parties providing conflicting solutions. *Id.* Additionally, each party may consider the other's court as not only unfair, but expensive. *Id.* See THE INT'L AND COMP. LAW CENTER OF THE SOUTHWESTERN LEGAL FOUND., SYMPOSIUM, PRIVATE INVESTMENTS ABROAD: PROBLEMS AND SOLUTIONS (1959-1993) for a discussion of the legal problems related to foreign investment. This collection is published in yearly volumes; currently available are those from 1959 through 1993.

14. "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., Nov. 1982, at 1357. This Article lists instances of immigrants being defrauded by US notaries who mislead them into believing that they are the legal professionals that notaries are in their countries of origin. But money is not the only thing that they could lose. "In some cases a notary may intend to

closed many instances of fraud perpetrated by notaries who took advantage of foreign immigrants or potential 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 duped immigrants.¹⁵ Successful prosecutions for illegal practice of law have also been instituted against persons who have used the title "*Notario Público*"¹⁶ to mislead clients into believing they could deliver legal services.¹⁷

help but can't because of his lack of legal knowledge. ... '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.*

15. See, e.g., Patrick McDonnell, *Victimized Brothers Help End Immigration Scam*, LOS ANGELES TIMES, SAN DIEGO COUNTY ED., Aug. 4, 1991, Metro sec., at 1 (stating 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*, RECORDER, Feb. 1, 1991, Alien Justice sec., at 1 (stating, that notaries have violated advertising and pricing laws, and attorneys representing immigrants in asylum claims estimate that 50 to 80 percent of their cases have been tainted by the work of notaries and non-lawyers. The best case scenario for these aliens is that they only lose their money, but in the worst cases, they are deported); Constanza Montana, *New Immigration Laws Cause New Set Of Problems For Aliens*, CHI. TRIB., Dec. 11, 1987, Chicagoland sec., at 14 (reporting that 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*, LOS ANGELES TIMES, ORANGE COUNTY ED., Apr. 2, 1987, Metro sec., part 2, at 1 (stating that 75 members of an immigrant's rights group protested in Santa Ana, California against fraudulent practices by notary publics, and that a recent investigation by the Los Angeles Times discovered notaries who charged over 100 times the state limit to complete state immigration forms, charged between \$300 and \$1,000 to process amnesty cases, provided erroneous advice that could potentially undermine amnesty cases, practiced law without a license, and advertised that they were both notaries and immigration consultants, which state law forbids).

16. In Spanish, the Latin Notary is referred to as "*notario público*," which would literally translate to "notary public" in English.

17. See, e.g., Fla. Bar v. Isabel Rodriguez, 509 So. 2d 1111 (Fla. 1987) (stating that "[t]he [Spanish-language newspaper] advertisement indicated ABC General Services employed a 'Notario Publico,' and offered services in immigration, corporations, divorce, and income tax" (emphasis added)); Fla. Bar, v. Alfredo Borges-Caignet, 321 So.2d 550, 551 (Fla. 1975) (stating that the "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)); The Florida Bar v. Nicholas F. Fuentes, 190 So.2d 748, 750-51 (Fla. 1966) (stating that using terms, such as "Notaria," "Notario Publico" and "Consultoria" were misleading to the Cuban clientele of the Respondent and to his clientele native to other Spanish speaking countries, because these terms purported that the Respondent was an attorney authorized to provide services generally rendered by an attorney admitted to the Florida State Bar); and The Fla. Bar v. Marco Tulio Escobar, 322 So.2d 25 (Fla. 1975).

State laws generally prohibit misleading advertising¹⁸ and the practice of law by notaries.¹⁹ However, this problem has become significant enough to lead several states to enact more specific laws that require notaries to indicate that they are not lawyers when advertising in a language other than English,²⁰ and to prohibit the literal translation of the title "notary public" to the Spanish "*Notario Público*."²¹ It is with great regret that much more education is needed in this area, judging from law professors reaction to my earlier articles, some of whom are from jurisdictions that have enacted these laws.

In spite of the need for a proper understanding of the Latin notariat, there is surprisingly little relevant material available in American literature that utilizes comparative methodology. Hopefully, this series of articles will contribute to a better understanding of the profession, and illustrate the importance and usefulness of the comparative method.

18. See, e.g., CAL. GOV'T. CODE § 8214.1(f) (West Supp. 1998); COLO. REV. STAT. 12-55-107(1) (West 1996); FLA. STAT. ch. 117.01(4)(e) (West 1996); IDAHO CODE § 51-112(c) (Michie 1994).

19. See, e.g., CAL. GOV'T CODE § 8214.1(g) (West Supp. 1998); FLA. STAT. ch. 117.01(4)(f) (West 1996); IDAHO CODE § 51-112(d) (Michie 1994); MO. REV. STAT. § 486.390(1) (1987); N.M. STAT. ANN. § 14-12-13 (A)(5) (Michie 1997); W. VA. CODE § 51-1-4a (1997); "A realtor or notary public, who prepares legal instruments for another, is engaged in the practice of law." 45 Ops. Att'y Gen. 488 (1953); WIS. STAT. § 137.01(8) (West Supp. 1997) ("If any notary public shall be guilty of misconduct or neglect of duty in office the notary public shall be liable to the party injured for all the damages thereby sustained.").

