

ARTICLES

THE FLORIDA CIVIL-LAW NOTARY: A PRACTICAL NEW TOOL FOR DOING BUSINESS WITH LATIN AMERICA

J. Brock McClane*

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I. INTRODUCTION

A local estate-planning/probate attorney referred a new client to you after learning about your reputation as a problem solver in international cases. The client's father ("Dad") died in Orlando, leaving a substantial tract of beach-front real estate in St. Martin to his wife ("Mom"), who owned a share already as a tenant-in-common with the decedent and also, incidentally, the client.¹ The client, the decedent's daughter, negotiated a sale of the real-estate to a Brazilian national who intends to erect a resort on the picturesque parcel. Time is of the essence, yet the transaction hits a snag when it is discovered that the land records in St. Martin do not reflect Dad's intestate death and the resulting vested interest in Mom.

The real-estate broker in St. Martin calls from the office of the St. Martin *notaire* handling the transaction, saying that title

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1. The fact pattern is based on the facts surrounding the probate case *In re Estate of Conan*. See *In re Estate of Conan*, No. 99-417-CP (Fla. 5th Jud. Cir. Oct. 4, 1999) (providing some background on the case).

is not valid. He does not know what to do because even a certified copy of a death certificate will not cure title when the property was to pass pursuant to the laws of intestate distribution of another jurisdiction. The *notaire* contends that since Dad died in and while a resident of Florida, the St. Martin choice-of-law rules dictate that Florida's rules of descent and distribution govern. Also, an ancillary probate proceeding in St. Martin could cure title, but the court would still need proof of Florida law. When the client suggests that her long-time estate-planning/probate attorney simply file a probate estate, the broker and *notaire* respond that even a certified copy of a probate order would be insufficient alone to prove chain of title, because they lack familiarity with the Florida probate court. Further, an opinion letter from a Florida lawyer would not be considered an official document that would clear title to a parcel of St. Martin real estate. Can you help? If you call a civil-law notary, the problem may be solved.

II. THE PASSAGE OF FLORIDA'S CIVIL-LAW NOTARY STATUTE

Before 1998, the Florida lawyer's arsenal for breaking through the legal barriers of an otherwise straight-forward real-estate sale involving parties in the United States and real property in a Latin American or other civil-law jurisdiction was limited. In the foregoing example, the lawyer could file a probate case and obtain an order relating to the transfer of the St. Martin property. He could send to St. Martin a clerk-certified copy of the probate order and even send an opinion letter on his letterhead stating his opinion that the United States court has properly exercised jurisdiction over the estate at issue. However, in many cases such as the above example, this approach has been ineffective.²

The foreign notary has no way to verify independently that the court order is authentic or that a court of competent jurisdiction did indeed issue the court order. To assuage this concern, the lawyer could apply to the consulate in the United States for assistance with recognition of the probate order. However, while a consulate may be willing to identify a state's department of state as

2. William H. Hill, Jr., *Notary Practice in the United States and Florida* 1 (unpublished ms. Sept. 16, 2002) (copy on file with Authors).

the proper authority to appoint notaries public and civil-law notaries,³ consulates are reluctant to weigh in regarding the authority or jurisdiction of a court. Increasingly, foreign consulates in the United States consider their certification of court authority to be an improper role for them to serve, leaving the parties in the United States and the foreign country with few real options.⁴ In addition, while a lawyer's opinion letter may be accepted from time to time in certain parts of the world, in many cases it will have no effect on the foreign attorney or notary. The lawyer is not speaking as a government officer, and the foreign attorney or notary views the lawyer as being an interested party.⁵

The client's problem in the foregoing example arises in other probate or inheritance contexts in which official public or private documents require use and recognition in foreign jurisdictions and in litigation in foreign jurisdictions when an authentic act may prove certain facts. While this disconnect between the civil law and United States common-law traditions has existed for many decades, the globalization of society and business increasingly has caused the problem to be reckoned with and has begged for resolution.

On May 30, 1997, the Florida Legislature passed into law a bill, part of which was codified as the new Chapter 118, Florida Statutes, with associated regulations that the Department of State later promulgated.⁶ Originally fashioned as part of a legislative-study commission draft creating a method of electronic notarization, the civil-law notary legislation was seen as a way to address practical problems in international business.⁷ The Legisla-

3. This is essentially fulfillment of the consulate's role in relation to the Hague Convention on the Legalization of Documents, which clearly identifies the governmental departments within signatory countries that can issue apostilles confirming the authority of a notarizing body. However, the issuers of apostilles typically will not certify the authority of a state or federal court and certainly will not comment on the court's jurisdiction.

4. Telephone Interview with Todd Kocourek, Founding Trustee of the Natl. Assn. of Civ. L. Notaries (Sept. 16, 2002).

5. Hill, *supra* n. 2, at 1.

6. Fla. Stat. §§ 118.10, 118.12 (2002); Fla. Admin. Code Ann. r. 1C-18.001 (2002). For the full text of the preceding statutes and administrative code, consult *infra* Appendix A.

7. See 1997 Fla. Laws ch. 97-241 (including the creation of Florida Statutes Section 117.20, regarding electronic notarization); *id.* 97-278 (including the creation of the civil-law notary statute). The electronic-notary provision was later repealed in 1999 and is no longer in effect. 1999 Fla. Laws ch. 99-251.

ture hoped that the law would help to ameliorate seemingly needless transactional roadblocks such as the St. Martin example.⁸

The new law, which was revised and refined twice in the two years that followed its initial passage, created for the first time in a common-law jurisdiction a “civil-law notary.”⁹ Sponsored by then-Florida Senator Katherine Harris,¹⁰ the law was intended to enhance and facilitate international trade with Florida.¹¹ Attorney Todd Kocourek, one of the chief lobbyists for and proponents of the new law, stated, “We’ve often been told that Miami is the capital of Latin America. We are more closely connected to more foreign nations than any of our neighbours.”¹²

The law was intended to bridge the divide between the common- and civil-law countries and thereby facilitate international commerce.¹³ While there are many examples of incidental difficulties resulting from the differences in the two legal traditions, the practical problem facing businesses and individuals was that the different requirements of the two systems have, according to lawyer Theodore S. Barassi, “resulted in numerous U.S.-executed documents being rejected by legal and recording authorities overseas.”¹⁴ This has occurred when Florida notaries public, who are not even required to hold a high school diploma to be appointed as notaries public, acknowledge documents that are to be used overseas.¹⁵

8. Telephone Interview, *supra* n. 4.

9. See Fla. Stat. § 118.10 (including the amended changes). An exception would seem to be made for Louisiana and Québec. However, as civil-law jurisdictions within the common-law-based systems of the United States and Canada, Louisiana and Québec, not surprisingly, require the greater role of a civil-law notary. Philip Moscovitch, *Focus on U.S. Civil Law Notaries*, *Les Carrières du Droit* 65, 65 (2000).

10. Senator Harris later was elected to serve as Florida Secretary of State charged with, among other duties, overseeing Florida’s international protocol and the appointment and oversight of Florida civil-law notaries. L. Janá Sigars-Malina, *Chair’s Message*, 15 *Intl. L.Q. (Newsltr. of Fla. B.)* 1, 2 (Winter 1999).

11. Moscovitch, *supra* n. 9, at 65.

12. *Id.*

13. *Id.* at 65–66.

14. *Id.* at 66.

15. See Fla. Stat. § 117.01 (excluding a requirement for a high school diploma). In fairness to other common-law jurisdictions, it is important to note that not all common-law jurisdictions have allowed the standards of the notarial profession to erode as deeply as in the United States. For example, in Australia, common-law notaries public are required to be lawyers, to demonstrate high moral character, and to have practiced law for ten years. Interview with Angus B.C. Thornburn, Sol. & Notary Pub., Sydney, Australia (Oct. 16, 2002).

III. QUALIFICATIONS OF CIVIL-LAW NOTARIES

The intent behind Chapter 118, as amended, is not to replicate a profession of civil-law notaries as they exist in Latin American or civil-law jurisdictions. To do so would hardly be possible because the United States common-law system and legal profession do not train notaries as a distinct profession and because the nature of the notary profession varies from one civil-law jurisdiction to another. In spite of the particular differences found among the notarial traditions of the Latin American jurisdictions, they do share certain common standards. In essentially all civil-law jurisdictions, the notary is a legally trained and well-respected professional whose signature and seal, when affixed to a document, lend the document authentic status for use abroad and domestically.¹⁶ This signature and seal is used to authenticate a public or private record or certify the accuracy and truth of the facts surrounding a transaction or event in the case of an authentic act.¹⁷ Chapter 118, as amended, attempts to set out minimum requirements of notarial qualifications and standards of practice that will instill in the new profession of Florida civil-law notaries what most foreign notarial professions and faculties would consider the essential elements of a civil-law notary.¹⁸

In most civil-law jurisdictions, to be qualified to become a notary, the candidate must be of high moral character.¹⁹ There is typically an inquiry into the applicant's character.²⁰ This inquiry is akin to the background check and character evaluation of applicants that the United States bar associations conduct. In addition, the notary must be trained at law.²¹ In many cases, the notary candidates attend law school with those studying to be lawyers or judges.²² At some point, they must choose either the notarial profession or the legal profession, both of which require legal training.²³ To address this concern, Chapter 118 requires that to

16. Alejandro M. Garro, *The Role of the Notary in the Civil Law Tradition* <http://www.lna.org/l_esprit/garro.htm> (accessed Jan. 9, 2003).

