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

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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

BY PEDRO A. MALAVET*

I. INTRODUCTION

The Latin Notary is a legal professional who enjoys a state-controlled monopoly over important private transactions in civil law countries.¹ It is easy to think that I describe the Latin notariate only because I am a Latin Notary and because I have been involved in notarial practice.² However, my publications on this subject are not motivated by familiarity. The Latin notary and the substantive and procedural rules that apply to this profession are a tremendous example of a non-partisan professional ethic, which has much to teach an American legal audience. In this article, I will focus on the notarial transaction as a private, non-adversarial, extra-judicial process to develop facts and explain applicable law so that the parties may memorialize a legally significant fact and/or provide informed consent to a contract. The notarial transaction is analogous to a judgment in which a court approves a settlement stipulation and makes necessary findings of fact and conclusions of law. It is an inexpensive and reliable model for a market-driven, non-adversarial system of informed contracting and fact-determination.

The Latin Notariate is an old and complex legal institution found in

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¹ See ENRIQUE GIMÉNEZ-ARNAU, DERECHO NOTARIAL ESPAÑOL 118 (2d ed. 1976). Professor Giménez-Arnau tells us that "Latin Notary" ("Notario Latino") refers to the profession that has found its greatest acceptance and exposure in Latin countries, and the designation, therefore, is not a reference to its origin in Roman law.

² I am still in the active register of lawyers in Puerto Rico. However, I have turned over my notarial archives to the Notarial Inspector, because I no longer reside in Puerto Rico. See P.R. LAWS ANN. tit. 4, §§ 2104, 2106 (1994).
many countries around the world today. Since I cannot possibly cover the notarial laws of every country in this limited context, I have selected legislation from a few nations that are representative of the Latin Notarial system.

There are important practical reasons for us to learn about the Latin notarial system. For example, the notarial monopoly affects common commercial transactions such as the purchase of real property, mortgages and the drafting of many corporate documents. Given that American law firms annually generate over a billion dollars in fees for services rendered abroad, learning about a legal professional who is often statutorily entitled to a share of those fees might prove useful to transnational practitioners. Legal services is also a significant market sector, which has attracted the attention of United States government international trade negotiators. Additionally, legislators and bar authorities need to know why many of our recent immigrants are easy prey for unscrupulous American notaries public who deceive them into believing that they can provide legal services. The newest Americans will often come from systems in which notaries are legal professionals. Moreover, notaries are generally the most trusted and most successful legal professionals just about everywhere outside the United States. Therefore, the literal translation of "Notary Public" to a foreign language is quite deceiving, unless it is accompanied by an equally understandable statement that the notary public is not authorized to practice law.

More importantly, the notariate is a mostly-private, non-adversarial

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3 For a listing of over thirty countries that follow the Latin Notarial system in Europe, Latin America, Africa and East Asia, see Pedro A. Malavet, Counsel for the Situation: The Latin Notary, a Historical and Comparative Model, 19 HASTINGS INT’L & COMP. L. REV. 389, 450-52 (1996).
4 I will generally refer to Spanish, French and Puerto Rican legislation. Additionally, I will make occasional references to Mexican, German and Italian notarial laws. The French, Spanish and Italian are the oldest and most influential modern notarial laws.

It is presumptuous to believe that the entire notarial system can be described comparatively in a single law review article. Therefore, I am working on a series of articles of which this is the third. In my first piece I described the historical development of the Latin Notary from its roots in Roman law to its contemporary definition in 19th Century Europe. I then used a detailed study of the profession, its educational, admission, appointment and regulatory requirements to describe a legal specialist who is governed by a non-adversarial client ethic. Malavet, supra note 3.

The second article was a summary of the doctrinal contents of the article I just described, with additional analysis of the importance of this foreign professional to American legal scholarship. Pedro A. Malavet, The Foreign Notarial Legal Services Monopoly: Why Should We Care? (1998) (publication pending, manuscript on file with the author).

In future publications I will explore the notarial ethic, particularly the notary's obligations regarding client communications, and the substantive law applicable to notarial transactions which illustrates the difference between our theory of contract and the basic theory reflected in the civil code.

One important distinction is in the definition of contractual consideration. We generally reject the concept of moral obligations or moral consideration as the basis for enforceable contracts. The civil law sees moral benefits as a legally enforceable form of consideration. Many notarial transactions reflect this concept, especially, for example, inter-vivos gifts. Malavet, supra note 3, at 459.
system for avoiding legal disputes. I believe that calls for the wholesale abandonment of the adversarial ethic in our system are absurd. Nevertheless, non-adversarial alternatives, when used properly, can be more efficient approaches to the avoidance and resolution of certain legal disputes. Given the current fascination with Alternative Dispute Resolution ("ADR"), many will be tempted to put this legal area within ADR scholarship. But this would be overly-narrow and ill-conceived legal analysis. The notarial transaction is much more than a model for ADR because it is not a system for resolving legal disputes without adversarial negotiation or litigation, it is rather a non-adversarial system that mostly prevents litigation by ensuring the informed consent of the parties to a juridical act and the truthfulness of factual assertions.

The notarial transaction is an comparative example of private, extra-judicial, non-adversarial certification of facts. The notarial system is designed reliably to establish essential facts, to ensure that all parties concerned have full access to these factual findings and, when necessary, to provide publicity and notoriety to factual certifications, without the need to go to court or to seek expensive governmental intervention. Furthermore, when needed, the parties receive impartial legal advice to understand the transaction into which they are entering. By combining accurate factual certification with impartial, expert legal advice, the notarial transaction is designed to ensure informed consent. The system is private because the notary is a private legal professional whose fees are paid by the parties to the transaction. It is inexpensive because the alternative is usually an expensive judicial or administrative process in which the government bears the principal cost of the transaction. Even for the parties, costs are kept low through a statutory fee schedule and the efficiency of the notary in avoiding extended adversarial public proceedings.

In this article, I focus on the notarial transaction itself from a procedural perspective. I wish to answer the following question: Why is the notarial transaction an example of a reliable private system of non-adversarial, extra-judicial fact-certification and legal stipulation? This may be difficult for an American audience to accept because the notary public certification in the United States has very limited probative effect. However, under the Latin system, the publica fides gives a duly certified notarial document the strongest presumption of truth. The document is generally admissible into evidence without any accompanying testimony and is considered proof of the facts contained therein. This presumption rests on the manner in which the notary performs his duties. The notarial

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3 The Fe Publica Notarial, or notarial publica fides, "is the legal acceptance of the certainty that comes from the presumption of truth that accompanies the notarial document." PEDRO MALAVET-VEGA, MANUAL DE DERECHO NOTARIAL PUERTORRIQUEÑO 23 (unofficial translation by Pedro A. Malavet) (1987); see also Malavet, supra note 3, at 440-44.
transaction is carefully designed to justify this strong assumption of veracity. This system provides an assurance of competent, informed consent, proper legal form, and truth and accuracy for the parties and the public in general. On many occasions, the notary function not only looks quasi-judicial, but is an express alternative to judicial intervention. Therefore, in this article, I will describe the notarial transaction, including the juridical act, as well as the content of the actual documents, and the process by which they are produced. This is an inexpensive model of extrajudicial, impartial legal advice that is designed and structured to ensure the legality and truth of the resulting legal transaction.

II. HISTORICAL EVOLUTION: FROM JUDICIAL COLLUSION TO NOTARIAL CERTIFICATION

Historical reflection is essential to a true understanding of the theoretical implications of the law. It is impossible to derive any useful learning from comparative analysis without taking history into account. History provides us with the context of old legal institutions and gives us needed perspective to understand why new ones exist. Moreover, the proper application of comparative methodology requires the scholar to understand a system by establishing how that system understands itself. The Civil Law Tradition sees itself as the legitimate heir of Roman legal forms which are twenty-five centuries old. This provides it with a strong sense of security about basic ideas of law. This self-assurance can often turn into deep resistance to change and into a form of legal inertia which preserves obsolete rules. On the other hand, the idea that a legal institution is very old can endow it with great strength. The rule and its underlying theory will be accompanied by a long history of analysis, application and criticism. Its purposeful survival will reflect not inertia but rather understanding, acceptance and legitimacy. The American comparativist must determine if a superficially attractive foreign legal theory or rule will fit within the context of our legal thinking. Is he faced with an anachronism? Is the legal thinking under consideration valid in the foreign context, but not in our own? If the rule is worthy of his attention, can or must its historical legitimacy be duplicated here? If it cannot, are there alternate theories in our system that would allow it to be imported?

The hotariate is a time-tested system in which the notarial transaction is much older than the notary professional. The notarial transaction starts as

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6 See Giménez-Arnau, supra note 1, at 63. (Professor Giménez-Arnau coined the phrase “Evolución Histórica del Notariado.”)

an extra-judicial meeting of the minds, which is given public documentary form in a collusive judicial proceeding. In allowing this collusion, the State recognizes that adversarial posturing is not always needed. Over time, the State eliminates the judicial simulation and gives to the notary the power to attest the entire transaction in an extra-judicial, non-adversarial setting. In other words, initially the document was a judgment of the court, later, it became the deed subscribed by the notary.8

Documents that memorialize legal transactions such as wills and contracts are easily found in most developed ancient cultures.9 These writings were given authenticity and certified by the state through the placement of an official seal. While these are the historical ancestors of what can rightly be called a notarial document and transaction, until the fall of the Western Roman Empire, there is no evidence that the functionaries who drafted them performed anything other than a ministerial function. Clearly, in the Byzantine Empire, the officials known as tabelliones were private legal professionals closely regulated by the State.10 At this stage, however, the notarial transaction acquired public documentary form only after a specialized collusive judicial proceeding.11 For example, in Roman Law the sale of a person under patria potestas was allowed to produce the emancipation of that person.12 The Twelve Tables, circa 450 b.c., were intentionally misinterpreted to allow the collusive sale and manumission (liberation) of the person in a judicial proceeding to produce emancipation, i.e., the liberation of the person under potestas from the authority of the paterfamilias.13 The emancipated person became a responsible,
property-owning adult. Over time, the Romans eliminated this sham sale, and substituted a simple judicial proceeding for emancipation. "This is one of a number of cases where the Roman jurists used a collusive action to bring about results for which no direct method was provided by law."\^14 Generally, the modern version of these collusive judicial actions is the contemporary notarial transaction. For example, many contemporary civil codes allow emancipation of minor children by notarial document.\^15 This is the important historical evolution: from an adversarial public judicial proceeding, to a private, non-adversarial extra-judicial transaction subscribed by a notary.

The transformation of the notarial transaction from a collusive judicial proceeding into an extra-judicial agreement, required the state to delegate the public authority to attest, i.e., the publica fides, to the notary. Following the fall of the Western Roman Empire, the notarial profession was slowly incorporated into the early medieval codes of Western Europe. As European law developed, what were initially Germanic judges became private professionals following Roman legal forms, but retaining the power of the publica fides.\^16 The notary became a private legal professional with the power to attest closely regulated by the state, and the public document was produced and certified by the notary, not by a judge in a collusive judicial proceeding.\^17

The common law world developed a similar process of collusive judicial proceedings to give publicity to certain specialized legal transactions. However, when the power to attest was delegated to private individuals, the common law world chose a different path. Initially, Anglo-Saxon countries followed the Germanic system of the judge-notary, as the official before whom private legal transactions were entered into the public record. But when the notarial and judicial functions separated in the United States, the extra-judicial power to attest was given to a lay person whose intervention was strictly clerical. Even in the American states in which French and Spanish notariates had existed, the substantive law...
required notarial form, but the notary was, and remains, like counterparts in all the other fifty states, a non-professional. In England, the notary became a conduit for business between the British and their civil law European counterparts. Thus, the professional notarial function and the privileged notarial transaction became institutions of the countries on the Western European mainland and their former colonies.¹⁸

The transaction and the notary are now inexorably linked; the notary, as a liberal professional extra-judicially endows a document with a certification of legality and truth. Historically, the notarial transaction started out as a collusive judicial proceeding. Now the notary alone gives the juridical act an element essential to its validity or provides certain legal assurances that are extremely desirable. This power to attest makes the notary an alternative to a judicial officer, and the notarial transaction an inexpensive alternative to a court proceeding.

III. NOTARIAL DOCUMENTS: EXTRA-JUDICIAL JUDGMENTS

The document is the objective product of the notarial transaction. The various categories of notarial documents reflect differences in the content and effect to be given to the transaction. Under normal circumstances notarial documents substitute judicial findings of fact or determinations of law which might be found in a court judgment. Extra-judicially, the notarial document is presumed to be truthful for all applicable legal purposes. If the notarial document reflects an agreement, it is treated not just as a written contract, but more as a settlement stipulation entered into by the parties and approved by a court. The document can be entered into public registries and will be acted upon unless judicially invalidated. Even in a judicial proceeding involving a notarial transaction, a notarial document will be treated in a manner analogous to a judgment. Factual certifications will only be invalidated when found to be clearly erroneous. Legal statements and conclusions are corrected for violation of applicable substantive law. In this context, the notary is given great deference to choose the legal institution most convenient for the parties' transactions. Moreover, when certain facts or substantive parts of an agreement have to be nullified, the document will often only be partially invalidated. The rules applicable to notarial transactions are carefully designed to ensure that the strong presumption of truth that attaches to them is deserved.

The Latin Notary is generally responsible for producing three types of documents. One is a simple document for which the notary bears the least professional responsibility, the other two are different types of public

documents for which the notary bears a high level of professional liability. In ascending order of importance, notarial documents are: (1) affidavits, simple documents in which he only certifies the identity of the party or parties signing it, a particular fact or a contract; (2) minutes (actas), public documents certifying facts that the notary has personally witnessed or otherwise ascertained; and (3) the deed, public documents in which the notary gives proper legal form to an agreement reached by the parties, authenticating what would otherwise be a private transaction, making it a public act by memorializing it in this document.

I will first describe each category of notarial document in the present section. In the following section, I will describe the formalities that apply to the notarial transaction generally, and how these rules are reasonably inexpensive and effective protectors of legality and truth.

A. Affidavits: Simple Findings of Fact

Affidavits are the simplest notarial documents. They are simple findings of fact that, generally speaking, have little importance in notarial practice, due to the relatively low level of formality required for their subscription, and the reduced professional obligation that is undertaken by the notary. They are distinguished from the two types of public documents discussed below because the notary is not obliged to keep originals, and is only responsible for the identification of the parties and certification of facts that are based on personal knowledge. 19

Affidavits are naturally known by different names in the systems presented. Precision in language is essential to comparative studies. Therefore, I will try to use and to define the foreign terms applicable to the institutions described herein. 20 Most familiar, the affidavit, or

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19 In this section, I focus mostly on French, Spanish and Puerto Rican practice. However, most other notarial systems follow the dichotomy of the public document and the lesser affidavit. For example, the basic Italian law, the Notarial Law of 1913, also distinguishes between the public document to be permanently maintained by the notary, who then issues certified copies to the parties, and the lesser document that is delivered to the parties without the requirement that the original be kept in the notarial office. EDUARDO BAUTISTA PONDE, EL ORIGEN E HISTORIA DEL NOTARIADO 329-30 (1967).

20 The comparativist must tread carefully when translating. I will attempt to explain translated terms as much as possible. Hopefully, I will achieve what professor Peter W. Schrøth describes when he states that "the differences between languages are such that something is always lost in translation, but for most purposes, most of the time, a good translator can arrange to make what is lost the part that doesn’t matter to the particular audience." Peter W. Schrøth, Legal Translation, 34 AM. J. COMP. L. 47-48 (Supp. 1986).

21 Even in Spanish, in Puerto Rican practice, we have adopted the use of the term affidavit, obviously a bastardization of the English "affidavit," to refer to the declarations of authenticity. See, e.g., MARÍANO MORALES LEBRÓN, DICCIONARIO JURÍDICO SEGÚN LA JURISPRUDENCIA DEL TRIBUNAL SUPREMO DE PUERTO RICO—PALABRAS, FRASES Y DOCTRINAS 34-38 (2d ed. 1994).
"declaration of authenticity" is a "private document in which the Notary attests to the authenticity of the signature or signatures, a fact or a contract." This document is called a brevet in French, and testimonio in Spanish.

The brevet may be used for procurations, a type of agency agreement discussed in detail below, acts of notoriety, a certification of important facts, usually related to civil status, also discussed in detail below, and many kinds of receipts. Testimonios, in Spanish practice, are used to: (1) produce certified copies of certain documents; (2) certify a summary of another document; (3) certify, for use abroad, currently applicable Spanish legislation; (4) certify the signatures in a document, and/or (5) certify signatures in a commercial document. In Puerto Rico, testimonios o declaraciones de autenticidad, otherwise known as afidavit, or "testimony or statements of authenticity" are documents "in which the notary at the request of an interested party, attests a document that is not an original public document." The new Puerto Rican notarial law describes...
five purposes for affidavits: (1) legalizing signatures; (2) taking an oath; (3) certifying a translation of a document that is not part of the protocolo; 34 (4) certifying a copy of a document that is not part of the protocolo; or (5) generally, certifying the identity of any object or thing. 35 As to every type of afidavit, the notary certifies, in addition to the five categories of facts just mentioned, the date of the document. 36

The most common use of an afidavit is the certification of signatures. Here, the notary certifies the date on which the document was signed 37 and the legitimacy of the signatures. 38 Attesting to the legitimacy of the signature requires the notary either to know or properly to identify the person who signs the document. 39 In all cases, the notary certifies the date of the transaction and attests to personal knowledge of any other fact certified.

In addition to expressly providing what types of documents may be memorialized in this form, the applicable laws or regulations often expressly prohibit the use of an afidavit, brevet or testimonio for certain contracts, which, when subscribed by a notary, must be transcribed in a public document. In Puerto Rico, the Notarial Law expressly prohibits the use of an afidavit to reproduce a contract "included in subsections (1) through (6) of section 3453 of Title 31." 40 Similarly, the Spanish Civil Code

(emphasis added). This is an unfortunate translation, especially the part in italics. The Spanish version makes clear that the reference should be to a "document that is not an original deed." 34 The protocolo is the permanent collection of public documents that the notary must retain in her possession. See infra Part IV.B.1.

35 P.R. LAWS ANN. tit. 4, § 2091 (1994).

36 The certification of the date was clearly implied in the legal scheme created by the old notarial law and the new Rules, however, the new version of section 2091 is much clearer in this regard. The introductory language indicates that the notary certifies the date, and, in addition thereto, the five types of facts already described. This is not surprising, of course. The date on which a document is signed is a fact known to the notary, and for which he is held personally responsible. See generally P.R. Notarial Rules R. 65 (the notary certifies facts that occurred before him or which he knows personally). Additionally, since a dated note about the affidavit has to be included in his register, and the note has to be reproduced in the monthly indices, there are independent checks to ensure the accuracy of that information. P.R. LAWS ANN. tit. 4, § 2094 (1994) ("Notaries shall keep a registry of affidavits in concise notes, dated, numbered, sealed and undersigned by them . . . .") In fact, "any testimony not included in the index that does not have the executing notary’s signature or has not been recorded in the registry [sic] of affidavits shall be null." P.R. LAWS ANN. tit. 4, § 2095 (1994). I find the choice of the word “registry” in the official translation mistaken; the better choice would have been "register." See also infra note 64 and accompanying text.

37 Id; see also P.R. Notarial Rules R. 67 ("The affidavit legalizing a signature is the affidavit that certifies that on a particular date, a signature has been placed in the presence of the notary and by the person who evidently is who he or she claims to be.") (unofficial translation by Pedro A. Malavet).

38 See P.R. Notarial Rules R. 67.

39 The third paragraph of Rule 67 expressly states: “The notary shall state in the affidavit, and in the Register of Affidavits, his personal knowledge of the person who signs, or, if he lacks such knowledge, the use of the supplementary methods of identification provided by Art. 17 of the Notarial law [P.R. LAWS ANN. tit. 4, § 2035 (1994)].” (unofficial translation by Pedro A. Malavet).