20. See, e.g., CAL. GOV'T CODE § 8219.5 (West Supp. 1998) (discussing "[a]dvertising services in language other than English"). See also NEV. REV. STAT. § 240.085 (Michie 1995) (stating that "[a]dvertisements in language other than English [must] contain notice if notary public is not an attorney"). Whether these statutes are effective is uncertain, however. See also OFFICE OF PROF'L STANDARDS, STATE BAR OF CAL., REPORT OF THE PUBLIC PROTECTION COMM. 8 (1989). This report was discussed 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 had to be taken to prevent unscrupulous notaries from misleading immigrants and non-English speakers. *Id.* at 244-45.

21. See, e.g., CAL. GOV'T CODE § 8219.5 (West Supp. 1998) (discussing the literal translation of the phrase "notary public" into Spanish is prohibited). See also, 19 OR. REV. STAT. § 194.162 (5) (1991) (stating "[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 § 406.017 (West 1990); *The Fla. Bar v. Nicholas F. Fuentes*, 190 So.2d 748, 750-51 (Fla. 1966) (discussing the court enjoining 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).

III. THE CONTEMPORARY LATIN NOTARY

A. *Relevant Comparison*

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.²²

Please be cautioned that the Latin Notariat is, by definition, found in non-English-speaking countries, henceforth the Spanish *Notario Público*, the French *Notaire*, the Italian *Notaio*, the Dutch *Notaris* and the German *Notär*.²³ With these considerations as general guidelines, this piece attempts to identify, to paraphrase Professor Merryman's eloquent introduction, the qualities that the Latin Notary institutions, as implemented in different countries, have in common, which set them apart from those of any other system.²⁴

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

In the United States, there is one kind of lawyer who is generally expected to be an advocate for his client. Generally speaking, legal specialization here is a matter of custom and practice,

22. MERRYMAN & CLARK, *supra* note 8, at 1.

23. The comparativist must tread carefully when translating. These translated terms will be attempted to be explained as much as possible. Hopefully, this explanation will achieve what professor Peter W. Schroth describes when he states that "[t]he 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." Peter W. Schroth, *Legal Translation*, 34 *supp. AM. J. COMP. L.* 47, 48 (1986).

24. MERRYMAN & CLARK, *supra* note 8, at 2. Some comparativists prefer the term "juristic style" rather than "legal family." ZWIEGERT & KÖTZ, *supra* note 8, 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.

Id. See generally MERRYMAN & CLARK, *supra* note 8, at 1-23; GLENDON, ET AL., *supra* note 8, at 1-12; DAVID & BRIERLEY, *supra* note 5, at 1-31; ZWIEGERT & KÖTZ, *supra* note 8, at 63-75; SCHLESINGER, *supra* note 4, at 31-43 for a general discussion of legal "families" or "traditions" or "styles" in comparative law.

there is nothing governmental about it.²⁵ In most civil law countries, however, governmentally designated legal specialties are the norm. Within this professional balkanization, there is a particular specialist, generally located at the top of the legal hierarchy, who is a non-advocate, impartial counsel who advises all parties to a transaction. The State gives the Latin Notary, i.e., the professional that has found its greatest acceptance in Latin countries,²⁶ the exclusive authority to perform certain forensic functions and to impart the required formality to specified legal transactions. The practitioner of the Latin Notariat may be identified by the four essential elements of this career as: (1) a private legal professional performing a non-advocacy 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; (4) who is subject to professional, civil and criminal liability for miscarriage of his office.

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 place within established systems of legal specialization; (3) its place within a unified code-based legal system in which notarial law interacts closely with other areas of the law, particularly mortgage and registry law.

1. 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.²⁷

Is the *notario* a public officer, an administrative functionary, or a professional in "private" practice? In simple terms, notaries are liberal professionals who allow *private* parties to give legal effect to their transactions. Because they do so by exercising both

25. One rare example of substantive law specialization that is governmentally enforced is the patent bar. 35 U.S.C. § 31 (1994).

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

27. PEDRO MALAVET-VEGA, MANUAL DE DERECHO NOTARIAL PUERTORRIQUENO 13 (Pedro Malavet trans., 1987).

professional judgment and a sovereign power, their status can be confusing.

To the extent that the state gives a notary a license to practice his profession, the Latin notary is not different from any other liberal profession. The Latin notary is similar to the American lawyer: a private legal professional, who holds his office permanently as long as he remains in good standing. The supervision of both professions can be compared to the American lawyer's status as an "officer of the court." However, generally speaking, notarial supervision is not an inherent *judicial* function, because it is normally exercised by legislative authority, sometimes delegated to professional groups. Additionally, notaries simply do not traditionally participate in judicial proceedings. Nevertheless, the notary is closely supervised, not by the judiciary, but certainly by the state or its designees. 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 sovereign power delegated to him —the *publica fides*— by regulating admission and practice of the profession, thus guaranteeing the special status of notarial acts.²⁸

a. The Publica Fides

The *publica fides* or *fe pública* is, in essence, the governmental power to authenticate or to certify. The concept would literally translate as "public trust" or "public faith."²⁹ One can also analogize to *bona fides*, defined as "[i]n or with good faith ... without deceit or fraud ... without simulation or pretense ... the attitude of trust and confidence, without notice of fraud"³⁰ The *fe pública* gives the notary the public trust and authority to attest.³¹

28. JEAN YAIGRE & JEAN-FRANCOIS PILLEBOUT, DROIT PROFESSIONNEL NOTARIAL 86 (1991).

29. "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." BLACK'S LAW DICTIONARY 599 (6th ed. 1990).

