

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 121 Notaries Public

**SPONSOR(S):** Civil Justice & Property Rights Subcommittee, Garrison and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/CS/SB 228

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**FINAL HOUSE FLOOR ACTION:** 115 Y's      0 N's      **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 121 passed the House on April 1, 2021, and subsequently passed the Senate on April 8, 2021.

Florida law considers many documents to be of such importance that they must be signed before a notary public. A notary public's function is to authenticate signatures and administer oaths on these documents, thereby preventing fraud. The notary public is responsible for determining that the person signing is who he or she states. A notary public is authorized to perform six duties:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriage;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.

Current law allows a notary public to perform notarial acts using electronic means in which the principal appears using audio-video communication technology as long as certain procedures, standards, and minimum technology requirements are met.

The bill makes several changes to Florida online notarization law. Specifically, the bill:

- Requires the Remote Online Notary (RON) platform to store the video of a notary session.
- Requires the RON platform to certify to the Florida Department of State (DOS) annually that the platform complies with Florida law.
- Directs DOS to include on its website a list of RON service providers.
- Removes a requirement that a foreign passport bear a U.S. stamp when performing an online notarization of a principal not located within the U.S.
- Prohibits a RON platform from selling its platform users' personal information.
- Allows court reporters to remotely swear in witnesses and newly admitted attorneys via audio-video communications technology.
- Clarifies that the principal does not need to satisfy a knowledge-based authentication and credential analysis if the online notary personally knows the principal.
- Distinguishes notary fees from the RON platform's fees, and clarifies that the platform's services are not "closing services."
- Clarifies that although an online notary may select the RON provider and no person can require the notary to use a particular RON service provider, an employer who requires online notarizations may require the online notary public employee to use of a particular RON service provider.

The bill will likely have a fiscal impact on state government; but does not appear to have a fiscal impact on local governments.

The bill was approved by the Governor on June 21, 2021, ch. 2021-137, L.O.F., and will become effective on January 1, 2022.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### Notary Public

The law considers many documents to be of such importance that they must be signed in the presence of a notary public. The notary's function is to authenticate signatures and administer oaths on these documents, thereby preventing fraud. The notary public is responsible for determining that the person signing is who he or she states.<sup>1</sup> A notary is authorized to perform six duties:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriage;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.<sup>2</sup>

A notary must be at least 18 years old, maintain legal residence in Florida, and possess the ability to read, write, and understand English. The notary public application must be signed and sworn by the applicant and accompanied by the fee and proof of a bond<sup>3</sup> required by law. The application for appointment must include a \$25 fee, a \$10 commission fee,<sup>4</sup> and a \$4 surcharge which is used for notary education and assistance.<sup>5</sup> The bond must be for at least \$7,500, payable to any individual harmed as a result of a breach of duty by the notary.<sup>6</sup>

A notary applicant must also take an oath following the application process. As part of the oath, the applicant must swear that he or she has read the statutes relating to notaries public and knows a notary public's responsibilities, limitations, and powers.<sup>7</sup> Once appointed, a notary may serve for four years. No person may be automatically reappointed as a notary; the application process must be completed regardless of whether an applicant has previously served as a notary.<sup>8</sup>

When notarizing a signature, a notary public must complete a notarial certificate for an oath, affirmation, or an acknowledgment.<sup>9</sup> Current law provides notaries with a form certificate to use in substantially the same form.<sup>10</sup> The certificate of acknowledgement must contain the following items:

- The venue stating the location of the notarization;
- The type of notarial act performed;
- A statement that the signer personally appeared physically before the notary public or by online notarization at the time of the notarization;
- The exact date of the notarial act;

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<sup>1</sup> National Notary Association, Inc., *What is a Notary Public?* <https://www.nationalnotary.org/knowledge-center/about-notaries/what-is-a-notary-public> (last visited May 4, 2021).

<sup>2</sup> Florida Governor's Office, *Duties of a Notary Public* (Dec. 13, 2016), [https://www.flgov.com/wp-content/uploads/Notary\\_Reference\\_Manual\\_12.13.16.pdf](https://www.flgov.com/wp-content/uploads/Notary_Reference_Manual_12.13.16.pdf) (last visited May 4, 2021).

