

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 228

INTRODUCER: Judiciary Committee, Commerce and Tourism Committee, and Senator Bradley

SUBJECT: Notaries Public

DATE: February 17, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|---------------|
| 1. | <u>Harmsen</u> | <u>McKay</u> | <u>CM</u> | <u>Fav/CS</u> |
| 2. | <u>Ravelo</u> | <u>Cibula</u> | <u>JU</u> | <u>Fav/CS</u> |
| 3. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 228 provides updates to the recently created process for online notarizations in ch. 117, F.S. In part, the bill:

- Institutes a self-certification requirement for remote online notarization service providers to ensure their eligibility to assist with the provision of notary services;
- Transfers specific duties from online notaries public to their remote online notarization service providers;
- Requires the Department of State to publish information about active and inactive online notaries public and remote online notarization service providers;
- Permits online notaries to rely on a foreign passport of an individual who is currently outside of the borders of the United States to perform an online notarization;
- Implements privacy requirements for personally identifying information given during an online notarization;
- Provides several clarifications and technical updates to the process of online notarizations provided for in ch. 117, F.S.; and
- Allows for remote swearing in of witnesses for court proceedings and attorney admission to The Florida Bar.

The bill takes effect on January 1, 2022.

II. Present Situation:

In 2019, the Legislature substantially amended ch. 117, F.S., to authorize notaries public, civil-law notaries, and commissioners of deeds to register as online notaries to provide online notary services through two-way, remote audio-visual communication technology, similar to skype and zoom.¹

Florida is one of 29 states that permits remote online notarization (RON).² Virginia was the first to enact a RON law in 2012,³ and the proposed SECURE Act in Congress would permit all current notaries public appointed in the U.S. to perform RON in connection with interstate transactions.⁴ Additionally, RON has been expanded through federal agency guidance, state emergency powers, and specific court administrative orders to allow necessary business to continue during the COVID-19 pandemic.⁵ The Florida Supreme Court issued an administrative order that permits notaries and all other parties qualified to administer oaths in Florida to swear a witness remotely by audio-video communication technology from a location within the State of Florida.⁶

Online Notaries Public in Florida

The Department of State (department) governs the registration of online notaries public (online notaries), and as a prerequisite, requires registrants to:⁷

- Be commissioned or appointed as a notary public pursuant to ch. 117, F.S., a civil-law notary under ch. 118, F.S., or a commissioner of deeds under part IV of ch. 721, F.S.;
- Complete training that covers the duties, obligations, and technology requirements for serving as an online notary;
- Pay a \$10 notary public registration fee;
- Have a current contract with a RON service provider whose technologies and credentialing processes satisfy the statutory minimum requirements; and

¹ Chapter 2019-71, L.O.F. CS/CS/HB 409 (2019) was signed into law on June 7, 2019, and took effect on January 1, 2020.

² M.H.K. Tank, D. Whitaker, E.S.M. Caires, A. Grant, *Coronavirus: Federal and State Governments Work Quickly to Enable Remote Online Notarization to Meet Global Crisis*, DLAPiper Publications (Jan. 4, 2021), available at https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/#:~:text=Currently%2C%20there%20are%2028%20states,Dakota*%2C%20Tennessee%2C%20Texas%2C (last visited Jan. 25, 2021).

³ Lauren Silverman, *Notaries are Starting to Put Down the Stamp and Pick Up a Webcam*, National Public Radio, All Tech Considered (June 12, 2017), <https://www.npr.org/sections/alltechconsidered/2017/06/12/532586426/notaries-are-starting-to-put-down-the-stamp-and-pick-up-a-webcam> (last visited Jan. 25, 2021). See Office of the Secretary of the Commonwealth of Virginia, Notary Public Division, *A Handbook for Virginia Notary Publics*, <https://www.governor.virginia.gov/media/governorvirginiagov/secretary-of-administration/Virginia-Remote-Online-Notarization-Guidance.pdf> (last visited Jan. 25, 2021).

