

Common Law & Civil Law Notaries: A World Of Difference

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If you were to ask people in different parts of the world what a Notary does, you would get very different answers. Notaries in the United States play an important role in authenticating signatures and deterring fraud, but at the same time there are strict limits to what they may do. A U.S. Notary is a ministerial officer, which means that the Notary may not make decisions on behalf of a signer, offer advice or prepare documents.

Unlike the Notaries Public of the U.S. "common law" system, which is based on unwritten custom and legal precedent, many other countries use legal codes which traditionally rely on government officials to confirm the legality of a transaction as well as a signer's identity. The Notaries of "civil law" nations have significantly different duties than their U.S. counterparts and fulfill many functions not permitted Notaries in the United States. Civil law Notaries are attorney-like legal professionals who act as impartial advisers, prepare documents on behalf of both sides in a transaction and ensure that these documents meet the legal requirements of the appropriate jurisdiction.

Needless to say, this dichotomy has resulted in complications when notarized documents are sent between the United States and other countries. Because U.S. Notaries often do not have the same legal training as their civil law counterparts, many nations view their work with skepticism and are reluctant to accept documents notarized in the United States. At the same time, the concept of a legal professional representing both sides of a transaction contradicts basic assumptions of U.S. legal codes. However, work continues to improve the status and reputation of U.S. Notaries abroad. In fact, two states, Florida and Alabama, have recently developed a new type of notarial office to bridge the gulf between U.S. and civil law Notaries.

Common Law and Civil Law

Many of the obstacles in reconciling the roles of U.S. and civil law Notaries result from the two offices evolving under radically different legal systems. While most European and Latin American nations adopted systems based on a tradition known as "civil law," using written codes originally developed by the Romans, legal traditions in the United States were based on the "common law" system of England, which employed custom and unwritten law to determine legal decisions.

"In the civil law tradition, laws evolved from detailed written codes, with judges acting as enforcers of that law," said Alejandro Garro, professor of comparative law at Columbia University in New York. "Common law evolved without a written code. Cases were decided based on past precedent." This led to different approaches to authenticating documents in each legal system, he explained. Civil law systems preferred a more detailed authentication process for documents that included verification by a government official who also determined the legality of the transaction, while common law used Notaries who acted in a more limited role to verify the identity of the signer.

What Is the Role of a Civil Law Notary?

In civil law countries, Notaries are legal professionals and must have a degree in law. However, they do not function in the same way as a traditional attorney. They act as public officials, serving as impartial legal advisers to both sides of a transaction. For example, if two parties request the assistance of a civil law Notary in concluding a real estate transaction, the Notary advises both sides of any legal ramifications and, if the parties involved ask, can verify the details of the transaction. Once both parties understand and are in agreement, the civil law Notary drafts a document executing the transaction. This document is considered self-proving - based on the status and reputation of the Notary drafting it, it is accepted as authentic and legally admissible in a court of law.

"Civil law Notaries are responsible for preparing a document that is legally enforceable and valid," said Angel Marrero, former president of the Puerto Rico Notaries Association. (Although a U.S. territory, Puerto Rico uses a civil law system because of its Spanish heritage.) "It is the civil law Notary's responsibility to make sure the parties involved in the contract understand what they are doing." Civil law Notaries are also responsible for keeping and storing documents they prepare. "Once the document is signed by the parties and Notary, the original becomes public property. It remains in the custody of the Notary, but the property of the state," Marrero said. "The Notary then issues under his signature a copy of the document which, for all legal purposes, is the same as the original."

Notaries Public in the United States, on the other hand, are expressly prohibited from offering legal advice or drafting documents for signers unless they are a qualified professional in the appropriate field, such as an attorney, escrow officer or real estate agent, for example. The Notaries of the state of Louisiana are a unique exception to this rule. As a former colony of France and Spain, Louisiana is the only state which has a legal system based on the civil law model. "We received authorization to retain our civil law system when Louisiana became a state in 1812," said Robert Hodges, an attorney and Notary in Baton Rouge. "There was a great deal of concern about adopting a common law system, but Thomas Jefferson (the president who purchased Louisiana from France) was very understanding."

Because of this, Louisiana's Notaries have powers to prepare documents and act in a role similar to the civil law Notaries of other countries.

Conflict and Confusion

apart from Louisiana, the differences between the roles of Notaries in the United States and those in civil law nations have led to many complications in authenticating documents sent between the United States and these other countries. Because they perform a ministerial role which is considerably different from their civil law counterparts, U.S. Notaries are not required to have the extensive legal training of civil law Notaries. As a result, officials in other countries often misunderstand the U.S. Notary's role, or even reject documents notarized in the United States, according to Professor Garro. "Other countries have sometimes refused to accept documents notarized by a U.S. Notary," he said. "In Germany, for example, objections have been raised to documents notarized by common law Notaries. It's a subject of contention."

Marrero concurred, adding that the differences between U.S. and civil law Notaries has been an ongoing issue in many parts of the world.

Finding Common Ground

In 1997, the state of Florida introduced legislation creating a new office to heighten trust abroad in the integrity of American documents. Attorneys with five years of experience practicing law could apply and take an exam to come "international Notaries" authorized to act in a fashion similar to that of civil law Notaries in other nations.

"The state government wants to encourage international trade," said Tom Skola, an attorney and international Notary with the firm of Becker & Poliakoff in Miami, Florida. However, because of the newness of the office, other countries have not yet fully recognized Florida's international Notaries. "I haven't used my civil law Notary power yet, because Latin American countries won't honor it," Skola said. "The Brazilian consulate said it would not recognize the authority of a Florida international Notary."