30. *Id.* at 177 (citations omitted).

31. "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. *Lidesev v. Realty Trust Co.*, Tex.Civ.App., 75 S.W.2d 322, 324; *City Lumber Co. of Bridgeport v. Borsuk*, 131 Conn. 640, 41 A.2d 775, 778. 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 exam-

Originally, only two kinds of *publica fides* were recognized, the judicial and administrative authority to attest.³² But over time, the state delegated this power to the private professional notary. This means that when one certifies and attests, the *notario* always "gives faith," in Spanish "*da fe*" of the contents of the document subscribed, 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."³³

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.³⁴

The American notary public has the power to certify, and so does his British counterpart. But this power is not really comparable to the notarial *publica fides*? In the United States, the notary public's certificate is not "deemed to certify or guarantee the facts stated" in the document to which it is attached.³⁵ Generally,³⁶

ined it." Attestation of will: "Act of witnessing performance of statutory requirements to valid execution." *Zaruba v. Schumaker*, Tex.Civ.App., 178 S.W.2d 542, 543. (Id.)

Id. at 127.

32. EDUARDO BAUTISTA PONDÉ, *ORIGEN E HISTORIA DEL NOTARIADO* 188 (1967).

33. MALAVET-VEGA, *supra* note 27, at 23.

34. MANUEL GONZÁLEZ ENRÍQUEZ ET AL., *COMPROBACIÓN NOTARIAL DE HECHOS* 8, (Ponencia presentada ante el X Congreso Int. del Not. Latino 1969).

35. 58 AM. JUR. 2D *Notaries Public* §§ 45, 75 (1989). *See also* *Kansa Reins. Co. v. Congressional Mortg. Corp.*, 20 F.3d 1362 1376 (5th Cir. 1994) (holding that 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.*, 620 A.2d 118, 126 (1993) (holding that it is 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. STAT. ANN. § 52.165 (Michie 1993) (stating that "[d]ocuments 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 Bankr. 271 (S.D. Ohio 1985) (holding that notary certificate could not authenticate document).

36. 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. *See, e.g.,* 765 ILCS § 5/37 (West 1996) (requiring that deeds for real property must be sworn before

hearsay concerns, and the common law preference for in-court testimony, justify the inadmissibility of notarized documents as proof of the matter therein asserted.³⁷

Contrast the Latin Notariat. "The notaire's mission which gives authenticity to the act, meaning a particular probative force, is an essential aspect of [notarial] law."³⁸ 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 public or private matter.³⁹

In France, the notarial document and the facts included therein, are automatically admissible in evidence and only upon judicial declaration of invalidity does the document lose its executory nature.⁴⁰ In Spain, the notarial document constitutes proof of the facts that motivated its subscription, and of the statements made by the contracting parties.⁴¹ In Mexico, the notarial document has the strongest possible evidentiary value, subject to none of the exceptions normally applicable to document interpretation.⁴² Even when notarial intervention is not required for there to be valid agreement, the notarial document "reinforces, with a pre-

public officer, including, but not exclusively, a notary.); IND. CODE ANN. § 32-1-2-18 (Michie 1995) (stating that "[t]o 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]").

37. See generally 4 WIGMORE ON EVIDENCE §§ 1237, 1274, 1275, 1287 & 1288 (2d ed. 1972). Wigmore indicates that the general rule requires testimonial proof of attestation by the attesting witness, in our case the notary. *Id.* at § 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.* at § 1287. See, e.g., *Ahmed Abdelsamed v. New York Life Ins. Co.*, 857 P.2d 421, 426 (Colo. Ct. App. 1992); *D'Ambrosio v. D'Ambrosio*, 19 Phila. 347, 1989 Phila. Cty. Rptr. LEXIS 35 (Aug. 15, 1989).

38. YAIGRE & PILLEBOUT, *supra* note 28, at 3.

39. France (Civil Code, arts. 1317, 1319; Ordinance No. 45-2590 of 2.11.1945, art 1; Law of 25 ventôse year XI, art. 19), Belgium (Civil Code, arts. 1317, 1319; law of 25 ventôse year XI, arts. 1, 19), Italy (Civil Code, arts. 2699, 2700; Notarial Law (1913), art. 1), Spain (Civil Code, arts. 1216, 1218; Civil Procedure Law, art. 596; Notarial Law (1862), art. 1; Notarial Regulations (1944), arts. 1, 2;), Germany (Civil Procedure Ordinance, arts. 415(1), 418(1), 437; Notarial Ordinance (1961), art. 1).