40 P.R. LAWS ANN. tit. 4, § 2091 (1994) (amended 1995). The quoted language comes from the translation of the old version of this statute, but the 1995 amendment left this excerpt unchanged, although it moved it around in restructuring the provision. See also P.R. LAWS ANN. tit. 31, § 3453.
provides that certain contracts may only be memorialized in a public document. The French generally require all notarial acts to be memorialized in a minute, and only by exception do they allow the use of the brevet.

French experts say that brevets “are employed only in a small number of documents of little importance.” An American observer might find this characterization disconcerting, at least as to some of the juridical acts that can be included in a brevet. One example of an important agreement that may nonetheless be reflected in a simple brevet, is a “procuration” or “mandat.” This means “an act whereby one person gives to another the power to do something for the principal in his name.” In comparative terms, this type of agreement is often referred to as an agency contract. The reason for allowing such a contract to be included in the simple brevet is that the Civil Code does not require any particular form, therefore, a high-level of notarial formality was not considered essential by the drafters of the Civil Code. Another example of a brevet that reflects important information are the so-called “actes de notoriété” or “acts of notoriety.” This refers to affidavits for the certification of certain facts related to legal status. While these affidavits are usually issued by a judicial officer, notaries have the authority to subscribe such certificates as brevets. Generally speaking, the facts certified in the acts of notoriety are subject to rebuttal, but the brevet is used to conduct normal business until

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41 C. Civ. Sp. art. 1280; see also Spanish Notarial Rules art. 258. (Because it might prove confusing due to the lack of identification of country of origin after the first citation, I have not used the “bluebook” form for these citations. Hereinafter, I will use the following for the respective civil codes of France: “C. Civ. Fr. art. ___”; Puerto Rico: “C. Civ. P.R. art. ___”; Spain: “C. Civ. Sp. art. ___”; and Mexico: “C. Civ. Mex. art. ___. “Mexico is a federal state and each state has its own code, however, the code I use here, that of the Federal District, is the most influential and is binding nationally in federal matters.)

42 Décret No. 71-941 du 26 novembre 1971, art. 13 (Journal Officiel de la Republique Française, 3 decembre 1971, at 11799).

43 PLANIOL, supra note 25.


45 See, e.g., C. Civ. Fr. art. 1984 (“Agency or procuration”). As usual, this is not a perfect translation of the term. For a general description of the meaning of mandate, see In re Feliciano Ruiz, 117 P.R. Dec. 269, 274 n.2 (1986).

46 The mandate does not require a specific form for its validity; it can even be oral. C. Civ. Fr. art. 1985; C. Civ. P.R. art. 1601 (P.R. LAWS ANN. tit. 31, § 4422 (1994)).

47 See, e.g., C. Civ. Fr. arts. 71 (substitute certificate of birth and civil status of a person who is about to marry, sworn before a judge of the court of first instance), 311-13 (certificate of civil status requested by parents on behalf of their child, issued by a judge of guardianships).

48 Décret No. 71-941 du 26 Novembre 1971, supra note 42; see also YAIGRE & PILLEBOUT, supra note 23, at 105. This is a Ministerial Decree, issued by the Prime Minister, which has the force of statute. It is now an essential part of the French notarial, modifying the law Ventose. The current regulation of the notariate can be found in the annotations to Articles 1317 to 1321 of the French Civil Code, Dalloz Edition, C. Civ. Fr. arts 1317-21 (84th ed. 1994).
the matter is disproved in a judicial proceeding.49

To be sure, the _procuración_ and the acts of notoriety illustrate the level of trust placed on the notarial office, especially the latter since the notary is expressly made an alternative to a judicial officer. However, the observer should not use this to overvalue the nature of the _brevet_, _afidávit_, or _testimonios_ as notarial instruments. The true indicator of the "simple" nature of these documents is not their content, interestingly enough, but rather the level of responsibility and liability assumed by the notary in their subscription. The notary does not generally vouch for the entire content of these documents, but only certifies certain facts included within them. Because of this lower level of notarial intervention, the document itself has a much-reduced probative effect when compared to the public document.

Since this is not a public document, by definition the notary is not required to retain a copy of the affidavit and the original is turned over to the subscribing parties. The _brevet_ is given to the signatory or to the beneficiaries of any right created by or recognized in the document.50 Generally, the notary may choose not to keep any record of the transaction, and assumes no "responsibility for the contents of the private documents whose signatures he authenticates."51 The notary is not responsible for advising the parties about the legality of agreements contained in an affidavit.52 However, the notary is responsible for the identification of the parties,53 as well as for the truth of certifications based on his personal knowledge.54 This certification does not extend to the legality or proper formality of any juridical act included in the _afidávit_.55 However, while, in this context, the notary cannot give an assurance of legality, Spanish notaries may not certify signatures even in simple _testimonios_ if they reflect

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49 The Spanish allow a similar certification but choose to use the notarial minute for it, therefore, I discuss it in the next section.

50 _Yagié & Pillebout, supra_ note 23, at 105. This decree is still in effect and is very important to modern French notarial practice. Most recently, the Ministry of Justice has issued a series of _Arreates_ allowing the use of specific types of photocopy machines by notaries in the performance of their duties. _See_ e.g., _Arrete du 2 juillet 1997 (Journal Officiel de la Republique Française, 10 juillet 1997, at 10444)_.

51 _P.R. LAWS ANN. tit. 4, § 2091 (1994)_.

52 _See id. para. 3; cf. Part III.C infra_ (the notary is responsible for advising parties about the legality of agreements contained in a deed).

53 _P.R. LAWS ANN. tit. 4, § 2092 (1994)_ ("Notaries shall keep a registry of affidavits in concise notes, dated, numbered, sealed and undersigned by them attesting as to the name of the grantees and a brief statement of the authenticated act."). I discuss this subject further below. _See infra Part IV.C._

54 The notary is not responsible for the content, just for the certification of facts actually known to him (such as the correctness of a translation). _See_ Rodríguez Vidal v. Benvenuti, 115 P.R. Dec. 583 (1984). A notary should never certify facts as to which he lacks personal knowledge. _See, e.g., In re Roldán Figueroa, 92 J.T.S. 8 (1992)_.

55 Ávila-Álvarez, _supra_ note 24, at 187-88, explains that the document may have been signed without being read, for example, and the notary takes no responsibility for that. Compare this however, to the public document, as to which the notary must certify legality and that the parties have been made aware of its contents and its consequences. _See infra_ Parts III.C and IV.
agreements that violate the law or are against public morals or customs.\footnote{Therefore, the notary should refuse to certify a testimonio if the parties do not allow him to read it. Spanish Notarial Rules art. 260.}

While the notary is not obliged to keep a copy of the document, in some jurisdictions the notary is required to keep some record of affidavits.\footnote{P.R. LAWS ANN. tit. 4, § 2094 (1994).} These records are an essential part of the regulatory scheme that ensures the honesty of the notarial transaction. Contemporaneous records are independent cross-checks of the accuracy of factual certifications even for the simple affidavit. In France, the notary must make a note of the brevet in a repertoire, the index of daily notarial activity.\footnote{Décret No. 71-941, supra note 42, arts. 21-22; see generally YAIGRE & PILLEBOUT, supra note 23, at 112-13. See also infra Part V.} The Spanish use the so-called libro indicador to memorialize notes related to some types of testimonios.\footnote{Spanish Notarial Rules art. 283.} In Puerto Rico, this is literally a big register book in which the number of the affidavit is noted,\footnote{Spanish Notarial Rules art. 283.} the signing parties are identified and a brief description of the contents is made.\footnote{"The affidavits shall be numbered successively and continuously and shall be headed by their corresponding number which will correlate to that of the inscription in the registry [sic] ...." P.R. LAWS ANN. tit. 4, § 2093 (1994).} Each annotation has to be certified by the notary's signature, rubrica and notarial seal.\footnote{P.R. LAWS ANN. tit. 4, § 2094 (1994); see generally MALAVET-VEGA, supra note 5, at 152-54. In Puerto Rico, you are also required to cancel a one dollar stamp for each affidavit you subscribe. This is only one of many small taxes collected by notaries. See, e.g., P.R. LAWS ANN. tit. 4, § 2021 (1994). As to the notary's signature, rubric and sign, see also infra Part IV.A.} When dealing with persons whom the notary does not know personally, prudence would suggest that the document used to identify the subscribing party be mentioned in the note,\footnote{The new notarial rules require the notary to include a reference to supplementary identification in the document itself and in the note related thereto placed in his register. P.R. Notarial Rules R. 67, para. 3. However, traditionally, even as to public documents, the notary could include a non-specific reference stating that he had used supplementary methods of identification. The better practice would be expressly to mention the specific form of identification that was used both in the document and in the note in the register.} and a record of it maintained by the notary.\footnote{Additionally, the fact that the notary is not required to keep a copy of the document does not mean that he cannot do so. As a practitioner, I always kept a simple photocopy of affidavits subscribed before me by persons whom I did not previously know, together with a photocopy of the identification they supplied. I bound these copies into a single volume. You never know when a notarial transaction, even a minor one, might come back to haunt you. Hence, the notary is well advised to follow procedures carefully, and to maintain as good a record as possible of every transaction, not just the public documents.}

In addition to maintaining a register of affidavits, the notary may be required regularly to inform disciplinary authorities of his activities. For example, in Puerto Rico, the note that the notary places in his register of affidavits must also be included in the monthly index that he is required to
send to the Notarial Inspector. 65 In France, a certified copy of the repertoire for the previous year must be sent to the supervising authorities within the first two months of the following year. 66 Spanish notaries are required to mail monthly indices of public documents 67 and to maintain a special book of notes regarding certain testimonios as well. 68

The notary's responsibility in relation to "simple" affidavits, such as the afidávit or brevet, tends to be mostly clerical. The notary must ensure that the I's are properly dotted and the T's are adequately crossed; yet, the notary bears little professional responsibility. In contrast, the two categories of public documents discussed below demand the utmost attention. Nevertheless, it is important to note that the notary, consistent with his status as the extra-judicial guardian of truth, must ensure the proper identity of the subscribing parties and the truth of the facts personally certified. In some situations, such as when the French notaries certify acts of notoriety, the notary is an express alternative to a judicial officer as a certifier of facts, even in the low-level afidávit, brevet or testimonio. Moreover, there is a scheme of contemporaneous records of these documents that may be used by parties and disciplinary authorities to cross-check the accuracy of the certifications. This an uncomplicated, yet reliable, process for factual certification.

B. Notarial Minutes (Actas): Complex Findings of Fact

Notarial documents are generally divided into affidavits and public documents. Public documents are further divided into notarial minutes and deeds. A notarial minute "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." 69 The minute shall "consign facts and circumstances witnessed by [the notary] or of which [he has] personal knowledge and that due to their nature do not constitute a contract or juridical business." 70 Therefore, the notarial minute is distinguished from any other type of public document

67 ÁVILA-ÁLVAREZ, supra note 24, at 176; see also Spanish Notarial Law art. 33, Spanish Notarial Rules arts. 284-88.
68 Spanish Notarial Rules art. 283. The notes must be dated and signed by the notary, although he may so certify one day's notes with a single dated signature. Id.
69 P.R. LAWS ANN. tit. 4, § 2048 (1994).
70 Id. (emphasis added). The official translation uses the term "juridical business" instead of "juridical act," which is more commonly used in American comparative scholarship. See, e.g., MERRYMAN, supra note 7.
by (1) the notary's personal knowledge of and responsibility for the facts, and (2) the absence of a juridical act.

Language and translation might be a problem in this area. The Spanish term for the public document is "escritura pública," "escritura matriz," or simply "escritura." The French refer to them as "minutes." The French minute should not be understood as the "minutes of proceedings" known in American judicial practice, simply because it is not produced by a judicial officer. Additionally, the Spanish term "minuta" can be translated both as "minutes of proceedings" and as "preliminary documents, not definitive, which contained acts that subsequently had to be included in a public document." Only the latter is prepared by a notary. Minute can also be the translation of the Spanish word acta. In this paper, I will refer to actas as notarial minutes, or simply as minutes, and to Spanish escrituras or French minutes as deeds or public documents or instruments.

Notarial minutes are complex findings of fact distinguishable from the simple affidavit because the notary is the protagonist rather than the expert assistant to the parties. The notary memorializes his own observations in a specialized public document that does not in and of itself reflect a juridical act. Depending on what information the notary is certifying, notarial minutes can be classified into three categories: (1) general factual, (2) correction, and (3) addition to the protocolo.

"General factual" notarial minutes are those that certify facts

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71 PLANIOLO, supra note 25.
72 Black's defines "minutes" as "[a] memorandum of what takes place in court, made by authority of the court." BLACK'S LAW DICTIONARY 998 (6th ed. 1990). Some Spanish commentators translate the word "minute" from the French into the word "minuta" in Spanish. See, e.g., PONDE, supra note 19, at 610 (translation of the basic French notarial law). The point of this choice is that minute includes any public document prepared by a French notary, of which he must make a permanent record. In that respect, the use of the word minute is analogous to its use in the English language, when referring to extra-judicial activities.
73 Nevertheless, as we will see below, the notary is treated like a judge without a court, and what he includes in a minute is often treated with as much legal respect as a judicial finding.
74 BERNARDO PEREZ-FERNANDEZ DEL CASTILLO, DERECHO NOTARIAL [MEXICANO] 131 (4th ed. 1989). The minuta is no longer permitted under the legislation for the Federal District but the laws of certain Mexican states still allow them. Id. See also LUIS CARRAL, DERECHO NOTARIAL Y DERECHO REGISTRAL 168-69 (7th ed. 1983). In Spain, the Notarial Rules have long recognized that parties can supply a notary with a draft of a public document, which he may accept or reject. This draft is referred to as a "minuta." Prior to 1984, the Rules had very specific provisions for the handling of a minuta. However, the applicable Rule was amended in 1984 to make a very simple reference to a minuta in its second paragraph, while reiterating the notary's duty to draft the public document himself, subject to his professional liability. See Spanish Notarial Rules art. 147; see generally ÁVILA-ÁLVAREZ, supra note 24, at 40-42.
75 The official translation of the Puerto Rico notarial law has chosen the word "certification" to translate the term "acta." This choice quite correctly reflects the action being performed by the notary, i.e., she certifies certain facts to be true and correct. However, I think that in the context of the notarial law, which provides for many different kinds of certifications, this might prove confusing as a name for a specific type of document. In my opinion, the word "minute" would have been better as a designation of the document itself. See P.R. LAWS ANN. tit. 4, § 2048 (1994).
observed or otherwise known by the notary.\textsuperscript{76} The most common factual notarial minute is the certification of construction. This means that a notary certifies that a structure has been built on a particular lot, after it has entered into the property registry.\textsuperscript{77} This usually involves two steps. First, blueprints of the building and the lot, certified by a licensed architect are supplied to the notary. Second, the notary goes to the property to examine the building. The minute is generally used to register the structure in the registry of property.\textsuperscript{78} The uses of a notarial minute are limited only by the notary’s capacity to observe or otherwise personally ascertain facts.\textsuperscript{79} Because the notary is the extra-judicial judge of truth, his certification of facts is then enough legal basis for entry into the public registry.

A special sub-category of “factual” notarial minutes, the Spanish

\textsuperscript{76} I have seen them used, for example, to certify the contents of safety deposit boxes, opened in the notary’s presence pursuant to a court order. They are also used to certify a translation of a public document which was prepared by the notary. While the certification of translation may be done by affidavit, as discussed above, given the time and the cost of having the notary certify the translation, it is better done as a public document. They may even certify the results of a television game show when a notary is asked by the producer to observe the proceedings and prepare a minute thereof. This fact is usually prominently advertised in the promotion of the show. \textit{See also} Colón v. Shell Co. Ltd., 55 P.R.R. 575, 585 (1939) (minute certifying that soil and water samples were taken, marked and sent to a laboratory for chemical analysis); People v. Mangual Hernández, 111 P.R. Dec. 136, 141-42 (1981) (certifying the state of a public court file).

\textsuperscript{77} The notarial and registry systems work side by side. The Spanish registry system, for example, is structured as follows:

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

(1) Public registries. There are three public registries in Spain:
(a) The Land Registry (Registro de la Propiedad) is where rights over real property are registered. Each sale of real property, and any mortgages, liens or other encumbrances relating thereto, must be duly registered. There is a Land Registry in most major provincial capitals or municipalities.
(b) The Commercial Registry (Registro Mercantil) is where legally significant information relating to companies and businesses must be registered. There is a central Commercial Registry in Madrid and others in most provincial capitals.
(c) The Civil Registry (Registro Civil) is where personal particulars of Spanish nationals are registered, e.g. births, deaths and marriages. Most major municipalities keep a civil registry.

\textit{FABREGAT & BERMEO, BUSINESS LAW GUIDE TO SPAIN} 6-7 (1990); \textit{see also} \textit{ALEXIS MAITLAND HUDSON, FRANCE: PRACTICAL COMMERCIAL LAW} 110-15 (1991); \textit{see generally} \textit{MALAVET-VEGA, supra} note 3, at 460-62.

\textsuperscript{78} \textit{See} Puerto Rico Registry Rules § 2003-198.1. The rules do not require blueprints, but they make it clear that they are the best source of reliable technical information. \textit{See generally} \textit{MALAVET-VEGA, supra} note 5, at 102-05. In Spanish practice, the notary certifies the existence of the object, either through personal observation, or with the assistance of expert blueprints. \textit{ÁVILA-ÁLVEZ, supra} note 24, at 134-35. Registration is important because this gives to the new construction the benefits of the publicity of the registry, which makes transfer of the real estate easier. Mortgages cannot be extended to property unless it is registered in the property registry, for example.

\textsuperscript{79} For example, in Spanish practice, there are minutes to certify that notice of a specific fact has been given by the notary to a particular party, that a document has been delivered to a party, and many others. \textit{ÁVILA-ÁLVEZ, supra} note 24, at 127-46. In French and Spanish practice, notaries may additionally use notarial minutes to acknowledge receipt of funds. \textit{Id.} at 131-32. They may also use them to certify so called “Acts of Notoriety,” meaning that certain “notorious” facts my be certified by notarial minute. \textit{Id.} at 143-46.
actas de notoriedad,\textsuperscript{80} i.e., minutes of "notoriety" are used to certify that a particular fact is "generally known by the people who have a direct or close relationship with that factual situation or its consequences, or who belong to the social or economic environment of the person affected by this fact."\textsuperscript{81} The notarial rules introduce this document. Once proved, "notorious facts" become the source of legal rights and legitimate personal or property relationships.\textsuperscript{82} The process by which the Spanish notary produces such a minute looks emphatically quasi-judicial. The notary, upon request by an interested party, shall receive the party's statement that the fact is correct. The party is responsible for the truth of the statement, subject to the penalties for making a false statement in a public document.\textsuperscript{83} The notary is responsible for checking the truth of the statement, with whatever evidence he deems necessary.\textsuperscript{84} The notary is even required to post public notice of the possible finding if, in his judgment, third parties would be affected by the acta.\textsuperscript{85} The acta shall include reference to the evidence gathered and responses to the allegations by third parties. Upon reaching the conclusion that the fact is true, the notary as the judge of the situation, in the absence of litigation, certifies that the fact is true, in his judgment or estimation.\textsuperscript{86} While the acta is subject to a judicial rebuttal, it is otherwise executory and may be used in the appropriate registries, without anything more than the notary's certification.\textsuperscript{87} This acta may therefore be used to certify the identity of a person who is referred to by different names in separate legal documents, when this misnaming is the result of error or other innocent cause. This minute may also be used to certify a person's civil status as single, widow or widower or divorced.\textsuperscript{88} This is another example of the notary acting as an express alternative to a court proceeding for the certification of facts.