17. *Id.*

18. *See infra* app. A (providing the full text of Florida Statutes Section 118.10).

19. Interview with Me. Maurice Roueaux, Exec. Council Member, Intl. Union of Latin Notaries (Sept. 15, 2002).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

apply for an appointment to the Secretary of State as a civil-law notary, one must not only be a member of The Florida Bar, but must have been a member in good standing for five years.²⁴ Although it is impermissible in most civil-law jurisdictions for notaries to be simultaneously engaged in private-law practice as advocates, in Florida, the international notarial community seems to have accepted the dual role of notary and advocate. It would be difficult to create a separate legal profession complete with separate specialized training because the concept of the civil-law notary is brand new in Florida.²⁵

To raise the comfort level of foreign jurisdictions in this regard, the Florida law underscores the distinct professional attributes of the civil-law notary by requiring that all civil-law notaries achieve a passing grade on an examination relating to the following: (1) characteristics of Florida and non-Florida civil-law notaries, (2) the governing law, (3) the purposes and uses of authentic acts and associated rules and issues of discipline, (4) ethical dilemmas, and (5) malpractice dangers facing the civil-law notary in Florida.²⁶ In addition, both the Florida Department of State and The Florida Bar regulate Florida civil-law notaries.²⁷ They are appointed for life, a fact that also distinguishes them from Chapter 117 notaries public.²⁸

To achieve acceptance internationally, the Florida Legislature looked outside of the state to address the issue of international standards of notarial practice. For example, the International Union of Latin Notaries has generally articulated standards that would be considered minimum requirements within civil-law jurisdictions.²⁹ According to Professor Jeffrey Talpis, Executive Council Member of the International Union, a civil-law notary's valid, universally recognized authentic act ideally should

24. Fla. Stat. § 118.10(1)(b).

25. For example, being licensed as both lawyer and notary is not permitted in the Czech Republic, Québec, or the German state of Bavaria. BNotk, *German Notaries and How They Are Organised* <http://www.bnotk.de/Informationen_Presse_ueber_uns/wirole.htm> (accessed Mar. 11, 2003). It is, however, common in Puerto Rico and the German state of Hessen. *Id.*

26. Fla. Admin. Code Ann. r. 1C-18.001(2)(a)(1)-(9), (4)(a).

27. *Id.* (4)(b).

28. *Id.* (4)(c).

29. Professor Jeffrey Talpis, Exec. Council Member of the Intl. Union, Remarks, *Key Qualities of a Civil-Law Notary in Québec and Internationally* (Montreal, Québec, Canada, Sept. 16, 2002).

possess certain basic characteristics.³⁰ In the case of authentic acts in which the notary confirms the full text of a document or contract, the notary should retain the original documents.³¹ In the case of a “brevet,” in which a notary merely attests to the authenticity of a fact or signature, Professor Talpis insists the notary still must retain a copy, though the parties may retain the original.³² The notary must approve the authentic act if he or she did not prepare the document and must give the parties an explanation of the legal consequences of the signed document.³³ Professor Talpis states that, in a two-party transaction, it is essential that the notary maintain his or her impartiality, typically requiring the parties to the transaction to obtain independent legal advice.³⁴ Finally, the notary must “defend” and be true to the law.³⁵

Chapter 118 attempts to meet these general requirements in several respects. Although the Florida civil-law notary is not required to retain the original document signed by the parties and the notary, the statute does require that the civil-law notary maintain a protocol containing copies of every civil-law notary’s authentic act, oath, attestation, or solemnization.³⁶ For the security of the protocol and the records contained in it, the notary must designate a successor custodian for the protocol who must also be a civil-law notary.³⁷

The statute also prescribes that, when a notary renders an authentic act, the civil-law notary confirm the full contents of the instrument to which the authentic act relates.³⁸ The civil-law notary is not required to have prepared the document, but as in other jurisdictions, must verify the contents.³⁹

As a matter of traditional practice in Florida, in the case of a contract that the parties desire to have certified with an authentic act of a Florida civil-law notary, the lawyers for the parties are likely to negotiate and handle primary preparation of the con-

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Fla. Stat. § 118.10(5).

37. *Id.* § 118.10(1)(c); Fla. Admin. Code Ann. r. 1C-18.001(4)(b).

38. Fla. Stat. § 118.10(1)(a).

39. *Id.*

tract. Chapter 118 is silent about the Florida civil-law notary's duty to explain the law, defend the law, and give independent legal advice.⁴⁰ However, the rules of professional conduct regulating Florida lawyers define the terms under which a lawyer may enter into a representation of clients whose interests could be adverse.⁴¹ As members of The Florida Bar, Florida civil-law notaries are required to avoid representation of a client with interests directly adverse to another client, unless the civil-law notary "reasonably believes the representation will not adversely affect the . . . responsibilities to and relationship with the other client[] and each client consents after consultation."⁴² The lawyer is not required to explain the law, but he or she must explain the implications of a common representation.⁴³

In accordance with the Florida Rules of Professional Conduct Rule 4-2.2, the best practice for a Florida civil-law notary rendering an authentic act when two opposing parties are executing the document is to disclose that he or she represents neither party in the transaction against the other and also to obtain from the parties a waiver of the apparent conflict of interest.⁴⁴ It would further behoove the Florida civil-law notary to ensure that both parties have independent representation and to so indicate in the authentic act.

IV. PRACTICAL USES

A Florida civil-law notary is authorized to take oaths and declarations regarding the truth of material statements made in documents requiring an oath in the same manner as a notary public appointed pursuant to Chapter 117, Florida Statutes.⁴⁵ The Florida civil-law notary also may take an attestation requiring that the notary verify the identity and signature of the signor against a document verifying the signor's identity.⁴⁶ This too is common practice for the Chapter 117 notary public. The Florida civil-law notary may certify the truth of a fact that has been put

40. *Id.* § 118.10.

41. Fla. R. Prof. Conduct 4-1.7(a) (2002).

42. *Id.* 4-1.7(c).

43. *Id.* 4-2.2.

44. *Id.*

45. Fla. Stat. § 118.10(7).

46. *Id.*

before the notary over and above the verification of the signature of the executing party.⁴⁷ This is a function notaries public in Florida often perform, such as when a copy of a document requires certification that it is a true copy, but which notaries public appointed under Chapter 117 actually are not authorized to perform without actually supervising the making of the copy.⁴⁸

What distinguishes a Chapter 118 civil-law notary is that he or she is authorized to authenticate documents not merely by witnessing a signature or taking an oath, but also by verifying and confirming the truth of the statements contained within the documents.⁴⁹ When appropriate, the Florida civil-law notary also may verify and confirm the applicable law and include that verification in the authentic act. When serving this function, the civil-law notary acts as an independent third party to the transaction (if there is more than one party to the transaction). This process of verifying and confirming representations of fact and authenticity of a document can arise in an infinite variety of contexts when an individual uses a document from the United States to prove a fact in a foreign civil-law jurisdiction. A few examples reviewed here include verification of facts and law determining heirship in a real-estate context, proper execution of a power of attorney in connection with a sale of real property in a civil-law jurisdiction, and establishment of identity, maternity, paternity, or other relations in connection with litigation.

A. Real Estate/Probate

The St. Martin real-estate transaction described in the introduction is an example of a matter in both a probate and a real-estate context that would have been hard to resolve without the use of a Florida civil-law notary. The inability of the St. Martin *notaire* to accept at face value the authority of the order of the probate division of the Florida Circuit Court for the Fifth Judicial Circuit stymied the transaction. The probate order from the Fifth Circuit established the clear title of the property under Florida law. Were the property held as a joint tenancy with a right of survivorship or similar tenancy, the death certificate, together with

47. Hill, *supra* n. 2, at 3.

48. *Id.*

49. Fla. Stat. § 118.10(3).

the Florida State Registrar's certification of authenticity and an apostille certifying the authority of the State Registrar to issue death certificates, would have been satisfactory to the St. Martin notary to establish clear title.⁵⁰ In this case, although the interest in the property was held by a husband and wife, their interest was held as tenants-in-common. Consequently, even though the death certificate could be recorded and accepted in St. Martin, it would not be instructive about the new, proper owner of Dad's interest in the property. The Florida probate order established the heirship,⁵¹ but the notary's lack of familiarity with the Florida court system dictated that the authority of the court needed to be established. This is the job of neither the Florida Department of State nor the consulate. As discussed above, although it might be acceptable in the context of another United States jurisdiction, an opinion letter from a private attorney would not have legal meaning to satisfy the *notaire* in St. Martin. Rather, the establishment of the heirship through the use of a Florida civil-law notary's authentic act confirming the daughter-client's sworn affidavit and the order of the probate court provided the St. Martin *notaire* with the comfort needed to conclude the transaction.