40. Law 25 Ventôse art. 19, which is still in effect, C. CIV. art. 1317, notes (Dalloz 1994).

41. CÓDIGO CIVIL ESPAÑOL arts. 1216 and 1218 (Civitas 1991).

42. BERNARDO PÉREZ & FERNÁNDEZ DEL CASTILLO, DERECHO NOTARIAL [Mexicano] 86-87 (4th ed. 1989).

sumption of validity, the juridical act performed."⁴³

The International Union of the Latin Notariat, which is a private organization that links Latin Notaries around the world, differentiates between two types of presumptions: one of truthfulness and the other of legality. The notarial document presumes the facts included to be true. The legality and proper form of the juridical act it reflects is likewise presumed.⁴⁴ Even though it reflects a private juridical act, the notarial document is nonetheless given the same probative effect as a duly certified document produced by a governmental agency or instrumentality.⁴⁵ Generally speaking, only upon a judicial declaration of invalidity does the notarial document lose its probative effect.⁴⁶ Depending on the jurisdiction, the document may be attacked indirectly in the context of another proceeding, or a special action directed specifically at invalidating the document may be instituted.⁴⁷ It is up to the contesting party to prove the invalidity of the notarial document in a judicial process, generally by clear and convincing evidence.⁴⁸

The presumptions favoring the notarial document are even more important in civil law countries because unlike their common law counterparts, civil law jurisdictions express a general preference for documentary evidence over testimonial matter. In contrast, both England and the United States express a preference for in-court testimony, which justifies exclusion of documents certified by a notary public to prove the truth of the matter asserted therein. This is one of those areas where matters might superficially appear similar, but where close scrutiny discloses an important difference in the way the two systems approach a particular legal problem. The civil law jurisdictions see testimonial evidence as temporary, and susceptible to many subjective factors that might affect its value, particularly when that testimony is received

43. MALAVET-VEGA, *supra* note 27, 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.* However, the notarial document, as a practical matter, makes evidentiary matters easier.

44. *Principes du Notariat Latin*, title 2, art. 9, original text in Spanish, in ATLAS DU NOTARIAT 321-322 (1989).

45. JAIME GUASP, DERECHO PROCESAL CIVIL 396 (1968).

46. See, e.g., *Principes du Notariat Latin*, tit. 2, art. 10 (stating that the presumptions of article 9 "may only be contradicted by judicial proceedings"). *Id.* But the notarial document may suffer from certain defects that might cause its inadmissibility into a public registry, thus depriving it of effect.

47. GUASP, *supra* note 45, at 404-05.

48. See, e.g., Spain, L.E.CIV. art. 597; France, N.C.P.C. arts. 303-316 in YAIGRE & PILLEBOUT, *supra* note 29, at 86-87; Puerto Rico, 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. Dec. 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 28, at 87.

after the differences that have led to litigation have arisen. Documentary evidence, on the other hand, is seen as objective, and more reliable, particularly because it is contemporaneous with the act or accord among the parties and it is prepared prior to the advent of litigation or the necessity (i.e. because it is not subject to the weaknesses of human beings).⁴⁹ 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 very special probative value.

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

The notary, as part of his public function, is the permanent archivist of the original documents subscribed by him. "The *protocolo* is the organized collection of master public documents and *actas*⁵⁰ subscribed by a Notary . . . including those documents that are attached [as supplements] to the public document."⁵¹ A public document, for example, may be supplemented by attaching 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.⁵² Typically, the Latin notary will issue certified copies that will be used by the parties to give effect to their transactions. The *protocolo*, or register, may only be removed from the notary's office pursuant to a court order.⁵³ The

49. See, e.g., YAIGRE & PILLEBOUT, *supra* note 28, at 5.

50. 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 27, at 102-03. 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, Law 75 of 2 July 1987, art. 30 (P.A. Malavet, trans., 1987). It is a public document, that must be treated in the same manner as any other public deed.

51. MALAVET-VEGA, *supra* note 27, at 117.

52. 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). Notaries are also obliged to notify the Supreme Court upon the subscription of a will within the 24 hours after its subscription. Art. 73. The notice must be delivered personally to the registries or by certified mail, return receipt requested. *Id.*

53. In jurisdictions, such as Puerto Rico, where the notariat is a free and open profession without territorial or numerical limitations, upon death, suspension, disbarment, mental or physical incapacity or retirement of the notary, it is turned over to the inspector of notarial offices, and this office is thereafter responsible for its protection and for issuing copies of the public documents therein contained to interested parties. See generally, MALAVET-VEGA, *supra* note 27, at 117-30. The system is different in those states that

register is the property of the state, but its custody stays with the notary occupying that particular notarial seat. The notarial office is the day-to-day custodian as long as it remains open, regardless of the identity of the resident notary, until the documents become "old documents" that must be turned over to public archives.⁵⁴ The State, generally through the inspector of notary offices, is entitled to absolute and unobstructed access to the *protocolo*.⁵⁵

The secrecy of the *protocolo* could be analogized to the attorney-client privilege only as to third parties not involved in the juridical act contained in the public document.⁵⁶ For example, a notary has an obligation to notify a buyer of a defect in the seller's title, and of any encumbrances over the property. The notary is also allowed to inform non-parties to a transaction of defects in title and encumbrances that should be reflected in a public registry, even if a party to the transaction conveys this information to the notary.⁵⁷ Even more importantly, the notary has an affirmative obligation to search the public registry for information relevant to the transaction, and to disclose it to the parties.⁵⁸

2. Legal Specialization

The Latin Notary is part of an integrated system of legal specialization. The division of the legal profession into separate categories is common, particularly in Western Europe.⁵⁹ The "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."⁶⁰ Because of the special public function that they per-

have territorial or numerical limitations. See *infra* Section III(C).

