

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: SB 1042

INTRODUCER: Senator Brandes

SUBJECT: Notaries Public

DATE: January 30, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	Pre-meeting
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____

I. Summary:

SB 1042 permits a notary public to register to provide online notarizations to people both in and out-of-state using audio/video technology. A notary public seeking to provide online notarizations must still qualify, be appointed and commissioned by the Governor, and be governed by the traditional provisions set forth in chapter 117, F.S. However, the bill divides chapter 117, F.S., into two parts and creates Part II, which sets forth the requirements for those notaries who also want to register with the Governor to provide online notarizations.

The bill requires that any notary public registered for and offering online notarizations carry a one million dollar insurance policy to protect against errors and omissions in addition to being bonded. The bill also gives rule-making authority to the Governor and the Agency for State Technology to refine the types of “identity proofing” technology notary publics are required to use to verify a person’s identity remotely. Additionally, notaries offering online services must take the upmost care in maintaining online security, particularly over their electronic journal, electronic signature, and electronic seal.

II. Present Situation:

Notary Publics in Florida

A notary public is a public officer under the Florida Constitution,¹ and “and an impartial agent of the State.”² “[I]n the performance of his or her duties, [a notary public] exercises a delegation of the State’s sovereign power as in attesting the genuineness of any deeds or writings in order to

¹ Art. II, s. 5, FLA. CONST.

² 58 AM. JUR. 2D Notaries Public § 1.

render them available as evidence of the facts therein contained and in administering oaths and attesting to the authenticity of signatures.”³

As a public officer, notary publics are constitutionally required to give a bond (as required by law) and swear or affirm to uphold the Constitutions of the United States and Florida.⁴ Notary publics are appointed and commissioned by the Governor to four-year terms,⁵ and are authorized under Florida law to perform six basic duties:⁶

- Administer oaths or affirmations;⁷
- Take acknowledgments[;]⁸
- Solemnize marriages[;]⁹
- Attest to photocopies[;]¹⁰
- Verify vehicle identification numbers (VINs)[;]¹¹ [and]
- Certify the contents of a safe-deposit box[.]¹²

Importantly, a notary may only exercise the foregoing duties within the physical boundaries of the State of Florida.¹³ Generally, a notary may not charge more than \$10 per notarial act and may not charge a fee for notarizing a vote-by-mail ballot.¹⁴

A notary public may provide an electronic signature that is unique, verifiable, under the notary’s sole control, and attached to a document in a way revealing any subsequent alteration.¹⁵ When a signature must be accompanied by a notary public seal, the requirement is met when the notary public includes his or her full legal name, the words “Notary Public State of Florida,” the expiration date of the notary’s commission, and the notary’s commission number.¹⁶ The seal may

³ *Id.* (footnotes omitted). See also BLACK’S LAW DICTIONARY (10th ed. 2014) (“The notary public, or notary, is an official known in nearly all civilized countries. The office is of ancient origin. In Rome, during the republic, it existed, the title being *tabelliones forenses*, or *personae publicae*; and there are records of the appointment of notaries by the Frankish kings and the Popes as early as the ninth century. They were chiefly employed in drawing up legal documents; as scribes or scriveners they took minutes and made short drafts of writings, either of a public or a private nature. In modern times their more characteristic duty is to attest the genuineness of any deeds or writings, in order to render the same available as evidence of the facts therein contained.”) (quoting Benjamin F. Rex, *The Notaries’ Manual* § 1, at 1–2 (J.H. McMillan ed., 6th ed. 1913)).

⁴ See n. 1, *supra*. See s. 117.01(3) & (7), F.S. ((3) requiring that, as part of oath, notary must swear he or she understands the English language, has read ch. 117, and understands duties, responsibilities, limitations, and powers; (7) requiring that notary give a bond in the amount of \$7,500 in the event the notary breaches duties, both a physical and electronic copy of which is to be kept on file with the Department of State).

⁵ Section 117.01(1), F.S.

⁶ Executive Office of the Governor, State of Florida, *Governor’s Reference Manual for Notaries Public*, p. 13 (Dec. 13, 2016).

⁷ Section 117.03, F.S.

⁸ Section 117.04, F.S.

⁹ Section 117.045, F.S.

¹⁰ Section 117.05(12)(a), F.S.

¹¹ Section 319.23(3)(a)2., F.S.

¹² Section 655.94(1), F.S.

¹³ See n. 5, *supra*.

¹⁴ Section 117.05(2), F.S.

¹⁵ Section 117.021(2), F.S.

