

The Evolving Role of the Latin American Notary Public

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The role of the notary public is significantly different in civil and common law countries.¹ In the latter, notaries mainly authenticate signatures, attest affidavits, prepare wills, and occasionally protest bills of exchange and other commercial instruments.² In contrast to civil law notaries, common law notaries do not certify the contents or veracity of the acts, transactions, or contracts they authenticate,³ nor do they keep a protocol or record of such instruments. Moreover, in common law, countries, one may become a notary public without a legal degree or legal training.⁴ Although notaries occasionally have to be present to validate certain legal acts in common law jurisdictions, and they occasionally intervene as bankruptcy trustees, conservators, executors, or guardians ad litem, they do not play a central role in the common law system.⁵

In contrast, the role of notaries is crucial to understanding the civil law system.⁶ In fact, whether it concerns creating legal entities, amending articles of incorporation, writing and amending of wills, handling of land transfers, verifying the legality of a transaction, or performing other acts related to family law, hardly any legal act takes place in civil law countries without encountering the intervention of a notary public. Unlike common law notaries, civil law notaries must have a legal degree, and in some jurisdictions they must also complete a specialization course, including practical training, in order to obtain a government license and appointment to their posts.⁷

The quintessential role of the civil law notary is to authenticate and record legal acts. They keep a registry—protocol—of all of the documents that they authenticate, referring to instruments that the parties execute without the intervention of a government official of any type, such as contracts and powers of attorney. Notaries public are also

witnesses-for-hire, meaning that they attest to a multitude of acts and circumstances. For instance, a notary public may “certify” that on a determined date a person was present in a given location or that a car was painted a specific color on New Year’s Eve. In the business realm, the intervention of notaries public is even more substantial, since they witness the creation of business entities and the transfer of different types of assets (e.g., real estate, commercial paper, stock), assist in liquidations, authenticate a multiplicity of legal documents (e.g., purchase agreements, leases, deeds, and any type of contracts in general) and corporate instruments (e.g., shareholder agreements, bylaws, corporate resolutions, powers of attorney). The intervention of notaries is also commonly sought as an evidentiary means in judicial proceedings, such as litigation. Their presence also validates the writing of wills and codicils.⁸ In addition, notaries public review the legality of titles to land,⁹ provide information on liens, and may act as tax collectors in real estate transactions.¹⁰

However, the role of the Latin American civil law notary public is still evolving. There are voices calling for the opening up of a profession that to this point has been largely bred on political favors and nepotism.¹¹ Oftentimes, these voices cite the lack of accountability and high fees of Latin American notaries, and their monopoly in the legal field, as reasons for a profound review of this institution.¹²

New technologies have also helped to spur a debate about the modernization of the old-fashioned recording methods of notaries public use. With the emergence of electronic commerce and digital documents and signatures, the intervention of the civil law notary is arguably an obstacle to the promotion of business in Latin America. The main field where the intervention of notaries has been debated, and to a certain extent reduced, is the authentication of contracts.¹³

Civil Codes generally demand the presence of a notary public to provide legal validity to contracts dealing with goods and services that are essential for economic activity.¹⁴ Such Codes thus deny legal force to electronic documents. Therefore, legislatures have passed targeted amendments to Codes to allow the expansion of electronic commerce.¹⁵

There are other areas where the role of the notary public has also been subject to reform. Among these, the field of secured transactions is important.¹⁶ In the case of Mexico, for example, mortgages must be formalized before a notary public and recorded in the property registry. Traditionally, the assignment of mortgage rights also required the presence of a notary public.¹⁷ However, under new legal developments, creditors may assign their credits directly without providing notarial notice to debtors or complying with registration requirements.¹⁸

Wills are another area of interest for reassessing the role of notaries public in Latin America. While a will requires the signature of the testator and two witnesses in many common law jurisdictions, in civil law countries the additional presence of a notary public is a prerequisite for the validity of a will. This difference has generated numerous problems in the case of testators unaware of this requirement who execute their wills in a common law jurisdiction naïvely expecting the civil law jurisdiction to recognize them.¹⁹

The role of the Latin American notary is undergoing a number of challenges. Nonetheless, their presence seems assured for the near term in a region where legal changes do not take hold quickly. In this context, it is more likely than not that Latin America will see in the near future an increased interest at the legislative level in the regulation of the notary public.