The following authentication is an example of the way a civil-law notary can satisfy the requirements of the foreign notary. This example is based on the same fact pattern used in the Introduction.⁵²

AUTHENTICATION

I, J. Brock McClane, a duly appointed Civil-law Notary for the State of Florida, United States of America, make this Authentication of the Affidavit of Succession of Client as follows:

50. Telephone Interview with Daniel Gidds, St. Martin *Notaire*, Notaire Associes (Feb. 2001).

51. Since the asset at issue was a parcel of real estate, the court of St. Martin also could have asserted jurisdiction over the inheritance issue and determined the proper heir to the real estate. However, the St. Martin court likely would have applied Florida law, which it is obviously not as well equipped to do as compared to a court in Florida, which was both the place of death and the place of Dad's domicile at death. With the estate issue clearly settled in the forum of the applicable law, updating the title was simply an act for the St. Martin notary.

52. *Supra* pt. I (discussing the fact pattern based on the probate case *In re Estate of Conan*); Work Product from J. Brock McClane, Esq., Fla. Civ. L. Notary, *Authentication* (Apr. 24, 2001) (copy on file with Authors).

1. I am a licensed attorney and civil-law notary practicing in the State of Florida.
2. I have taken an oath from the Client entitled "Affidavit of Succession." She has sworn that she and her mother are the unique heirs of her natural father, Dad, who died in Orlando, Florida on December 18, 1996. She has further sworn that, up to the time of Dad's death, he was domiciled with his wife, Mom, in Clermont, Lake County, Florida. The original *Affidavit of Succession* is attached hereto as Exhibit "A."
3. Based on the domicile of the decedent, Dad, and pursuant to Sections 26.012 and 26.021, Florida Statutes, the Florida Circuit Court for the Fifth Judicial Circuit in Tavares, Florida was the proper court to exercise probate jurisdiction over the settlement of Dad's estate under Florida law.
4. I have reviewed the following documents, certified as official true copies of the originals by the Clerk of the Court for Lake County, Florida, which is the appropriate authority to certify copies of court documents from the Florida Circuit Court for the Fifth Judicial Circuit, in and for Lake County, Florida:
 - A. Petition for Discharge
 - B. Oath of Personal Representative and Designation of Resident Agent, and Acceptance
 - C. Receipt of Beneficiary and Consent to Discharge
 - D. Letters of Administration
 - E. Petition to Waive Bond of Personal Representative and Consent to and Waiver of Notice
 - F. Order of DischargeCopies of the foregoing, confirmed to be true copies by the undersigned, are attached hereto as Exhibit "B."
5. I have reviewed the original Death Certificate, document number 6464563, certified by the State Registrar of the State of Florida, attached as Exhibit "C."
6. The Petition for Discharge indicates that pursuant to Florida law, the personal representative of Dad's estate has asserted that one hundred percent of the estate should pass to Mom, the wife of the decedent. The Or-

der of Discharge indicates that the court has found that the distribution of one hundred percent of the estate of Dad to Mom is a proper distribution under the law.

Under the law of the State of Florida, Section 118.10, Florida Statutes, this authentic act is legally equivalent to the authentic acts of civil-law notaries in all jurisdictions outside the geographic borders of the United States and is issued on the authority of the Secretary of State.

DONE and attested to this 24th day of April, 2001.

(SEAL)

J. Brock McClane
Florida Civil-law Notary
McClane Tessitore
215 East Livingston Street
Orlando, Florida 32801
United States

This authentication establishes the heirship of Mom by not only attaching and explaining the effect and appropriateness of the probate order leaving the entire estate of Dad to Mom, but also by attaching a certified copy of the death certificate and the affidavit of succession in support of the order.⁵³ An apostille indi-

53. The Affidavit of Succession provides as follows:

AFFIDAVIT OF SUCCESSION

Before me, the undersigned authority, personally appeared Client who, after first being duly sworn, deposed and said:

1. My name is Client. I make this sworn affidavit of my own personal knowledge, and I am over age twenty-one.
2. I am the natural daughter of Dad and Mom.
3. My father, Dad, died on December 18, 1996 in Orlando, Florida, United States. A certified copy of my father's death certificate has been supplied to Me. Renaud Herbert. At the time of his death, my parents were domiciled in Clermont, Florida, maintaining a permanent residence at 1921 Brantley Circle, Clermont, Florida 34711 United States.
4. My father died leaving only my mother and me as surviving heirs. He had no other children and was married to my mother at the time of his death. His will left his entire estate to my mother. The estate was settled by the probate court of Lake County, Florida under the laws of the State of Florida. The court confirmed my mother's succession to my father's entire estate by court order. A certified copy of the Oath of Personal Representative, and Designation of Personal Representative and Acceptance, Letters of Administration, Receipt of Beneficiary and Consent to Discharge, Petition for Discharge (indicating that one hundred percent of the assets of my father's estate are to pass to my mother, Mom), and the Order of Discharge have been supplied to Me. Renaud Herbert.

cating the Registrar's authority from the Florida Department of State accompanied the attached death certificate. The civil-law notary certified the order of the probate court, also attached, as an authentic document sealed by the clerk of the Fifth Circuit court within the personal knowledge of the civil-law notary. Much of the content of the Authentication could have been the subject of an attorney's opinion letter. As an authentic act, the statements contained in the document are taken as true, and not merely matters of legal opinion from a biased lawyer. It is also significant to the weight given to the authentic act that an appointed and disinterested officer of the state made the statements rather than merely a private lawyer.

Based on the receipt of the authentication, the Order of Discharge passing one hundred percent of the estate of Dad to Mom was given effect, and the St. Martin real-estate transaction was timely concluded.

5. At the time of my father's death, he and my mother owned a parcel of property situated in Marigot, St. Martin, French West Indies. The property is otherwise identified by the following address:

Appartement 59 bat 1 escalier II
Residence la Fregate
Marigot
97150 St. Martin
French West Indies

and description:

Un Appartement de Type 2 comprenant
1 séjour avec balcon, 1 coin cuisine, 1 salle de bain, 1 WC et 1 chambre avec balcon.

1. My mother and I desire that the above-described property be sold and presently have a contract for the sale of the property.

FURTHER SAITH AFFIANT NAUGHT.

Client
Affiant

Sworn to and subscribed before me this 8th day of April 2001 by Client who presented a Florida Driver's License (#N 200-254-38-517-1) as identification and who did take an oath.

J. Brock McClane
Florida Civil-law Notary

Work Product from J. Brock McClane, Esq., Fla. Civ. L. Notary, *Affidavit of Succession* (Apr. 8, 2001) (copy on file with Authors).

B. Real Property/Power of Attorney

One of the simplest examples of the use of a civil-law notary's authentic act is in the context of a power of attorney. In the following example the client wanted to give her brother, an Italian resident, the ability to sell property in Italy because she, the owner, was located in Florida.⁵⁴

AUTHENTIC ACT

ACKNOWLEDGEMENT OF SIGNATURE AFFIXED TO SPECIAL POWER OF ATTORNEY

On July 24, 2002 appeared before me Mrs. Client, born October 3, 1945 in Rome, Italy, whose permanent residence is 110 - 119 Piazza Manetti, Rome, Italy, and who is temporarily residing at 390 Hudson Boulevard in Marco Island, Florida.

Mrs. Client represented for identification her Italian/EU passport No. 999999, a copy of which is attached hereto.

Mrs. Client represented that the attached document is a Special Power of Attorney (hereinafter referred to as the "Power") which she wrote in the Italian language by hand at the instruction of her Italian Notary on July 7, 2002. She stated that the Power authorizes her brother, Antonio Calderone, born on August 28, 1954, to use his best judgment and best efforts to sell Mrs. Client's real property located at Sacrofano, Rome, Italy, at the most advantageous conditions.

Mrs. Client furthermore stated that the text of the Power had been provided to her by her Italian Notary and that she has been advised by her Italian Notary with respect to the legal consequences of executing the Power.

Mrs. Client confirmed to me that she affixed her signature to the Power on July 11, 2002.

Mrs. Client reaffirmed the Power by reaffixing her signature before me on July 24, 2002.

Norma Brenne Vincent
Florida Civil-law Notary
3003 Tamiami Trail North
Suite 300

54. Work Product from Norma Brenne Vincent, Esq., Fla. Civ. L. Notary, *Authentic Act* (July 24, 2002) (copy on file with Authors).

Naples, Florida 34103-2714
United States (Seal)
Declaration pursuant to Rule 1C-18.00[1], F.A.C.

