

# The Legal Counselor and Draftsman

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*This last discourse of Pope Pius XII was delivered on October 5, 1958 to the Fifth Congress of the International Union of Latin Notaries. As appears in the Pope's discussion of their duties, notaries in the civil law countries perform functions of counseling, negotiating, and drafting which the common-law tradition reserves to attorneys or solicitors.*

# THE LEGAL COUNSELOR AND DRAFTSMAN†

**T**O CELEBRATE the tenth anniversary of your first meeting, gentlemen, you have decided to hold the Fifth Congress of the International Union of Latin Notaries in Rome. Having convoked your four previous congresses in Buenos Aires, Madrid, Paris, and Rio de Janeiro, you now come to the very center of the Latin world — not indeed the geographical center but the spiritual center — where your labors will find an appropriate setting and an unusual solemnity. We wish you a hearty welcome and sincerely hope that your meetings will fulfill the general aims of your association as well as the purpose for which you have convoked this congress.

## **The Notary's Function**

While the exercise of a notary's profession differs from country to country, a clear-cut distinction can be made between the Anglo-Saxon countries and the lands that follow Roman Law. In the former, the function of a notary consists mainly in certifying to the identity of the signers of documents. Consequently, no special study is required to exercise this office. The office is, in short, that of an official witness. In nations influenced by Roman Law, on the other hand, the notary is charged with expressing in legal form the contractual intent of the parties and his mediation gives a contract its full legal value and its executory force, without the need of any other authority to confirm it. The role of a notary in these various regions is formed by one and the same tradition, comprises similar duties and responsibilities, and has common traits

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†This translation of the original French text, by the Rev. Paul Oligny, O.F.M., is reprinted with permission from 5 THE POPE SPEAKS 169-73 (Spring 1959).

which amply justify the nature of your Union. You intend to give a sustained impulse to the international cooperation of Latin notaries, to intensify cultural exchanges, to make known the theoretical and practical norms which regulate the exercise of that profession in each region, and in that way strive toward their unification. Your first congress in Buenos Aires not only laid the foundations of your Union but also established a permanent bureau of information and inaugurated your *Revue internationale du Notariat*, of which there are two editions, one in Spanish and one in French.

### Objectives of This Congress

Since you are preoccupied with the efficacy of a document drawn up by a notary in international relations, you have dedicated a part of the program of your congress to this question, and We know that the papers that have been so carefully prepared will help you to study all the interesting aspects of this point. You intend to consider once again the delicate question of the professional secret, as it applies to the notary and his co-workers, and to examine how your activity can be adapted to modern techniques and procedures, especially in identifying parties and drawing up deeds and making transcripts.

Your endeavors, We are sure, will help to emphasize the importance of your position in establishing those sane and solid legal relationships which are so basically necessary to a peaceful social life. They will bring out more clearly certain traits of the moral character of the notary and the role which he is called upon to play in the international community which is developing today. We are aware that, consequent upon

the founding of the Common European Market, your national associations reacted in a positive way by pointing out the direction your effort was to take in order to comply with the needs of new institutions and to promote their happy evolution.

### A Liberal Profession

The prestige and authority connected with the exercise of a liberal profession presupposes two conditions on the part of its member: a proved technical competence and an unquestionable moral integrity. A notary must have these qualities, especially when he acts as an official intermediary between his client and the legal system which he, the notary, interprets. It would be incorrect to regard the function of a notary as simply drawing up documents which express the intent of the parties in an authentic form.

Even if modern discoveries should one day reduce to a considerable extent the notary's work of recording, preserving, and reproducing written or spoken expressions — work by reason of which he is considered "the fashioner of the document" — he will always have to act as mediator and display his own professional competence even before the drawing up of the document, since he must then proceed to identify the parties and discover their intent. You are only too aware that in our modern society individuals are constantly moving about from one place to another and thus break most of the social ties which formerly were so strong and that, for this reason, the task of identifying persons sometimes presents serious difficulties. Moreover, the witnesses required by law may have but a superficial acquaintance with the interested party. The notary thus finds himself under pressure to

use empirical methods of questionable value to make sure of the identity of his client.