54. For example, in France, the notary retains documents in his notarial office until they are one hundred years old. YAIGRE & PILLEBOUT, *supra* note 29, at 106-07. They must then be turned over to the public archives. *Id.*

55. MALAVET-VEGA, *supra* note 27, at 121-22.

56. The contents of a public document are secret material that 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 defined by law. MALAVET-VEGA, *supra* note 27, at 121. Notarial wills, however, must remain totally confidential until after the death of the testator. *Id.* The one exception to this rule is that the notary may divulge the admission of paternity of a "natural child." *Id.* Violation of the secrecy of the *protocolo* may result in criminal prosecution. *Id.*

57. See, e.g., YAIGRE & PILLEBOUT, *supra* note 28, at 134-36.

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

59. See generally HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* (1992) (discussing the extent of legal system specialization within the European Union).

60. HENRY DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 54

form, the *notarios* continue to enjoy a special place among legal professionals.

This kind of legally mandatory professional specialization will seem quite foreign to an American. Americans are used to only one kind of lawyer, although *de facto* specialization in practice is common, there is nothing governmental about it. The closest common law analogy that might be drawn would be between the Solicitor and Barrister distinction made in England and Wales in the United Kingdom.⁶¹

A powerful current illustration showing 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.⁶² 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.⁶³ The European Court of Justice has encouraged transnational practice by professionals within the Member States through a series of decisions regarding

(1976).

61. "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." STEPHEN O'MALLEY, *EUROPEAN CIVIL PRACTICE* 1456 (1989). The Barrister, generally speaking, is the legal expert and litigator; he "is to act as legal consultant and as an advocate in court." *Id.* at 1458. The barristers are increasingly specialists in particular fields of law who advise solicitors and present cases in court. Zahd Yaqub, *The Legal Professions in the United Kingdom*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 300, 303 (Allan Tyrell & Zahd Yaqub eds., 1993). The solicitors do not have a mandatory monopoly over legal advice, just their status as certified legal professionals. *Id.* at 325. In litigation, both solicitors and barristers are allowed to subscribe pleadings. *Id.* at 311. The barrister is sometimes given the exclusive right to appear in court, although solicitors may also appear in certain lower courts or on appeals. *Id.* 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. O'MALLEY, *supra*, at 1458-59. Other than the foreign-lawyer exception, however, the solicitor, effectively acts as a barrier between the barrister and the general public, since the barrister may not approach clients directly and must be brought in by a solicitor. Yaqub, *supra*, at 317.

62. Goebel, *supra* note 7, at 489; Council Directive 77/249/EEC of Mar. 22 1977, 20 O.J. Eur. Comm (No. L. 78) 17 (1977) to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Legal Services. This distinction is still true today among the Members of the European Union, where only Denmark, Great Britain and Ireland do not have a notary system. ADAMSON, *supra* note 60, at 12. "Denmark has the distinction of being the only Member State with a single legal profession (title: advokat)". *Id.* See *Id.* at 17-18 for Ireland. See also *Id.* at 23-24 for Great Britain.

63. Art. 48(4) allows Member States to impose a restriction "which prevents an employed worker from taking up 'employment in the public service,' " and Art. 55 one which "excludes self-employed persons from 'activities connected, even occasionally, with the exercise of official authority.'" LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 169-69 (1987).

mutual recognition of professional diplomas.⁶⁴ Additionally, the Court has taken a narrow view of the "public service" exception.⁶⁵ Both the directive, and member states' attempts to exempt certain professions from its application, have caused a great deal of controversy, but, interestingly, not as to notaries. The Lawyers' Services Directive of 1977 (77/249/EEC) provides that "Notarial 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."⁶⁶ 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.*⁶⁷

As illustrated by the European Union's treatment of notaries, despite the Latin Notariat's wide area of influence throughout the world, the profession is practiced as a fundamentally national or regional institution. Specialization does not, however, limit the notary solely to the certification of documents. The notary is often a legal advisor to the parties. "Since the *avocat* is generally limited to 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."⁶⁸ Similarly, for the Spanish *notario* mere legal knowledge is

64. See generally JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 137-71 (2d ed. 1990); *Id.* at 184-202.

65. Steiner notes in *Sotgiu*, case 2/74, the court, interpreting Art. 48(4) the same way it interpreted Art. 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." *Id.* at 171.

66. *Id.* at 193.

67. *Id.* 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 would seem 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 Art. 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. Resolution A3-0422/93 passed on Tuesday, January 18, 1994 (Official Journal No. C 44/36).

68. DEVRIES, *supra* note 60, at 61 (italics in original, footnotes omitted).

not enough, a formal legal education is mandatory so the notary can perform his duties as a trusted counselor and advisor to the parties.⁶⁹ As a general rule, while the notary *may* provide legal advice relevant to the juridical acts performed before him, even in one's own country, practice of law as both an advocate and as a notary have generally been considered legally incompatible.⁷⁰

Even in jurisdictions that allow notaries to practice as lawyers, they may not act as both notary and lawyer in the same contentious matters.⁷¹ Additionally, professional societies between notaries and other professions are generally not allowed.⁷² The Latin notary's work is personal and not delegable; the notary must personally witness the entire notarial transaction in the document subscribed before him.⁷³ In some cases, this means that notaries may not even practice in partnership with other notaries.⁷⁴ But in