“Under the law of the State of Florida, Section 118.10, Florida Statutes, this authentic act is legally equivalent to the authentic acts of civil-law notaries in all jurisdictions outside the geographic borders of the United States and is issued on the authority of the [Florida] Secretary of State.”

An Italian *notaio* prepared a power of attorney for the client’s signature. To assure that the power of attorney signed in Florida has the intended effect in Italy, it was advisable to execute it before a civil-law notary and to do an authentic act confirming the identity of the giver of the power of attorney (Client) indicating the source of her identity. Although the civil-law notary in this case, Norma Brenne Vincent of Naples, Florida,⁵⁵ did not hold herself out as a speaker of Italian, the authentic act was nonetheless effective. For purposes of her notarization it was important not that she know Italian, but that the giver of the power of attorney understand that the legal effect of the power of attorney is the authorization to sell real property owned by her in Rome, Italy. Client’s understanding is supported in the authentic act by the statement that she is an Italian national, that she wrote the power of attorney in her own handwriting, and that her doing so was at the advice of an Italian notary who had advised her directly.

C. Probate/Litigation

Authentic acts are also useful when facts are needed for proof at trial in a civil-law jurisdiction. The following authentic act was prepared for use in an Italian court.⁵⁶ The parties conducted a trial to address an estate challenge. At trial, once it was determined that the heirs-at-law, in this case lineal descendants of the decedent, would receive the estate, it became necessary to establish their status as heirs. The client was the decedent’s grandson who lived in Florida and whose father also had died during the

55. The Authors thank attorney and civil-law notary Norma Brenne Vincent for generously sharing her work product so that it can be used as an example for others to follow.

56. Work Product from J. Brock McClane, Esq., Fla. Civ. L. Notary, *Authentic Act* (Apr. 9, 2002).

pendency of the Italian litigation. The authentic act stated the following:

**AUTHENTIC ACT OF NOTARY J. BROCK MCCLANE
RELATING TO HEIRSHIP OF VINCENT CLIENT, JR.**

This Authentic Act is made in Orlando, Orange County, Florida this 9th day of April 2002 by J. Brock McClane, a Civil-law Notary (#000045) appointed by the governor of the State of Florida, United States and relates to the heirship of Vincent Client, Jr. to the estate of his grandfather, Francisco Client.

Vincent Client, Jr. was born April 23, 1933 in Pennsylvania, United States. See copy of birth certificate of Vincent Client, Jr., a copy of which is attached as Exhibit 1, and passport of Vincent Client, Jr. issued by the United States of America, attached as Exhibit 2. Vincent Client, Jr. is the son and heir of Vincent Client (Sr.). Vincent Client (Sr.) died May 4, 1980 in Atlantic City, New Jersey. See copy of death certificate issued by the New Jersey State Bureau of Vital Statistics, attached as Exhibit 3. Vincent Client (Sr.) was the son of Francisco Client whose estate is presently being administered in Italy. See Exhibit 3 indicating that Francisco Client is the father of Vincent Client (Sr.). By virtue of his relationship as grandson of Francisco Client and the fact that Vincent Client (Sr.) is deceased, Vincent Client, Jr. is an heir at law of Francisco Client entitled to receive his per stirpes share of his grandfather's estate in the amount and in the manner set out under Italian law.

All of the attached documents are copies of documents certified by the respective issuing authority and have appropriate apostilles affixed with the exception of the copy of the passport of Vincent Client, Jr., the original of which was examined personally by me and which was personally copied by me.

Under the law of the State of Florida, Section 118.10, Florida Statutes, this authentic act is legally equivalent to the authentic acts of civil-law notaries in all jurisdictions outside the geographic borders of the United States and is issued on the authority of the Secretary of State.

J. Brock McClane
Florida Civil-law Notary
McClane Tessitore
215 East Livingston Street

Orlando, Florida 32801
United States

In this instance the authentic act attaches the following three documents: (1) a birth certificate, (2) a death certificate, and (3) a passport copy. None of the documents, alone, establish the client's heirship. However, using the authentic act, the civil-law notary establishes for the court that the client is the decedent's grandson and heir.

D. Certification of Copies/Litigation

In many other contexts of foreign litigation, it is necessary to prove that litigation or arbitration is occurring in the United States. The following is an example of an authentic act used for the simple purpose of certifying the copies of the official arbitration documents for use in a court proceeding in Venezuela.⁵⁷

AUTHENTIC ACT

In the City of Miami, State of Florida, United States of America, this ____ day of February, 2002, I, ALBERTO J. XIQUES, Florida Civil-law Notary, do hereby certify and attest:

That on 30 November 2001, Ana Maria Ramirez ("Affiant"), appeared before me, established her identity [and] provided proof of her capacity as attorney of record for the following entities: ABC, C.A., a Venezuelan corporation; ABC Antilles, B.V., a Netherlands Antilles corporation; and ABC Limited, a Canadian corporation (which shall be collectively referred to as the "ABC Entities").

In her capacity as Attorney for the ABC Entities the Affiant presented me with an original Demand for Arbitration and Statement of Claim, together with the exhibits attached to same (collectively the "Demand for Arbitration").

The Affiant later presented me with the original of a true copy of the same Demand for Arbitration which was filed with the America Arbitration Association (the "AAA"), at its offices located in Miami, Florida, and which was stamped "filed" with the notation "11-30-01 P05:20 RCVD". The AAA assigned to

57. Work Product from Alberto J. Xiques, Esq., Fla. Civ. L. Notary, *Authentic Act* (Feb. 2002) (copy on file with Authors).

the arbitration proceeding initiated as a consequence of the filing of the Demand for Arbitration the following file number: "30R28033002."

I, the Florida Civil-law Notary and an attorney at law, do certify and attest that I personally made a photocopy of the original of the true copy of the Demand for Arbitration marked "filed" by the AAA, and that those copies which are true, complete and unaltered, are attached to this Authentic Act.

Alberto J. Xiques
Florida Civil-law Notary
101 Madeira Avenue
Coral Gables, FL 33134
Tel: 305-377-1000

(SEAL)

Under the laws of the State of Florida, § 118.10 Fla. Stat., this Act is legally equivalent to the Authentic Acts of Civil Law Notaries in all jurisdictions outside the geographic borders of the United States, and issued on the authority of the Florida Secretary of State.

In this case, the Florida civil-law notary, Alberto Xiques of Coral Gables,⁵⁸ properly documented his independent verification of the signor's identity and her relationship as attorney for a party in a Florida arbitration. Alberto Xiques states that he verified that the document presented to him bore a stamp with a file number corroborating the fact that it was an original and that he personally made the copy of the original attached to the authentic act. The foregoing example shows the proper manner of certifying a copy for use in a civil-law jurisdiction. With this Florida civil-law notary's notarization, the demand for arbitration attached to the authentic act was admitted into court as evidence in the Venezuelan proceeding without any further documentation or testimony.⁵⁹

58. The Authors thank attorney and civil-law notary, Alberto J. Xiques, for generously sharing his work product so that it can be used as an example for others to follow. Xieques has used authentic acts in Venezuela, Guatemala, Peru, and Spain.

59. Telephone Interview with Alberto J. Xiques, Esq., Fla. Civ. L. Notary (Sept. 2002).

E. Other Contexts for Using the Florida Civil-law Notary Power

The practical uses of the Florida civil-law notarial power in Latin American and other civil-law countries are limited only by the extent of the requirement of or preference for notarization of public records and private documents in Latin American and other civil-law jurisdictions. Those uses commonly would include the following: (1) drafting, attesting, certifying, and authenticating deeds and other documents including real-property transfers, and powers of attorney relating to the transfer of real property (as shown in two of the above examples); (2) certifying transactions relating to negotiable instruments and bills of exchange; (3) incorporating, modifying, and dissolving corporations; (4) proving representations made in business contracts; (5) drafting wills and other testamentary documents and certifying documents for overseas estate claims; and (6) drafting formal papers relating to the carriage of cargo and international trade.⁶⁰ Other common uses include proving identity and relationship for spousal or family pension and survivorship benefits, authenticating school transcripts and work records, and authenticating certified copies of United States federal and state court judgments for domestication in a civil-law jurisdiction. The civil-law notary accomplishes this common use by proving the chain of custody from the United States clerk certifying the judgment to the foreign clerk at the place of domestication. Additionally, the civil-law notarial power is used to prove other chain of title and any circumstance where a proof of the authenticity and accuracy of a document is required, such as in foreign litigations. The Florida civil-law notary may even perform the solemnization of marriages outside of the territorial limits of the state of Florida.⁶¹

60. Hill, *supra* n. 2, at 4.

61. Fla. Stat. § 118.10(3). Although the power to solemnize marriages also is given to Chapter 117 notaries public, the lack of a geographic limitation on the location of the exercise of an authentic act under Chapter 118 effectively enables Florida civil-law notaries to solemnize marriages in places where no other territorial law applies, such as on the high seas. *See id.* § 117.045 (authorizing a notary public to solemnize a marriage).