"Correction" minutes are those used to rectify minor errors in form or omissions made by the notary in prior public documents.\textsuperscript{89} An acta can be used, for example, to provide the surnames of both parents when they are

\textsuperscript{80} Spanish Notarial Rules arts. 209-210; see also ÁVILA-ÁLVAREZ, supra note 24, at 143-46.
\textsuperscript{81} Id. at 143.
\textsuperscript{82} Spanish Notarial Rules art. 209.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} If a judicial proceeding is instituted before the acta is finished, the process must stop. Id.; ÁVILA-ÁLVAREZ, supra note 24, at 143-44.
\textsuperscript{87} Spanish Notarial Rules art. 209; ÁVILA-ÁLVAREZ, supra note 24, at 143-44.
\textsuperscript{88} The examples are given by Id. at 144-45.
\textsuperscript{89} See P.R. LAWS ANN. tit. 4, § 2047, para. 2 (1994); Spanish Notarial Rules art. 153.

One of my favorite notary jokes involved actas: My law partner was surprised that a notary from a small town had subscribed well over 300 public documents in the first eight months of a particular year. He mentioned it to the notary, over a cup of courthouse coffee, congratulating him on the success of his notarial office. The notary laughed loudly, and said, "Well, actually, I only really subscribe about 50 deeds a year, the other 250 are actas to correct the mistakes I made in the first fifty escrituras!"
left out of the original public document.\(^{90}\)

The final type of minute is the *acta* of addition to the *protocolo*, the collection of original public documents that remains permanently in the notary’s custody. By definition, this minute is used to include a document in the notary’s *protocolo*.\(^{91}\) Including a document in a notary’s *protocolo* may occur for three basic purposes: (1) preservation; (2) limited memorialization of domestic private documents; and/or (3) execution of foreign legal documents. A notary, by choice or upon request, may add a document of any kind to his *protocolo* in order to ensure its preservation.\(^{92}\)

The law gives the notary complete discretion in accepting or rejecting documents for this type of preservation.\(^{93}\) Additionally, both Spanish and Puerto Rico notarial rules allow a private document that reflects a lawful contract to be added to notary’s *protocolo*.\(^{94}\) The rules make it clear that mere addition to the *protocolo* does not turn the private document into a public deed.\(^{95}\) However, the inclusion does have some usefulness in addition to that provided by simple preservation because the date on which the private document is added to the *protocolo* will thereafter bind third parties with interests related thereto.\(^{96}\) Likewise, the protocolization certifies the existence of the document, and the fact that it was subscribed before being added to the *protocolo*.\(^{97}\) These documents, however, may not be entered into the property registry.\(^{98}\)

The limited minute adding a document to the *protocolo*, must be distinguished from the *acta* that attaches a foreign document to the *protocolo* and from the elevation of a domestic private document to public documentary form.\(^{99}\) Foreign legal documents often must be added to a local notary’s *protocolo* in order to become executory within the national

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\(^{90}\) Malavet-Vega, *supra* note 5, at 105-06. It is common practice in most Latin American countries for parties to use both their parents’ surnames in official documents. See, e.g., C. CIV. P.R. art. 118, P.R. LAWS ANN. tit. 31, § 466 (1994) (“Legitimate children have the right: (1) To bear the family name of the father and the mother. . . . ”) (emphasis added). This is done without hyphenation, which creates confusion in the U.S., where the mother’s last name will be incorrectly substituted for the person’s last name.


\(^{92}\) P.R. Notarial Rules R. 43. The rule expressly refers to blueprints, photocopies, printed matter, photographs, and any other graphic material whose measurements and nature will allow them to be included in the *protocolo*. *Id.* The Spanish rules allow a similar type of addition to the *protocolo*. Spanish Notarial Rules, Art. 214.

\(^{93}\) P.R. Notarial Rules R. 40.

\(^{94}\) P.R. Notarial Rules R. 42; Spanish Notarial Rules art. 215.

\(^{95}\) P.R. Notarial Rules R. 42; Spanish Notarial Rules art. 215.

\(^{96}\) C. CIV. P.R. art. 1181; C. CIV. SP. art. 1227; C. CIV. FR. art. 1328.

\(^{97}\) Ávila-Álvarez, *supra* note 24, at 130.

\(^{98}\) P.R. Notarial Rules R. 42, cmts.

Generally, this requires that the original document be certified by competent authority and that the signature of this authority be "legalized." Once these requirements are met, the foreign document is added to the protocolo; the notary may issue certified copies that may gain entry into public registries and are otherwise executory public documents. The rules also give the notary the choice of transcribing an agreement reflected in a domestic private document into a public deed, or simply attaching the document to the deed without transcribing it in the new document. This type of instrument is fully executory and may gain entry into public registries. All parties to the private agreement are required to appear to subscribe the document to which the private document is to be attached. This document is then treated as if it had been memorialized in a deed, as explained in the next section. Therefore, it is distinguished from a mere addition to the protocolo by acta described above, which only certifies the existence of the document and its date but has no effect regarding its content. Only one party may request that a private document be added to the protocolo in this manner, hence its limited effect. However, if both parties wish to give their agreement the strongest presumption of truth, they can choose the somewhat simplified procedure for turning it into a deed, rather than having an entirely new deed prepared, in the manner that I describe in the next section.

100 See, e.g., P.R. LAWS ANN. tit. 4, § 2056 (1994) ("In order for it to be valid as a public instrument, every notarial document executed outside Puerto Rico must be previously protocolized"); Spanish Notarial Rules art. 212. This is most commonly used to give effect to a power of attorney subscribed outside Puerto Rico. See, e.g., MALAVET-VEGA, supra note 5, at 195-201; In Re Protocolización de Poder, 110 P.R. Dec. 652, 654 (1981).

101 See, e.g., P.R. LAWS ANN. tit. 4, § 2056 (1994) ("In order for it to be valid as a public instrument, every notarial document executed outside Puerto Rico must be previously protocolized, with the notary being bound to cancel the same fees as if it had been originally executed in Puerto Rico."); P.R. Notarial Rules R. 41.

102 "Legalizing" the signature of the competent authority means obtaining a governmental certification of the signature and seal borne by the foreign document belong to a duly authorized official. When dealing with documents supplied by U.S. Notaries Public that are to have effect in Puerto Rico, this takes the form of a certification issued by the county clerk that the subscribing notary was, at the time he or she subscribed the instrument, a registered notary. See, e.g., MALAVET-VEGA, supra note 5, at 201 (certification form issued by the County Clerk for New York County). Puerto Rico, Mexican and Spanish rules all require legalization of foreign instruments prior to protocolization. P.R. Notarial Rules R. 41(A)(1); LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL art. 91; Spanish Notarial Rules art. 212.

103 See, e.g., P.R. LAWS ANN. tit. 30, § 2009 (1994) (foreign documents must be protocolized in order to gain entry into the property registry).


105 Id.

106 P.R. Notarial Rules R. 42; Spanish Notarial Rules art. 215.

107 This raises the question of whether this is really an acta. I am inclined to call it an escritura, because it reflects a juridical act. It is simply that the drafters of the Puerto Rico notarial regulations have chosen to allow a shortcut procedure that makes the process less time-consuming, but the fundamental nature of the document as a public document reflecting a juridical act has not changed. See infra Part IV. In Spain, in fact, if the parties present a private document to the notary, the choices
The notarial minute is thus a flexible device for obtaining the assistance of a notary in the determination, preservation and use of factual information. The major advantage of this procedure is cost. The assistance of the notary will be cheaper than a judicial proceeding used to accomplish the same purpose, and is sometimes an express alternative thereto. Moreover, because this is a public document, the notarial certification is given the strongest presumption of truth. Therefore, the document is admissible in evidence and may often be used to gain entry into public registries.

C. Deeds: Complex Findings of Fact and Conclusions of Law

The third category of notarial documents and second type of public document are deeds. They are distinguished from affidavits and notarial minutes because they "are the documents subscribed before a Notary that contain a juridical act." Deeds are the most important and demanding notarial documents; they require the utmost attention from the notary and entail the highest level of professional regulation of the notariate. In affidavits and minutes, the notary is generally responsible for identifying the signatories and for the truth of facts certified based on personal knowledge. In the deed, the notary bears the same responsibility and, in addition thereto, is charged with giving proper legal form to the agreement desired by the parties.

In the following sections, I describe how the formal content of the deed is structured to ensure truthful, informed consent, how deeds are used to reflect special juridical acts, and finally, how the role of the notary as the judge of the transaction is a reliable assurance of accuracy and informed consent.

1. Formal Content of the Deed: Memorializing Informed Consent

The deed is divided into the following sections: (1) preliminary information; (2) appearance; (3) exposition of facts; (4) stipulations of the agreement; (5) acceptance by the parties and witnesses; and (6)
authorization by the notary.\textsuperscript{109}

The preliminary information generally includes a document number and a description of its content. The number of the document is the corresponding number of the public deed as it enters into the protocolo.\textsuperscript{110} Additionally, a description of the type of deed and the juridical act that is being performed is included by way of title.\textsuperscript{111} For example, "Deed Number Three (3): Prenuptial Agreement." The French do not officially have this type of introduction. However, in the repertoire, the index of minutes that the notary maintains, he must write a brief description of the type of document, its date, and the other information that is usually included preliminarily in other systems.\textsuperscript{112} There is some difference of opinion as to whether the notary's name and address are part of the appearance or of the preliminary matters.\textsuperscript{113} I frankly prefer to refer to it as part of the appearance because the notary is one of the participants in the deed. Hence, I discuss it below.

The next section is the appearance, comparecencia in Spanish, and préambule in French. The notary identifies herself and the persons who will sign the document with her.\textsuperscript{114} Initially, the notary must indicate that the transaction takes place before her. In French practice, the notary indicates that she receives the notarial act.\textsuperscript{115} Spanish-speaking notaries state "ante mi," i.e., "before me." It is almost never plural, the individual notary certifies the juridical act that takes place before her.\textsuperscript{116} The notary then indicates her name, address and other identifying information.\textsuperscript{117} The parties

\begin{itemize}
\item \textsuperscript{109} See Article 15 of the P.R. Notarial Law, P.R. LAWS ANN. tit. 4, § 2033 (1994). See generally MALAVET-VEGA, supra note 5, at 76; CARRAL, supra note 74, at 148-50, 155-63; ÁVILA-ÁLVAREZ, supra note 24, at 49-50; YAIGRE & PILLEBOUT, supra note 23, at 93-104.
\item \textsuperscript{110} P.R. LAWS ANN. tit. 4, § 2033(a) (1994) ("[t]he public deed shall include the following: ... Its corresponding protocol number written in letters at the beginning thereof."); LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL art. 74; ÁVILA-ÁLVAREZ, supra note 24, at 49.
\item \textsuperscript{111} P.R. LAWS ANN. tit. 4, § 2033(b) (1994) ("[t]he public deed shall include the following: ... The classification of the act or contract with its legally-recognized name unless it does not have a special one."); Spanish Notarial Rules art. 156(9).
\item \textsuperscript{112} See Décret No. 71-941, supra note 42, art. 22, para. 2.
\item \textsuperscript{113} This is the opinion of Ávila-Alvarez. See ÁVILA-ÁLVAREZ, supra note 24, at 50.
\item \textsuperscript{114} The preamble in France includes the names, addresses and other information about the notary, witnesses and parties. See generally YAIGRE & PILLEBOUT, supra note 23, at 93-99. See, e.g., PRÉCIS-FORMULAIRE DES ACTES NOTARIÉS 23-26 (Jean-Marie Bez ed., 14th ed. 1992) (form for preamble to notarial documents).
\item \textsuperscript{115} Décret No. 71-941, supra note 42, art. 6; PRÉCIS-FORMULAIRE DES ACTES NOTARIES, supra note 114.
\item \textsuperscript{116} MALAVET-VEGA, supra note 5, at vii-vii. In France, however, it is possible for two notaries to participate in a single juridical act. Loi Ventôse, art. 9. See generally YAIGRE & PILLEBOUT, supra note 23, 105-06.
\item \textsuperscript{117} P.R. LAWS ANN. tit. 4, § 2033(c) (1994) ("[t]he public deed shall include the following: ... The notary's name, his residence, the location of his office, as well as the day, month and year and place of execution which shall be that in which the last of the grantors signs the document if there are no attesting witnesses."); Décret No. 71-941, supra note 42, art. 6; Spanish Notarial Rules art. 156 (requiring the Spanish notary to include, in addition to name and address, the name of the regional Notarial College to which he belongs).
\end{itemize}
and witnesses must be identified next. The notary indicates, naturally, her competence in the matter, by identifying herself as a notary. Her business address and the location of the subscription, if different, also show that she is within any applicable territorial competence. As to the other persons who will sign the document, the notary must certify in what capacity they appear. They can appear as directly concerned parties, as representative parties, or as witnesses. This is why I prefer to refer to this as the appearance section, which includes the notary, the parties and witnesses to the notarial act. Finally, the notary certifies that, in her judgment, the people before her have the legal or civil capacity to enter into the agreement.

The next section of the deed describes the factual background of the transaction. Here the notary, certifies facts and any necessary explanations of the transaction. The facts that will be established will naturally depend on the nature of the transaction. For example, if one of the parties appears in a representative capacity, the nature of that power should be described in order to establish that the transaction they are about to subscribe is thereby authorized. One of the most important factual matters is the description of real property involved in a notarial transaction. The notarial or registry law will often carefully control the description that must be used, in order to gain registration of the deed. If the deed is subdividing a larger parcel of real estate, the notary may be required to certify that the pertinent governmental authorities have authorized it.

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118 P.R. LAWS ANN. tit. 4, § 2033 (1994); Spanish Notarial Rules arts. 156-69; LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL art. 62 (XIII); Décret No. 71-941, supra note 42, arts. 5-6. I describe the formalities of party and witness identification in detail below in Parts II.C.3 and II.C.4.

119 Competence is often national. However, a notary in Spain or France occupies a specific notarial seat, which is identified by his or her location. Malavet, supra note 3, at 472-73.

120 Parties may appear as personal representatives with a power of attorney. They may also appear as representatives of an organization. In either case, the pertinent documentation must be examined by the notary and referred to in the deed.

121 Witnesses may be requested by the notary or the parties, or required by law. I discuss this further in Part IV.D below.

122 P.R. LAWS ANN. tit. 4, § 2033(e) (1994); Spanish Notarial Rules art. 156(8), 167; see generally YAIGRE & PILLEBOUT, supra note 23, 95-96; MALAVET-VEGA, supra note 5, at 88; ÁVILA-ÁLVAREZ, supra note 24, at 91-95. Ávila-Álvarez describes minority, insanity, and drunkenness as examples of lack of capacity. Id. at 91. Naturally, the notary is being required to make a subjective evaluation as to the last two. One tricky area is dealing with people who are ill. If they are under a physician’s care, it would be prudent to get the doctor to certify their capacity.

123 P.R. LAWS ANN. tit. 4, § 2033 (1994) ("The public deed shall include the following: . . . its background and the facts witnessed and consigned by the notary in the explanatory part and provisions."); Spanish Notarial Rules arts. 170-75.

124 MALAVET-VEGA, supra note 5, at 90 (citing article 1604 of the Puerto Rico Civil Code, P.R. LAWS ANN. tit. 31 § 4425 (1994)) ("In order to compromise, alienate, mortgage, or to execute any other act of strict ownership, an express commission is required."); see also YAIGRE & PILLEBOUT, supra note 23, at 98-99.

125 See, e.g., P.R. Registry Law art. 87, P.R. LAWS ANN. tit. 30, § 2308 (1994); LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL art. 62(III); Spanish Notarial Rules arts. 170-71.

126 See, e.g., Preciosas Vistas del Lago Inc. v. Registrador, 110 P.R. Dec. 802 (1981). This is a fairly notorious case in Puerto Rico, involving the subdivision of a larger parcel without authorization.
The next section of the deed is the actual agreement, the clauses or stipulations of the contract. Here the notary takes the wishes of the parties and, while remaining as close to them as possible, puts them in the proper legal form. In addition to getting the juridical act substantively correct, the notary must ensure that the transaction included in the stipulations is the actual transaction into which the parties are entering. Simulation, partial or total, is to be prevented. Total simulation completely invalidates the juridical act. Partial simulation does not invalidate the juridical act but merely requires its amendment, usually by judicial intervention, to reflect the true agreement. However, the distinction is unimportant for disciplinary purposes. The notary will be considered responsible for any simulation, if he knew of it. Judging from anecdotal evidence, probably the most common type of partial simulation is understating the purchase price of real property. This is often motivated by tax evasion. Of course, the notary can only be held responsible for what he knows or should know. If the parties lie or mislead convincingly, there is nothing to be done disciplinarily. However, as to the purchase price, the notary must be careful how he phrases stipulations regarding payment. If payment does not occur in his presence, which would allow him to see the check or other method of payment, he must so indicate in the document itself. Another important general prohibition regarding stipulations forbids agreements favoring the subscribing notary or persons related to him.

127 P.R. LAWS ANN. tit. 4, § 2033 (1994) ("[T]he public deed shall include the following: . . . the juridical business that motivates its execution.")

128 See generally MALAVET-VEGA, supra note 5, at 94; ÁVILA-ÁLVAREZ, supra note 24, at 109-12. I have also described the notary's role in this drafting in Part III.C.3 supra. Note as well that the notary must use his independent judgment in drafting the agreement, even if the parties supply a draft. See article 14 of the Puerto Rico Notarial Law, P.R. LAWS ANN. tit. 4, § 2032 (1994) ("Whenever the grantors hand over to the notary drafts or [minutes] concerning the act or contract they have submitted for his authorization, he must state it without impairing his review and editing, with their consent, to the effect that the meaning of the statements of will and agreements comprised therein are clearly and specifically stated.")

129 One example of total simulation is attempting to pass an inter-vivos gift off as a purchase and sale agreement. See, e.g., Reyes v. Jusino, 116 P.R. Dec. 275, 282-83 (1985); Puig v. Sotomayor, 55 P.R.R. 244, 249 (1939).

130 See generally Reyes, 116 P.R. Dec. at 275 (1985) (this is the most important and best explained case in this area in Puerto Rico jurisprudence).

131 See generally MALAVET-VEGA, supra note 5, at 92-93.

132 See, e.g., LEY DEL NOTARIAO PARA EL DISTRITO FEDERAL art. 35; Décret no. 71-941, supra note 42, art. 2; P.R. LAWS ANN. tit. 4, § 2005 (1994):

(a) No notary may authorize documents he is a party to, or which include provisions in his favor. Neither may he authorize them if any one of the executing parties is related to him within the fourth degree of consanguinity or the second degree of affinity, except when he appears in the document as a representative.

(b) The provisions in favor of relatives of the notary who authorized the public document in which they were made within the fourth degree of consanguinity or the second degree of affinity shall have no effect.

Compare, however, the Spanish approach. Article 27 of the Spanish Notarial law forbids the notary from subscribing documents that include provisions in his favor. Article 139 of the Spanish
Following the clauses, the parties must accept the agreement. The acceptance is an expression of informed consent that involves three elements: (1) reading; (2) understanding; and (3) signing the document. In general, the notary either gives the parties the opportunity to read it or must read it to them himself. More specific rules may apply, based on substantive provisions. For example, the open will must be read to the parties out loud during its subscription. Understanding the agreement implies that they understand the juridical act and its consequences. This is the advisory function of the notary. The pertinent legal warnings must also be given. It is prudent to include these warnings in the text of the document, rather than making a simple certification that all pertinent warnings have been given. This includes the consequences of the transaction and any necessary follow up. Following this, the parties sign at the end, and place their initials, or some other handwritten mark, on every page to ensure the integrity of the document.

Finally, the notary signs. This is known as the authorization of the document. The notary attests the entire transaction by signing last. He must also place his notarial seal and rubric on every page of the master

Notarial Rules does not make this an absolute prohibition, rather it only prohibits the notary from subscribing documents containing clauses favoring him, or members of his family. Unlike other systems, the Spanish notarial rules allow the Spanish notary to subscribe documents including clauses where he or a member of his family undertakes obligations.