According to Todd Kocourek, Special International Counsel for the Florida Department of State, Florida officials have been working with other countries and with the International Union of Latin Notariats (IULN) to help promote recognition of Florida international Notaries abroad.

"We've focused on receiving guidance on things they would like to see in our program," Kocourek said. "One example is 'public faith' - the legal and judicial deference given to notarial acts. 'Public faith' is a demonstration that there is a statute that provides authority for international Notaries to act appropriately for the jurisdiction receiving the document."

Making the office compatible with the existing U.S. legal system is another challenge that is being worked on, said Bruce J. Robbins, director of the International Notary Network of Florida, Inc. "The United States has never recognized that position in its practice of law. It's not like a Notary Public at all, it's more like an intermediary," he said. "It's really foreign to U.S. practice, where you're normally representing one side or another."

According to Skola, ethical guidelines for attorneys in the U.S. make it difficult to represent both sides in a transaction in the manner of civil law Notaries. "The general principle is that you can't represent both parties in a transaction in most cases. A U.S. attorney still has to comply with bar requirements, ethics and concerns," he said. "Usually Notaries in other countries are not acting as lawyers. They may have gone to law school, but are not practicing attorneys."

Despite this, the creation of the international Notary office has been hailed as an important step in promoting international commerce. Skola said he sees the establishment of the Florida office as the first phase in improving the recognition of U.S. documents sent abroad. "Now that Florida has international Notaries, they can go to other jurisdictions and find out how they can get recognition for them by other countries," he said.

The state of Alabama recently followed Florida's example and passed a law to create its own international Notary program. Chuck Grainger, General Counsel for the Alabama Secretary of State's office, said the state hopes to work closely with Florida and other states to promote consistent development of international Notary programs nationwide. "We're working to make sure the foundation of civil law Notaries is well-built before rushing to implement something," he said. "Alabama is setting the example of developing civil law Notaries as a national program, rather than as a state-by-state program, by working with Florida. National organization is not well-developed yet because it's a new concept for the United States."

Where the U.S. Notary Public Fits in

It should not be assumed that the roles of international Notaries and civil law Notaries will diminish the traditional office of the Notary Public in the United States. In fact, many people both in the United States and other countries have expressed a desire to create more common ground between civil and common law Notaries. "In both traditions, the Notary institution has gained prominence and importance all over the world," said Carmen H. Carlos, director of the Puerto Rico Office for the Inspection of Deeds. "The functions of the Notary are various and entitle more responsibility and skill than any short description could convey."

Professor Garro said the state of New York has taken steps to improve the Notary Public's standing abroad by providing statutory wording (New York Executive Law, Section 135) supporting the acceptability of international documents notarized by a U.S. Notary Public. "In New York, the state legislature provides that a Notary Public is authorized to authenticate a document to be sent in a foreign country," he said. "When the issue of whether or not the Notary is authorized arises, a New York attorney can bring up the statute." While this does not give New York Notaries any authority to practice law or draw up documents, it does provide official support if the Notary's status is questioned by another nation, Garro said.

According to Todd Kocourek of Florida, the creation of the international Notary office may even reduce the pressure exerted on Notaries Public by employers and businesses who want them to perform unauthorized acts when notarizing. "Very often, attempts to generate documents acceptable to a foreign legal system means Notaries Public are pushed by businesses to act beyond their legal bounds in order to make the document appear acceptable, simply because of the lack of an alternative," Kocourek said. "Now that there is an alternative being developed, we have a way to avoid these situations."

As Angel Marrero stated, the goal of both U.S. Notaries and civil law Notaries should be cooperation, not competition. "We're trying to equalize the notarial systems and requirements between the United States and the international community," he said. "We're not trying to replace the U.S. system, of course. We're just trying to fulfill many of the requirements regarding notarized documents sent abroad."

The Civil Law Notary's Dual Role

While civil law Notaries are independent legal professionals, they also enjoy a long-standing traditional status as public officials. For example, Mexican notarial law states: "A Notary is a member of the legal profession vested with the state with public authority and faith."

According to Professor Alejandro Garro of Columbia University in New York, civil law Notaries organize their own services as they see fit and collect fees from their clients in a fashion broadly similar to U.S. Notaries, although the scope of a civil law Notary's duties as a legal adviser and preparer of documents means the fees charged for services are significantly higher than in the United States, often reaching thousands of dollars. And unlike the office of Notary Public in the United States, the number of civil law Notaries in a given region is fixed by law. Usually civil law Notaries are only appointed after a rigorous examination, and notarial appointments are usually for life. A civil law Notary may only be removed from office for improper behavior such as negligence or violation of law.

Because of its strict qualifications, the lifetime term of office and the responsibility of the civil law Notary as a multiparty legal counselor, civil law Notaries are regarded as having a unique status that differs considerably from standard attorneys or common law Notaries Public.

Common Law Notaries:

- serve as impartial third-party officials to the signing of documents.
- verify the identity of signers, require their personal appearance and serve to deter fraud.
- operate in a ministerial capacity in which they do not offer advice, but follow the instructions of the document signer and do not make decisions on behalf of the signer.
- are qualified to act as Notaries by completing a mandatory application that does not require them to have legal training.

Civil Law Notaries:

- serve as impartial third-party legal professionals to a transaction.
- verify the identity of signers, require personal appearance and serve as a deterrent to legal challenges made to a transaction.
- are responsible for keeping the originals of documents they prepare.
- operate in a judicial capacity in which they prepare the document, authenticate its legality and make certain the parties involved understand and agree to all legal ramifications.
- are qualified to act as Notaries by passing a mandatory exam and possession of a law degree.