⁴ Tank, et al. *supra* note 2. Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020, S.B. 3533, 116th Cong. (2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/3533/text?q=%7B%22search%22%3A%5B%223533%22%5D%7D&r=4&s=2> (last visited Jan. 25, 2021).

⁵ Tank, et al. *supra* note 2.

⁶ Florida Supreme Court, *In Re: COVID-19 Emergency Procedures for the Administering of Oaths via Remote Audio-Video Communication Equipment*, Fla. Admin. Order No. AOSC20-16, (Mar. 18, 2020) available at <https://www.floridasupremecourt.org/content/download/632105/file/AOSC20-16.pdf> (last visited Jan. 25, 2021).

⁷ Section 117.225, F.S.; Fla. Admin. Code, R. 1N-7.001 (2020). See also, Department of State, *Remote Online Notary Public*, <https://dos.myflorida.com/sunbiz/other-services/notaries/remote-online-notary-public/> (last visited Jan. 25, 2021).

- Maintain a \$25,000 bond and a current errors and omissions insurance policy.

As of January 2021, 6,278 online notaries have registered with the department.⁸

An online notary can administer oaths or affirmations, take acknowledgements, attest to photocopies, verify vehicle identification numbers, and certify the contents of a safe-deposit box. The online notary must perform the notarial service from Florida, but the individual who seeks the notarial service (principal) and any witnesses can login to the RON platform from anywhere in the world. An online notary may charge a fee of no more than \$25 for performing a notarial service.⁹

Online notaries differ from notaries public in that they may use audio-visual technology to notarize a document for a principal who is in a different physical location; a notary public must be physically present with the principal to notarize a document. Additionally, although notaries public can solemnize marriages, an online notary cannot.¹⁰

Remote Online Notarization (RON) Service Providers

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 to facilitate their performance of online notarizations.¹¹ More concretely, a RON service provider hosts a platform that provides the audiovisual technology that allows the notary and signer to see, hear and communicate with each other over the internet.¹²

Online Notarization

To perform an online notarization service, an online notary must first determine whether the principal is located outside of Florida at the time of notarization. If so, the online notary must confirm that the principal understands that the notarization will occur according to Florida law.

Next, the online notary must confirm the principal's identity.¹³ An online notary may do so by documenting that he or she personally knows the principal, or, if the notary does not know the principal, by documenting all of the following:

- The principal's remote presentation of a government-issued identification;¹⁴

⁸ E-mail from Department of State staff (Jan. 13, 2021) (on file with the Senate Committee on Commerce and Tourism).

⁹ Section 117.275, F.S.

¹⁰ Section 117.209(1), F.S.

¹¹ Section 117.201(14), F.S.

¹² David Thun, The National Notary Magazine, *The State of Remote Online Notarization* (Nov. 19, 2019), available at <https://www.nationalnotary.org/notary-bulletin/blog/2019/11/the-state-of-remote-online-notarization> (last visited Jan. 25, 2021).

¹³ Section 117.265(4), F.S.

¹⁴ Section 117.05(5)(b)2 lists acceptable identification as: Florida identification card or driver license; a U.S. passport; a passport issued by a foreign government if it is stamped by the U.S. Bureau of Citizenship and Immigration Services; a driver license or id card issued by a state other than Florida, or a territory in the U.S., Canada, or Mexico; an id card issued by the U.S. armed forces; a veteran health id card; an inmate id card issued by if the principal is still in the Florida Department of Correction's or U.S. Department of Justice's custody; an id card issued by the U.S. Bureau of Citizenship and Immigration Services; or, where all of the inmate's identifications were confiscated upon his or her confinement—a sworn, written statement from a law enforcement officer that states that the inmate is the person whose signature is to be notarized.

- The notary's credential analysis¹⁵ of the identification to ensure its validity; and
- The notary's identity proofing¹⁶ of the principal, wherein a third-party provides knowledge-based authentication questions that must be correctly answered by the principal in a limited amount of time.

If the notary cannot document these steps, then he or she is not permitted to perform the online notarization.