¹⁶ Section 117.021(3), F.S.

also be applied to a physical paper copy using a rubber stamp containing the foregoing information.¹⁷

Additionally, as a public officer, a notary public is held to high standards and is subject to discipline, including suspension by the Governor and removal by the Senate, for malfeasance, misfeasance, or neglect in the performance of his or her duties.¹⁸ A notary public is also subject to criminal penalties for certain unlawful uses of the notary commission (such as notarizing his or her own signature),¹⁹ and liable to pay fees for certain civil infractions (such as notarizing a document when the signor is not in the notary's presence).²⁰

Becoming a Notary Public in Florida

In order to be eligible to become a notary public in Florida, a person must:

- Be at least 18 years of age;
- Be a Florida resident or permanent resident alien with a recorded declaration of domicile;
- Maintain Florida residence throughout the appointment; and
- Be able to read, write, and understand the English language.²¹

To apply to be a notary public in Florida, the application form provided by the Department of State must be completed, signed, sworn, and filed along with the appropriate applications fees.²² Because the bond must be attached, the bonding agency usually submits the application in both a paper and electronic format.²³ The oath of office and notary bond must accompany the notary's application when filed with the Department of State.²⁴ Applicants must also provide the following as part of the application:

- Personal identification information;
- Affidavit of good character from a reference who has known the applicant for at least one year and is not a relative;
- Ten-year history of any licenses and discipline;
- Statement regarding whether the applicant has ever been convicted of a felony or had his or her civil rights restored; and
- Any other information requested by the Governor's office to confirm eligibility.²⁵

Notary's Duty to Confirm Identity and Physical Presence for Signing

One of the notary public's primary duties is to verify the identity of the person who is signing a document. If the person is personally known to the notary public or provides "satisfactory

¹⁷ Section 117.05(3), F.S.

¹⁸ Art. IV, s. 7, FLA. CONST.; s. 117.01(4), F.S.

¹⁹ Section 117.05(1), F.S. (providing violation is a third degree felony). *See also* s. 117.05(3)(d), (7), & (8), F.S.; s. 117.105, F.S.; s. 117.107, F.S.

²⁰ Section 117.107(9), F.S. (providing violation is a civil infraction punishable by a fine of up to \$5,000).

²¹ *See* n. 5, *supra*.

²² Section 117.01(2), F.S. (requiring \$25 application fee, \$10 commission fee, and \$4 educational surcharge, except that the commission fee is waived for veterans with a 50 percent disability).

²³ *See* n. 6 at p. 7, *supra*.

²⁴ *Id.*

²⁵ *Id.*

evidence” by producing valid identification or witnesses or both verifying that the person is who he or she claims to be, the notary may notarize the document.²⁶

Additionally, generally the person signing the document, as well as any witness, must be in the notary’s physical presence at the time of presenting identification and signing.²⁷ It is the physical presence requirement that the proposed bill seeks to redefine.

Online Notarization

Because of new audio/video technologies, such as FaceTime and Skype, two or more people may be able to both see and hear one another in real time using a computer or mobile device, even though they are in different states. This means a notary public can view a person’s face, using audio/video technology, while simultaneously reviewing the person’s identification and other credentials.

One article explains how online notarization works:

The process is pretty straightforward: You upload a document to an app or website and get connected with a notary by video, on a split screen; you verify your identity by showing a government-issued photo ID, and the notary witnesses you signing your name on screen using your finger or mouse. Then, the notary adds their electronic signature and a digital version of a stamp or seal. The whole transaction is recorded and secured on the cloud in compliance with retention rules; both the signer and the notary can get copies.

Right now, even though notarization apps and sites are accessible by everyone, the participating notaries themselves are certified and based only in Virginia and Texas. Nevada will also join those states; it enacted a remote notarization law on June 9.²⁸

Virginia was the first to pass a remote notarization law in 2012.²⁹

III. Effect of Proposed Changes:

Section 1: The bill divides ch. 712, F.S. into two parts: Part I entitled “General Provisions,” and Part II entitled “Online Notarizations.”

²⁶ Section 117.05(5), F.S.

²⁷ Section 117.05(4), F.S. *See also* Effect of the Bill, Part I, *infra*, amending multiple provisions in chapter 117, F.S., to clarify that “physical presence” can include an appearance by audio/video technology.

²⁸ 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. 29, 2018).

²⁹ *Id.* *See* Office of the Secretary of the Commonwealth of Virginia, Notary Public Division, *A Handbook For Virginia Notary Publics*, <https://governor.virginia.gov/media/2089/NotaryHandbook.pdf> (last visited Jan. 29, 2018). *See also* <https://notarize.com/>, a Virginia-based online platform offering online notary services. The video on the homepage also explains how the process works. *Id.* (last visited January 29, 2018).