F. Using Authentic Acts in Florida

Since the passage of Chapter 118, little attention has been paid to the potential for use of authentic acts within the state of Florida. It appears from the Authors' research that there has not yet been a court test, at least at the appellate level, of Section 118.10(2) of the Chapter. The statute provides that "[t]he contents of an authentic act and matters incorporated therein shall be presumed correct."⁶² This presumption should have the effect in the context of litigation, at least with respect to the facts asserted in the authentic act, of requiring a jury instruction as to the presumption, regardless of who has the ultimate burden of proof in the case. How the Florida courts ultimately give effect to the presumption remains to be seen. However, one practice point is clear: transactional lawyers who need to establish facts and recitations in the context of closing a transaction can strengthen their contract and create a legal presumption of correctness that will deter litigation by using the services of a Florida civil-law notary.

Furthermore, as discussed below, as Florida lawyers become familiar with the notion of a Florida civil-law notary and the meaning of an authentic act, the usefulness of the authentic acts of Florida civil-law notaries may be enhanced.

V. LIMITATIONS

In certain respects, Florida civil-law notaries are limited in their ability to function in a manner comparable to notaries authorized under the law of Latin American and other civil-law jurisdictions. As discussed above, in most civil-law jurisdictions it is considered inconsistent and inappropriate for a civil-law notary to serve both as an advocate and a notary.⁶³ Because some members of the International Union allow advocates also to function as notaries,⁶⁴ the International Union seems to be giving the fledgling United States delegation a break. The International Union is allowing the National Association of Civil Law Notaries to function

62. *Id.* § 118.10(3).

63. The policy is sometimes inconsistent even within the same country. For example, in Germany, some Länder require that a civil-law notary not be a practicing attorney. BNotk, *supra* n. 25. Others permit the dual role, so long as they are not wearing both hats in a particular transaction. *Id.*

64. *Id.*

as a permanent observer in the International Union on behalf of the United States, even though the United States does not have a separate profession of civil-law notaries. The International Union does assume, however, that when preparing authentic acts, civil-law notaries in the United States understand that they cannot wear both hats simultaneously.

VI. THE FUTURE OF UNITED STATES-BASED CIVIL-LAW NOTARIES

Currently, the existence of civil-law notaries authorized by United States state statutes is not widely known, and the civil-law notary practice is essentially confined to Florida and Alabama.⁶⁵ It has been more than five years since the original enactment of Chapter 118, and the number of civil-law notaries in Florida still remains less than one hundred.⁶⁶ However, there are signs that the civil-law notary will not only become better known in Florida and throughout the United States as a facilitator of international business, but may acquire significance within Florida jurisprudence as well.

Since the passage of the Florida statute in 1997, as the Florida Legislature has updated and refined Chapter 118, the National Association of Civil Law Notaries also has worked to develop a model state civil-law notary act (Model Act) for other states to follow.⁶⁷ While it is likely to continue to be refined, the Model Act represents the current thinking of how the civil-law notary can provide the most significant service within the confines of the American common-law tradition. However, the effort has not been without its critics. Certain attorney groups have questioned Section 2(2) of the Model Act, concerning the pre-

65. While Louisiana has a long-established notarial profession that has played a distinct role in the law for certain transactions, such as conveyances of real estate, and was among the founding members of the International Union of Latin Notaries, the profession in Louisiana does not limit professional notaries to those with formal legal training. La. Stat. Ann. § 35:191 (1995 & Supp. 2003).

66. Natl. Assn. Civ. L. Notaries, *Membership List* <<http://www.nacln.org/MEM-List.html>> (updated Sept. 4, 2002). There are currently ninety-three civil-law notaries in the United States. *Id.*

67. Natl. Assn. Civ. L. Notaries, *Model Civil Law Notary Act* <<http://www.nacln.org>>; *select Reference, select NACLN Reference, select Model Act, select Model Act for State Legislation* (last modified Sept. 4, 2002). For the full text of the Model Civil Law Notary Act, consult *infra* Appendix B.

sumption of correctness. This provision states that “[t]he contents of an authentic act and matters incorporated therein shall be presumed legal and accurate but such presumption may be rebutted in litigation upon a showing of clear and convincing evidence.”⁶⁸ Including this heightened presumption would not only give civil-law notaries in United States jurisdictions a more powerful tool to seal documents and authenticate facts in a manner that would be useful in foreign civil-law jurisdictions, but also would give United States civil-law notaries a new, useful role to play in their own states analogous to the civil-law notaries’ role within foreign civil-law jurisdictions. In most Latin American and other civil-law jurisdictions, a document such as a deed or will sealed by a civil-law notary carries a high presumption of authenticity and correctness.

Alabama, which was the second state — Florida being the first — to pass a modern civil-law notary statute, adopted the Model Act nearly verbatim.⁶⁹ However, faced with a challenge from the plaintiff’s bar, the Alabama Legislature declined to include the Model Act’s language raising the evidentiary standard for a challenge of the facts certified by an authentic act.⁷⁰ Since the passage of the Alabama statute, both Illinois and Texas have set in motion legislative initiatives to create their own civil-law notary professions.⁷¹ Although the Illinois and Texas statutes also do not contain “clear and convincing evidence” language, they reflect a clear trend among progressive state legislatures to facilitate international transactions with Latin American countries through the bridging of the gap between American common-law and their civil-law legal traditions.⁷² It is perhaps only a matter of time and increased familiarity with the civil-law notaries’ practice before the heightened evidentiary standard or possibly the re-

68. *Id.* § 2(2).

69. See *infra* app. A (providing the full text of Florida Statutes, Chapter 118); *infra* app. B (providing the full text of the Model Civil Law Notary Act).

70. See Ala. Code Ann. § 36-20-50 (LEXIS L. Publg. Supp. 2002) (providing the Alabama statute for International Notaries Public); *infra* app. B (providing the full text of the Model Civil Law Notary Act).

71. E-mail from Chuck Grainger, Gen. Counsel, Ala. Off. of the Sec. of St., to J. Brock McClane, Esq., Fla. Civ. L. Notary, *Pending Legislation in Texas and Illinois* (Mar. 7, 2003).

72. *Id.*

quirement of a fraud finding to challenge authentic acts becomes more acceptable among United States state jurisdictions.⁷³

Another development that may increase the acceptance and importance of civil-law notary practice is the creation of a role for the civil-law notary in the Gulf of Mexico States Accord (“GOMSA”). GOMSA is a joint agreement among the states of Mexico and the United States with coastline on the Gulf of Mexico.⁷⁴ The objective of GOMSA is to “encourag[e] trade, investment, transportation, communication, tourism, health and environmental issues, agriculture, educational and cultural exchange between the two geographic regions” (i.e., the Mexican and the United States gulf coast regions).⁷⁵ To this end the GOMSA Legal Issues Subcommittee has floated the following issues for the state GOMSA members to consider: (1) education of Mexican states about the existence of the civil-law notary in the United States gulf states — including Florida, Alabama, and Louisiana, so far — and its similarities to the Mexican *notario* and distinction from the traditional common-law notary public as it exists in the United States states; (2) GOMSA’s recognition of the heightened presumption of legality and accuracy of the representations and promises made in agreements executed between or among contracting parties in two or more GOMSA states authenticated by a civil-law notary; and (3) the possible creation of an alternative dispute resolution mechanism for agreements entered into among parties in the GOMSA states in which the mediators or arbitrators would comprise civil-law notaries or panels of civil-law notaries from the GOMSA states.⁷⁶ The third proposal is attractive in part due to concerns among some United States companies. This concern is about the well-publicized perceptions of corruption encountered in some Mexican courts and concerns among Mexican firms about being hauled into a long and very expensive legal bat-

73. In essentially all Latin American and other civil-law jurisdictions, a party challenging a fact certified by a civil-law notary may be overcome only through a proof of fraud or similar wrongdoing on the part of the notary certifying the fact.

74. GOMSA, *The Accord Background* <<http://www.gomsa.org/accord/background.html>> (accessed Feb. 17, 2003).

75. GOMSA, *The Accord* <<http://www.gomsa.org/accord/accord.html>> (accessed Jan. 6, 2003).

76. Mark Kruse, Intl. Leg. Liaison, Fla. Dept. of St. & Panel Coord. of the Leg. Infrastructure Subcomm. for the GOMSA Exec. Plan. Sess., Panel Proposals, *GOMSA Executive Planning Session* (Orlando, Fla., July 25, 2002).

tle in a United States court in the event of a dispute. The third proposal is also a natural way to exploit the statutorily imposed neutrality of a civil-law notary in both systems.