133 P.R. LAWS ANN. tit. 4, § 2033(e) (1994) reads in pertinent part that the deed must include a certification of "having read the deed to [the parties] and the witnesses, in their case, or having allowed them the option to read it before signing it, or of a waiver of their right to do so." See also Spanish Notarial Rules art. 193.

134 C. CIV. P.R. art. 645, P.R. LAWS ANN. tit. 31, § 2182 (1994) ("The will when drawn in accordance with it and with the expression of the place, the year, the month, the day and the hour of its execution shall be read aloud in order that the testator may declare that it is in conformity with his intention. Both the testator and the witnesses may read the will themselves and the notary must inform him of this, his right.")

135 For example, the notary might state that all pertinent warnings have been given, and in particular, the parties have been informed of the convenience or necessity of registering this deed in the property registry, in order to bind third parties. See, e.g., MALAVET-VEGA, supra note 5, at 176-77 (convenience of Property Registration), 184-85 (registration of mortgage and execution thereof), 192 (duty to register with Registry of Wills), 197-98 (registry of powers of attorney), 208-09 (extraordinary extension of general power of attorney), 215 (consequences and limitations of emancipation), 219 (registration of certification of construction).

136 P.R. LAWS ANN. tit. 4, § 2033(f) (1994) ("[T]he public deed shall include the following: . . . Of having orally made the pertinent legal warnings and reservations to the grantors during the act of execution. This notwithstanding, there shall be consigned in the document those warnings that, in the notary's judgment, must be expressly detailed due to their importance.") For example, the parties should be made aware that the document needs to or should be registered, and that the notary is not responsible for that, unless expressly retained therefor. See also Spanish Notarial Rules art. 194.

137 P.R. LAWS ANN. tit. 4, § 2034 (1994) ("The grantors and witnesses shall sign the deed and shall also affix the initials of their name and surname or surnames to the margin of each one of the pages of the document"). In France, the Notary and the witnesses and parties put their mark (paraphe) on each page of the document. Décret no. 71-941, supra note 42, art. 9; Spanish Notarial Law art. 17, Spanish Notarial Rules art. 195.

138 Spanish Notarial Rules art. 196; LEY DEL NOTARIADO PARA EL DISTRITO FEDERAL art. 68; MALAVET-VEGA, supra note 5, at 99-102.
deed, again, to ensure the integrity of the original.\textsuperscript{139} Under certain circumstances, the notarial subscription must take place in so-called "unity of act." This means that the formalities must start and be completed without interruption in a single act. Open wills are the most important example of this requirement, which must be certified by the notary in the deed.\textsuperscript{140} Unity of act is also required when witnesses participate in the subscription.\textsuperscript{141} Otherwise, the notary may take the signatures of the parties individually, at their convenience, although, in some systems, an absolute time limitation is imposed.\textsuperscript{142}

The formal content of the deed is carefully described by applicable law and regulations. As to public deeds, there are certain other requirements of form, which range from the size of the paper and the margins to be used, to the prohibition of the use of numbers alone (i.e., without transcribing the number using words) or of abbreviations, to the language in which the document must be drafted.\textsuperscript{143} But, the most important reason for form requirements in the deed is to ensure and to memorialize informed consent to the juridical act it transcribes.


Deeds reflect juridical acts that are "privileged" because they are important enough to require or benefit from notarial formality. Accordingly, juridical acts can be categorized as mandatory or voluntary transactions as they relate to notarial formalities.\textsuperscript{144} While these general categories are useful, I think it best to be even more precise here. I would therefore identify the following categories of juridical acts subscribed by a notary: (1) acts that are valid only if included in a deed; (2) acts which require public notarial form for certain aspects of their enforceability but not as to the

\textsuperscript{139} P.R. LAWS ANN. tit. 4, § 2034 (1994) ("[Each one of the pages of the document] shall be flourished and sealed by the notary.") Décret no. 71-941, supra note 42, art. 9; Spanish Notarial Law art. 17, Spanish Notarial Rules art. 196.
\textsuperscript{140} P.R. Notarial Rules R. 35.
\textsuperscript{141} P.R. LAWS ANN. tit. 4, § 2046 (1994). See also Part IV.D infra.
\textsuperscript{142} For example, in Puerto Rico, in the absence of witnesses, all signatures may be taken separately, but they must be taken within the same calendar day. P.R. LAWS ANN. tit. 4, § 2046, para. 2 (1994).
\textsuperscript{143} See, e.g., MALAVET-VEGA, supra note 5, at 77-80; Spanish Notarial Rules art. 148 (language), R. 152 (writing the public document), R. 154 (paper); see also Part IV infra.
\textsuperscript{144} I have previously described this as follows:
Notaries exercise their exclusive power to authenticate two general categories of private transactions: (1) mandatory notarial transactions (i.e., those that the law requires be completed by public document) and (2) voluntary notarial transactions (i.e., those for which the notarial form is not essential, but which the parties voluntarily memorialize in a notarial form to obtain the protection of the presumptions associated therewith.)
MALAVET, supra note 3, at 455-56. See generally MALAVET-VEGA, supra note 5, at 73-76; YAIGRE & PILLEBOUT, supra note 23, at 90-92.
validity of the underlying accord; (3) acts that, when subscribed by a notary, can only be in public documentary form; and (4) acts which do not require notarial formality but as to which the parties voluntarily seek it. There is a bit of overlap in these categories, especially between the last three. However, the distinctions are important to our understanding of the notarial transaction that is reflected in a public deed.

An example of the first category, juridical acts that are valid only if included in a deed, is the prenuptial agreement145 which must be transcribed in a deed to be valid.146 In this case, a purely private agreement is generally not an alternative at all. A prenuptial agreement that is not reflected in a deed is null and void ab initio.147 Another example is the inter-vivos gift.148 For this act to be valid, at least when certain types of property are involved, it must appear in a public notarial document.149 Other agreements in this category are the partnership agreement, when real property is being supplied

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145 These contracts are used to opt-out of the default legal regime. C. CIV. FR. art. 1394; C. CIV. P.R. art. 1267; C. CIV. SP. art. 1315, 1316, 1325, 1327; C. CIV. MEX. art. 179. The default regime is generally community property. C. CIV. FR. art. 1393, para. 2; C. CIV. P.R. art. 1267, para. 2; C. CIV. SP. art. 1316; C. CIV. MEX. art. 178. Normally, they must be made prior to the marriage and have no effect if the couple does not marry. C. CIV. FR. art. 1395; C. CIV. P.R. arts. 1267, 1273. But the Spanish code allows them before or after marriage. C. CIV. SP. art. 1326. Marriage contracts (Eheverträge) can be either pre- or post nuptial under German law, §1408 BGB, both however must be made in the presence of a notary. See §§ 1408 (Die Ehegatten können ihre güterrechtlichen Verhältnisse durch Vertrag (Ehevertrag) regeln, insbesondere auch nach der Eingehung der Ehe den Güterstand aufheben oder ändern.), 1410 BGB ("Der Ehevertrag muß bei gleichzeitiger Anwesenheit beider Teile zur Niederschrift eines Notars geschlossen werden.")(unofficial translation by Andrea Lewis) [hereinafter the German Civil code will be cited as follows, § _ BGB. If the original German text of the BGB is used I will cite it exactly the same way except it will carry the designation “unofficial translation by Andrea Lewis.”] German law strictly regulates the use ownership and disposal of matrimonial property. See WERNER F. EBKE & MATTHEW W. FINKIN, INTRODUCTION TO GERMAN LAW 256-57 (1996). If the Ehevertrag differs from the statutorily prescribed “matrimonial property regime” it is only valid against the interests of third parties if it is both notarized and registered in the “register of Matrimonial Property” (Güterrechtsregister) or the third party was notified of the existence of the contract. See id. at 258, 348 and see IAN S. FORRESTER, SIMON L. GOREN, HANS-MICHAEL ILGEN, THE GERMAN CIVIL CODE, §§ 1412, 1588 BGB.

146 C. CIV. P.R. art. 1273, P.R. LAWS ANN. tit. 31, § 3557 (1994) ("Marriage contracts and modifications made therein must be contained in a public instrument executed before the celebration of the marriage."); see also C. CIV. FR. art. 1394; C. CIV. SP. art. 1327.

147 The only exception applies to personality not exceeding five hundred dollars in value. C. CIV. P.R. art. 1276, P.R. LAWS ANN. tit. 31, § 3560 (1994). It is, of course, possible that the parties will decide to divide the property in accordance with an imperfect agreement, since parties are free to accept any type of settlement, but the agreement is unenforceable.


149 The French Civil Code requires that they be included in a minute on penalty of nullity. C. CIV. FR. art. 931. In Puerto Rico, only gifts of real property must be made by notarial deed. C. CIV. P.R. art. 575 ("In order that a gift of real property may be valid it shall be made in a public instrument, stating therein in detail the property bestowed as a gift and the amount of the charges, which the donee must satisfy.") Spain follows a similar rule. C. CIV. SP. art. 633. Mexico requires a public document when real estate or personality with value exceeding five thousand pesos. C. CIV. MEX. arts. 2340-45.
by one of the partners, the repudiation of inheritance and the censo enfiteutico. Extra-judicial emancipation by parental consent is another example. Generally, a minor is subject to parental authority, parens patriae or patria potestas, and responsibility until they reach the age of majority. By way of exception, some civil codes allow parents to emancipate the child, i.e., give them the rights and obligations of an adult, by deed after they have reached a particular age. It is interesting to note that most systems allow this to occur by judicial order and, as an exceptional alternative, some allow it by deed with parental consent. It is also important to note that both the repudiation of inheritance and the notarial emancipation are express alternatives to judicial filings. The parties are given the choice of accomplishing these juridical acts either by filing a

150 C. CIV. P.R. art. 1558 ("Civil partnerships may be established in any form whatever, unless when real property or property rights should be contributed to the same, in which case a public instrument shall be necessary.") Partnership Agreements or oHG offene Handelsgesellschaften are regulated by §§ 105 II HGB and § 705 BGB. Generally these types of agreements do not require notarization. However, as with Puerto Rican law, if real property is contributed to the partnership then such agreements must be notarized. §§ 313, 925 BGB.

151 C. CIV. P.R. art. 962 ("The repudiation of an inheritance shall be made in a public or authentic instrument, or in writing presented to the part of the Superior Court having jurisdiction in testamentary or intestate proceedings.") There is a similar principle of forced heirship and repudiation of inheritance under German law, and generally a testator can exclude all his or her heirs from inheritance by will. See EBKE & FINKIN, supra note 145, at 286; §§ 2303-45 BGB.

152 C. CIV. P.R. art. 1520 ("An emphyteutic annuity can only be charged on real property and in a public instrument."); see also C. CIV. P.R. art. 1496 ("An annuity is called emphyteutic (censo enfiteutico) when a person transfers to another the beneficial ownership of an estate reserving to himself the legal ownership and a right to receive from the emphyteutary an annual income in recognition of such ownership.")

153 Parents have authority over their minor unemancipated children, including the authority "to correct and punish them moderately or in a reasonable manner." C. CIV. P.R. art. 153(2); see also C. CIV. SP. art. 154; C. CIV. FR. art. 371-1; C. CIV. MEX. arts. 411-24. They also control and administer the children's property. C. CIV. P.R. arts. 154-62; C. CIV. SP. art. 164-68 C. CIV. FR. arts. 382-87; C. CIV. MEX. arts. 425-42.

154 Parents are generally responsible for child support. C. CIV. P.R. art. 153(1); C. CIV. SP. art. 110; C. CIV. FR. art. 203; C. CIV. MEX. art. 303. Parents are also liable to third parties for damages caused by torts committed by their minor children, who live with them and absent proof of proper supervision. C. CIV. P.R. art. 1803, para. 2; C. CIV. SP. art. 1903, para. 2; C. CIV. FR. art. 1384 (parents jointly and severally liable for torts of children they supervise); C. CIV. MEX. art. 1903. The reason for this last rule is that the parents are directly liable to the third parties for their failure to supervise their children. See Alvarez v. Irizarry, 80 P.R.R. 60 (1957).

155 However, emancipated minors are sometimes subject to certain limitations not otherwise applicable to adults. See C. CIV. P.R. art. 237 (minor cannot incur obligations whose value exceeds his income for one year, and that he must appear in judicial proceedings represented his parents); C. CIV. SP. arts. 323-24.

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

157 See, e.g., C. CIV. P.R. art. 234, P.R. LAWS ANN. tit. 31, § 912 (1994); C. CIV. FR. art. 477; C. CIV. SP. art. 317.

158 C. CIV. SP. art. 317; C. CIV. P.R. art. 234.
judicial action or by notarial deed.

The second category is a slightly different type of notarial transaction: the agreements which require public notarial form for certain aspects of their enforceability but not as to the validity of the underlying accord. The mortgage is a good example. A mortgage must be included in a public deed and registered in the Property Registry for the mortgage preference to exist. If we focus only on the mortgage, this act would belong in category number one because in order to be a valid mortgage, both notarial form and registration are required. However, in the absence of a registrable deed, this would be a valid loan agreement among the original parties, and the debtor would be obliged to pay the creditor. Thus, the basic agreement reflected in the deed is not null and void. In the event of default, the mortgage preference would not exist, easy execution against the property would not be available, and the lender would have to compete with all other unsecured creditors. Transactions involving real property, generally, require public documentary form, in order to enter into the public registry and to bind third parties. To this extent, they are transactions that require public notarial form for an aspect of their enforceability, i.e., for registration purposes. Nevertheless, as private agreements, they do not otherwise require any specific form, as I discuss below.

The third category reflects a legislative decision that notarial intervention must take the form of a deed. These are agreements that, when subscribed by a notary, can only be in public documentary form. Private documents reflecting many of these agreements could be perfectly valid, but if a notary participates in drafting them, he must do so in the form of a deed. In other words, the applicable substantive law may not impose notarial form on the parties acting unassisted by a notary, but if they choose notarial intervention, the agreement will have to take the form of a deed. This is the case for wills. The law allows wills in many different forms. A testator

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160 Of course, the notary may advise them that they do not need notarial intervention, and may just send them on their way.

161 Holographic (ológrafo in Spanish, olographe in French) wills are those that are written by the hand of the testator. C. Civ. Fr. art. 970; C. Civ. P.R. art. 627; C. Civ. Sp. art. 688; C. Civ. Mex. art. 1550. Non-holographic wills can be divided into open (abierto in Spanish, par acte public in French) or closed (cerrado in Spanish, mystique in French). A closed will may be prepared by the testator or by someone else at his request. C. Civ. Fr. art. 976; C. Civ. P.R. art. 656; C. Civ. Sp. art. 706; C. Civ. Mex. art. 1521. For it to be effective, the closed will must be placed in a sealed container that must be broken in order to extract the document. It must then be presented before a notary for preparation of a notarial document attesting to the existence of the will. During this act, in the presence of the notary and witnesses (generally five, but the French code requires only two and the Mexican code only three), the testator must state that the document is his last will and testament. The notary prepares the document describing the appearance of the sealed container. The testator, witnesses and the notary must
may write a will without the assistance of a notary. However, if the document is to be subscribed by a notary, it must be an open will, which is a deed that must be prepared and certified by the notary and signed by the testator and witnesses. The notary must be especially careful to take into account the most important limitation on testamentary disposition, the forced-heirship rules that require the testator to leave most of the inheritance to his legal heirs.

sign the notarial document and certify the testator's testamentary capacity. C. CIV. FR. arts. 976-80; C. CIV. P.R. arts. 657-65; C. CIV. SP. arts. 707-15; C. CIV. MEX. arts. 1522-26.

Under German law there are two ways a testator can dispose of her property either through a will or through a contract of inheritance. See EBKE & FINKIN, supra note 145, at 286; § 2229 BGB et seq. ("The Making and revocation of a will") and § 2274-2302 BGB (inheritance contracts). Inheritance contracts, (Erbverträge), unlike wills, which are unilateral agreements, are not governed under the laws of succession but under general contract principals of German Law. See EBKE & FINKIN, supra note 145, at 288. Therefore unlike a will the testator may not unilaterally revoke an Erbvertrag. Id. However the right of the testator to make an inter vivos gift is not diminished by the presence of an Erbvertrag. § 2286 BGB. Because of its binding nature on the testator the testator must personally, in the presence of the other parties and the notary, enter into the contract. Id. Notaries then, while all parties are present, record the Erbvertrag. Id. Under German Law, wills are either ordinary or public. Id. at 286; see also § 2231 BGB ("A will may be made in regular form: 1. by notarial minute; 2. by a declaration of the testator under § 2247 [provision governing ordinary wills."] Id. An ordinary will can also be holographic § 2247 BGB. Public wills are registered and must be created through an Urkunde, deed, and require notarization. See EBKE & FINKIN, supra note 145, at 286; § 2232, 2258(a)(1) BGB ("A will may be made by notarial minute provided that the testator declares orally to the notary his last will or hands over to him a document with a declaration that the document contains his last will. The testator may deliver the document either unsealed or sealed; it is not necessary that it be written by him."). Id. § 2232. Under German law minors may only make wills through oral declarations to a notary. Id. § 2233(1). If the testator wishes to revoke a public will the notary must return the document to him or her. As in most countries if the required forms are not followed a will is considered deficient and therefore invalid. § 1251 BGB, and see EBKE & FINKIN, supra note 145, at 289. It is the testators decision which type of will he or she wants. § 2231 BGB. Neither ordinary nor public wills may violate public policy regarding such things as protection of the spouse or "statutory forced share." See EBKE & FINKIN, supra note 145, at 286-87.

Open wills must be prepared as public documents, and if the document is found to have been improperly made, the rules of intestacy take over. See C. CIV. FR. art. 969-75; C. CIV. P.R. art. 644-55; C. CIV. SP. art. 694-705; C. CIV. MEX. art. 1511-20.

In the Spanish and Latin American system, the part of the inheritance that must be left to the legal heirs is called the legítima (legitimate) in Spanish. C. CIV. SP. art. 806; C. CIV. P.R. art. 735. It is divided into the legítima estricta, usually one third of the inheritance, which must be divided equally among all heirs, and the mejora, usually one third of the inheritance, which the testator may use to "improve" one or more heirs, at the expense of the others. C. CIV. SP. arts. 808-10, 823; C. CIV. P.R. art. 751. The French also have a mandatory "reserve" for heirs that must be followed in testamentary disposition; the reserve starts at one half of the inheritance when there is only one heir, and increases with the number of heirs, to 2/3 if there are two, 3/4 if there are three or more. C. CIV. FR. arts. 913-14; see also JEAN-LUC AUBERT, INTRODUCTION AU DROIT 268-69 (5th ed. 1992). After the mandatory share is allocated, only a small proportion of the inheritance, usually one third, will be available for free disposition, i.e., to be left to whomever the testator wants, regardless of legal heirship. For example, you can will your Bentley to your cat. In France, whatever is left after the applicable reserve is called the quotité disponible, which may be freely disposed of by will. AUBERT, supra, at 269. A similar common law rule might be the imposition of limits on charitable bequests. The only way to avoid forced heirship is to disinherit the legal heirs, which is very hard to do. Heirs are entitled to the legítima or reserve. C. CIV. SP. art. 813; C. CIV. P.R. art. 741. For examples of rules applicable to disinheriting an heir, see C. CIV. SP. arts. 848-57; C. CIV. P.R. arts. 773-81. The drafters of the Mexican Code chose to eliminate forced heirship. They indicated that this was a "liberal social" approach to inheritance which complied with the constitutional right of Mexican citizens to dispose freely of their property. See
The final category is the purely voluntary agreement that the parties could complete without notarial assistance and in no particular form, but which they nonetheless seek to have transcribed in a deed. There is a great deal of overlap between the second and fourth categories, but this overlap is not complete, therefore it merits separate discussion. A good example are conveyances or encumbrances of real property that must be entered into the property registry in order to bind third parties. As a general rule, among the parties an agreement is valid if the required elements for a contract are present, regardless of its form. This rule also extends to transactions related to real property. Accordingly, even if the deed is held to be null and void for violation of a notarial formality, the underlying agreement is still generally valid. However, as a practical matter, notarial form, properly given, makes proof of the accord easy and it allows the transaction to enter into the public registry, thus binding all third parties. For example, A may orally agree to sell a farm to B for 100,000 pesetas; B accepts the offer and delivers the money and A gives him the keys to the property and allows him to occupy it. A and B have a perfectly valid contract. However, assume that A then sells to C, who has no knowledge of the contract with B and they appear before a notary, who conducts a registry search and finds nothing regarding B, since no registrable notarial document was subscribed by A and B. If C purchases by notarial deed and registers


165 "But the public document, subscribed before a Notary, reinforces, with a presumption of validity, the juridical act." MALAVET-VEGA, supra note 5, at 74.

