

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 432
SPONSOR: Committee on Judiciary and Senator Margolis
SUBJECT: Notaries Public
DATE: January 21, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute specifically requires the Executive Office of the Governor to notify notaries public of changes in the law regarding fees, services and duties. This committee substitute prohibits any notary public from charging a fee for notarization on behalf of a military veteran, firefighter, or law enforcement officer applying for a pension or other benefit in connection with his or her public service. This committee substitute also requires notaries to maintain a journal of services provided, and subjects notaries to sanctions for failure to comply.

This committee substitute substantially amends s.117.01(2) and s. 117.05 of the Florida Statutes, and additionally creates s. 117.055 of the Florida Statutes.

II. Present Situation:

Chapter 117, F.S., governs the regulation of notaries public in Florida. The last major re-organization chapter 117, F.S., occurred in 1998. *See* ch. 1998-246, L.O.F. The Governor is authorized by statute to appoint as many notaries public as needed. A notary public must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write and understand English.

Whether a person is applying for a new commission or re-applying for a renewal or subsequent commission, an application is required. The Department of State prescribes the form to be used. The applicant or re-applicant must pay a \$25 fee plus a \$10 commission fee¹ and a \$4 surcharge. The \$4 surcharge is appropriated to the Executive Office of the Governor which is responsible for the education and assistance of notaries public. The applicant for notary public must also

¹ See s. 113.01, F.S., relating to fees for commissions issued by the Governor.

swear that he or she has read chapter 117, F.S., and knows the attendant duties and powers of a notary public. Since 2000, first-time applicants for notary public are also required to complete at least a three-hour interactive or classroom instruction, including electronic notarization, and covering the duties of the notary public. *See* ch. 2000-164, L.O.F.; s. 668.50, F.S.

Once appointed, a notary public serves a four-year term. A notary public must post and maintain a \$10,000 bond. The bond is to be payable to any individual harmed as a result of a breach of duty by the notary acting in his or her official capacity. The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida. If a surety company has to pay an individual harmed by the notary public for breach of duty, the company has to notify the Governor about the payment and the underlying circumstances leading to the claim.

A notary public must notify the Department of State of any change of address, telephone number, or criminal record within 60 days after such change. Within 60 days of a name change, the notary public must amend the commission. The notary can continue to act for 60 days or until receipt of the amended commission, whichever is earlier.

Duties of a Notary

Duties of a notary can be found primarily in chapter 117, F.S., although other statutory provisions implicate the duties of a notary public.² A notary can administer an oath or solemnize a marriage (but not via electronic solemnization) or notarize a document. A notary public must certify in the certificate of acknowledgment or jurat the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying. A notary public must reasonably accommodate persons with disabilities and read an entire instrument to a person who is blind prior to notarizing it. A notary can also notarize the signature of a person who signs with a mark under specified circumstances. A notary cannot notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization. A notary public can not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument. Section 117.107, F.S., sets out additional prohibited acts. Only one such prohibited act rises to the level of malfeasance and may result in a maximum civil penalty of \$5,000 and a third degree felony offense if a notary public notarizes a signature of a person not in the notary's presence.

A notary is required to notify the Department of State if a seal is lost, stolen, or believed to be in the possession of another person. The official seal and the certificate of notary public

² See e.g., ss. 15.15 (issuance of apostiles), 28.24 and 839.11 (fees for notary services), 116.35, 116.36, 116.37, 116.38, and 320.04 (government employees as notaries public), 92.50, 92.52, 695.03, and 92.525 (oaths), 92.51, 695.031 (administration of oaths by armed forces officers), 695.25 (notarial certificates relating to real property), 741.07 and 741.08 (solemnization of marriages), 391.23 (verification of VIN), 655.94 (certification of safe-deposit box content), 668.50 (electronic notarization), 943.10 and 316.640 (oaths by law enforcement officers), 732.503 (notarizing a self-proof will), 425.26, (notary services for rural electric cooperatives), 695.236 (recording requirements), 744.3215 (rights of mentally incapacitated), 839.25 (official misconduct), 831.01 and 831.02 (forgery), 775.082 and 775.083 (penalties under the law), 454.23 (penalties for unauthorized practice of law), 721.96, 721.97 and 721.98 (timeshare commissioner of deeds). List extracted from *Governor's Reference Manual for Notaries*.

commission are the exclusive property of the notary public, even if the employer paid for the commission. Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

With the exception of solemnizing a marriage, a notary public can not charge more than \$10 for each notarial act. No fee can be assessed for witnessing an absentee ballot.