69. PONDÉ, *supra* note 32, at 556.

70. See DEVRIES, *supra* note 60, at 61 for a discussion regarding France. The French law Ventose codified matters, tasks and other professions that were incompatible with notarial practice. PONDÉ, *supra* note 32, at 553. It made notarial practice wholly incompatible with being a judge or any other type of judicial functionary. *Id.* The Spanish notario may not be a public employee or judicial officer. 1 JOSÉ MARÍA SANAHUJA Y SOLER, TRATADO DE DERECHO NOTARIAL [ESPAÑOL] 292-94 (1945); See also GERMÁN FABRA-VALLE, CÓDIGO DE LEGISLACIÓN NOTARIAL 20, 63, 69 (1990); PEDRO AVILA-ALVAREZ, DERECHO NOTARIAL [ESPAÑOL] 202-204 (7th ed. 1990); PÉREZ & DEL CASTILLO, *supra* note 42, at 184 (discussing that while 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 Comrs., 201 A.2d 365, 368 (Md. App. 1964) (holding that the 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. *Id.*

71. See, e.g., PÉREZ & DEL CASTILLO, *supra* note 42, at 184. Italy gives the notary authority to appear in court on behalf of clients in non-contentious matters related to documents subscribed before her. PONDÉ, *supra* note 32, at 319-323. As one may 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 27, at 146. In the Netherlands the *notaris* may act as *advocaat*, a legal advisor, but not a *procureur*, a litigator in the same transaction. Hans Hoegen Dijkhof, *The Legal Professions in the Netherlands*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE 253-255 (Alan Tyrrell & Zahd Yaqub, eds., 1993). But they may wear the different hats, since the *advocaat* is automatically sworn as a *procureur*. *Id.*

72. See, e.g., O'MALLEY, *supra* note 61, at 1243.

73. PÉREZ & DEL CASTILLO, *supra* note 42, at 177-78.

74. This is the case in Puerto Rico, where lawyers may practice in professional partnerships, but notarios must always keep their work separate.

any case, as to notarial transactions, the notaries "[e]njoy a monopoly for giving authenticity to acts and contracts made by individuals: no other public officer can compete with them."⁷⁵ In fact, no one may compete with the notary in the performance of his function. The only individual capable of performing these duties is the notary. No other professional may compete with him.⁷⁶

3. Unified Code-Based Legal System

The Latin notary performs his function 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."⁷⁷

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.

[B]ecause 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.⁷⁸

Notaries exercise their exclusive power to authenticate over two general categories of private transactions: (1) mandatory notarial transactions, i.e., those that the law requires be completed by public document as a prerequisite for their validity;⁷⁹ and (2)

MALAVET-VEGA, *supra* note 27, at 32-33, 147. But in France, notaries are allowed to form professional partnerships among themselves, but not with any other professional. YAIGRE & PILLEBOUT, *supra* note 28, at 33-40. Additionally, the French Civil code expressly allows more than one notary to officiate over particular juridical acts, such as wills. See CIV. FRAN. art. 971 (allowing two notaries to receive a public open will).

75. PLANIOL, 2 CIVIL LAW TREATISE, Ch. IV § 138, at 81-82 (Louisiana State law Institute trans., 1959) [hereinafter PLANIOL].

76. See generally THE LEGAL PROFESSIONS IN THE NEW EUROPE (Alan Tyrell & Sahd Yaqub, eds. 1993). See *Id.* at 69-97 for a discussion on Belgium; *Id.* at 127-42 for a discussion on France; *Id.* at 143-76 for a discussion about Germany as to notarizing, but not drafting documents; *Id.* at 223-40 for a discussion on Italy; *Id.* at 253-84 for a discussion on the Netherlands.

77. MALAVET-VEGA, *supra* note 27, at 1-2.

78. *Id.* at 2.

79. The most common mandatory notarial transactions, are non-holographic 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

voluntary notarial transactions, i.e., those for which the notarial form is not essential to their validity, but which the parties voluntarily memorialize in a notarial document in order to obtain the protection of the presumptions associated therewith.⁸⁰ *Notarios* are required to be experts in the substantive law applicable to each of the transactions they certify. For example, the notary must take into consideration the Civil Code's Title on Succession, in the Book on the Acquisition of Property, when preparing a will; the Book on the Family, generally titled "About Persons," the Title on Community Property 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 a profession in a Civil-code system, in which laws are expected and required to interact. 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 in any voids.⁸¹

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 supported by the notary's professional training and status, and by the full power of the legal presumption of authenticity and legality that has been previously discussed.

C. Education, Admission and Territoriality

Latin notaries generally require post-secondary legal education, passage of relevant professional examinations and often a period of apprenticeship. Latin Notaries in general are preliminarily required to: (1) be nationals; (2) have "good moral charac-

movable property, partnership agreements, adoption, and acknowledgment of natural children. PÉREZ & DEL CASTILLO, *supra* note 42, at 71; YAIGRE & PILLEBOUT, *supra* note 27, at 12-13; MALAVET-VEGA, *supra* note 27, at 24-28.

80. See generally MALAVET-VEGA, *supra* note 27, at 73-76; YAIGRE & PILLEBOUT, *supra* note 28, at 90-92.

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

ter," 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.⁸² The Spanish Notarial Law of 1862 requires the notary to have a specified post-secondary education or be a lawyer.⁸³ Today, *notarios* must have a law degree (*licenciados en derecho*) or be doctors of law.⁸⁴ The *notario* must also pass a notarial examination including written and oral components, one part is drafting a notarial document, another drafting a judicial opinion about Spanish civil law, and the last one answering questions of notarial law or related substantive law subjects.⁸⁵ Under the 1913 law, the Italian notary was required to obtain a law degree, practice for at least two years and pass an exam.⁸⁶ These requirements have not changed, the *notaio* is still required to have a law degree, to perform an apprenticeship and to pass a competitive examination.

