CIVIL LAW NOTARY

An office whose time has come?

The establishment of civil law notaries in addition to notaries public would benefit the U.S. legal system in more ways than one.

By Nicholas G. Karambelas

Most of the nations of the world use a legal system that is based on either the civil law tradition or the common law tradition. The civil law tradition evolved from the given law of antiquity through Roman law, the codes of Theodosius and Justinian, Salic law, and the Napoleonic Code. That tradition is the foundation of the legal systems of continental Europe, Francophone Africa, South America, and Middle Eastern countries that were under French dominion such as Egypt, Lebanon, and Syria. The legal systems of China and Japan, though they did not evolve from the same given law as did the civil law, are functionally similar to the civil law tradition.

In the civil law tradition, all law flows from a coherent set of legal principles contained in a written code provided or enacted by the sovereign. The civil law tradition has been described as "anything that is not permitted is prohibited."

Although scholars have found traces of the common law tradition in ancient Roman law, the common law tradition essentially derives from the merging of the Saxon and Norman legal systems after William I conquered England in 1066. The common law tradition is the foundation of the legal systems of Great Britain (except Scotland), the United States (except Louisiana and Puerto Rico), Canada, Australia, Cyprus, India, Pakistan, and Anglophone Africa.

In the common law tradition, law is developed through the decisions of judges made in resolving actual cases. The common law tradition has been described as "anything that is not prohibited is permitted."

At the beginning of the 21st century, each legal tradition is gradually adopting essential features of the other legal system. The law of the common law systems is becoming more statutory. The law of the civil law systems is being made increasingly in judicial decisions and interpretations of civil code provisions. The civil law notary is but another feature of the civil law tradition that is receiving serious consideration in common law jurisdictions.

Functions of a Civil Law Notary

A notary in civil law systems—*notario* in Spanish-speaking countries, *notaire* in French-speaking countries, *symvoulographos* in Greece—performs a very different function than

does a notary public in the United States. The civil law notary is an attorney who has undergone special training and performs the following three basic functions: drafts legal documents such as wills, contracts, and deeds; authenticates legal instruments; and serves as a public repository of legal instruments. By contrast, a notary public in the United States need not be an attorney. The functions of a U.S. notary public are basically to administer oaths, take sworn statements, and verify the identity of a person who executes a legal document.[1]

The roots of the civil law notary fade back to ancient Rome. Called *tabelliones*, certain individuals drafted and maintained legal documents, particularly wills. Tabelliones were literate and learned persons, but not necessarily lawyers. The tabellio was rediscovered in medieval times as the notarial function developed as a consequence of increasingly complex commercial activity.

The International Union of the Latin Notariat defines a civil law notary as "a legal professional specifically designated to attest the acts and contracts that persons celebrate or perform, to draft the documents which formalize the latter, and to give legal advice to those who require the services of his office."

Drafting Legal Instruments. Because the civil notary is an attorney, he or she can render legal services in connection with any transaction for which the civil notary is performing a notarial function. However, unlike the notary public in the United States, the civil law notary is expressly authorized by law to represent the transaction rather than a particular party to the transaction. However, the civil law notary is prohibited from acting as both notary and advocate for a party to the transaction. If the civil law notary drafts the relevant legal document, he or she must make sure that the legal instrument accurately represents the intent of the parties, that the parties understand the legal nature and effect of the instrument, and that the legal instrument complies with applicable law. In complex transactions the parties may each be represented by an attorney and the attorneys work with the civil law notary to draft the legal instrument.

Authentication of Legal Instruments. After the civil law notary is satisfied that the legal instrument is properly drafted and understood by the parties, he or she authenticates the legal instrument. An authenticated legal instrument is conclusively deemed genuine, legally binding, and a true and accurate recital of the agreement of the parties. The civil law notary provides a written statement that sets forth the transactional facts from which the legal instrument derives and an opinion that the legal instrument satisfies applicable legal requirements and is legally binding. The authentication of the civil law notary is presumed to be correct and is accorded the effectiveness and validity of an administrative or court order. A legal instrument need not be authenticated to be legally enforceable. However, any legal instrument that transfers title to real property must be authenticated by a civil law notary.

If a party seeks to challenge an authenticated legal instrument on the grounds of mistake, fraud, lack of consideration, or lack of meeting of the minds, that party must bring a special proceeding. Such proceedings are very rare and, if asserted, must allege that the civil law notary abused his or her office in authenticating the legal instrument. If an authenticated legal instrument is ultimately found not to represent the intent of the parties or fails to comply with applicable law, the civil law notary is liable for the full value of transaction set forth in the legal instrument.

Public Repository of Legal Instruments. The civil law notary is required to maintain the original of any document that he or she authenticates. That original document is conclusive written

evidence of the contents of any such document. The civil law notary must maintain each such document in a secure and accessible environment.

Qualifications of a Civil Law Notary. The office of a civil law notary is a public office, and as an appointed public official, the civil law notary is subject to ethical standards as well as special civil and criminal liability for abuse or misuse of the office. The civil law notary must be an attorney and must take a course of special law studies as well as a special notarial examination. The number of notaries is limited. In some countries the office is still hereditary under certain circumstances. A civil law notary can practice only within a designated geographical area.