<sup>3</sup> A notary bond is a three-party obligation. A bonding company guarantees to the Florida Department State that it will pay, on behalf of a commissioned Florida notary, any losses incurred by the public up to \$7,500 during the notary's commission term. The bonding company will then demand reimbursement from the notary in the event of such paid losses. American Association of Notaries, *Florida Notary Bond*, <https://www.floridanotaries.com/florida-notary-bond#:~:text=A%20notary%20bond%20is%20a,during%20the%20notary's%20commission%20term> (last visited May 4, 2021).

<sup>4</sup> A \$10 fee is prescribed for each Governor-issued commission of an elected officer or a notary public. S. 113.01, F.S.

<sup>5</sup> S. 117.01, F.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> S. 117.05(4), F.S.

<sup>10</sup> S. 117.05(12), F.S.

- The name of the person whose signature is being notarized;
- The type of identification the notary public is relying upon;
- The notary's official signature;
- The notary's name, typed, printed, or stamped below the signature; and
- The notary's official seal<sup>11</sup> affixed below or to either side of the notary's signature.<sup>12</sup>

### *Electronic Notarization and Electronic Records*

Any document requiring notarization may be notarized electronically. When notarizing a document electronically, a notary public must use an electronic signature that is:

- Unique to the notary public;
- Capable of independent verification;
- Retained under the notary public's sole control; and
- Attached to or logically associated with the electronic document so that any subsequent alteration to the electronic document displays alteration evidence.<sup>13</sup>

When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains the minimum information specified.<sup>14</sup> An electronic signature is any letters, characters, or symbols, manifested by electronic means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included, is attached to or logically associated with the signature or record.<sup>15</sup> In performing an electronic notarial act, a notary must reasonably ensure the security, reliability, and uniformity of electronic notarizations. To this end, the notary may use an authentication procedure such as a password, token, card, or biometric to protect access to the notary's electronic signature or the means for affixing the signature.<sup>16</sup>

### Remote Notarization

A notary public may complete a registration as an online notary public with the Florida Department of State (DOS) if he or she:

- Holds a current:
  - Commission as a notary public;
  - Appointment as a civil-law notary;<sup>17</sup> or
  - Appointment as a commissioner of deeds;<sup>18</sup>
- Submits a copy of such commission or proof of such appointment with the registration;
- Certifies that the notary public, civil-law notary, or commissioner of deeds registering as an online notary public has completed a course covering the online notary public duties, obligations, and technology requirements;
- Pays a notary public registration fee;<sup>19</sup>

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<sup>11</sup> The notary seal must be a rubber stamp and include the words "Notary Public—State of Florida"; it must also include the name of the notary public, the date of expiration of the notary's commission, and the commission number.

<sup>12</sup> S. 117.05(12), F.S.

<sup>13</sup> S. 117.021, F.S.

<sup>14</sup> *Id.*

<sup>15</sup> S. 668.50(11)(a), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> A civil-law notary is 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. S. 118.10, F.S.

<sup>18</sup> A commissioner of deeds is a person appointed by the Governor to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any territory of the United States outside the 50 states. S. 721.97, F.S.

<sup>19</sup> S. 113.01, F.S.

- Identifies the Remote Online Notary (RON) service provider<sup>20</sup> whose audio-video communication and identity proofing technologies the registrant intends to use for online notarizations, and confirms that such technology and processes satisfy statutory requirements;
- Provides evidence that the registrant has obtained a \$25,000 bond, payable to any individual harmed as a result of the registrant's breach of duty as an online notary public; and
- Provides evidence that the registrant acting in his or her capacity as an online notary public is covered by a minimum \$25,000 errors and omissions insurance policy.<sup>21</sup>

An online notary public may perform any function as an online notarization authorized under ch. 117, F.S., excluding solemnizing matrimony rites.<sup>22</sup> If a notarization requires a principal<sup>23</sup> to appear before the online notary public, the principal may appear by means of audio-video communication technology.