The only reasonable comparison of a Latin Notary's admission requirements is to an American lawyer's typical three-year law school career after obtaining an undergraduate college degree, and passing a state bar examination.⁸⁷ However, there is an important difference in the much increased level of educational specialization required of the notary. This is accomplished directly or indirectly. Direct, express requirements imposing specific notarial education, are not uncommon. This is the French *voie universitaire*. 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. A notary, is required to obtain an educational degree, the general law certificate, as in Spain and Italy, and in the French *voie professionnelle*.

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 other subcategories of attorney for initial admission. Notaries on the other hand are seeking appointment to a legislatively-created specialty. Another significant difference is the apprenticeship requirement, and the series of specialized exams that

82. See generally YAIGRE & PILLEBOUT, *supra* note 28, at 24; PÉREZ & DEL CASTILLO, *supra* note 42, at 172; GIMÉNEZ-ARNAU, *supra* note 26, at 275-77.

83. PONDÉ, *supra* note 33, at 301-02.

84. See SANAHUJER Y SOLER, *supra* note 70, at 276.

85. *Id.* at 282-84.

86. PONDÉ, *supra* note 32, at 324-25.

87. 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).

candidates must take to be *notaire stagiere* and *notaire assistant*. The notary public, whose ranks require no particular education beyond literacy, and are only sometimes required at most to take an elementary written exam, is not a pertinent comparison in this area.

In a final and striking difference, unlike the American lawyer, 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 of the traditional model. The Mexican system, provides a clear illustration of this two-step process of 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 for at least eight months, then must 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.⁸⁸

So-called *numerus clausus* rules impose limits on the absolute number of notarial positions in a country or state, usually proportional 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*."⁸⁹ Notaries must be appointed, generally by the Ministry of Justice, to one of the specific positions in order to be able to practice.

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 are quite low, as is the ratio of notaries to lawyers. As a general rule the notary may only subscribe documents within the national or state territory, never outside of it.

88. PÉREZ & DEL CASTILLO, *supra* note 42, at 172-77.

89. Denis-M. Phillipe & Helen Roberts, *The Legal Professions in Belgium*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE 69, 94 (Tyrell & Yaqub, eds., 1993) 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 José Guglietti, *La Comisión de Asuntos Americanos (CAA) y los Notariados de América Latina*, in ATLAS DU NOTARIAT 334g-334i (1989). 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 27, at 29.

COUNTRY	NO. OF LAWYERS ⁹⁰	POPULATION ⁹¹	NO. OF NOTARIES ⁹²
Belgium	9,000+	10,063,000	1,225
France	21,952 ⁹³	57,840,000	7,500
Italy	53,000	55,138,000	4,500
Netherlands	6,500	15,368,000	1,000
Spain	60,076 ⁹⁴	39,303,000	2,100

The notary public, in this area, is quite different, except for some elementary examinations. Superficially, a comparison may be drawn to some of the pre-requisites for becoming a notary, such as being an adult and have good moral character and appointment by State authority, but this comparison is really only skin-deep. More to the point, legal education and bar admission requirements in Europe and in the United States may, within limits, be generally comparable. What really characterizes the Latin notariat and sets it apart from the American lawyer, and even his national counterparts, is the governmentally enforced specialization of the profession, accomplished through educational or testing requirements, and the limitation in the number of notarial offices or 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 be a mere assistant in someone else's office.

D. Professional Liability

Most criticism of the notariat is directed to the self-discipline of the profession⁹⁵ that is found in many countries and to a general lack of proper quality control.⁹⁶ Notaries are generally subject to

90. THE LEGAL PROFESSIONS IN THE NEW EUROPE 69, 118, 194, 232, 281 (Alan Tyrell & Zahd Yaqub eds., 1993).

91. See WORLD ALMANAC 747, 767, 788, 804 (1995) for the populations of Belgium, France, Italy, Netherlands, and Spain.

92. ADAMSON, *supra* note 59, at 11-23.

93. Includes *Avocats* and *conseils juridiques*.

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

95. The most important safeguard of the guarantee of truth, legality and good faith of the notarial transaction is a proper disciplinary system. Nevertheless, may not be the case everywhere. Personal knowledge and clear information are the only indicators of the effectiveness of the Puerto Rican system. Even though this discussion pertains to the addressing of other systems, empirical evidence to evaluate their true effectiveness has not been obtained. This matter must be left for another day.

96. This is the case of Professor Suleiman's book. EZRA N. SULEIMAN, PRIVATE POWER AND CENTRALIZATION IN FRANCE: THE NOTARIES AND THE STATE (1987). The studies and conclusions of this work must necessarily be limited to France because the sale of offices still occurs in France, which is the reason for most of the problems of the French notariat. Additionally, Mexican

three types of liability in the practice of their profession: (1) professional-ethical liability; (2) civil liability for damages; and (3) criminal liability.⁹⁷ The notaries public are similarly subjected to removal by the authority that appoints them, and to civil liability in damages and 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.⁹⁸

"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."⁹⁹

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.¹⁰⁰

One of the "golden rules" in the practice of notarial law is "when in doubt, don't do it." But this was only possible because of practicing in a jurisdiction with an open notariat. That is not the case in most countries, where the notarial monopoly imposes a duty to offer your services upon any *lawful* request.