Suspension of a Notary

As a public officer, a notary public can be suspended by the Governor for any of the grounds provided in Art. IV, sec. 7, of the *Florida Constitution*. Grounds of malfeasance, misfeasance, or neglect of duty are further specified in section 117.01(4), F.S., to include, but not be limited to:

- A material false statement on the application;
- A complaint found to have merit by the Governor;
- Failure to cooperate or respond to an investigation by the Governor's office or the Department of State regarding a complaint;
- Official misconduct as defined in s. 839.25, F.S.;
- False or misleading advertising relating to notary public services;
- Unauthorized practice of law;
- Failure to report a change in address or telephone number within the required time;
- Commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.;
- Charging fees in excess of fees authorized by law; or
- Failure to maintain the required bond.

Once the Department of State notifies a notary that his or her office is vacant, the notary must mail or deliver to the Secretary of State his or her notary commission. Notaries are expressly prohibited from surrendering these items to his or her employer upon termination, even if the employer paid for the commission.

In 1998, the Legislature enacted a law which required all electronic notarizations to be logged in a journal.³ See ch. 98-246, L.O.F.; s. 117.20 (Fla. Supp. 1998). Each notarial act memorialized in the journal had to include certain information. The journal had to be kept at least 5 years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. See s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* (State of Florida, November 2001 ed.) recommends that notaries voluntarily maintain a journal.

III. Effect of Proposed Changes:

This committee substitute amends the law governing notaries public by prohibiting a notary public from charging a fee for notarization performed for a United States military veteran

³ The provision hailed back to a recommendation that was rejected by the Legislature when first proposed by the Governor's Task Force on Notaries Public in 1989.

firefighter, police officer or sheriff's deputy applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service. The term "veteran" is defined by cross-referencing section 1.01(14), F.S., which defines a veteran as any person who served during the Spanish-American War, Mexican Border period, World Wars I and II, Korean Conflict, Vietnam Era, and the Persian Gulf War. It is not known whether the military personnel involved in the current military "attack on terror," particularly the military offensives in Iraq, would be exempt from the notary public fees as this military offensive is not currently listed in the general definition of veterans in chapter 1, F.S.

The committee substitute also creates s. 117.055, F.S., to require all notarizations to be logged sequentially on numbered pages in a journal. The notary public is required to retain the journal for at least five years after the date of the last entry. Each entry of a notarial act must include:

- The date, time, and type of notarization;
- The date, type, title, or description of the document or proceeding;
- The name, address, signature, and thumbprint of the signer or principal;
- A description of the evidence of the signer's or principal's identity; and
- The fee charged, if any.

Unlike the 1999 repealed law (s.117.20, F.S.), this committee substitute does not limit examination of the journal to the Governor's Office or the Department of State. Under this committee substitute, the notary public must allow *any person lawfully entitled to the information* in the journal to inspect an entry but the request must be made in writing and the entry must be identified specifically. The request for the entry must include the month, year, type of document or proceeding, and the name of the signer or principal.

Also unlike the 1999 repealed law, this committee substitute also does not require a notary public to report to the Governor's Office or the Department of State if the journal is lost or stolen. The committee substitute also does not require that the journal be kept sealed and under the exclusive control of the notary public.

The committee substitute provides that if a notary public fails to comply with any of the requirements associated with the notarial journal, he or she is subject to sanctions but the notary public's failure to comply will not invalidate an otherwise valid acknowledgement, jurat, or other notarial act.

Section 117.01(2), F.S., is amended to direct the Executive Office of the Governor to notify notaries public of changes in the law relating notary fees, services and duties, which conforms with the office's current duties to educate and assist notaries public.