Civil Law Notary in the United States

Because of the conceptual and substantive differences between the U.S. legal system and the civil law systems and the manner in which attorneys practice in the United States, enabling civil law notaries raises fundamental ethical and practical questions. The National Association of Civil Law Notaries has recommended a model act, the Model Civil Law Notary Act, to the states to allow for the establishment of civil law notaries.

Alabama and Florida are the only U.S. jurisdictions that have enacted statutes that enable civil law notaries.[2] Adopted in 1999 and amended in 2001, the Alabama statute is based on

the model act. The Florida statute was enacted in 1997 primarily to enable legal documents authenticated by a civil law notary in Florida to have legal effect in civil law countries, particularly in Central and South America.[3]

The model act essentially incorporates the concepts of the civil law notary as the office exists in civil law countries.

Qualifications. The Model Civil Law Notary Act recommends that a civil law notary be an attorney admitted to practice law in the jurisdiction and who has practiced for at least five years. The attorney must successfully pass a civil law notary examination. The Florida regulations prescribe a particular course of study and examination for a civil law notary.[4]

Functions and Powers of the Civil Law Notary. The functions and powers of the civil law notary are enumerated in the model act and embody the traditional functions and powers of the civil law notary:

- Draft legal instruments that accurately reflect the desires of the parties and are prepared in a manner consistent with applicable legal requirements so that the legal instrument is legally enforceable;
- Represent the transaction for the purpose of drafting legal instruments and act as an intermediary in multiple-party transactions;
- Advise the parties equally, accurately, and impartially as to the nature and legal consequences of the legal instrument and the transaction;
- Refrain from acting as an advocate for any party in connection with any matter arising from or incident to any transaction or legal instrument for which the civil law notary has served a notarial function;
- Authenticate legal instruments by providing written finding of transaction facts, as those facts are known to the civil law notary, which shall be presumed correct and rebutted only by clear and convincing evidence and a legal opinion that each instrument is legally binding[5] (the civil law notary is prohibited from including in any such authentication facts that are in controversy, although the notary may certify as to those facts that are in controversy); and
- Develop a protocol to preserve, protect, and maintain each legal instrument authenticated by the civil law notary.

Civil Law Notary in Perspective

As does any legal innovation, the civil law notary raises many issues of implementation, especially since the concept bridges different legal traditions. The primary issues are ethical, such as the extent of professional liability and the evidentiary effect of an authenticated notarial act. Neither Alabama nor Florida has amended its rules of professional conduct to account for the office of civil law notary. In the District of Columbia civil law notaries would presumably conduct their functions consistent with Rule 2.2 of the D.C. Rules of Professional Conduct, which allows an attorney to act as an intermediary subject to certain conditions. For clarity the rules may have to be amended to address specifically the ethical considerations of an attorney who acts as a civil law notary.

In civil law countries, if the civil law notary authenticates a legal instrument in a commercial transaction in error or wrongfully, the civil law notary is liable for the full value of the transaction. Neither the model act nor the Alabama and Florida statutes contain any such provision. It is unclear whether civil law notaries incur any special professional liability as a result of the functions they perform. It remains to be seen how malpractice carriers will view attorneys who act as civil law notaries.

In civil law countries, a notarial act including the statement of transactional facts has the effect of a court order and is presumed correct. The rules of evidence and civil procedure should be amended to set forth specifically the evidentiary effect of a notarial act and how the notarial act is admitted in a legal proceeding.

There are benefits that can accrue to the U.S. legal system from the civil law notary. Civil law notaries will become a class of attorneys who are expert in drafting legal instruments, and would establish uniform and predictable standards for drafting legal instruments. Much of the litigation that stems from poorly drafted legal instruments could be eliminated. Another benefit is that personal and commercial transactions involving legal instruments that must be produced or have legal effect in civil law countries will be more simple and efficient. It would eliminate the cumbersome and time-consuming Hague Convention and apostille systems.

The 70 member countries of the International Union of the Latin Notariat already recognize the notarial acts of civil law notaries in Alabama and Florida. As long as the civil law notary can be adapted to the U.S. legal system and the legal traditions of the states, the civil law notary may be an old idea whose time as come.

Notes

[1] *See generally* Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 Hastings Int'l & Comp. L. Rev. 389 (Spring 1996).

[2] Ala. Code 1975 § 36-20-50 *et seq.*; Fla. Stat. ch. 118.10; *see also* Fla. Admin. Code r. 1C-18.001 *et seq.* Note that Louisiana, as one of two civil law jurisdictions within the United States, has adopted certain elements of the civil law notary function into its notary public law. The other civil law jurisdiction is Puerto Rico.

[3] McClane & Tessitore, *The Florida Civil Law Notary: A Practical New Tool for Doing Business with Latin America*, 32 Stetson L. Rev. 727 (2003).

[4] Fla. Admin. Code r. 1C-18.001(2)–(3).

[5] The Alabama statute does not require that an authenticated act be rebutted only by clear and convincing evidence.

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