Once notaries are 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 its imposition might differ. But there is one very big difference between the overall scheme of professional liability of the notary and notary public: what is at stake. At stake for the Latin notary is his title, his livelihood, a professional status that requires very careful education, professional qualification and appointment to one of the limited number of positions available will be lost to the disbarred *notario*. While comparing this with the disbarment of an attorney, this is simply not the case with the notary public. Finally, even the lawyer is not the holder of an office that is

lawyers have complained about the political method of appointment that exists in certain Mexican states. See PÉREZ & DEL CASTILLO, *supra* note 42, at 170 (discussing that 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).

97. See generally MALAVET-VEGA, *supra* note 27, at 45-72; PÉREZ & DEL CASTILLO, *supra* note 42, at 347-78.

98. PLANIOL, *supra* note 75, at 89, § 150.

99. GIMÉNEZ-ARNAU, 3 DERECHO NOTARIAL ESPAÑOL 261 (1965).

100. See SCHLESINGER ET AL., *supra* note 4, at 19 n.12 and accompanying text for Professor Schlesinger citing for example, the German Beurkundungsgesetz of August 28, 1969 (BGBl I 1513).

so jealously protected and carefully limited.

E. Status of the Profession

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."¹⁰¹ 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 notaries were at the very top of the list¹⁰² and of the social scale.¹⁰³ The profession is still highly regarded in modern times —although it is certainly not universally loved.

IV. CONCLUSION

An American legal practitioner should be aware that counterparts in a foreign jurisdiction may be a notary, and, more importantly, that the services of a notary could be essential or, certainly, very useful for the completion of a particular legal transaction. The notary should also be able to explain to the client the services that will be performed. For example, a bank lending abroad might be interested in knowing that in many civil code jurisdictions, a real estate mortgage generally must be a notarial document *and* be registered for the mortgage right to exist. Additionally, it may be advisable to include certain agreements in notarial documents in order to benefit from the evidentiary value attached to such documents. This is not incompatible with the American lawyer's advocacy and counseling functions.

The *notario's* monopoly on legal transactions and the substantial barriers to full entry into the profession, which keep the number of notaries relative to other specialties and to overall population so very low, ensure that the *notario* is a legal profes-

101. DEVRIES, *supra* note 60, at 61 (footnotes omitted). See also PLANIOL, *supra* note 75, at 79, § 132. However, Planiol points out that abuses of this special status led to new French laws restricting *notaire's* management of their client's funds and mandating the avoidance of conflicts of interest. *Id.* at 80.

102. 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. PONDÉ, *supra* note 32, at 104.

103. *Id.* at 153-54.

sional that cannot be overlooked. This is especially true in the era of increasing globalization of legal practice and commercial trade. Even the European Union, a free trade area and customs union, which is on the march toward internal professional compatibility, has maintained among its member states the *notarios'* national and regional monopolies. In a world increasingly involved in international trade, American citizens, and their lawyers, will find themselves in need of these notarial services. This should be viewed as an opportunity for cooperation among professionals. The American comparativist will be an essential link between the client and the notary, and will continue to perform a substantial amount of the legal counseling related to the transactions. Hence, the Notary should be viewed as an essential ally, and not a competitor. This brings with it the important benefits for the client and the lawyer.

Because the notary has had a sovereign power delegated upon 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 on him by regulating admission and practice of the profession, thereby guaranteeing the special status of notarial acts. Thus, the careful and competitive system of ensuring proper education, selection and appointment to the notariat. The notarial candidate who meets all eligibility requirements, passes every exam, and completes periods of apprenticeship, may never practice because *numerus clausus* rules limit the number of available notarial positions. This specialist is an impartial counsel to the parties. If the parties want a private advice, they must seek counsel from another legal professional. Therefore, American lawyers can continue to counsel and advocate on behalf of their clients, while using the services of the notary. The adversarial ethic can co-exist with, and benefit from, notarial impartiality.

The *notaire* is a specialized legal professional, who is required to be an expert on the law applicable to the juridical act over which she officiates. This requires the notary 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 certification is supported by strong government regulation and professional training requirements.

Finally, the 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 proving it. The fundamental difference between the notarial *publica fides* and the notary public's power to certify is the evidentiary effect. The document subscribed by the notary public has very limited probative effect. By contrast, the notarial

seal is a certification of truth, legality and good faith. Thus, the transnational transaction is at least more easily enforceable.

Notarial practice challenges traditional notions about our legal profession and law. One natural example is the ongoing debate regarding the adversary ethic,¹⁰⁴ which lately has taken on strong "law and economics" overtones. In this context, the Notarial profession and registration system offer important economic benefits,¹⁰⁵ in the context of a *limited* non-adversarial practice model. One very dated study concluded that adoption of the notarial system was impractical.¹⁰⁶ Perhaps it is time for American legal theorists to revisit the matter.

Let us work together as legal theorists and as practitioners to use the Latin notary as a necessary, and useful aide to the successful completion of transnational legal transactions, and as a model of non-adversarial ethic in an adversarial world.

104. See *Counsel*, *supra* note 1, at 398-402.

105. See J. T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213 (1977).

106. See SCHLESINGER ET AL., *supra* note 4, 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 345 (1941). See also STATE OF NEW YORK, SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION 65-374 (1936) (discussing the acts and recommendation relating to the Seal and Consideration and Studies relation to the Seal and Consideration).