An online notary public may perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, as long as the notary public is physically located in Florida while performing the online notarization.<sup>24</sup>

An online notary public is subject to both the general notarization and electronic notarization provisions.<sup>25</sup> An online notary may charge up to \$25 for notarizing a document online, in addition to fees allowable for in-person notarial acts.<sup>26</sup>

### *Technology Standards for Online Notarization*

Florida law establishes minimum requirements for online notarization technology standards:

- *Identity proofing:*<sup>27</sup> The security characteristics, at a minimum, must present the principal with five or more questions with a minimum of five possible answer choices per question. Each question must be:
  - Drawn from a third-party provider of public and proprietary data sources;
  - Identifiable to the principal; and
  - Subjected to a two-minute time constraint, with the principal answering at least 80 percent correct.<sup>28</sup>
- *Credential analysis:*<sup>29</sup> An online notary must use commercially available credential analysis automated software or a hardware process that:
  - Is consistent with sound commercial practices;
  - Aids the notary public in verifying the authenticity of the credential to ensure it is not fraudulent or inappropriately modified; and
  - Uses information held by the issuing or authoritative agency to confirm the validity of credential details.<sup>30</sup>
- *Audio-video communication technology:*<sup>31</sup> The technology must:
  - Be secure from interception or access by anyone other than the participants communicating; and

<sup>20</sup> A RON service provider is a person that provides audio-video communication technology and related processes, services, software, data storage, or other services to online notaries public for the purpose of directly facilitating their performance of online notarizations.

<sup>21</sup> S. 117.225, F.S.

<sup>22</sup> S. 117.209, F.S.

<sup>23</sup> A principal is an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who takes an oath or affirmation from the online notary public.

<sup>24</sup> S. 117.209, F.S.

<sup>25</sup> S. 117.235, F.S.

<sup>26</sup> S. 117.275, F.S.

<sup>27</sup> Identity proofing is a process by which a third party confirms the identity of an individual through use of public or proprietary data sources, which may include knowledge-based authentication or biometric verification. S. 117.201, F.S.

<sup>28</sup> S. 117.295, F.S.

<sup>29</sup> Credential analysis is a process by which a third party aids a public notary in affirming the validity of a government-issued identification credential and data thereon through review of public or proprietary data sources. S. 117.201, F.S.

<sup>30</sup> S. 117.295, F.S.

<sup>31</sup> Audio-video communication technology is technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another. S. 117.201, F.S.

- Provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and to confirm the identity of the principal.<sup>32</sup>

With respect to electronic notarization, a notary must include access protection to a signature through use of passwords or codes under the notary's control. The notary may not allow another person to use the notary's electronic journal, seal, or signature. Notaries must also reasonably ensure that any device used to create their electronic signature is current and secure.<sup>33</sup>

#### *Online Notarization Procedures*

In performing an online notarization, an online notary public must verify the identity of a principal at the time the signature is taken by using audio-video communication technology. The notary must record the entire audio-video conference session between the notary public and the principal and any subscribing witnesses. A principal may not serve as a witness for an online notarization.<sup>34</sup>

In performing an online notarization for a principal not located in the state, an online notary must confirm that the principal desires for the notarial act to be performed by a Florida notary public and under Florida law. An online notary public must confirm the identity of the principal and any witness by personal knowledge, or by:

- Remote presentation of a government-issued identification credential by each individual;
- Credential analysis of each government-issued identification credential; and
- The identity proofing of each individual, in the form of knowledge-based authentication or another legal method of identity proofing.<sup>35</sup>

If an online notary fails to comply with the online notarization procedures, such failure does not automatically impair the validity of the notarial act or the electronic record. However, such failure may be introduced as evidence to establish violations of ch. 117, F.S., or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes.<sup>36</sup>

#### *Electronic Journal and Electronic Records*

An online notary must keep a secure electronic journal of electronic records he or she has notarized.<sup>37</sup> For each online notarization, the electronic journal entry must contain the:

- Date and time of the notarization;
- Type of notarial act;
- Type, title, or description of the electronic record or proceeding;
- Identity evidence for each principal involved in the transaction or proceeding;
- Indication that the principal passed the identity proofing;
- Indication that the government-issued identity credential satisfied the credential analysis; and
- Fee charged for the online notarization.<sup>38</sup>

Identity evidence for each principal may be a:

- Statement that the person is personally known to the online notary public; or
- Notation of the type of identification document provided to the online notary public.<sup>39</sup>

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<sup>32</sup> S. 117.295, F.S.