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1 See generally M. Read Moore, *Tax and Estate Planning Issues for U.S. Clients who Own Foreign Property*, SP040 ALI-ABA 1939, 1 (2009). See also Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 Harv. Latino L. Rev. 115 (2004).

2 Phanor J. Eder, *Contracts*, in *A Comparative Survey of Anglo-American and Latin-American Law*, 130 (Littleton, Colo.; F.B. Rothman,

ed., 1981 (originally published: New York, New York University Press, 1950).

3 Eder, *supra* note 2, at 129. See also Charles E. Meacham, *Foreign Law in Transactions Between the United States and Latin America*, 36 Tex. Int'l L.J. 507, 6-7 (2001)

4 Armando J. Tirado, *Proceedings of the Ninth Annual Conference on Legal Aspects of Doing Business in Latin America: New Approaches: Looking to the Twenty-First Century, in Successfully Financing Operations and Projects.*, 11 Fla. J. Int'l L. 1, 58 (1996).

5 See generally William M. Hannay, *Selecting and Working with Foreign Counsel*, in *The International Lawyer's Deskbook* 443-61 (Lucinda A. Low et al. eds, 2002, 2nd Edition) (discussing the expectations of U.S. lawyers regarding the roles of notaries in foreign jurisdictions vis-à-vis the role of notaries in most U.S. jurisdictions).

6 Eder, *supra* note 2, at 130.

7 See George E. Glos, *The Mexican Law*, in *Comparative Law*, 711-23 (Littleton, Colo., F.B. Rothman, ed., 1979) (discussing general aspects of the notaries public in Mexico). See also Roger Van den Bergh, *Competition in Professional Services Markets: Are Latin Notaries Different?*, 2 J. Competition L. & Econ. 189, 10 (2006).

8 Frank G. Helman, *Practical Implications of the Diversity of Languages and Legal Cultures in International Practice*, 19-SPG Int'l L. Practicum 84, 1 (2006).

9 Byron Swift, et al., *Private Lands Conservation in Latin America: The Need for Enhanced Legal Tools and Incentives*, 19 J. Envtl. L. & Litig. 85, 19 (2004).

10 Daniel B. Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. Miami Inter-Am. L. Rev. 213, 12 (2009).

11 Jonathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983-1999)*, 7 Sw. J.L. & Trade Am. 369, 10 (2000). See also Guillermo Ortiz, in *Panel #2: The Judicial System and the Rule of Law Reform in Latin America*, 25 Ariz. J. Int'l & Comp. L. 299, 8 (2008) (discussing the problem of favoritism in judicial appointments in Latin America).

12 See Francisco Moreyra, *Joint-Venture Agreements under Peruvian General Corporation Law*, in *Symposium: Doing Business in Latin America*, 32 Stetson L. Rev. 769, 4 (2003) (discussing new Peruvian laws eliminating the requirement of the intervention of notary publics in the creation of certain business entities).

13 See generally Luz E. Nagle, *E-Commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 Am. U. L. Rev. 859 (2001) (discussing the role of Latin American notaries public concerning the authentication of digital documents and signatures).

14 See generally Hannay, *supra* note 5. See also Robert Kossick, *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. Miami Inter-Am. L. Rev. 23, 7 (2000).

15 See Nagle, *supra* note 13, at 920-22.

16 Georgette Chapman Poindexter & Wendy Vargas-Cartaya, *En Ruta Hacia El Desarrollo: The Emerging Secondary Mortgage Market in Latin America*, 34 Geo. Wash. Int'l L. Rev. 257, 1 (2002-2003).

17 Richard C. Jordan, *Will the Bubble Burst? Some Subprime Lessons from Mexico, Latin America's Leader in Asset Securitization*, 42 Int'l Law. 1181, 10 (2008).

18 See Poindexter, *supra* note 16, at 24. See also Tirado, *supra* note 4, at 58.

19 Helman, *supra* note 8, at 84.