Should the online notarization also require a witness, the online notary must confirm the witness' identity.¹⁷ If the witness is physically present with the principal, he or she can confirm his or her identity by stating his or her name and current address on the recording. If the witness is connected via audio-visual communication technology (outside of the principal's presence), the online notary must confirm the witness' identity by presentation of government-issued identification and performance of a credential analysis and identity proofing, as required for the principal.

After the notary succeeds in confirming the pertinent identities, the notary may witness the principal electronically sign the document. Then the notary adds his or her unique electronic signature and digital notary seal using tamper-evident technology that would document any subsequent change to the document.¹⁸

For all online notarizations, an online notary must:

- Make and maintain a recording of the audio-visual component (video) of the notarization, including the credential analysis and identity proofing he or she performed, if any;¹⁹ and
- Create an entry in his or her electronic journal of notarizations that notes specific information about the notarization, including types of identification used and the names and addresses of all parties involved.²⁰

The online notary must maintain both the electronic journal and the recordings for at least 10 years after the notarization. An online notary, his or her estate, or guardian may transfer these documents to a secure repository should he or she become incapable of maintaining them before the 10 years have elapsed.²¹

III. Effect of Proposed Changes:

Section 117.021, F.S., currently grants a notary public the right to perform notarial acts, with respect to an electronic record, with whatever form of technology he or she chooses. **Section 1** amends s. 117.021, F.S., to accommodate an employer's requirement that a notary public who performs notarial acts as a part of his or her job use technology chosen by the employer within the scope of employment or as provided by a contract. This allows a business to standardize its

¹⁵ Section 117.201(3), F.S. *See also*, s. 117.295(3)(b), F.S.

¹⁶ Section 117.201(7), F.S. *See also*, s. 117.295(3)(a), F.S.

¹⁷ Section 117.285, F.S.

¹⁸ Section 117.255, F.S. *See also*, Silverman *supra* note 3.

¹⁹ Section 117.245(2), F.S.

²⁰ Section 117.245(1), F.S.

²¹ Section 117.245(4), F.S.

services and contracts. The notary public's right to use his or her preferred technology outside of the scope of any contract or employment is not changed by this amendment.

Section 2 amends s. 117.05, F.S., to make the language of the fee ceiling for a single notarial act consistent with the language regarding the fee ceiling for an online notarial act in s. 117.275, F.S. This is a technical amendment.

Section 3 amends s. 117.201, F.S., to permit an online notary to use a passport issued by a foreign government that *does not* include an immigration stamp from the U.S. Bureau of Citizenship and Immigration services to validate a principal's identity. This accommodates online notarizations where the principal has not entered the United States, and appears via audio-visual technology for the notarization.

Section 4 amends s. 117.225, F.S., regarding requirements for a notary public, civil-law notary, or commissioner of deeds to register as an online notary public. The bill requires these registrants to provide the Department of State with their notary commission or appointment number as opposed to the current broad standard of "proof" of their commission. This change eliminates the possible need for rule-making regarding this section.

Section 5 amends s. 117.231, F.S., to allow for a notary public to use audio-visual technology to swear in individuals who are testifying during any court proceeding, deposition, arbitration, or public hearing when they are outside the physical presence of the notary. When the individual is located outside of the state, consent must be obtained to take his or her oath using audio-visual technology.

The bill also allows for a notary to administer the oath of admission for The Florida Bar using audio-visual communication for an individual outside the physical presence of the notary.

A notary is not required to be an online notary or use an RON service provider when performing notarial acts under this section.

Sections 6 and 7 amend ss. 117.245 and 117.255, F.S., to transfer the duty to maintain a recording of the audio-video communication in which an online notarization was performed from the online notary to the RON service provider used for the services. The online notary, however, is still required to ensure that that recording includes:

- The appearance of the principal and any witness before the online notary public;
- Confirmation of the identity of the principle and any witness;
- A general description or identification of the records to be signed;
- Recitation by the online notary public of information sufficient to identify the notarial act;
- A declaration by the principal that his or her signature on the record is knowingly and voluntarily made; and
- Any of the actions and spoken words of the principle, notary public, and any required witnesses during the entire online notarization.