<sup>33</sup> Ss. 117.021 and 117.225, F.S.

<sup>34</sup> S. 117.265, F.S.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> S. 117.245, F.S.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

An online notary public must retain an unedited and uninterrupted recording of a remote notarization audio-video communication, which must include:

- Appearance by the principal and each witness before the online notary public;
- Identity confirmation of the principal and each witness;
- A general description of the records to be signed;
- A principal's declaration that his or her signature is knowingly and voluntarily made; and
- All of the actions and spoken words of the principal, notary public, and each required witness during the entire online notarization.<sup>40</sup>

The notary must attach or logically associate the electronic signature and seal to the electronic notarial certificate of an electronic record in a manner capable of independent verification using tamper-evident technology.<sup>41</sup> The electronic journal and backup record of such must be maintained for at least 10 years after the date of the notarial act. A notary must immediately notify an appropriate law enforcement agency and DOS of the electronic journal, electronic signature, or electronic seal's unauthorized use.<sup>42</sup>

## Effect of the Bill

The bill makes several changes to Florida online notarization law. First, the bill requires the RON platform to store the video of a notary session, but requires that the notary ensure the recording includes the required elements of the online notarization session. This shifts the duty to preserve and store the recording of the online notarization session from the notary public to the RON service provider. The bill also requires the RON platform to certify to DOS annually that the platform complies with Florida law.

The bill also:

- Directs DOS to include on its website:
  - A list of each online notary public;
  - The online notary public's past and present RON service providers; and
  - The effective dates during which the online notary public used each RON service provider.
- Removes a requirement that a foreign passport must bear a U.S. stamp during an online notarization of a principal not located within the U.S.
- Prohibits a RON platform from selling personal information of platform users.
- Authorizes a RON service provider to use personal information obtained as part of an online notarization to:
  - Administer or process a related record;
  - Respond to a lawful request from a law enforcement or regulatory agency;
  - Monitor and improve its RON services;
  - Detect fraud, identity theft, or other criminal activities; or
  - Dissolve or cease business operations.
- Clarifies that the principal does not need to satisfy a knowledge-based authentication and credential analysis if the online notary personally knows the principal.
- Distinguishes notary fees from the RON platform's fees, and clarifies that the platform's services are not "closing services."<sup>43</sup>
- Allows court reporters to remotely swear in witnesses and newly-admitted attorneys via audio-video communications technology.

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<sup>40</sup> *Id.*

<sup>41</sup> S. 117.255, F.S.

<sup>42</sup> *Id.*

<sup>43</sup> "Closing services" are services performed by a licensed title insurer, title insurance agent or agency, or attorney agent in the agent's or agency's capacity as such, including preparing documents to close a transaction, conducting the closing, or handling the disbursing of funds related to a real estate closing transaction in which a title insurance commitment or policy is to be issued. S. 627.7711, F.S.

- Clarifies that although an online notary must select the RON provider and no person may require the notary to use a particular provider, an employer who requires online notarizations may require the online notary public employee to use of a particular RON service provider.
- Clarifies that a notary may enter into a contract that requires the use of a particular RON service provider.
- Clarifies that access to, or a copy of, the audio-video communication record must be provided without charge if requested by any of the following parties within the 10-year record retention period:
  - A party to the electronic record;
  - A title agent, settlement agent, or title insurer who insured the electronic record or engaged the online notary public;
  - DOS pursuant to an investigation relating to online notary misconduct;
  - The qualified custodian of an electronic will notarized by the online notary public;
  - The online notary public performing the online notarization; or
  - With respect to electronic copies of a given series of related electronic records, the RON service provider used for the online notarization of those records.
- Allows a RON service provider to delegate to a secure repository its duty to maintain the recordings of online notarization sessions and requires all delegations to be reported to DOS.
- Requires an online notary public applicant to provide DOS with his or her notary commission or appointment number.

The bill provides an effective date of January 1, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

According to DOS, this bill will likely have an indeterminate fiscal impact. The bill will likely require additional funding to update DOS's current technology system to maintain and publish a listing of each online notary public's RON service providers.<sup>44</sup>

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

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<sup>44</sup> Florida Department of State, Agency Analysis of 2021 SB 228, p. 5 (Jan. 27, 2021).