166 See generally id.; see also C. Civ. P.R. art. 1230; C. Civ. Sp. art. 1278; C. Civ. Mex. art. 1832.

167 Velez v. Camacho, 8 P.R.R. 35 (1905).


169 Under German law, unlike French law, a contract for the sale of goods or land does not constitute a conveyance. See HORN, ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 119 (Tony Weir trans., 1982); EBKE & FINKIN, supra note 145, at 231. This seemingly strange rule, called the Abstraktionsprinzip, occurs in German law because the passing of title, the conveyance, and the performance aspects of the agreement promise to sell and terms of the sale, must be memorialized in two different documents. See EBKE & FINKIN, supra note 145, at 229-37 and HORN at 119. Conveyances (Auflassung) of land must be notarized to be valid deeds (Urkunde). See HORN at 179, and see §§ 313 and 925 BGB. If for example X sells to Y and then to Z the same item however X only makes a valid conveyance to Y then under German Law Y may only sue for damages but not for equitable performance of the agreement so that Y is granted title to the item. See HORN at 119. The only exception to this general rule is when there is a land sale and a Vormerkung, or priority notice, is entered into the Grundbuch or Landregister through the use of a notarial document. Only if Y has a Vormerkung can Y sue for title. See HORN; §§ 883-902 BGB. A Vormerkung "is an entry in the Grundbuch to protect a claim to a registrable right in landed property, making dispositions which run counter to the claim of the person in whose favor the Vormerkung has been registered void as against that person." 2 CLARA-ERIKA DIETL ET AL., DICTIONARY OF LEGAL, COMMERCIAL AND POLITICAL TERMS, 729 (3d ed. 1988).

In addition all documents related to either the transfer of title (Auflassung) or the use, sale or disposal of real rights to the property, "such as right of way, rights to cut wood or pasture animals, rights to fetch water across another's land... and restrictive building covenants..." must be notarized or at a minimum bear signatures witnessed by the notaries. See HORN at 180-81.
this transaction, C can evict B. B has a claim against A, but C owns the land. 170 Parties may choose notarial form for transactions that they could complete, legally, with little or no formalities. They will do so, generally speaking, to get the benefits of legality, legal advice, publicity and evidentiary effect that the notarial transaction provides. 171

Some may find the provisions of article 1232 of the Puerto Rican code and 1280 of the Spanish Code somewhat confusing, as to how the categories are organized. Article 1232 of the Puerto Rican Civil Code reads:

The following must appear in a public instrument:

1. Acts and contracts the object of which is the creation, conveyance, modification, or extinction of rights on real property.
2. Leases of the same property for six (6) or more years, provided they are to the prejudice of third persons.
3. Contracts to govern property belonging to the conjugal partnership, and the creation and increase of dowries, whenever it is intended to enforce them against third persons.
4. The assignment, repudiation, and renunciation of hereditary rights or of those of the conjugal partnership.
5. The general power of attorney to institute lawsuits and the special powers of attorney to be presented in suits; the power of attorney to administer property and any other power of attorney, the object of which is an act drafted or which is to be drafted in a public instrument, or which may prejudice a third person.
6. The assignment of actions or rights arising from an act contained in a public instrument. 172

It is important to note that this section is not related to the validity of the agreement but rather to what constitutes the best evidence of the agreement. To this extent, notarial form affects aspects of their enforceability as a matter of evidence law. However, best evidence is not the only evidence. The same thing can be said for the provision included in this article that contracts regarding property valued in excess of $300.00 should be in writing. Again, we are talking about evidentiary matters, not about the underlying validity of the agreement. 173

However, article 1232 does point to what all juridical acts reflected

170 C. Civ. P.R. art. 1362, para. 2; C. Civ. Sp. art. 1473, para. 2. See also United States v. V & E Eng'g. & Constr. Co., 819 F.2d 331, 333-34 (1st Cir. 1987) (under Puerto Rico law, seller who fraudulently sells twice not entitled to protection, only good faith purchasers).

As I mentioned in the introduction, I do not consider here our system of property registration. However, the common law analogy in this area is obviously the U.S. property registries and the application of the statute of frauds.

171 I have described the strong evidentiary presumptions that favor the notarial document before. Malavet, supra note 3, at 440-45.

172 P.R. LAWS ANN. tit. 31, § 3453 (1994); C. Civ. Sp. art. 1280.

in a public deed have in common: the assurance of legality and truth provided by the notary. In acts such as the repudiation of inheritance and emancipation deeds, the notary is an express alternative to a judicial proceeding. In other situations, the notary helps to avoid litigation by making proof of matters easy through the deed and, often, the publicity of registration.

3. The Role of the Notary: Impartial, Honest, Expert Judgment

The notary's duties can be described as follows:

The Notario Latino [Latin Notary] is . . . [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.174

The notary is the impartial counsel for the transaction and representative of the public trust. He is, in effect, the judge of the parties' agreement in the absence of litigation. I have previously described this concept as follows:

The Latin Notary is, thus, exclusively empowered to complete certain legal transactions, and is in this context allowed to be the parties' only legal advisor. The notary is the judge of the legality of the transaction under normal circumstances, i.e., in the absence of litigation, and is their expert legal advisor. The notary, is held to the impartial function of advising all sides in a matter and her ethical duty is not to the parties but to the transaction. Since the notary's competence is generally limited to specific transactions, it is more accurate to call her "counsel for the transaction," but she is indeed, in Brandeis' terms, a legal professional who "rises above partisan advocacy."175

The notary does not really "represent" the parties, his principal duty is to the public power to attest to the truth of the transaction.176 In counseling the parties, the notary is responsible for ensuring informed consent. He must

175 MALAVET, supra note 3, at 402 (footnote omitted).
176 The Notary "... does not represent any clients. He represents the publica fides. He is the witness par excellence who must give form to the transaction that has been agreed to, and who must advise the parties of the legal aspects of the instrument that they subscribe and which he authorizes." In Re Colon Ramery, 93 J.T.S. 91 (1993) (quoting In re Lavastida, 109 P.R. Dec. 45, 86 (1979) (Irizarry Yunque, J.)) (unofficial translation by Pedro A. Malavet). See also Malavet, supra note 3, at 486-87.
balance any informational disadvantage among the parties regarding both facts and law. Advocacy is strictly forbidden. The notary must be the impartial "super-witness" to the agreement. When the notary is acting in this capacity, the lack of adversarial ethic is taken to the extreme of requiring the notary to testify about a notarial transaction subscribed before him in civil and criminal proceedings, even against the interests of the parties to that transaction.

Unlike the *afidavit* or *brevet*, in which the role of the Latin Notary and that of an American Notary Public are comparable, in the drafting and subscription of the deed, the notarial transaction differs greatly from the analogous agreement in the common law system. Although Latin notaries have specific rules regarding the manner in which they must identify the parties appearing before them, their identification function is otherwise

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177 "The notary must be impartial and must advise all parties well and equally. This obligation includes a duty to counsel parties who are not well informed, relative to the other parties to the transaction. In other words, the notary must counteract the effect of the differences in the legal sophistication of the parties, in order to produce a balanced, well-informed result. The notary represents the law for all the parties to the transaction." *Id.*

178 The notary must remain impartial:

In order to maintain this impartiality, the Latin notary must not become an advocate for any of the parties in litigation involving a transaction which he subscribed in his capacity as a notary. In jurisdictions in which there is no blanket incompatibility between the notariat and advocacy, since there is no privilege involved in the notarial transaction, there is no technical conflict of interest when the notary later becomes an advocate for one of the parties. However, the required level of impartiality demands that the notary remain completely neutral as to the parties to a transaction. This precludes his participation as an advocate in any legal action related to a notarial transaction subscribed before him. (Of course, this only applies in those countries in which, like in Puerto Rico, the notary may also be a lawyer.) I would characterize this as a transactional incompatibility between the role of an advocate and the duty to the notariat. To hold otherwise, the Supreme Court of Puerto Rico has reasoned, would allow the appearance of impropriety to exist. The notary is further enjoined from becoming an advocate in such a case because he is the best qualified witness to the facts of the case.

Malavet, *supra* note 3, at 486-87 (citation omitted).

179 I have previously described this as follows:

In fact, the notary may be compelled to testify about the facts related to a transaction in a court of law. Tomas Cano & Co. v. Robles, 32 DPR 643, 648 (1924). The only exception applies to the contents of a closed will, prior to the death of the testator. P.R. LAWS ANN. tit 4, § 2065 (1987). The absence of the privilege extends even to criminal proceedings, where a notary may testify against a party to the notarial transaction. The notary is allowed to relay any otherwise admissible evidence based on the party's statement to him in his capacity as a notary. Pueblo v. Denis-Rivera, 98 P.R. Dec. 704, 710-711, 98 PR Rep. 691, 697 (1970). If there is a suspicion that a criminal act has been committed after a legitimate examination of the *protocolo*, the competent authorities must be notified. P.R. LAWS ANN. tit 4, § 2072 (1987).


180 See *infra* Part III.C.
practically indistinguishable from that of the Notary Public.\textsuperscript{181} As "certifiers of signatures" and "takers of oaths," the functions of the Latin Notary and the notary public are quite similarly limited to the proper identification of the person signing the document. They are both also holders of the "public trust" inasmuch as the State delegates to them the power to attest and to authenticate, limited in the case of the notary public and quite general as to facts in the case of the Latin Notary. However, the Latin Notary is further required to have the legal knowledge necessary to ensure that transactions take the proper legal form, to advise the parties regarding the legal effects thereof, and to exercise proper judgment in the performance of his duties. This additional dimension makes the Latin notariate a true legal profession.\textsuperscript{182}

By definition, deeds are \textit{legal} documents that necessarily reflect a juridical act. Thus, their equivalent in the United States would have to be drafted by an attorney. For an American Notary Public to draft a "notarial document" would probably constitute illegal practice of law.\textsuperscript{183} Substantive requirements are imposed by whatever specific law governs the particular


Generally speaking, all [Notaries public in the United States] have the power to administer oaths to people in the same manner as courts. . . .

One of the most important and frequently used powers of a notary public is the power to attest to signatures. Typically, the scenario is that (1) the person whose signature is to be notarized presents evidence sufficient to satisfy the notary that the person is who he or she claims to be, (2) the person then signs his or her name to the subject document in the presence of the notary, and (3) the notary then formally witnesses the signature by affixing the notarial seal or stamp and by signing and dating the document. . . .

\textsuperscript{182} \textit{Id.} (citation omitted). Compare, however, \textit{supra} note 54 and accompanying text. Professor Schlesinger discusses the distinction with the following illustration:

Where German law requires merely a notarially authenticated document (as, e.g., in the case of communications addressed to the Commercial Register and providing information concerning registrable facts), it is generally recognized that such authentication can be provided by an American notary public. To perform the authenticating function, does not require any legal learning, and thus it would seem that the differences between a civil-law notary and an American notary public are irrelevant so long as nothing but mere authentication of a signature is involved. Where a true notarial document is required, however (as in the cases, among many others, of most real estate transactions and of promises to make a gift), it is the prevailing view among German courts and legal authors that a document drawn up by an American notary public does not meet this form requirement. The reason is that such a document, because of the low status of the American notary public, simply is not a "notarial document," as that term is understood in Germany and other civil-law countries.

\textsuperscript{183} See, e.g., \textit{CAL. GOV'T CODE} § 8214.1(g) (West 1993); \textit{FLA. STAT.} ch. 117.01(4)(f) (1993); \textit{IDAHO CODE} § 51-112(d) (1993); \textit{MO. REV. STAT.} § 486.390(1) (1992); \textit{N.M. STAT. ANN.} § 14-12-13 (A)(5) (1993); \textit{W.VA. CODE} § 51-1-4a (1993) ("A realtor or notary public, who prepares legal instruments for another, is engaged in the practice of law. 45 Ops. Atty. Gen. 488 (1953).") 45 Ops. Atty. Gen. 488 (1953).); \textit{WIS.STAT.} § 137.01 (1991-1992) ("If any notary public shall be guilty of any misconduct or neglect of duty in office he shall be liable to the party injured for all the damages thereby sustained.")
Notarios, as legal professionals, are therefore required to be experts in the substantive law applicable to each of the transactions they certify. As a threshold matter, the notary will be asked to decide whether the transaction before him is one that can be accomplished without notarial intervention. He will then have to determine if a notarial transaction can be contained in a simple afidavit or whether it must or should be memorialized in a formal deed.

The notary is the impartial legal advisor to the parties and the preferred official witness to the transaction. He gives the agreement proper legal form, in both substantive content and notarial formality. In producing the deed, the notary becomes the judge of the parties to the transaction in the absence to litigation. Included in this capacity is the authority to certify facts. In the following section, I cover the formalities that apply to notarial documents in general, and emphasize the formalities peculiar to public documents. I will also discuss how these rules are designed to ensure the truth and legality of the transaction, that the parties give informed consent, and that the process is as inexpensive as possible.

IV. Generally Applicable Rules: Ensuring Reliability, Publicity and Executability of Notarial Transactions

There is a legal scheme in notarial law and regulations that generally ensures the reliability, publicity and executability of the notarial transactions described above. Multiple contemporaneous records of each transaction are kept by the notary and transmitted to supervising authorities. The identification of the parties and any necessary witnesses contributes to the reliability of the transaction and helps to ensure its legality. The publicity

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184 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. See, e.g., C. CIV. P.R. arts. 628-36, P.R. LAWS ANN. tit. 31, §§ 2144-52 (1994) (Wills); arts. 1267-78, §§ 3551-62 (pre-nuptial agreements); arts. 558-98, §§ 1981-2053 (inter-vivos gifts donaciones).

185 This of course is perfectly consistent with the nature of the profession as impartial legal advisors. It is likewise consistent with civil code systems, 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. See, e.g., C. CIV. SP. arts. 1(2) (higher ranking law controls), 1(4) (general principles will only apply in the absence of law or custom), 13(2) (the Civil Code is supplementary in absence of specific rules in special and regional laws); C. CIV. P.R. art. 12 (the Civil Code is supplementary to specific legislation). See generally Malavet, supra note 3, at 455-60; PEREZ-FERNANDEZ DEL CASTILLO, supra note 74, at 71; YAIGRE & PILLEBOUT, supra note 23, at 12-13; MALAVET-VEGA, supra note 5, at 24-28.
of the transaction must be assured by the use of certified copies of documents that clearly reflect notarial intervention. This section describes these general procedural requirements and identifies how they ensure the public, truthful and lawful nature of the notarial transaction.

When it comes to notarial transactions, the notary is generally responsible for: (1) certifying, and in a way, clearly disclosing the notarial nature of the document by placing on it his signature, rubric, sign and seal; (2) maintaining a permanent record of the public documents subscribed before him, issuing copies to or sharing the contents with interested or authorized parties upon request; (3) identifying and advising the parties to the transaction; (4) identifying and advising any participating witnesses; and (5) providing governmental authorities with reports produced in the regular course of business.

A. Signaling Notarial Intervention: Signature, Rubric, Sign and Seal

The Latin Notary signals his participation in the subscription of a public document or the authentication of an affidavit by using his signature and seal. His rubric and sign are also required in the public document.

First of all, the notary must use his officially registered signature, sign and rubric in all notarial documents he subscribes. Additionally in all Latin notarial systems the law requires the notary to use an official seal. The seal is generally a rubber stamp. The content of the seal is usually carefully regulated in the law or the notarial rules. However, some

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186 See P.R. LAWS ANN. tit. 4, § 2011 (1994) ("[The Notary] must register his signature, sign, seal and flourish at the Department of State pursuant to the provisions of section 2012 of this title as well as in a Register kept for that purpose in the office of the Clerk of the Supreme Court of Puerto Rico." Section 2012 requires him to display the certificate issued by the Department of State.); Spanish Notarial Law arts. 19 (registration of official signature, sign and rubric, 23(3) (documents not bearing the notary's official signature, sign and rubric are null and void); Spanish Notarial Rules arts. 36, (registration with regional notarial college), 39 (public notice to other notaries of sign, rubric and signature).

187 Décret No. 71-941, supra note 42, art. 20 (sceau); P.R. LAWS ANN. tit. 4, § 2011 (1994). In Spain the seal was introduced in the Rules. Article 66 of the Spanish Notarial Rules makes it mandatory.

188 The use of the press-on embosser seal typically found in the United States would be impractical in the notarial system. See Michael Closeen et al., Notary Law & Practice, Cases and Materials 110-15 (1997) (discussing the notary public seal). In Puerto Rico, some notaries tried this system and discovered, to their horror, that when the original deeds are bound together to form the protocolo volumes, these stamps tend to disappear under the pressure of the binding process.

189 For example, Article 66 of the Spanish Rules provides for a seal that includes in the center a graphic depiction of a book in the form of a protocolo, with the theme "Nihil prius fide" printed on it, and bordered by the name of the notary and his business address. Article 20 of the Décret No. 71-941, states that the sceau shall include the notaire's name, notarial rank (i.e., the type of notarial appointment he or she holds), address and a standard depiction of the symbol of the French Republic. Décret No. 71-941, supra note 42, art. 20.
systems leave it totally to the discretion of the notary.  

In any case, the seal generally must be stamped on every page of the public document, and it is at least advisable to include it on lesser documents. The Spanish rúbrica or rubric is a flourish, or special mark, added to the signature. This must be placed by the notary on every page of the public document, along with the notarial seal. In France, the notary, parties and witnesses use a paraphe, which must be placed on every page. In French legal practice, the word “paraphe” usually refers to “initials,” and the verb “parapher” means “to initial.” However, more specifically, paraphe is a handwritten mark, other than the signature—usually the person’s initials, but not exclusively limited thereto—made by the notary and the subscribing parties and witnesses to signal that they have seen every page of the notarial document and to save any additions, deletions and cross-references found therein. In Spain, the parties generally sign at the

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190 This is the case in Puerto Rico. See generally MALAVET-VEGA, supra note 5, at 101-02. While the overwhelming majority of seals are simple round ones, some notaries use more original ones. Triangular and rectangular are not unheard of. The most original I have seen was shaped like the main island of Puerto Rico.

191 Spanish Notarial Law art. 27(3); P.R. LAWS ANN. tit. 4, § 2034 (1994).

192 Article 241 of the Spanish Notarial Rules requires that copies or public documents bear the notarial seal and rubric on every page. This same rule of form applies to testimonios by express provision of Article 251 of the same Rules. The seal must be placed on the annotations in the register of affidavits required by article 59 of the Puerto Rico Notarial Law. P.R. LAWS ANN. tit. 4, § 2094 (1994). However, the law does not expressly require the notarial seal on affidavits. See P.R. LAWS ANN. tit. 4, §§ 2091-95 (1994). The law only voids an affidavit when it lacks the notary’s signature. Id. § 2095. But it was advisable to include the seal anyway. See generally MALAVET-VEGA, supra note 5, at 102. The new Notarial Rules, however, have clarified the matter by requiring signature, seal and flourish on the affidavits. P.R. Notarial Rules R. 65.

193 The official translation of the Puerto Rico Notarial Law uses the term “flourish” to translate the Spanish term rúbrica. See, e.g., P.R. LAWS ANN. tit. 4, § 2012 (1994).