The RON service provider must keep a copy of the recording for at least 10 years, but may delegate this duty by contract to a secure repository provided that the Department of State is

notified of such delegation of retention duties within 30 days. The effective date of such a delegation must be reported to the Department of State.

The bill also extends the duty to provide access to the RON service provider's stored recordings, or a copy thereof, to specific parties upon their request. The bill permits the RON service provider to charge a fee of no more than \$20 for producing a copy of the recording, and requires disclosure of the fee in a timely manner. The bill clarifies that certain parties are exempt from the \$20 production fee during the 10 year period that the audio-video recording is retained by the RON service provider.

Section 6 is also reorganized to clarify an online notary's duty to note in his or her electronic journal that a principal's government-issued identification satisfied the credential analysis only when the online notary relied on a principal's identification to prove his or her identity, not in cases where the online notary personally knew the principal.

Section 8 amends s. 117.265, F.S., to offer an accommodation to employers of online notaries to allow them to specify which RON service provider the online notary may use in his or her capacity as an employee, similar to the change made for notary public employers in section 1 of the bill. This amendment also reiterates that an online notary public may choose to use any RON service provider outside of his or her employment relationship.

Section 9 amends s. 117.275, F.S., to specify that the \$25 fee ceiling for an online notarial act does not govern fees charged by a RON service provider, and clarifies that online notarization services are not considered closing services, as defined in s. 627.7711, F.S., regarding title insurance.

Section 10 amends s. 117.295, F.S., to create a process whereby RON service providers must certify with the department that they are eligible, pursuant to statute and rule, to provide audio-visual communication and related processes for assistance in the provision of online notarization services. These self-certifications remain active for a period of one year from the date of filing.

While these eligibility requirements exist in current statute, the duty to confirm the RON service provider's eligibility rests with the online notary at the time of his or her registration. **Section 4** deletes the online notary's duty to confirm a RON service provider's eligibility in s. 117.225(5), F.S., thereby completing the transfer of RON service provider eligibility certification from online notary to RON service provider.

Section 10 further amends s. 117.295, F.S., to require that the department publish on its website both a list of each online notary public, his or her past and present RON service providers, and the effective dates during which the online notary used the RON service provider; and a list of all RON service providers who have an active self-certification with the department. The bill requires the department to have the above information from January 1, 2022, and thereafter, and does not apply retroactively. Thus, any RON service providers used in the past by an online notary public, for example, would not need to be published on the website unless it is used again by the online notary public on or after January 1, 2022.

The bill deletes the department's emergency rulemaking, but retains the department's rulemaking authority intact to permit further rulemaking to implement remote online notarizations in Florida.

Lastly, section 10 implements privacy standards that prohibit a RON service provider from using, selling, or offering to sell or transfer for use or sale any personally identifying information that it obtained under part II of ch. 117, F.S., from a principal, witness, or person named in a record that was presented for notarization, except in cases where provision of the information is necessary to:

- Facilitate the notarial act;
- Administer or process a record provided by or on behalf of a principal or the transaction for which the record was provided;
- Comply with federal, state, or local law, or to comply with a lawful subpoena or court order;
- To monitor and improve the audio-video communication technology and related processes, services, software, data storage, or other services offered by the RON service provide to the online notaries public for the purpose of directly facilitating their performance of online notarizations; or
- Engage in the sale, merger, transfer, or exchange of all or a portion of the RON service provider's business—if the transferee agrees to comply with the statutory privacy restrictions in this same provision of law.

Section 11 provides that the bill takes effect on January 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill appears to codify language from a recent Florida Supreme Court Administrative Order which was executed in relation to the COVID-19 pandemic to allow for remote

administrations of oaths and swearing in of witnesses.²² The bill also allows a notary to issue the oath of admission to The Florida Bar remotely.