VII. CONCLUSION

The foregoing review of the emergence of civil-law notary practice in Florida and other American states is not intended to endorse or otherwise pass judgment on the practice of the notary in the context of a civil-law legal tradition. The existence of the civil-law notary in Latin American and other civil-law jurisdictions is a fact. The unique role played by notaries in those jurisdictions has a long history and is not likely to change in the near future. The effort of American states to establish a profession with analogous authority in key respects to that of the true civil-law notary reflects a forward-thinking and well-intentioned initiative to bridge dissimilarity between Latin American and other civil-law jurisdictions and the common-law jurisdictions in the United States. The fledgling profession in Florida already has facilitated the resolution of many transactions between Florida and Latin American and other civil-law jurisdictions.

With time and experience, authentic acts by civil-law notaries in Florida and other United States states will gain wider awareness and acceptance among foreign civil-law notaries, attorneys, and also among United States-based attorneys needing to prove facts in foreign jurisdictions. Regardless of whether United States jurisdictions take the step to establish a heightened evidentiary standard for disproving facts established in court by a United States-licensed civil-law notary's authentic act, the civil-law notary will improve international practice. The ability to use an authentic act from a United States licensed civil-law notary to give a comfort level to foreign attorneys and notaries in inheritance proceedings, real-estate transactions, and other contexts reflects an enormous step forward in international practice between the United States and civil-law jurisdictions in Latin America and around the world.

APPENDIX A

INTERNATIONAL NOTARIES

118.10 Civil-law notary

- (1) As used in this section, the term:
 - (a) “Authentic act” means an instrument executed by a civil-law notary referencing this section, which instrument includes the particulars and capacities to act of any transacting parties, a confirmation of the full text of any necessary instrument, the signatures or their legal equivalent of any transacting parties, the signature and seal of a civil-law notary, and such other information prescribed by the Secretary of State.
 - (b) “Civil-law notary” means a person who is a member in good standing of The Florida Bar, who has practiced law for at least 5 years, and who is appointed by the Secretary of State as a civil-law notary.
 - (c) “Protocol” means a registry maintained by a civil-law notary in which the acts of the civil-law notary are archived.
- (2) The Secretary of State shall have the power to appoint civil-law notaries and administer this section.
- (3) A civil-law notary is authorized to issue authentic acts and thereby may authenticate or certify any document, transaction, event, condition, or occurrence. The contents of an authentic act and matters incorporated therein shall be presumed correct. A civil-law notary may also administer an oath and make a certificate thereof when it is necessary for execution of any writing or document to be attested, protested, or published under the seal of a notary public. A civil-law notary may also take acknowledgments of deeds and other instruments of writing for record, and solemnize the rites of matrimony, as fully as other officers of this state. A civil-law notary is not authorized to issue authentic acts for use in a jurisdiction if the United States Department of State has determined that the jurisdiction does not have diplomatic relations with the United States or is a terrorist country, or if trade with the jurisdiction is prohibited under the Trading With the Enemy Act of 1917, as amended, 50 U.S.C. ss. 1, et seq.

- (4) The authentic acts, oaths and acknowledgments, and solemnizations of a civil-law notary shall be recorded in the civil-law notary's protocol in a manner prescribed by the Secretary of State.
- (5) The Secretary of State may adopt rules prescribing:
 - (a) The form and content of authentic acts, oaths, acknowledgments, solemnizations, and signatures and seals or their legal equivalents;
 - (b) Procedures for the permanent archiving of authentic acts, maintaining records of acknowledgments, oaths and solemnizations, and procedures for the administration of oaths and taking of acknowledgments;
 - (c) The charging of reasonable fees to be retained by the Secretary of State for the purpose of administering this chapter;
 - (d) Educational requirements and procedures for testing applicants' knowledge of all matters relevant to the appointment, authority, duties or legal or ethical responsibilities of a civil-law notary;
 - (e) Procedures for the disciplining of civil-law notaries, including, but not limited to, the suspension and revocation of appointments for failure to comply with the requirements of this chapter or the rules of the Department of State, or for misrepresentation or fraud regarding the civil-law notary's authority, the effect of the civil-law notary's authentic acts, or the identities or acts of the parties to a transaction;
 - (f) Bonding or errors and omissions insurance requirements, or both, for civil-law notaries; and
 - (g) Other matters necessary for administering this section.
- (6) The Secretary of State shall not regulate, discipline, or attempt to discipline any civil-law notary for, or with regard to, any action or conduct that would constitute the practice of law in this state, except by agreement with The Florida Bar. The Secretary of State shall not establish as a prerequisite to the appointment of a civil-law notary any test containing any question that inquires of the applicant's knowledge regarding the practice of law in the United States, unless such test is offered in conjunction with an educational program approved by The Florida Bar for continuing legal education credit.

- (7) The powers of civil-law notaries include, but are not limited to, all of the powers of a notary public under any law of this state.
- (8) This section shall not be construed as abrogating the provisions of any other act relating to notaries public, attorneys, or the practice of law in this state.

Laws 1997, c. 97-241, § 7 eff. May 30, 1977; Laws 1997, c. 97-278, § 1, eff. July 1, 1997. Amended by Laws 1998, c. 98-246, §§ 10, 30, eff. Jan. 1, 1999; Laws 1999, c. 99-251, § 74, eff. July 1, 1999.

Fla. Stat. § 118.10.

118.12 Certification of civil-law notary's authority; apostilles

If certification of a civil-law notary's authority is necessary for a particular document or transaction, it must be obtained from the Secretary of State. Upon the receipt of a written request from a civil-law notary and the fee prescribed by the Secretary of State, the Secretary of State shall issue a certification of the civil-law notary's authority, in a form prescribed by the Secretary of State, which shall include a statement explaining the legal qualifications and authority of a civil-law notary in this state. The fee prescribed for the issuance of the certification under this section or an apostille under s. 15.16 may not exceed \$10 per document. The Department of State may adopt rules to implement this section.

Added by Laws 1999, c. 99-251, § 75, eff. July 1, 1999.

Id. § 118.12. The Florida Department of State has promulgated more detailed regulations concerning the Florida civil-law notaries as follows:

CHAPTER 1C-18
FLORIDA CIVIL-LAW NOTARY

1C-18.001 Florida Civil-law Notary.

- (1) Application:
 - (a) Florida Civil-law Notaries appointed pursuant to this rule may continue to use the title "Florida International Notary" wherever that title is used or required to be used under this rule. Persons wishing to be appointed by the Secretary of State as Florida Civil-law Notaries may request an applica-

tion by writing to the following address and requesting Form Number DS-DE-38, titled "Application for Appointment as a Florida Civil-law Notary," effective October 8, 1998, which form is hereby incorporated by reference. All other forms discussed in this rule may be obtained by writing the same address:

Department of State
Office of the Secretary
PL-02
The Capital
Tallahassee, FL 32399-0250

- (a) The application to become a Florida Civil-law Notary must be complete and on the above form prescribed by the Department of State. The application must be accompanied by:
 1. A certificate of good standing from the Supreme Court of Florida issued within 90 days of the date of application showing that the applicant is currently a member of the Florida Bar and has been a member of the Florida Bar for at least five years.
 2. An application processing fee in the amount of fifty dollars.
- (2) Educational programs:
 - (a) Persons or entities who wish to submit a proposed civil-law notary curriculum or course of study to the Department of State for consideration as to its acceptability by the Department of State may do so. Any such curriculum or course of study submitted for the Department of State's approval should incorporate all of the following elements:
 1. The nature and characteristics of notarial practice in civil-law jurisdictions including a review of the historical development of civil-law notarial practice;
 2. A comparison of notarial functions and the nature and characteristics of notarial practice under Chapter 117, Florida Statutes, and civil-law notarial functions and practices under Chapter 118, Florida Statutes,

- including a review of the historical development of common law notarial practice;
3. The nature and characteristics of the Florida Civil-law notary, including a comparison of notarial practice in civil-law countries and practice as a non-lawyer notary public under Chapter 117, Florida Statutes;
 4. The similarities and differences between practicing as a Florida Civil-law Notary and the traditional practice of law in the State of Florida;
 5. The purpose of and uses of authentic acts, and the rules regulating the execution of authentic acts, administration of oaths, and taking of acknowledgments by Florida Civil-law Notaries;
 6. Solemnization of marriage by Florida Civil-law Notary;
 7. Florida laws relevant to practice as a Florida Civil-law Notary;
 8. Rules regulating The Florida Bar including the Rules of Discipline and the Rules of Professional Conduct;
 9. The potential malpractice liability of Florida Civil-law Notary.
- (b) The Department of State shall maintain a list of the currently approved Florida Civil-law Notary education programs and shall make the list available upon request. Each education program shall be subject to annual renewal.
- (c) Persons who have had a curriculum or course of study approved by the Department may also administer the Department's civil-law notary test under the Department's supervision, but may not charge a fee in excess of \$200 to any person for administering a test to that person. All test materials are confidential property of the Department of State and any person who compromises the confidentiality of the test materials or allows another to do so shall not in the future be authorized by the Department to serve as a test administrator.