195 P.R. LAWS ANN. tit. 4, § 2034 (1994) (“The grantors and witnesses shall sign the deed and shall also affix the initials of their name and surname or surnames to the margin of each one of the pages of the document which shall be flourished and sealed by the notary.”) See, e.g., Cour de cassation, First Civil Chamber, Pourvoir No. 94-10.530, Arrêt no. 225, 20 janvier 1996 (the notarial document contained on each page the party’s paraphe, corresponding to his initials (“le paraphe "CD", correspondant à ses initiales”)).

196 Décret No. 71-941, supra note 42, art. 9.

197 That in practice the paraphe is usually a person’s initials was confirmed by several French practitioners reported that in practice the term refers to initials.

198 That in practice the paraphe is usually a person’s initials was confirmed by several French practitioners, in response to an electronic mail posting, as I mention above. However, the Cour de Cassation uses the term in ways that seem consistent with the Larousse definition, in that it refers to handwritten marks, other than a signature, which in particular cases happened to correspond to the person’s initials. See, e.g., Cour de cassation, First Civil Chamber, Pourvoir No. 94-10.530, Arrêt no. 225, 20 janvier 1996 (the notarial document contained on each page the party’s paraphe, corresponding to his initials (“le paraphe "CD", correspondant à ses initiales”)).

199 In the Puerto Rico system, the notary uses his rúbrica, and the parties use their initials for the same purpose, as discussed above. I know what the rúbrica is, since I have registered mine and used it in all my notarial documents. I also know that the term flourish is used in the official translation of the Puerto Rico law, and is easily found in any dictionary. See, e.g., THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 738 (2d ed. 1987). Additionally, in French-Spanish dictionaries, paraphe is translated as rúbrica. DICCIONARIO SUPERIOR FRANCES-ESPAÑOL, ESPAÑOL-FRANCES 360 (1977). So far, so good. However, in my Petit Larousse Illustre, while paraphe is defined as a flourish added
end of the document, thereafter the notary places his signature, rubric and sign and seal on the last page. The *sign* or *signo* is a special mark written under the signature. It is an anachronism that nonetheless survives in Spain and Puerto Rico. The rubric and sign, like our signature, are matters of personal choice. However, once registered, they can only be changed with authorization. The young notario is well advised to choose a simple official signature, rubric and sign because he will use them thousands of times over his lifetime of practice.

In France, the parties also must place their *paraphe* on every page of the document and use it to save additions, deletions and cross-references. The notary’s seal and rubric must also appear with the initials of each person signing the document, on each page of the public document, even the page bearing everyone’s signatures (which has always struck me as a bit redundant). Nevertheless, a careful approach to these formalities is important. A series of handwritten marks, including the person’s signature, initials and flourish are used as objective evidence that the parties have seen the entire document, and that they can be assured that no changes have been made to the material they signed. The notarial seal is used for the same purpose. Naturally, this is also accompanied by rules forbidding blank areas in the notarial deed into which something could later be inserted. Additions and corrections written on the master deed, that are not expressly acknowledged by everyone signing the document, are generally null and void. So strong is the interest in these objective signs of informed consent, that when the party does not know how to sign or is physically incapable of

to a signature, in normal usage, it is also defined, in its usage in law, as an abbreviated signature, usually the person’s initials, used to authenticate crossed-out material and cross-references. *Petit Larousse Illustre* 728 (1984). To the extent that both the notary and the subscribing parties use it, I am inclined to believe that in practice it will usually refer to initials. In fact, this led me not to accept the easy answer that *paraphe* was simply *rubrica*. While it made sense for the notary to use it, it seems impractical for the parties. It would appear then that it can mean both flourish and initials. The Larousse definition strikes me, then, as the most explanatory and accurate. In any case, however, it is an idiosyncratic, handwritten mark, other than the signature, made by the notary and the subscribing parties and witnesses, to signal that they have seen every page of the document.

I am grateful to my colleagues on the LAWPROF electronic mail list for their helpful notes in this regard.

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200 Spanish Notarial Law art. 17; Spanish Notarial Rules art. 196.
201 MALAVET-VEGA, supra note 5, at 99-102.
203 Décret No. 71-941, supra note 42, art. 9.
204 P.R. LAWS ANN. tit. 4, § 2034 (1994).
205 P.R. LAWS ANN. tit. 4, §§ 2045 (1994) (blank spaces not allowed in deeds), 2050 ("The blank spaces remaining at the end of a line or when a paragraph begins on the next line shall not be considered as such; but in this case the blank shall be filled with a line or dash."); Spanish Notarial Law art. 25, Spanish Notarial Rules art. 152.
206 P.R. LAWS ANN. tit. 4, § 2050 (1994) ("Any additions, annotations, interlineations, erasures and crossouts in the public deeds shall be held as valueless unless they are certified after the last line, with the express approval and signature of those who must sign the document."); Spanish Notarial Rules art. 152.
Illustration 1. At left: the author's notarial seal, and at right: signature with rúbrica (flourish) and signo (signo). Both as registered with the Supreme Court and the Department of State of the Commonwealth of Puerto Rico.

doing so, some substitute for the signature is required by the notarial law. For example, if a party does not know how to sign, their thumb print may be required instead. If the party is physically incapable of signing, witnesses may be used to sign for them as discussed below.

B. Legal Publicity: Originals and Copies of Public Documents

The notary is required to retain the original of the public documents he subscribes, in a collection known as Protocolo. Copies are often needed to give legal effect to the transaction. Therefore, the notary can issue simple or certified copies as needed or upon legitimate request.

1. Archiving Notarial Transactions: The Protocolo

The notary, as part of his public function, is the permanent archivist of the original documents subscribed before him. "The protocolo is the organized collection of master public documents and actas subscribed by a Notary . . . including those [supplementary] documents that are attached to

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207 See, e.g., P.R. LAWS ANN. tit. 4, § 2043 (1994) ("Whenever any of the grantors does not know how to, or cannot sign, the notary shall require that they affix their two (2) thumb prints.")
208 See, e.g., P.R. LAWS ANN. tit. 4, § 2043 (1994) ("If [the parties] do not have thumbs, any other fingers, next to the witness' signature who signs at his or their request, and on the margin of the rest of the document's folios, all which the notary shall attest to in the deed. If the grantor or grantors have no fingers, the notary shall state this circumstance and two (2) attesting witnesses shall sign at their request.") See also, Décret No. 71-941, supra note 42, art. 11 (the notary must expressly attest in the minute that the grantor(s) is (are) unable or incapable of signing).
209 I have previously used this material in Malavet, supra note 3, at 445-49, as a necessary to the explanation of the concept of the publica fides. I reproduce it here, basically unchanged, except for the addition of some material, and supplementation of the footnotes, because it is an essential aspect of the notarial function that I am trying to describe here.
The public document. A public document may be supplemented, for example, 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.

The protocolo or register is generally required to be bound at least into yearly volumes, not exceeding a particular number of pages. It must be kept in a safe place. In Puerto Rico, when it is kept inside a wooden structure it must be placed in a fire-proof cabinet. While the notary is its authorized custodian, the protocolo belongs to the State. It may not be removed from the notary's office, except pursuant to a court order. In jurisdictions, such as Puerto Rico, where the notariate 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. The system is different in those states that have territorial or numerical limitations. Custody of a protocolo belongs to 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.

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210 MALAVET-VEGA, supra note 5, at 117; P.R. LAWS ANN. tit. 4, § 2071 (1994) ("The protocol is the orderly collection of original deeds and acts executed during a calendar year by the notary, as well as the documents included therein."); see also Spanish Notarial Law art. 17, Spanish Notarial Rules art. 271; ÁVILA-ÁLVAREZ, supra note 24, at 169-72.

211 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, P.R. Notarial Law art. 76, P.R. LAWS ANN. tit. 4, § 2126 (1994); Law of Registry of Powers of Attorney of 1937, P.R. LAWS ANN. tit. 4, § 922 (1994), and of the subscription of a will within the 24 hours after its subscription. P.R. Notarial Law Art. 73. The notice must be delivered personally to the registries or by certified mail, return receipt requested.

212 P.R. LAWS ANN. tit. 4, § 2073-74 (1994); Spanish Notarial Rules art. 276.

213 P.R. LAWS ANN. tit. 4, § 2078 (1994).

214 P.R. LAWS ANN. tit. 4, § 2072 (1994); Spanish Notarial Law art. 36; see generally MALAVET-VEGA, supra note 5, at 121-22.

215 P.R. LAWS ANN. tit. 4, § 2077 (1994) ("The protocol shall not be removed from the office where it is kept in custody except by judicial decree or by authorization of the Office of Notarial Inspection.") The Spanish rule is even stricter. Spanish Notarial Law art. 32.

216 See generally MALAVET-VEGA, supra note 5, at 117-30.

217 See Malavet, supra note 3, at 471-74.

218 Each notarial office has an archive of protocolos which shall remain under the custody of the notary while he lives, Spanish Notarial Rules art. 291, or in the custody of his successor upon death, removal or resignation. Id.; see also id. art. 277-78; Spanish Notarial Law art. 38.

219 For example, in France, the notary retains documents in his notarial office until they are one hundred years old. They must then be turned over to the public archives. YAIGRE & PILLEBOUT, supra note 23, at 106-07. In Spain, they are kept for the lifetime of the notary or twenty-five years after closing, whichever is longer. Spanish Notarial Rules art. 291, Spanish Notarial Law art. 37.
Spanish law provides for different types of protocolos.\textsuperscript{220} In the Spanish notarial system, there are one general and three specialized protocolos.\textsuperscript{221} Two of the specialized collections are known as protocolos reservados, or reserved registers, and the last one is for letters of exchange. The protocolos reservados are: (1) the testamentario, which includes the open wills subscribed before the notary and the closed wills entrusted to his custody\textsuperscript{222} and (2) the protocolo de filiaci\textsuperscript{3}ón, which I would describe as a paternity register because it includes deeds acknowledging paternity of so-called natural children.\textsuperscript{223} The final type of protocolo accumulates certain commercial documents subscribed by the notary.\textsuperscript{224} They exist because of special rules regarding the secrecy of the protocolo, as I discuss below. The Spanish system, in order to better protect the different levels of privilege that attach to the protocolos, has made the practical decision to require that documents covered by different rules of disclosure be kept separately.

The contents of the protocolo are secret and may not be shown or otherwise divulged to third parties.\textsuperscript{225} Information from the protocolo may only be read by or shown to interested parties, as defined by law.\textsuperscript{226} Notarial wills, however, must remain totally confidential until after the death of the testator.\textsuperscript{227} The only exception to the confidentiality of wills is the admission of paternity of a "natural" child, a fact that may be disclosed by the notary even during the testator's lifetime.\textsuperscript{228} In all other cases, however, violation of the secrecy of the protocolo is forbidden, and may result in professional and civil liability, and in extreme cases, in criminal prosecution.\textsuperscript{229}

\begin{itemize}
\item \textsuperscript{220} See generally ÁVILA-ÁLVAREZ, supra note 24, at 174-75.
\item \textsuperscript{221} The general protocolo includes the deeds and actas subscribed before the notary, just as mentioned above. However, in the Spanish system, in addition to the general protocolo we find the specialized ones. ÁVILA-ÁLVAREZ, supra note 24, at 172, 174-75.
\item \textsuperscript{222} Spanish Notarial Law art. 34.
\item \textsuperscript{223} Id. art. 35. Natural children are those born out of wedlock. P.R. LAWS ANN. tit. 31, § 501 (1994).
\item \textsuperscript{224} Opening this special type of protocolo requires prior permission from the regional notarial college. Spanish Notarial Rules art. 272, para. 2.
\item \textsuperscript{225} P.R. LAWS ANN. tit. 4, § 2071 (1994) ("The protocol shall be secret and shall only be examined according to the provisions of this chapter or by judicial order issued pursuant to the provisions of this chapter."); Spanish Notarial Rules art. 274; Loi Ventose art. 23, amended by Law No. 73-546, of 25 June 1973; see generally MALAVET-VEGA, supra note 5, at 121; ÁVILA-ÁLVAREZ, supra note 24, at 171-74.
\item \textsuperscript{226} P.R. LAWS ANN. tit. 4, § 2065 (1994) ("In addition to the grantors, their representatives and assigns, any person who is entitled to some right as a result of the deed, whether directly or already acquired through different deed and in the judgment of the notary or notarial registrar, establish a legitimate interest in the document, excepting wills prior to the death of the testator shall have a right to obtain copies at any time.").
\item \textsuperscript{227} P.R. LAWS ANN. tit. 4, § 2065 (1994).
\item \textsuperscript{228} See P.R. Notarial Rules R. 48. The Spanish notary is even required to maintain a separate protocolo of documents that include a voluntary acknowledgment of paternity. Spanish Notarial Law art. 35. See generally MALAVET-VEGA, supra note 5, at 121.
\item \textsuperscript{229} See P.R. LAWS ANN. tit. 33, § 4192 (1994); MALAVET-VEGA, supra note 5, at 121; ÁVILA-ÁLVAREZ, supra note 24, at 210.
\end{itemize}
Naturally, there are a series of exceptions designed to give legal effect to the notarial transaction. For example, copies of public documents in the *protocolo* may be issued to interested parties as discussed below.

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. 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 he was told that by a party to a notarial transaction. 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. Additionally, the State, generally through the inspector of notary offices, is entitled to absolute, unobstructed access to the *protocolo*. Other agencies may also be expressly empowered to receive information from the *protocolo*.


Since the notary is required to retain the original public documents he subscribes, copies are issued as needed or upon request. This is of course essential to giving notarial transactions the public effect that makes them so important. Generally speaking, only the notary is authorized to issue copies of the documents in his *protocolo*. "Copies issued by the Notary may be, by virtue of their formality, certified or simple; and by virtue of their content, they may be partial or total." Simple copies lack the notary's certification and have little purpose beyond informing an interested party.

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252 Malavet-Vega, supra note 5, at 121-22.
253 Ávila-Álvarez, supra note 24, at 173, explains that this usually includes tax authorities who have authority to review the tax effects of notarial transactions.
254 Spanish Notarial Law art. 31, Spanish Notarial Rules art. 222; Décret No. 71-941, supra note 42, art. 17 (however, the French notary is authorized to allow a clerk in his office to issue dépôtions).
255 Malavet-Vega, supra note 5, at 131-32 (unofficial translation by Pedro A. Malavet) (emphasis omitted).
256 P.R. LAWS ANN. tit. 4, § 2068 (1994) ("Notaries may issue simple copies of main deeds upon request of the same persons with a right to request certified copies, but without a guaranteed transcription of the document. These copies shall not be signed, sealed or flourished, nor shall a marginal note of its certified copy be placed on the original deed."); Spanish Notarial Rules art. 250. See generally Malavet-Vega, supra note 5, at 131.
of the contents of a deed. The certified copy, however, is essential to giving proper publicity to the notarial transaction.

The French have two types of certified copies: copies exécutoires (formerly known as grosses) and those known as copies authentiques or expéditions. The former is a “super-copy,” which is really like an executable judgment. The copies exécutoires are written in the same terms as a judicial judgment and they are fully executory. Only one executory copy may be delivered as a matter of course; a second one may be delivered only upon a judicial order. The expéditions, or copies authentiques, have no numerical limitation and may be issued at the discretion of the notary. The Spanish notaries take a similar approach with their primera copia having superior effect, pursuant to the code of civil procedure.

Every certified copy bears a certificate subscribed by the notary attesting that it is a true and correct copy of the original in his protocol.

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237 Hence, the same section on copies in the Puerto Rico law includes the following language: “The notary shall allow the contents of documents of his protocol to be read by those who, in his judgment, show a legitimate interest as provided in section 2065 of this title.” P.R. LAWS ANN. tit. 4, § 2068 (1994). See also Spanish Notarial Rules art. 250.

238 While the basic notarial law still uses the term “grosse,” see Décret No. 71-941, supra note 42, art. 15. Yaïgre & Pillebout report that the law of 15 June 1976 substituted the term grosse with the term copies exécutoire. Yaïgre & Pillebout, supra note 23, at 109. The origin of the term grosse apparently refers to the large type that was used in these documents. Planiol, supra note 25, § 149, at 88-89 (“The acts are called “grosses” because they are “grossoyes” (written in letters of large size), as opposed to minutes, which are in ordinary writing.”)

239 Décret No. 71-941, supra note 42, art. 15.

240 Id., art. 18; Yaïgre & Pillebout, supra note 23, at 109.

241 Planiol describes the concept of executory as follows:

The executory formula is a sort of commandment addressed to sheriffs and the public force; it alone permits execution, seizures, and in a manner more general the employment of force to obtain justice. There are only two sorts of acts which can be clothed with this formula which, by virtue thereof, become executory titles; they are the “grosses” of judgments and the “grosses” of notarial acts. This is one of the great advantages of the notarial act: the creditor possesses an executory title which dispenses him from obtaining a judgment of condemnation against his debtor.

Planiol, supra note 25, § 149, at 88-89. Yaïgre & Pillebout confirm that this is still the case. Upon default by the debtor or obligee, the copy is delivered to a judicial official who may proceed to execute it without judicial order. Yaïgre & Pillebout, supra note 23, at 110.

242 Décret No. 71-941, supra note 42, art. 19. The order must then be attached to the original minute. Id.

243 Id. art. 15; Yaïgre & Pillebout, supra note 23, at 111-12.

244 The primera copia, contemplated by the third paragraph of Article 17 of the Spanish Notarial Law, is given special treatment in execution upon default, i.e., it is executory. Spanish Civil Procedure Law art. 1429. In order to prevent double execution, only the first copy or a second one issued pursuant to a judicial order receive this treatment. Spanish Notarial Rules art. 233. See generally Ávila-Álvarez, supra note 24, at 147-48.

245 P.R. LAWS ANN. tit. 4, § 2061 (1994) (“A certified copy is the literal, total or partial transcript of a document executed before a notary that is issued by him or the person officially in charge of his protocol, with a certificate regarding the truth of the contents, and the number of folios of the document as well as the signature, sign and flourish, and the seal and flourish of the attesting notary on every page.”); see generally Malavet-Vega, supra note 5, at 138-39.
With the exception of executory copies that I have just described, certified copies issued by the notario have the same value. Copies may be total or partial. Partial copies are certified but only transcribe part of the document, not the entire deed. These are used when the original document is very lengthy and its full transcription is impractical or too expensive. This is rare, however, given modern methods of copying and the use of computers to reproduce the original document. However, the allowance of partial copies is not totally anachronistic. There could be substantive reasons that may require that only partial copies be issued. For example, a partial copy of the most secret of notarial documents, a will, may be issued simply to certify a recognition of paternity, even during the lifetime of the testator. Certified copies are valid for all applicable legal purposes, including, for example, registration in the property registry.

The persons entitled to review the information contained in a public document and, therefore, to receive copies of it, are specifically identified by law.