The Supreme Court has exclusive jurisdiction over the procedural rules of the Florida courts.²³ The Florida Evidence Code, for example, contains both procedural and substantive laws for the courts to apply. However, rules of that are procedural in nature, even if passed by the Legislature, must be approved by the Supreme Court. Occasionally, the Court has rejected legislative changes. In 2000, for example, the Court refused to adopt a recently enacted hearsay exception, noting that the application of the statute would go against long standing rules of evidence.²⁴ A concurring opinion by Justice Lewis also found that the statute was an unacceptable rule of procedure, and therefore infringed on the Court's ability to adopt rules.

The Court likewise has exclusive jurisdiction over attorney regulations and admission to the Florida Bar.²⁵ Thus, the Court may have the power to reject any oath of admission conducted remotely if it repeals or changes its Administrative Order.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

RON service providers may have to update terms and processes to implement the privacy restrictions in this bill.

C. Government Sector Impact:

The Department of State will be required to implement processes to publish and maintain lists of RON service providers and online notaries. It currently maintains a list of notaries public, their commission number, and their commission's expiration date—but does not currently indicate whether a notary public is registered as an online notary public.²⁶ The department states that this duty to publish additional information regarding online notaries public and RON service providers will “have a significant impact on its current technology systems. ... [and] will require additional funding and may require additional deliverables and/or timeframe be added to the COTS [commercial-off-the-shelf business registry system] contract in progress.” The department therefore “request[s] additional

²² Florida Supreme Court, *Supra* note 6.

²³ Art V, s. 15, Fla. Const.

²⁴ *In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339, 341 (Fla. 2000). The statute in question stripped the former testimony of witnesses' hearsay exception of the requirement that the witness be unavailable.

²⁵ Art V, s. 2(a), Fla. Const.

²⁶ Department of State, *Approved Notaries*, <https://dos.myflorida.com/sunbiz/other-services/notaries/remote-online-notary-public/approved-notaries/> (last visited Jan. 25, 2021).

funding and FTE positions in order to perform the additional processing duties, responsibilities and services specified in the bill.”²⁷

The department also “suggests a fee for the RON service provider to file the self-certification.”²⁸ It is unclear if the department suggests this fee to defray costs related to the publication of information required under the bill. Additionally, the department may have to adopt forms or rules to implement the certification of RON service providers.

The bill codifies language from a recent Florida Supreme Court Administrative Order which was adopted in relation to the COVID-19 pandemic to allow for remote swearing in of witnesses and newly admitted attorneys.²⁹ The Administrative Order may be rescinded by the Court at any time, possibly as soon as health guidelines make it feasible to allow daily in person court to resume. By codifying this language in statute, the bill may have a positive impact on courtroom efficiency by allowing remote swearing in to continue after the COVID-19 pandemic.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 117.021, 117.05, 117.201, 117.215, 117.225, 117.245, 117.255, 117.265, 117.275, and 117.295.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on February 15, 2021:

- Revises the notary and online notary fee ceilings to be applicable “per notarial act” as opposed to “per signature”;
- Allows a notary to swear in witnesses and newly admitted attorneys via audio-video technology;
- Allows a remote online notary to delegate his or her duty to maintain records of online notarization sessions to a secure repository in a similar method as an online notary currently can with their electronic journal;

²⁷ Department of State, *Senate Bill 228 Agency Analysis*, p. 5 (Jan. 7, 2021) (on file with the Senate Committee on Commerce and Tourism).

²⁸ *Id.*

²⁹ Florida Supreme Court, *Supra* note 6.

- Clarifies that while a remote online notary service provider is responsible for maintaining the records of the notarization session, the notary himself or herself are actually responsible for ensuring that the notarization is compliant;
- Clarifies when a remote online service provider may use, sell, or transfer the personal information obtained as part of a notarial act; and
- Delays the effective to January 1, 2022 from October 1, 2021.

CS by Commerce and Tourism on January 25, 2021:

- Deletes “interim and emergency” rulemaking to implement provisions of the bill, but leaves the department’s general rulemaking authority intact;
- Requires RON service providers to self-certify each year instead of every two years; and
- Deletes the requirement that a RON service provider submit a new self-certification after each amendment to ch. 117, F.S., and any rules adopted pursuant thereto.

B. Amendments:

None.