(3) Examination:

- (a) A Florida Civil-law Notary application shall be valid for a period of one year from the date on which the application was received by the Department of State, during which time the applicant must complete the Florida Civil-law Notary examination. If the applicant completes the examination, with a satisfactory score of 70%, within the one year period prescribed above, the applicant remains eligible for appointment as a Florida Civil-law Notary even though the appointment itself may occur more than one year after the date on which the application was received.
- (b) After reviewing the application for completeness and accuracy of information, determining that all necessary documents accompany the application, and that the applicant meets the requirements of this rule and section 118.10, Florida Statutes, the Department of State will provide the applicant with a certificate of eligibility to take the Florida Civil-law Notary examination and a list of examination dates and corresponding examination locations.
- (c) The applicant who has been certified as eligible must notify the Department of State as least two weeks in advanced of any scheduled examination that the applicant intends to take a scheduled examination. If notice is not received, or if the notice is untimely, the applicant will not be admitted to the examination.
- (d) Upon appearing at the examination location, and prior to entering the examination facility, the applicant must present to the examination authorities the certificate of eligibility issued to the applicant by the Department of State, a governmentally issued identification card which bears the applicant's picture, and pay the examination fee.

(4) Appointment, Revocation, Voluntary Resignation:

- (a) Upon completion of each examination session and after the examinations are scored, the testing authority shall promptly forward the examination results to the Department of State. The Department of State shall then notify the applicants of their respective test scores and shall appoint those persons

with satisfactory scores of 70% as Florida Civil-law Notaries.

- (b) Upon accepting appointment as a Florida Civil-law Notary, the applicant shall file within 90 days after appointment with the Department of State Form Number DS-DE-42, titled "Appointment of Protocol Custodian and Seal Filing," effective October 8, 1998, which form is hereby incorporated herein by reference. The applicant shall identify a Florida Civil-law Notary in good standing with the Department of State and the Florida Bar who has agreed to take custody of the applicant's protocol in the event that the applicant's appointment is ever suspended or revoked, or if the applicant dies or becomes incapacitated. If for any reason a Florida Civil-law Notary chooses to change secondary custodial notaries, the Florida Civil-law Notary shall promptly notify the Department of State in writing and shall make the appropriate change in the civil-law notary's annual report.
- (c) Unless suspended or revoked in accordance with this rule, an appointment as a Florida Civil-law Notary shall continue in force for so long as the applicant is a member in good standing of the Florida Bar, subject to the requirement that the applicant must file an annual report with the Florida Department of State at the address noted above on form Number DS-DE-39, titled "Florida Civil-law Notary Annual Report," effective October 8, 1998, which form is hereby incorporated by reference. The annual report shall include the civil-law notary's current business address and telephone number and the identity and signature of another Florida Civil-law Notary who has agreed to take custody of the civil-law notary's protocol upon the suspension, revocation, incapacitation or death of the civil-law notary. A processing fee payable to the Department of State in the amount of fifty dollars shall accompany the annual report. Failure to file an annual report with the Florida Department of State shall result in revocation of the civil-law notary's appointment.

- (5) Form and content of signatures and seals; registration of signatures and seals:
 - (a) A Florida Civil-law Notary's original hand written signature and seal shall be registered with the Department of State. No Florida Civil-law Notary shall take any official action or execute any document as a civil-law notary until his seal has properly registered.
 - (b) Except for those documents executed by digital signature as provided under subsection (6)(b)2. this rule, the Florida Civil-law Notary's original handwritten signature and an original rubber stamp or embossed impression of the civil-law notary's seal shall be affixed by the civil-law notary to all documents executed by the civil-law notary while acting in as a Florida Civil-law Notary under Chapter 118, Florida Statutes. The civil-law notary shall not allow any other person to sign or seal a document using the civil-law notary's official signature or seal.
 - (c) The civil-law notary's seal may be an embossing seal or a rubber stamp and may be circular or square in shape and shall not be more than two inches nor less than one inch in diameter if circular, or more than two inches on each side nor less than one inch on each side if square.
 - (d) A registered signature and seal may be changed by applying to the Department of State at the address listed above for Form Number DS-DE-41, effective October 8, 1998, which form is hereby incorporated herein by reference. An application to change a signature or seal shall be considered an amendment to the notary's application and shall be accompanied by a processing fee of \$25.00.
- (6)(a) Form and content of authentic acts:
 - (b) Each authentic act shall contain:
 1. The handwritten signature and original seal of Florida Civil-law Notary.
 2. The signature and seal may be incorporated into public key certificate which complies with the requirements of Rule 1-10.001, F.A.C. When serving as part of an authen-

tication instrument, the public key certificate of a Florida Civil-law Notary must clearly show the Florida Civil-law Notary's signature and seal are registered with the Department of State.

3. The typewritten full name of the Florida Civil-law Notary in the form in which the notary's application for appointment was originally submitted to the Department of State and the words "Florida Civil-law Notary" typewritten in the English language.
4. The current business address and telephone number of the Florida Civil-law Notary typewritten in the English language.
5. A statement typewritten in the English language that "Under the laws of the State of Florida, section 118.10, Florida Statutes, this authentic act is legally equivalent to the authentic acts of civil-law notaries in all jurisdictions outside the geographic borders of the United States and is issued on the authority of the Florida Secretary of State."
6. The date on which the authentic act was signed and sealed by the Florida Civil-law Notary and the signatures of the parties to the transaction.
7. All words or statements required to appear in the English language may also appear in any other language.
8. An authentic act may also contain such other information or material as may be required to satisfy any legal requirements, or to satisfy ethical or legal concerns, or the business needs of the parties to the transaction or of the Florida Civil-law Notary including statements attesting to the signatures on accompanying documents if executed in the Florida Civil-law Notary's presence, and any witnessing signatures; a statement confirming the legality of the transaction and the contents of any documents and any limitations thereon; any facts contained in the documents or relied

on by any interested party and any limitations thereon.

- (7) Procedures for the administration of oaths; taking of acknowledgments and solemnizations of marriage:
- (a) A Florida Civil-law Notary may administer an oath and make a certificate thereof when it is necessary for the execution of any writing or document to be attested, protested, or published under seal of a notary public. In administering the oath, the Florida Civil-law Notary must require the signer to voluntarily swear or affirm that the statements contained in the documents are true.
 - (b) A Florida Civil-law Notary may administer an acknowledgment of deeds and other instruments of writing for record. Such acknowledgment does not require that an oath be taken, but the signer must acknowledge that the execution of the document is his or her voluntary act. The Florida Civil-law Notary may not take an acknowledgment of execution in lieu of an oath if an oath is required.
 - (c) A Florida Civil-law Notary may not administer an oath to a person or take his or her acknowledgment unless he or she personally knows, as defined in Section 117.05(5)(a), Florida Statutes, or has satisfactory evidence, as defined in Section 117.05(5)(b), Florida Statutes, that the person whose oath is to be administered or whose acknowledgment is to be taken, is the individual who is described in and who is executing the authentic act or other instrument. A Florida Civil-law Notary may not administer an oath to a person or take his or her acknowledgment unless the person whose oath is being administered or whose acknowledgment is to be taken is in the presence of the Florida Civil-law Notary at the time the oath is being administered or the acknowledgment is being taken.
 - (d) An oath or acknowledgment taken or administered by a Florida Civil-law Notary shall be signed in the presence of the notary, and where otherwise required by law witnessed in the

presence of the Florida Civil-law Notary, and shall be executed with the civil-law notary's handwritten signature and original seal.

- (e) A Florida Civil-law Notary may use any of the forms prescribed in Chapter 117, Florida Statutes, for administering oaths or taking acknowledgments but shall not be required to do so, and an oath or acknowledgment may be, but is not required to be, incorporated into any document executed by a civil-law notary as an authentic act. This section does relieve the civil-law notary of the obligation to secure the signatures of other witnesses where otherwise required by law.
- (8) The Florida Civil-law Notary's Protocol:
- (a) A Florida Civil-law Notary's protocol shall be maintained in a secure, fireproof location at the Florida Civil-law Notary's principal place of business;
 - (b) The protocol shall contain an original copy or photocopy of each of the Florida Civil-law Notary's authentic acts in date sequence, and an original photocopy of any supporting or related documents, which shall be permanently archived in the protocol. The protocol shall also contain, in date sequence, a photocopy or original copy of any document containing, incorporating or depending upon, an acknowledgment, oath or solemnization executed by the civil-law notary, which shall include a copy of any certificate made by the civil-law notary.
 - (c) The protocol shall contain or be accompanied by an index to its contents in date order. In addition to the date on which act, oath, acknowledgment, or solemnization was executed, each entry in the index shall identify the party or parties who paid the notary's fee.
 - (d) The protocol shall be available for inspection by the Department of State during reasonable business hours and copies of any documents contained in the protocol shall be furnished to the Department upon request. The contents of the protocol shall otherwise be considered confidential and shall be made available only to persons who have a legal interest in a particular transaction.