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

Because of the important effects of a notarial document, the certification of a copy must provide a reasonable assurance that the interested parties are getting a true and correct copy of the original deed. All copies must bear the notaire's paraphe on every page and his signature and

247 P.R. LAWS ANN. tit. 4, § 2062 (1994) ("At the request of a party the notary may issue partial copies of documents found in his protocol, stating under his responsibility that there is nothing which broadens, restricts, modifies or conditions the excerpt in what is issued."); *see also* Spanish Notarial Rules art. 237.
249 Spanish Notarial Rules art. 221 (certified copies treated like the original). However, in the event of a conflict, the original wins. C. CIV. SP. art. 1220; P.R. LAWS ANN. tit. 4, § 2067 (1994) ("[Copies] once they are certified by the notary shall be deemed valid for all legal purposes."); C. CIV. P.R. art. 1175. *See generally ÁVILA-ÁLVAREZ, supra* note 24, at 148; MALAVET-VEGA, *supra* note 5, at 139.
250 The French call the copy used for registration of a mortgage a copie pour publicité foncière. YAI GRIE & PILLEBOUT, *supra* note 23, at 112.
251 MALAVET-VEGA, *supra* note 5, at 133 (discussing P.R. LAWS ANN. tit. 4, § 2065 (1994) ("In addition to the grantors, their representatives and assigns, any person who is entitled to some right as a result of the deed, whether directly or already acquired through different deed and in the judgment of the notary or notarial registrar, establish a legitimate interest in the document, excepting wills prior to the death of the testator shall have a right to obtain copies at any time.")) *As to Spain, see Spanish Notarial Rules art. 224-30. As to France, see* Loi Ventose art. 23.
seal in the final one.252 The Puerto Rican notary must include in the copy a “certificate regarding the truth of the contents, and the number of folios of the document as well as the signature, sign and flourish, and the seal and flourish of the attesting notary on every page.”253 The Spanish notario must also certify that the copy is true and correct and must place his seal, signature, rubric and sign in the last page. His seal and rubric must be placed on every page of the certified copy.254 Again, objective contemporaneous markings are used, as in the original document, to prevent forgery, additions or deletions. One more important safeguard is the requirement of a contemporaneous notation of the issuance of copies. As to the first executory copy seen in France, an express certification of its issuance must be included in the original deed.255 In Spain and Puerto Rico, notes of the issuance of copies are written on the margins of the original document in the protocolo.256 The notarial system again imposes a series of checks that can be used to ensure the accuracy of the act. Contemporaneous notations and markings are intended to ensure the accuracy of the content of copies, just like the original deeds. This is especially important as to the executory copies, which are one more example of the notary being an express alternative to a judicial order.

C. Consent by Whom?: Identity and Legal Capacity of Parties

The notary is responsible for identifying the parties signing a notarial document, and in which capacity they appear.257 The parties are identified by their given name and the surnames of both their parents.258 They may not

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252 Décret No. 71-941, supra note 42, art. 15.
253 P.R. LAWS ANN. tit. 4, § 2061 (1994).
255 The Décret No. 71-941, supra note 42, art. 19, says that the note shall be placed on the minute, which might be read as requiring the note to be part of the minute, but Yaigre & Pillebout indicate that a marginal note, with the notary’s paraphe, is enough. Yaigre & Pillebout, supra note 23, at 109.
256 P.R. LAWS ANN. tit. 4, § 2063 (1994) ("When issuing a certified copy the notary shall consign in the main deed, by means of a signed annotation, the name of the person to whom it is issued, the date and the number corresponding to the copy according to those already issued. These data shall appear in the copies.") The note includes the number of the copy, the type of copy, the person to whom it was issued, the date and the number of pages. The notary must sign the note. Spanish Notarial Rules art. 244.
257 P.R. LAWS ANN. tit. 4, § 2033(d) (1994) ("[The deed must include] . . . The name and surname or surnames, as the case may be, age or legal age, civil status, profession, and residence of the grantors, their Social Security Number, if they have one, name and circumstances of the witnesses, if any, according to their statements. In the event that any of the grantors is married and the appearance of the spouse is not necessary, the spouse’s name and surname shall be stated, even though the spouse does not appear at the execution."); see also LEY HIPOTECARIA Y DEL REGISTRO DE LA PROPIEDAD Y SU REGLAMENTO, §2003-99.4; P.R. LAWS ANN. tit. 30, subtit. IV, §2003-99.4 (1994). See generally Malave-Vega, supra note 5, at 81.
258 P.R. Notarial Rules R. 25; see generally Malave-Vega, supra note 5, at 82. The practice in Puerto Rico and many other countries, is to use the paternal surname of both parents. However, in Rosado Collazo v. Registrar, 118 P.R. Dec. 577, 589 (1987), the Puerto Rico Supreme Court
use their “married” names or nicknames but rather, their names as they appear in their birth certificates. If the notary has any doubts about this, he should demand a copy of the birth certificate. The name of a party’s spouse must also be included, even if the spouse is not a party to the document. The notary has to attest that he personally knows the parties or, if he does not, that he has identified them in a manner authorized by law. Supplementary means of identification under notarial law include: (1) an introduction of the party by a person known by the notary; (2) identification of one party by another party who is personally known by the notary; or (3) identification through voluntary presentation of official identification documents issued by the State, bearing the party’s signature and photograph.

acknowledges that this is not the case in the U.S. states.

In Puerto Rico, until 1985, article 94 of the Civil Code required married women to adopt their husband’s last names. But this was repealed by Law No. 93 of 9 July 1985. Additionally, the Puerto Rico Supreme Court has indicated that even when it was in effect, the old provision was not interpreted as automatically amending the person’s name, as registered in the demographic registry, which is her legal name. See Rosado Collazo, 118 P.R. Dec. at 587-88.

P.R. Notarial Rules R. 25 (only the name need be included, not their personal circumstances as is required for the appearing spouse). See generally MALAVET-VEGA, supra note 5, at 82. This is an understandable precaution in a community-property jurisdiction. The Spanish Notarial Rules allow a spouse to appear alone when the transaction is one that does not require the other spouse’s authorization. Spanish Notarial Rules art. 169. If the transaction would be null and void without the consent of both spouses, the deed may nonetheless be subscribed by only one of them if, after an express warning to this effect, both parties choose to proceed. Id.

P.R. LAWS ANN. tit. 4, § 2033(e) (1994) (“[The deed must include] . . . . The attestation to by the notary as to his personal cognizance of the grantors or, in its absence, of having verified their identity by the means established by this chapter, . . . .”). See generally MALAVET-VEGA, supra note 5, at 83-88. In Puerto Rico, a photo ID can be a passport or a driver’s license. Id. Most countries have some form of national identity card that is also legally acceptable identification. Id. at 86. The prudent notary is advised to check the identification for signs of tampering. I believe it judicious to retain a copy of whatever documents were used to identify parties whom the notary did not personally know prior to the subscription, together with a copy of the affidavit or attaching it to the original escritura. The form of supplementary identification used should also be expressly described in the document.

P.R. LAWS ANN. tit. 4, § 2035(a) (1994) (“An assertion of a person who knows the grantor and is responsible for the identification and is known by the notary, and the notary is responsible for the witness’ identity.”)

P.R. LAWS ANN. tit. 4, § 2035(b) (1994) (“The identification of one of the contracting parties by the other, provided that the notary certifies his cognizance of the latter.”) In practice, this is read by the prudent notary as identification of one of the parties by the other, provided that the notary certifies his cognizance of the latter and trusts him! See also Décret No. 71-941, supra note 42, art. 5 (“[Parties] peuvent exceptionnellement lui être attestes par deux témoins ayant les qualités requises par l’article 4.”).

P.R. LAWS ANN. tit. 4, § 2035 (c) (1994) (“Identification by identity document with a photograph and signature issued by competent public authorities of the Commonwealth of Puerto Rico, the United States or a state of the Union, whose purpose is to identify the persons, or by a passport duly issued by a foreign authority.”) See also Décret No. 71-941, supra note 42, art. 5 (“L’identité, l’état et le domicile des parties, s’ils ne sont pas connus du notaire, sont établis par la production de tous documents justificatifs.”)

The voluntary presentation is very important because many laws prohibit the involuntary use of documents. For example, the Social Security Act prohibits the involuntary presentation of the Social Security card. Puerto Rico law forbids demands for display of the Voter Identification Card. Spanish and French notaries, and, those in most of the world, have an advantage when it comes to
Even in the simple affidavit, the notary must follow the same formalities in identifying the parties that he is required to follow when subscribing a deed. Additionally, "[i]n the event that the interested parties do not know how to, or cannot read or sign, the same norms of the public deed shall be applicable [to assure consent and provide objective evidence thereof]."

The notary must also state the parties' age, civil status, profession, work and domicile. While this listing may be a mere formality in some cases, in others it will be an essential element of the transaction, which the notary must attest based on personal knowledge or the examination of the appropriate documentation. For example, majority is essential since generally only people of legal age may consent to contracts. The notary may have to examine a birth certificate, if the identification used by the person does not include their age or if the notary has any doubts about the matter. Civil status may also be essential to a transaction involving marital property. The notary may be required to examine a marriage certificate. In emancipations, the birth certificates of both the parents and the child about to be emancipated must be examined, since the notary will be required to certify the fact of paternal authority before it can be voluntarily terminated.

If the person appears in a representative capacity, e.g., as an officer of a corporation or the holder of a power of attorney, this must also be verified and certified by the notary with proper documentation, unless all parties expressly admit to the representative capacity.

Finally, the Notary is also required to attest that, in her judgment, the party has the capacity to enter into the juridical act contained in the public document. For example, the notary certifies the testator's mental capacity identification. While we do not have a national identity card, most other countries do. The information that the notary must certify is generally included in these official national identification documents.

265 P.R. LAWS ANN. tit. 4, §§ 2035, 2092 (1994).
266 P.R. LAWS ANN. tit. 4, § 2092, para. 2 (1994). I discuss this further in the witnesses section below. See infra Part IV.D.
267 Spanish Notarial Rules art. 156(4).
268 Id. art. 156(5).
269 C. Civ. Sp. arts. 1258, 1261, 1263; C. Civ. Fr. art. 1124. See also Spanish Notarial Rules' art. 158.
270 C. Civ. Sp. art. 1377 (both spouses must consent to most transactions involving marital property); C. Civ. P.R. art. 91, para. 3 (the consent of both spouses is required to dispose of real property). See also Spanish Notarial Rules art. 159.
271 C. Civ. Sp. art. 317; C. Civ. P.R. art. 233 (parents exercising patria potestas may emancipate their children by notarial act).
272 P.R. LAWS ANN. tit. 4, §§ 2036-37 (1994); Spanish Notarial Rules arts. 164-66. See generally MALAVET-VEGA, supra note 5, at 82.
273 P.R. LAWS ANN. tit. 4, § 2033(e) (1994) ("[The deed must include the notary's certification] that, in his judgment, [the parties] have the necessary legal capacity to execute the act or contract concerned"); Spanish Notarial Rules art. 167. See generally MALAVET-VEGA, supra note 5, at 88.
to subscribe the will.\textsuperscript{274}

The proper identification of the parties and their personal circumstances, which may be essential to the legality of the transaction, must be certified by the notary. The rules for proper identification are designed to ensure that this certification is reliable. The affirmation of "capacity" is a judgment, based on the observations of the notary. While it may not detect subtle problems, or non-obvious medical conditions, it is nonetheless another step in the notarial laws' attempt to make sure that every participant in the act is capable of performing and understanding what they are doing. Again the notary "judges" the parties, in a consensual transaction.

D. Do we Really Trust the Notary?: the Peculiar Use of Witnesses

Generally-speaking, the notary is the witness \textit{par excellence} and no other is needed; therefore, lay witnesses appear in notarial transactions by exception.\textsuperscript{275} Witnesses participate in the notarial document: (1) if the notary demands it; (2) if the parties demand it; or (3) if expressly required by law.\textsuperscript{276} There are three categories of witnesses to the notarial document: (1) instrumental witnesses who attest the transaction; (2) instrumental witnesses who assist the party in giving or signaling their informed consent; and (3) identity witnesses.\textsuperscript{277} The attesting instrumental witnesses are generally required for the subscription of very specific transaction, mostly wills.\textsuperscript{278}

\begin{itemize}
\item \textsuperscript{274} C. CIV. FR. art. 971-75; C. CIV. P.R. art. 644-55; C. CIV. SP. art. 694-705; C. CIV. MEX. art. 1511-20.
\item \textsuperscript{275} Article 9 of the \textit{Loi Venitése} indicates that only one notary may receive all notarial acts. The two exceptions it recognizes are those applicable to wills by provision of the Civil Code, and cases in which two notaries may intervene. \textit{See also} P.R. LAWS ANN. tit. 4, § 2038 (1994) ("The intervention of attesting witnesses [testigos instrumentales] shall not be necessary in the execution of deeds, except . . .").
\item \textsuperscript{276} \textit{See, e.g.}, P.R. LAWS ANN. tit. 4, § 2038 (1994) ("[W]hen required by the authorizing notary or any of the parties, or when one of the grantors does not know how to or cannot read or sign. This provision does not apply to wills which shall be governed by what is established by applicable legislation.")
\item \textsuperscript{277} "Instrumental witnesses, [are] those that attest to the content of the document or who sign for persons who do not know how to sign or who are incapable of doing so." MALAVET-VEGA, supra note 5, at 107 (unofficial translation by Pedro A. Malavet). Testigos Instrumentales in the Spanish version of the Puerto Rico law, which the official translation substitutes with "attesting witnesses." P.R. LAWS ANN. tit. 4, § 2038 (1994). The French law refers to "témoin instrumentaire". Décret No. 71-941, supra note 42, art. 4. Ávila-Alvarez calls those witnesses that assist the party "corroborating witnesses," and those that are required by law to witness the juridical act "instrumental witnesses." ÁVILA-ÁLVAREZ, supra note 24, at 44. The Spanish Notarial Rules define the testigo instrumental as one who observes the act of reading, consenting, and signing and authorizing the public deed. Spanish Notarial Rules art. 180.
\item \textsuperscript{278} \textit{See, e.g.}, C. CIV. FR. arts. 971 (open will), 976 (closed will); C. CIV. P.R. arts. 644 (open will), 957 (closed will). In Puerto Rico, the Supreme Court has jurisprudentially imposed a requirement that the emancipation deed be witnessed. Toro Velázquez v. Registrador, 87 P.R. Dec. 887 (1963).
\end{itemize}
The other category of attesting witness assists the party in giving or signaling informed consent. For example, they assist persons who cannot read.\(^{279}\) They may also sign for people who cannot sign their name.\(^{280}\) Witnesses may also assist persons with physical disabilities to understand the transaction and to provide the needed consent.\(^{281}\) Identity witnesses identify the party to the notary.\(^{282}\) While those in the last two categories assist the notary in completing the act, the requirements for the instrumental witnesses to attest the transaction reflect a certain anachronistic distrust of the notary.\(^{283}\)

The most important notarial rule regarding witnesses is that there has to be "unity of act" when witnesses participate in the notarial act, i.e., the notarial transaction must be subscribed in a single, uninterrupted occasion.\(^{284}\) This applies when instrumental witnesses participate in the subscription either to attest or to assist in signing.\(^{285}\) However, when the witness acts only as an identifying witness, it is not required.\(^{286}\)

The selection of the witnesses is generally up to the grantor, but the notary may reject a particular witness.\(^{287}\)

The rules regarding the qualification and disqualification of witnesses are especially important. Article 22 of the Puerto Rican Notarial

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\(^{279}\) The law recognizes that if the person cannot read, a witness of his or her choosing may read the document to him or her. P.R. LAWS ANN. tit. 4, §§ 2038, 2039 (1994) ("When any of the grantors does not know how to, or cannot read, the document in question shall be read out loud twice, once by the notary and another by the witness designated by the grantor, all of which shall be attested to by the notary.")

\(^{280}\) The thumb print may be used instead of a signature, but if the person is missing his or her fingers, and is unable to read, two witnesses may sign for him or her. P.R. LAWS ANN. tit. 4, § 2043 (1994).

\(^{281}\) P.R. LAWS ANN. tit. 4, § 2039 (1994) ("When any of the grantors is deaf or blind who does not know how to read and sign, he must designate a witness who upon his request shall read or sign the public document for him or both. The notary shall record these circumstances."); Spanish Notarial Rules art. 183.

\(^{282}\) P.R. LAWS ANN. tit. 4, § 2035 (1994); Décret No. 71-941, supra note 42; art. 5; Spanish Notarial Rules art. 184.

\(^{283}\) Ávila-Álvarez characteristically reports how the Spanish notariate rails against the instrumental attesting witness requirement. He points out that the old Spanish Notarial Law provided that notaries could not subscribe inter vivos instruments without having at least two witnesses present. This has since changed. However, it stung while it lasted. In 1939 the preamble to the Notarial Law included the statement that the participation of witnesses in the notarial transaction did not add value nor authenticity to the transaction, nor did it constitute a guarantee for the contracting parties. Hence the general rule that witnesses are generally not required, which was introduced to the Spanish Law that year. Ávila-Álvarez, supra note 24, at 46.

\(^{284}\) See P.R. LAWS ANN. tit. 4, § 2046 (1994) ("If there are no witnesses, it shall not be necessary for those appearing to sign the documents together in the notary’s presence").


\(^{287}\) P.R. LAWS ANN. tit. 4, § 2041 (1994) (The attesting witness is "designated by the grantors, if they or the notary so require it. However, any of the two may oppose that certain persons act as such.")
Law is fairly typical:

The witnesses, including those as to identity, shall be of legal age, competent and know how to read and write and sign. Employees of the executing notary, his relatives or those of the interested parties within the fourth degree of consanguinity or the second of affinity shall not be attesting witnesses. The other systems have similar rules, which are generally designed to ensure the independence of the witnesses. The numerical requirements for witnesses, on the other hand, are somewhat arbitrary. Generally, only one witness is required. When the grantor cannot sign and does not have fingers, two witnesses will sign for him. Two witnesses are also required for mortgages of movable property in Puerto Rico. Three witnesses are required for the open notarial will. Five are required for the delivery of a closed will to the custody of the notary.

The notary is the most important witness to a transaction. The Italian Law of 1913 began to recognize that instrumental witnesses, i.e., non-parties who observe and witness the transaction had, over the years, become obsolete. The modern trend is to completely eliminate instrumental witnesses, except those that assist people who are unable to read or to sign. For example, the Spanish Civil Code was amended in 1991 to eliminate the requirement of instrumental witnesses in both open and closed wills. Identity witnesses and those who assist the parties are there to complement the transaction, not to look over the notary’s shoulder. The elimination of the instrumental witness requirements reflect increasing trust in the notary as the superior super witness to the transaction. To the extent that they participate in the notarial act, at best, instrumental witnesses contribute to

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289 The Spanish Notarial rules disqualify persons with familial relation to the notary or the party, employees of the notary. Spanish Notarial Rules art. 182(2), (3), (4). The rules also disqualify the blind, the deaf, the mute, and those with mental illness. Spanish Notarial Rules art. 182(1). Article 4 of the Décret No. 71-941, supra note 42, requires that instrumental witnesses be of legal age and have full civil capacity ("Tout témoin instrumentaire dans un acte doit être majeur ou émancipé et avoir la jouissance de ses droits civils"); see also C. Civ. Fr. art. 980 (qualifications of witnesses to wills).
290 P.R. LAWS ANN. tit. 4, § 2041 (1994) ("One person shall suffice as attesting witness").
291 P.R. LAWS ANN. tit. 4, § 2043 (1994).
293 C. Civ. P.R. art. 644. The French code requires only two witnesses in addition to the notary or two subscribing notaries. C. Civ. Fr. arts. 971-75.
294 C. Civ. P.R. art. 657.
295 PONDE, supra note 19, at 561.
297 The old provision required 5 witnesses. MANRESA, supra note 296, at 596. The new one requires no instrumental witnesses. C. Civ. Sp. art. 707(2).
its reliability, and at worse, they add nothing to it. The identity witnesses must be known to the notary, and they are there to assist in the transaction by providing the essential identification of the party. Article 17 of the Puerto Rican Notarial Law:

Witnesses as to identity shall be responsible for the identification of the grantors, as shall the grantor who attests to the identity of other grantors not known by the notary, and the notary shall be responsible for the cognizance of such witnesses.

The notary is responsible for accepting these witnesses because he is responsible for the transaction, not the witnesses. The instrumental witnesses who assist the party by ensuring informed consent or by supplying objective evidence of that consent, provide us with further assurance of the truth and legality of the notarial act.

E. Contemporaneous Reporting and Indexing

The notary is often required to provide the office charged with notarial inspection with regular reports of her activities. She is also sometimes required to provide tax and other governmental authorities with reports of specific transactions. Internally, the notarial office is required to maintain regular indices and records of most notarial acts.