This committee substitute provides an effective date of January 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This committee substitute implicates the public records law. The notary public is commissioned by the Governor and is a public official. As a public official, any work or materials generated in the course of his or her official business is a public record. Therefore, a notary public's notarial journal is arguably a public record. Construing the phrase "any person lawfully entitled to the journal information" as including all persons who have a constitutional and statutory right to access a public record, this provision would not violate the constitutional right of access to a public record. However, the committee substitute further proscribes that the request to the information must be preceded by a *signed*, written request and that the request must specify the entry to be seen to which inspection is limited. These limitations may impliedly create a public records exemption.

Every person has the constitutional right to access public records and meetings in connection with official business of any public body, officer, or employee of the state, or persons acting on their behalf. See Art. I, s. 24, Fla. Const. The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., to include: . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. This definition of "public records" has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980). Unless these public records are exempted by the Legislature, they are open for public inspection, regardless of their final form. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979). The State Constitution permits exemptions to open government requirements and states that these exemptions can be established by general law, provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.⁴

⁴In addition, the general law provides for a limited exemption period. The Open Government Sunset Review Act of 1995 establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3) (a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of five years. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption. Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:
 1. Allows the state or its political subdivisions to effectively and efficiently administer a

If the notarial journal is construed as a public record, then the exemption impliedly created by this committee substitute would need to be the subject of a separate bill stating the public necessity for the exemption.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This committee substitute may also implicate a right of privacy under s. 23 of Art. I of the *Florida Constitution*. Section 23 states that “every natural person has the right to be let alone and free from governmental intrusion into the person’s private life.” The committee substitute requires a notary public to enter specific details for each notarial function performed into a journal. Each journal entry information is to include the signer’s name, address, signature, and other possible identifiers. The committee substitute does not require that the journal be kept under seal or the exclusive control of the notary public. The committee substitute requires that the request specify the entry to be examined but it does not specify how and whether the notary public must protect the privacy of entries outside the scope of the request for inspection. However, the right of privacy is subservient to the right of public access under the *Florida Constitution*. See s. 23, Art. I, Fla. Const. Therefore, neither the custodian of the record or the person who is the subject of the public record can claim the right of privacy to bar inspection of a public record. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), rev. den. 589 So.2d (Fla. 1991). The personal identifying information collected would have to be made confidential or exempted from public records disclosure.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The amount of fees collected by the 435,453 state-commissioned notaries public potentially could be affected by the prohibition against fees for notarization services for veterans, firefighters and certain law enforcement officers.

governmental program, the administration of which would be significantly impaired without the exemption;

2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or

3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. The Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Military veterans, firefighters, and certain law enforcement officers could benefit from the prohibition against notary fees when applying for specified services or benefits related to insurance, public service, military pension, etc.

It is unknown what additional costs notaries public will incur as a result of the additional requirement to maintain a notarial journal. These additional costs, if any, cannot be recovered from the customer as the law currently limits the fees to be charged for notarial functions.

C. Government Sector Impact:

According to the Department of State, the fiscal impact of the committee substitute for the proposed fee elimination for veterans will range from \$2 - \$3 million collectively, whereas the fiscal impact on individual notary fees could range from \$100-200.

The Department of State is currently budgeted 4 FTE's and \$141,033 in salaries and benefits to process notary public applications and to comply with other duties related to notaries public.

As the Notary Section of the Executive Office of the Governor will be responsible for notice of legislative changes, the cost could be mitigated by incorporating notice of these changes into the existing notary training and education programs and manual. According to the interim coordinating director of the Notary Section of the Executive Office of the Governor, subject to enactment of this committee substitute, the section would update the Governor's notary public manual (2001 ed.) within two months and its website to reflect the legislative enactments. Additionally, the section would contact its approved educational providers across the state regarding the legislative enactments.

The Executive Office currently receives an annual transfer from the Department of State in excess of \$352,000 in surcharges for the education and assistance of notaries public which is deposited into the Grants and Donations Trust Fund.

	2003-2004	2002-2003
Notary:		
Salaries	\$167,392	\$171,524
OPS	28,283	28,283
Expense	150,967	151,239
OCO	12,500	12,500
Misc/RMI/HR	7,297	1,002
Total	366,439	364,548
Notary		

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