- (e) A Florida Civil-law Notary who takes custody of the protocol of another Florida Civil-law Notary's protocol because of suspension or incapacitation shall maintain the protocol, until the suspension period expires or the incapacitation is relieved. When a Florida Civil-law Notary takes custody of another Florida Civil-law Notary's protocol because of revocation or death the custodial Florida Civil-law Notary shall permanently maintain the protocol in accordance with this rule.
- (9) Discipline; suspension and revocation:
- (a) A Florida Civil-law Notary shall be disciplined for violation of this rule. All complaints to the Department of State concerning the conduct or acts of a Florida Civil-law Notary will also be referred to The Florida Bar for a determination by the Bar as to whether the complaint alleges a violation of the rules of The Florida Bar governing the conduct and discipline of lawyers.
 - (b) All complaints to the Department of State concerning the conduct or acts of a Florida Civil-law Notary which on their face appear to establish facts which if proven true would constitute an act of misrepresentation or fraud in the creation or execution of an authentication instrument will be investigated by the Department of State to determine whether cause exists to suspend the Florida Civil-law Notary's appointment or reprimand the Florida Civil-law Notary.
 - (c) After investigation and upon a determination by the Department that one or more acts of misrepresentation, fraud or violation of this rule has been committed by a Florida Civil-law Notary, the Department of State shall, after considering the extent of the fraud or misrepresentation including the number of persons involved and the effect of those persons; the number of acts of misrepresentation or fraud; any financial loss or other injury that may have resulted; and the degree of culpability of the Florida Civil-law Notary:
 - 1. Issue a letter of warning to the Florida Civil-law Notary including the Department's findings;

2. Order compliance with this rule;
 3. Order restitution;
 4. Order suspension of the appointment of the Florida Civil-law Notary;
 5. Order revocation of the appointment of the Florida Civil-law Notary.
- (d) Any order under this rule which requires payment of restitution or results in the suspension or revocation of the appointment of a Florida Civil-law Notary shall be accompanied by a notice of final agency action as required by Chapter 120, Florida Statutes, and the Florida Civil-law Notary shall be entitled to a hearing in accordance with the requirements of sections 120.57 and 120.569, Florida Statutes.
- (e) A former Florida Civil-law Notary whose appointment has been finally revoked shall not be eligible to apply for a new appointment as a Florida Civil-law Notary for a period of at least five years.
- (f) A Florida Civil-law Notary may voluntarily resign from an appointment by notifying the Department of State in writing at the above address of the intention to do so. Any voluntary resignation from an appointment as a Florida Civil-law Notary shall be permanent and the resigned Florida Civil-law Notary may only resume services as a Florida Civil-law Notary after successfully completing a new application and examination process.

Fla. Admin. Code Ann. r. 1C-18.001.

APPENDIX B

MODEL CIVIL LAW NOTARY ACT

(Proposed by the National Association of Civil Law Notaries
for Adoption in United States Jurisdictions)

Section 1. For purposes of this article, the following terms shall have the following meanings:

- (1) **Authentic Act.** An instrument executed by a civil-law notary referencing this article, which is imbued by the state with the legal acceptance of the certainty that comes from the presumption of truth that accompanies the document and which includes the particulars and capacities to act of transacting parties, a confirmation of the full text of any necessary instrument, the signatures or their legal equivalent thereof of any transacting parties, the signature and seal of a civil-law notary, and such other information prescribed by the Secretary of State.
- (2) **Brevet.** A private document in which the civil-law notary attests to the authenticity of the signature or signatures, a fact or a contract. Brevets may be used, among other things, to certify signatures, prescribe oaths, certify a translation or a copy of a document that is not part of the civil-law notary's protocol, or certify the identity of any object or thing.
- (3) **Civil Law Notary.** A person who is admitted to the practice of law in this state, who has practiced law in a United States jurisdiction for at least five years, and who is appointed by the Secretary of State as a civil-law notary.
- (4) **Minute.** An authentic act written by a civil-law notary which contains the exact narration of a finding of fact or facts influencing the rights of private parties of which the civil-law notary has personal knowledge and that due to the nature of the authentic act does not constitute a contract or juridical business. Types of minutes include, but may not be limited to:
 - (a) **General Minutes.** A minute providing a certification of general facts known to the civil-law notary;
 - (b) **Minutes of Notoriety.** A minute providing a certification that a fact is generally known by the people who have a direct or close relationship with the factual situation or its consequences, or who belong to the social or economic environment of the person affected by a particular fact;

- (c) **Minutes of Correction.** A minute for the purpose of rectifying minor errors in form or omissions made by the civil-law notary in prior authentic acts; or
- (d) **Minutes of Addition.** A minute for the purpose of including a document in the civil-law notary's protocol in order to provide for preservation of the document; limited memorialization of domestic private documents and/or execution of foreign legal documents.
- (5) **Notarial Deed.** An authentic act in which contains a contract, transaction or other juridical act and which may also include the certification of facts. Notarial deeds may involve either a single party, as in the case of a will, or multiple parties, as with a contract.
- (6) **Protocol.** A registry maintained by a civil-law notary in which the acts of the civil-law notary are archived.

Section 2.

- (1) The Secretary of State shall have the power to appoint civil-law notaries and administer this section.
- (2) A civil-law notary is authorized to issue brevets, minutes and notarial deeds and thereby may authenticate or certify any document, transaction, event, condition or occurrence. The contents of an authentic act and matters incorporated therein shall be presumed legal and accurate but such presumption may be rebutted in litigation upon a showing of clear and convincing evidence. A civil-law notary may also administer oaths and make certificates thereof when necessary for execution of any writing or document to be attested, protested or published under the seal of a notary public. A civil-law notary may also take acknowledgments of deeds and other instruments of writing for record.
- (3) The authentic acts, and oaths and acknowledgments of a civil-law notary shall be chronologically recorded in the civil-law notary's protocol in a manner prescribed by the Secretary of State.
- (4) A civil-law notary may, without prejudice to his duty to ensure professional confidentiality, issue certified copies of authentic acts to individuals who, in his or her opinion, have a legitimate interest in the contents of an authentic act. Certified copies of authentic acts shall have the same legal force and effect as the original.
- (5) A civil-law notary is obligated to:
 - (a) Draw up authentic acts in accordance with their knowledge and comprehension and such documents must clearly reflect the wishes of the contracting parties duly adapted

to legal requirements necessary for the documents to have full legal force and effect.

- (b) Represent the transaction itself in the creation of the authentic act. For this purpose, the civil-law notary acts as an intermediary where there are multiple parties to a transaction.
- (c) Use his or her best efforts to advise all parties to the transaction equally, accurately, fully and impartially regarding the nature and legal consequences of the transaction.
- (d) Refrain from representing any party in any matter arising from or related to the civil-law notary's authentic act.

Section 3. The Secretary of State may adopt rules prescribing:

- (1) The form and content of authentic acts, oaths, acknowledgments, and signatures and seals or their legal equivalents.
- (2) Procedures for the permanent archiving of authentic acts, maintaining records of acknowledgments, and oaths, and procedures for the administration of oaths and taking of acknowledgments.
- (3) The charging of reasonable fees to be retained by the Secretary of State for the purpose of administering this article.
- (4) Educational requirements and procedures for testing applicants' knowledge of all matters relevant to the appointment, authority, duties or legal or ethical responsibilities of a civil-law notary.
- (5) Procedures for the disciplining of civil-law notaries, including, but not limited to, the suspension and revocation of appointments for failure to comply with the requirements of this article or the rules of the Secretary of State, or for misrepresentation or fraud regarding the civil-law notary's authority, the effect of the civil-law notary's authentic acts, or the identities or acts of the parties to a transaction.
- (6) Bonding or errors and omissions insurance requirements, or both, for civil-law notaries.
- (7) Other matters necessary for administering this article.

Section 4.

- (1) The powers of civil-law notaries include, but are not limited to, all of the powers of a notary public under the laws of this state.
- (2) This article shall not be construed as abrogating the provisions of any other act relating to notaries public, attorneys, or the practice of law in this state.

Section 5. If certification of a civil-law notary's authority is necessary for a particular document or transaction, it must be obtained

from the Secretary of State. Upon receipt of a written request from a civil-law notary and the fee prescribed by the Secretary of State, the Secretary of State shall issue a certification of the civil-law notary's authority, in a form prescribed by the Secretary of State, which shall include a statement explaining the legal qualifications and authority of a civil-law notary in this state. The fee prescribed for the issuance of the certification under this section or an apostille may not exceed [twenty dollars (\$20.00)] per document. The Secretary of State may adopt rules to implement this section.

Section 6. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, the declaration shall not affect the part which remains.

Section 7. All laws or parts of laws in conflict with this act are repealed.

Section 8. This act shall become effective upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Natl. Assn. Civ. L. Notaries, *supra* n. 67.