The Spanish use the libro indicador to memorialize notes related to some types of testimonios. These are large bound volumes with numbered pages. The notary must make an opening note on the first page, and a closing note on the final page of each volume, both with his full signature. In between the opening and closing records, each abstract must be numbered consecutively and the corresponding number must be put on the original testimonio. Numbering starts anew with each volume. The notes must be dated and signed by the notary, although he may certify one day's notes with a single dated signature. In Puerto Rico, the notary also uses a big register book in which the number of the affidavit is noted, the signing

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298 Cf. supra note 283 and accompanying text.
299 P.R. LAWS ANN. tit. 4, § 2035 (1994).
300 Spanish Notarial Rules art. 283.
301 Id.
302 P.R. LAWS ANN. tit. 4, § 2093 (1994). I have seen two methods of numbering. One is the obvious, continuous numbering throughout the notary's professional life. The other is to use the last two digits of the calendar year as a prefix, and the continuous number for affidavits subscribed during that year as a suffix. Those using the latter system will presumably have to use three or four-digit prefixes starting in the year 2000.
parties are identified and a brief description of the contents is made. Each annotation has to be certified by the notary's signature, _rubrica_ and notarial seal. The new notarial rules require the notary to include a reference in the document itself and in the note related thereto placed in his register, whenever they use the supplementary identification methods of Article 17 of the notarial law. However, traditionally, even as to public documents, the notary could include a non-specific reference stating that he had used supplementary methods of identification. The better practice would be to expressly mention the specific form of identification that was used both in the document and in the note in the register. In any case, both these systems offer a record of notarial activity, even for the simple _testimonios_ or _afidávits_. Because these notes must be taken daily and kept in numbered order, the system serves as a check on back-dating of documents.

In France, the notary must maintain an abstract daily index of all his notarial activity called the _reperoire_. The _reperoire_ must include notes of all notarial acts, without regard to whether they are _brevets_ or _minutes_. The notes are kept on a daily basis, and each note must include "the date, the nature of the act (i.e., was it subscribed _en brevet_ or _en minute_), the type of act (e.g., sale, obligation, act of notoriet), the names, last names, and domicile of the parties." The notes should also include any other information required by law, which Yaigre & Pillebout indicate includes a description of any property involved, its legal status, the purchase price, and registration information.309

In addition to maintaining these records in their offices, the notaries are often required to allow their regular inspection and are compelled to send the same information to supervising authorities. For example, French law requires the president of the local chamber of notaries, or someone designated by him, to examine and initial the notes in the _reperoire_. However, this formality may be dispensed with if a process that would

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303 P.R. LAWS ANN. tit. 4, § 2094 (1994) ("The registry of affidavits shall be kept in duly bound books of not more than five hundred (500) sheets with successively numbered pages.")
304 P.R. LAWS ANN. tit. 4, § 2094 (1994); see generally MALAVET-VEGA, supra note 5, at 152-54.
305 In Puerto Rico, you are also required to cancel a one dollar stamp for each affidavit you subscribe. This is only one of many small taxes collected by notaries. See, e.g., P.R. LAWS ANN. tit. 4, § 2021 (1994).
306 P.R. Notarial Rules R. 67, para. 3; see also P.R. LAWS ANN. tit. 4, § 2035 (1994).
308 Yaigre & Pillebout, supra note 23, at 113 (unofficial translation by Pedro A. Malavet); see also Décret No. 71-941, supra note 42, art. 22[3].
prevent any substitution or addition is being used.31 In Puerto Rico, the note that the notary places in his register of affidavits must also be included in the monthly index that he is required to send to the Notarial Inspector within the first ten days of the following month.312 This index must also include a listing of all the public documents, both escrituras and actas, subscribed by the notary.313 The indices must include "with respect to the original deeds and affidavits authorized by them during the preceding month, the numbers in numerical order, the name of those appearing, date, the subject of the instrument or testimony and the name of the witnesses, if any appeared."314 If the notary had no notarial activity during the month, he must still send an index, a negative report, certifying the lack of activity.315 Spanish notaries are similarly required to mail monthly indices, but only of public documents.316 This includes the obligation to send a negative index.317 In France, a certified copy of the repertoire for the previous year must be sent to the supervising authorities within the first two months of the following year.318

In addition to these comprehensive indices, notaries are sometimes required to prepare special reports of some individual transactions. For example, the subscription of wills must be reported to a central registry run by the Supreme Court of Puerto Rico.319 This provides a public registry certifying the subscription of a notarial will. In fact, "[t]he Superior Court shall not admit or process any petition of declaration of heirship whatsoever that is not filed with a negative certification from the Office of Notarial Inspection" certifying that a will was or was not registered with that office.320 If a will was filed, a copy of it must be submitted. Spain has had a system for registration of wills subscribed within the national territory since 1986.321 A similar system is also followed for powers of attorney subscribed or protocolized in Puerto Rico.322 Notaries are required to report

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31 Id. I have to confess that I cannot even begin to imagine a system that would prevent any substitution or addition. However, I am also unfamiliar with how this supervision is performed in French practice.
313 Id.
314 Id.
315 Id. ("If the notary has not had any notarial activity during a particular month, he shall send a negative report for said month to the Inspector of Notaries.")
316 ÁVILA-ÁLVAREZ, supra note 24, at 176; see also Spanish Notarial Law art. 33, Spanish Notarial Rules arts. 284-88.
317 Spanish Notarial Rules art. 284[1].
318 Décret No. 71-941, supra note 42, arts. 21-22; YAIGRE & PILLEBOUT, supra note 23, at 113.
319 P.R. LAWS ANN. tit. 4, §§ 2121 (Creation and function of the registry), 2122 (Regulation by the P.R. Supreme Court), 2123 (Certified reports must be mailed by the notary), 2124 (1994) (Acknowledgment of certified report; certification thereof).
320 P.R. LAWS ANN. tit. 4, § 2125 (1994).
321 CÓDIGO DE LEGISLACION NOTARIAL, Reglamento Notarial, anexo 2, (Del Registro de Actos de Ultima Voluntad); see generally ÁVILA-ÁLVAREZ, supra note 24, at 189-93.
322 P.R. LAWS ANN. tit. 4, § 2126 (1994).
real estate transactions to the Internal Revenue Service in a special form that provides the identity of the parties, a description of the property and the moneys that were exchanged.\textsuperscript{323} For registration purposes, the Puerto Rican registry system has just added a system of \textit{minutas}, special forms that must include the essential information about a single notarial transaction to be entered in the property registry. This system is being used to speed up the registration process, which has been very slow in the last few years, and to allow for the use of technology in the registry.\textsuperscript{324}

All these requirements are designed as objective, contemporaneous checks that generally assure the integrity of the notarial transaction. As to individual transactions, the reporting requirements usually serve to protect governmental prerogatives, especially maintaining the integrity of public registries and, not unimportantly, collecting tax revenue. These formalities also serve to allow interested parties to get pertinent information by providing a public record and an indexing system. Finally, these records and reports serve as "backups" of notarial information, that can be used to reconstruct lost or destroyed notarial documents.

V. Notarial Fees: Reasonable costs shifted to the parties

Statutes fix the amount that a notary may charge for her services.\textsuperscript{325} The rules regarding fees serve three purposes: (1) allowing the notary to make a living, (2) providing this important service at a reasonable cost, and (3) maintaining the independence of the notary.

The Spanish Notarial Rules give the government the authority to set notarial fees,\textsuperscript{326} which are fixed by Royal Decree, and must be revised at least every ten years.\textsuperscript{327} In Puerto Rico, the fee is set by the notarial law.\textsuperscript{328} In France, the \textit{tarif légale} fixes the fees that notaries may charge for most

\textsuperscript{323} The law imposes the requirement on the party, however, the notary is ultimately responsible for it. P.R. LAWS ANN. tit. 4, § 2022 (1994) ("In the execution of deeds of segregation, merger or transfer of dominion the transferor or person who segregates or merges will be bound to complement and deposit at the office of the authorizing notary the Informative Return on the Segregation, Merging or Transfer of Real Estate."). The sending of this special return must also be confirmed in the monthly index. P.R. LAWS ANN. tit. 4, § 2023 (1994) ("In said report the notary shall certify to having sent the returns to the Treasury Department as required pursuant to section 2022 of this title.").

\textsuperscript{324} Until very recently registration meant a handwritten entry of large volumes kept at the property registry. The system was very reliable, but also very slow. For fifteen years, the government has been trying to introduce technology into the process, and it now appears to have succeeded. See ANOTA, Oct.-Dec. 1995, at 9.

\textsuperscript{325} See, e.g., P.R. LAWS ANN. tit. 4, § 2131 (1994). See generally MALAVET-VEGA, supra note 5 at 155-62.

\textsuperscript{326} Spanish Notarial Rules art. 63.

\textsuperscript{327} Id.

\textsuperscript{328} P.R. LAWS ANN. tit. 4, § 2131 (1994).
notarial transactions.\textsuperscript{329} Fees are set for the preparation of public documents and for the issuance of certified copies.\textsuperscript{330} The fees, when compared to those for traditional legal advice, are quite reasonable. In Puerto Rico, for documents involving property valued at less than $10,000, the maximum fee is $100.00; for property valued between $10,000 and $500,000, the fee is one percent of the property value; for property valued in excess of $500,000, the fee is one percent up to the first half million and one half of one percent for the excess.\textsuperscript{331} Thus, for a contract for purchase and sale of a $150,000 house, the maximum notarial fee would be $1,500. Given the formalities that I have explored above, this seems to be a bargain, and the prices are even lower in France and Spain. For documents with value of less than one million pesetas, the Spanish notary may charge 15,000 pesetas; for the excess between one million and five million, add 4.5 per one thousand; for the excess between five million and ten million, add 1.5 per one thousand; for the excess between ten million and twenty five million, add 1 per one thousand; and for the excess between twenty-five million one hundred million, add .3 per one thousand.\textsuperscript{332} The French fee schedule is fairly complex, but the basic series one amount that is the maximum that may be charged for sales of real property, for property valued at less than 20,000 francs, five percent; between 20,000 and less than 40,000, 3.3 percent; between 40,000 and 110,000, 1.65 percent; in excess of 110,000, .825 percent.\textsuperscript{333}

For documents without a fixed amount, like certain actas and wills, in Puerto Rico, the amount to be charged is that agreed to by the notary and the parties.\textsuperscript{334} However, in Spain, there are fees fixed for these types of documents. Powers of attorney, open wills and prenuptial agreements cost 5,000 pesetas and actas cost 6,000 pesetas.\textsuperscript{335} At current exchange rates, a will in Spain will cost less than fifty dollars.

Of course, notaries may charge for the additional time they spend in a transaction.

The fees fixed above for executing the documents shall not impair or limit the notary from charging the fees he believes reasonable and prudent in accordance with Canon 24 of Professional Ethics for the fixing of fees, for his prior and preparatory efforts, including the subsequent ones, such as

\textsuperscript{329} Yaigre \& Pillebout, supra note 23, at 139.
\textsuperscript{331} P.R. Laws Ann. tit. 4, § 2131(a)-(c) (1994).
\textsuperscript{332} Decreto 1426/1989, de 17 noviembre 1989, no. 2, supra note 330. The amount for a mortgage loan shall be twenty five percent less. Id.
\textsuperscript{333} Précis-Formulaire des Actes Notariés, supra note 114, at 668.
\textsuperscript{334} P.R. Laws Ann. tit. 4, § 2131(d) (1994).
\textsuperscript{335} Decreto 1426/1989, de 17 noviembre 1989, no. 1, supra note 330.
background and titles, studies, consultations, opinions, preparation of certificates and compensated powers of attorney in which the notary renders an additional service as a lawyer.336

For example, if a notary is asked to subscribe an acta certifying the construction of a house on a previously barren plot,337 the notary may charge for the time spent going to the construction site. However, if he were to base his acta on a blueprint, duly certified by an accredited civil engineer and never leave his office, he could only charge the statutory rate for the acta.338

The party paying the fee is generally entitled to choose the notary. For example, in Puerto Rico, the Supreme Court has ruled that absent proof of accepted and established use and custom and an agreement to the contrary, the buyer, not the seller, chooses the notary.339 In Spain:

The fees of the notary or notaries and expenses of the sale are usually all paid by the purchaser, although the parties are free to share them if they so agree. Registration duty is payable on completion in addition to the registration, search and notaries' fees.340

But be advised that this may not be true everywhere for both legal and "practical" reasons. Powerful economic interests, mortgage lenders for example, may be able to impose a choice on the consumer.

In certain jurisdictions, such as Puerto Rico, the notary may contract to charge less than the statutory amount, i.e., the statutory amount sets only the legally maximum fee. However, some countries require the notary either to waive his fee entirely or to charge the full statutory amount; partial discounts are not allowed. In Spain, the statutory fee must either be collected in full or completely waived. Discounts are illegal.341 In France, partial discounts may only be given with prior authorization from the local chamber of notaries.342 It is illegal for the notary to receive anything other than the legal fee.343 Some may view the Puerto Rican system's allowance of discounts as a sensible grant of flexibility to the notary. However, in practice, it is, in my opinion, the single biggest loophole in the notarial law. It allows powerful economic interests to demand discounts from notaries,
which jeopardizes notarial independence. 344

The rules applicable to the notarial fee should be designed to maintain professional independence. In my opinion, allowing general discounts completely undermines notarial independence. In effect, this undoes the accomplishments of the statutory fee. That is why I prefer the Spanish system, which disallows discounts. The notary receives an important state monopoly and subjects himself, in exchange, to very strict professional supervision; the state will reward him with a way of making an adequate living. This is, at least in part, the motivation for geographic and numerical limitations imposed on the notary. 345 One of the most interesting criticisms I have heard of the fee schedules is their regressive nature, i.e., they are reduced as the value of the notarial act increases. I think that this is a legitimate concern, however, given the level of liability imposed on the notary; the work must be done correctly, not ultra-cheaply. Moreover, a cursory review of the legal fees, compared to traditional legal services, will reveal that notarial intervention is usually a bargain.

VI. Conclusion

In a prior piece on the notariate, I concluded:

The presumptions favoring the notarial document are even more important in civil law countries because, unlike their common law counterparts, they express a general preference for documentary evidence over testimonial matter. ** The civilians see testimonial evidence as temporary and susceptible to many subjective factors that might affect its value. Documentary evidence, on the other hand, is seen as objective and more reliable because it is contemporaneous with the act or accord among the parties and because it is prepared prior to the advent of litigation or the reason therefor (i.e., because it is not subject to the weaknesses of human beings). 346

In this article I have endeavored to explain why the notarial document deserves these evidentiary presumptions. I have explored how the formalities of the notarial transaction are designed to provide an assurance of competent, informed consent, of proper legal form and of truth and

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344 I have heard disturbing rumors of mortgage banks in Puerto Rico charging their customers the full notarial fee, and paying the subscribing notary only a fraction of it. This is scandalous. The consumer is being ripped-off, his or her right to choose a notary is being denied, and the impartiality of the notary is compromised at the very least by the appearance of impropriety. The Puerto Rico Supreme Court and the authorities that regulate the mortgage banking industry should take immediate steps to put a stop to these disgraceful schemes.

345 See Malavet, supra note 3, at 471-74.

346 Id. at 445 (citation omitted).
accuracy for the parties and for the public in general. The notary is the judge of the parties in the absence of litigation, the judge of the transaction. The judicial analogy is quite appropriate. Notaries use their legal judgment to give a notarial act proper legal form and certify facts. The government, through the power of the publica fides, gives the notary's judgments and certifications the highest presumption of truth. On many occasions, the notary function is an express alternative to judicial intervention. More generally, it is an inexpensive model of extra-judicial, impartial legal advice that is designed and structured to ensure the legality and truth of the resulting legal transaction.

The substantive legal institutions related to the notariate are much older than the profession, but the transaction and the notary are now inexorably linked. It is now the notary who imparts upon the document the certification of the publica fides, without any need for judicial intervention. The notary alone gives the juridical act an element essential to its validity or provides certain legal assurances that are extremely desirable. This power to attest in effect makes the notary an alternative to a judicial officer and turns the notarial transaction into an inexpensive alternative to a court proceeding. The notary earns and maintains this deference by following a series of rules that are carefully designed to ensure that the strong presumption of truth that attaches to a notarial transaction is indeed a generally reliable assurance.

Notarial acts are included in three basic documents: the affidavit, the notarial minute and the deed. The notary's responsibility in relation to "simple" documents, such as the affidavit or brevet, tends to be mostly clerical. He must ensure that the I's are properly dotted and the T's are adequately crossed; otherwise, he bears little professional responsibility. It is an uncomplicated process for factual certification. Nevertheless, it is important to note that the notary, consistent with his status as the extra-judicial guardian of truth, is required to ensure the proper identity of the subscribing parties and the truth of those facts that he personally certifies. In some situations, such as when the French notaries certify acts of notoriety, the notary is an express alternative to a judicial officer as a certifier of facts, even in the low-level affidavit, brevet or testimonio.

The notarial minute is a flexible device for obtaining the assistance of a notary in the preservation and use of factual information. Because this is a public document, the notarial certification is given the strongest presumption of truth and is therefore admissible in evidence and may often be used to gain entry into public registries. Its major advantage is cost. The assistance of the notary will be cheaper than a judicial proceeding used to accomplish the same purpose. For example, a notarial minute in Spain will cost less than fifty dollars, and we saw the case of the Spanish acta de notoriedad, an express extrajudicial factual finding.
Deeds are public documents that include a juridical act. *Notarios*, as legal professionals, are therefore required to be experts in the substantive law applicable to each of the transactions they certify. All juridical acts reflected in a deed have in common the assurance of legality and truth provided by the notary. In acts such as the deeds for repudiation of inheritance and emancipation the notary is an express alternative to a judicial proceeding. In other situations, the notary helps to avoid litigation by making proof of matters easy, through the public document and, often, the publicity of registration. This again, at low costs when compared to traditional legal counseling, and certainly when compared to litigation. Since the original deed is kept by the notary, a system of reliable copies is essential for the publicity of the transaction. Contemporaneous notations and markings are intended to ensure the accuracy of the content of copies, just like the original deeds.

The proper identification of the parties and their personal circumstances, which may be essential to the legality of the transaction, must be certified by the notary. The rules for proper identification are designed to ensure that this certification is reliable. The affirmation of “capacity” is a judgment, based on the observations of the notary. While it may not detect subtle problems, or non-obvious medical conditions, it is nonetheless another step in the attempt of notarial law to make sure that every participant in the act is capable of performing and understanding what they are doing. Again the notary “judges” the parties in a consensual transaction.

The modern trend towards elimination of the instrumental witness requirements reflects increasing trust in the notary as the superior witness to the transaction. To the extent that they participate in the notarial act, at best, instrumental witnesses contribute to its reliability and, at worst, add nothing to it. The notary is responsible for the identity of witnesses because he is responsible for the transaction. The instrumental witnesses who assist the party by ensuring informed consent or by supplying objective evidence of that consent, provide us with further assurance of the truth and legality of the notarial act.

Indexing and general reporting requirements for all notarial transactions and special reports for particular acts are objective, contemporaneous checks that generally assure the integrity of the notarial transaction. The reporting requirements for individual transactions usually serve to protect governmental prerogatives, especially maintaining the integrity of public registries and, not unimportantly, collecting tax revenue. These formalities also serve to allow interested parties to get pertinent information by providing a public record and an indexing system, such as the registries of wills. Finally, these records and reports serve as “backups” of notarial information that can be used to reconstruct lost or destroyed.
notarial documents.

All of this is accomplished at a remarkably low cost. The rules applicable to the notarial fee are generally designed to maintain the professional’s independence. While allowing general discounts completely undermines notarial independence, the statutory-fee, more often than not, helps to ensure that independence. The notary receives an important state monopoly and subjects himself, in exchange, to very strict professional supervision. The state will reward him with a way of making an adequate living. Geographic and numerical limitations imposed on the notary are also designed to ensure independence.

In the final analysis, the notary is a judge for the parties in the absence of any judicial controversy. The notarial system is a counseling model for the prevention of disputes, by making sure that the parties provide truly informed consent in the first place. The formalities of the transaction are designed to ensure its reliability. There are many objective, regular checks of notarial performance. This produces an inexpensive, factually-accurate and legally-informed extra-judicial transaction.