### **The Intent of the Parties**

Once he is positive of the identity of the parties, he then proceeds to determine their intent, which he commits to writing in an adequate legal formulation. Now, does it not often happen that the parties come to the notary without any clear and definite idea of what they really want, of the motives which prompt them, of the formalities demanded if their act is to be legal, and of the consequences of their act? The notary then tries to bring all these particular points to light. He will call attention to matters in the wishes of his clients that do not comply with legal provisions or even with the principles of justice and equity. Thus he will be the counselor of the parties and the depository of their secrets. If he has exercised his office in the same place over a long period of time, he will have become acquainted with countless personal or family situations, and the experience thus gained will heighten his prestige and the value of his advice.

### **The Letter and the Spirit of the Law**

The notary, moreover, knows that any juridical declaration does not perfectly cover the given facts of a determined case. How many times is he not obliged to supply for their silence or their ambiguity! Sometimes he will not hesitate to go beyond the letter of the law in order the better to preserve its intention. For the laws themselves are not absolute; they give way to a correct and well-informed conscience, and the real man of law, whether he be a judge, a lawyer, or a notary, is known by the compe-

tence with which he interprets the texts in view of the higher good of the individuals and of the community.

### **Recourse to the Courts**

If he is adequate to his task, the notary will succeed in forestalling conflicts of interest; the document he draws up will be a clear manifestation of the wishes of the parties concerned, since they have been fully informed of their rights and duties. This will make it more easy for the court to set out in detail the obligations of both parties, if, through some deliberate fault of the contracting parties, a law suit follows. It may even be said that the notary makes every effort to render recourse to judicial authority unnecessary: by anticipating that authority's application of the law as he helps his clients to understand its scope, by inviting them to conform their intentions to it and, better still, by inspiring them with due respect for civil authority and a sincere desire for justice. For your own experience as well as the Latin adage, "*summum ius, summa iniuria*," ["the greatest right, the greatest injustice" — Ed.] are forceful reminders that he who is intent on pursuing his due, come what may, and he who pursues his claims to the extreme limits of legality has, in reality, already exceeded the limits of justice. He has lost that disposition of soul which primarily seeks concord and social peace and which — to safeguard these — prefers to accept some temporal loss.

### **Excessive Litigation**

In a recent discourse to process-servers and law officers, We called attention to something portrayed vividly by many dramatists, even in antiquity: a tendency to litigation, an exaggerated need for recourse

to a judge to settle real or imaginary differences. To refuse ever to cede any of one's rights distorts the character of the legal order. The effective agreement of the parties — concluded before anything is put down in a document whose text can always be used to unfair advantage by subtle exegesis — is, fundamentally, a union of wills, a meeting of minds with a view to effective cooperation.

### Every Contract a Compromise

The formulation of a contract or the setting down in writing of a will helps one better to foresee and determine the burdens that are accepted or to assure in a more stable way certain desired effects. There is always a certain compromise, an attempt to maintain an equal balance between the obligations of both parties and the advantages they offer. But it frequently happens, despite the best intentions of the parties concerned, that one of them suffers greater burdens or gains less profit than the other. If, at this moment, despite the absence of formal injustice, each one considers his own exclusive interest and loses the sense of common advantage which was sought in the beginning, conflict becomes inevitable.

It, therefore, devolves upon the notary, when he assists in drawing up a document, to bring out the intention which must govern every contract; namely, that of promoting a positive good which belongs by equal right to both contracting parties and which also concerns, in a large measure, the society of which they are a part. The many precautions which they themselves take and those which the law imposes on them have no other purpose than to assure this initial good will and to protect it against all else

and against itself, and not to lend support to vindictive claims that run counter to the true spirit of justice.

### The Law of Charity

It is clear that a notary who sincerely desires to preserve harmonious relations among men and to meet the new situations resulting from the evolution of social structures can contribute notably to the progress of private law. Modern techniques provide him with material aid, save him much valuable time, and relieve him from routine work. But these will never take the place of genuine knowledge of the law and that professional conscientiousness which seeks, in the legal relationships of individuals, to make the common good triumph over contractual norms which are, after all, means intended to facilitate attainment of a higher end.

This attitude can continue steadfast only if it is founded on a sincere love of neighbor, a love taught in the Gospels and of which the Gospels are a living example. In this matter there are no limits, because this God-given charity includes even the renunciation of the goods of this world, of human attachments, and of one's own life. It does not render contracts or written promises useless; it even presupposes that they are a safeguard and a precious auxiliary to human weakness. But the law of charity by no means intends that such contracts and promises be exempt from its demands.

We are convinced, gentlemen, that nothing will be of greater assistance to you in developing the sense of justice among men than the esteem and the practice of genuine charity, the object of the teachings of

*(Continued on page 165)*