With the exception of the effective date,³⁰ the remaining sections of the bill can be grouped as follows: Group (A), Sections 2 through 5; Group B, Sections 6 through 19; and Group (C), Sections 18 through 27.

Group (A): Sections 2 through 5 of the bill amend current provisions of chapter 712, F.S., which will now be part of Part I. And Part I is now the General Provisions governing how to become a notary public and the duties and responsibilities of a notary. The bill adds language to three of the existing provisions in Part 1 in order to set out some of the additional requirements a notary must follow in order to register to do online notarizations.

Most significantly, the bill adds that notary publics who wish to register with the Governor's office to do online notarizations must maintain an insurance policy of at least \$1 million to protect against errors and omissions (s. 117.01, F.S.).

The bill also provides that a notary must use a password- or code-protected electronic signature, and, presumably for security reasons, the notary cannot be required to use technology the notary has not selected (s. 117.02, F.S.). The bill also sets out a form certificate a notary must essentially use when notarizing an attested copy of an electronic document (s. 117.05, F.S.), and provides that the prohibitions in s. 117.107, F.S., do not apply to electronic signatures and seals necessary to perform online notarizations.

Additionally, the bill provides that a notary must submit proof of identity to the Governor's office rather than the Secretary of State (s. 117.05, F.S.).

Other changes to Part 1 primarily clarify that a signer of document may "personally appear" before a notary either in person or by "audio-video communication technology," and that an online notary must comply with Part II, *infra*. The bill also amends the various notarial form certificates in s. 117.05, F.S., to add an option for the notary to select: "The foregoing instrument was acknowledged before me by means of [] physical presence or [] online notarization[.]"

Group (B): Sections 6 through 19 create new provisions of chapter 712, F.S., specifically governing online notary services.

The bill clarifies in ss. 117.209, 117.225, and 117.235, F.S., that an online notary: must satisfy all the traditional notary requirements of Part I; is still subject to Part I; and may perform any of the notarial acts listed in Part I online *except* online marriage rites. An online notary may also charge a fee not to exceed \$25 *in addition to* the fees authorized by Part I (s. 117.275, F.S.).

Additionally, s. 117.225, F.S., sets out the registration requirements for online notaries. Online notaries must:

- Satisfy qualification requirements of Part I;
- Pay the online notarization application fee of \$25;
- Provide proof of professional liability insurance (the bill adds that it must be \$1 million under Part I);
- Submit a signed and sworn registration to the Governor's office; and

³⁰ See Section 28, *infra*.

- Identify the audio/video communication technology and identity proofing methods to be used online, which must
 - Comply with the standards promulgated by the Governor’s office; or
 - If there are no standards, be consistent with a later provision, s. 117.295(2), F.S.

The bill requires an online notary to keep extensive records of each online notarization in an electronic journal, which includes retaining the a copy of the audio/video and recording the logistical details concerning when, for who, and what type of notarial act was completed. These records must be retained for 10 years. (s. 117.245, F.S.). The bill also requires that an online notary take strict security measures to keep the electronic journal as well as a back-up of the journal, the notary’s electronic signature, and the notary’s electronic seal under his or her exclusive possession or control (s. 117.255, F.S.).

Procedurally, the bill provides that an online notary may notarize documents for people in other states so long as the notary verifies the identities of the principle signer and witnesses at the time of signing; and, if out-of-state, confirms that the principle signer consents to a Florida-based notary public and consents to comply with Florida law (s. 117.265, F.S.). An online notary may verify identification of a principle signer or a witness as follows:

- The notary’s personal knowledge of the person; or
- The remote presentation of a government-issued identification card subjected to a credibility analysis and “identification proofing” using “knowledge-based authentication” (similar to personal questions a credit card company asks to verify identity (mother’s maiden name, father’s middle name, etc.).

If the notary is not satisfied that a person’s identity has been verified, the notary must decline to do the online notarization.

Additionally, the bill provides that the Governor’s office and Agency for State Technology have rulemaking authority to further specify and refine the technological processes mentioned in Part II (s. 117.295, F.S.).

Section 117.305, F.S., provides that Part II supersedes 15 U.S.C. s. 7002, the federal Electronic Signatures in Global and National Commerce Act. This is expressly permitted by 15 U.S.C. s. 7002 when a state has adopted the Uniform Electronic Transactions Act,³¹ which Florida did in 2000.³² Section 117.305, F.S., also provides that the requirements in section 15 U.S.C. s. 7001(c) concerning consumer disclosures, and the requirement of 15 U.S.C. s. 7003(b) concerning the delivery of certain legal documents are not superseded or limited.

³¹ See Uniform Law Commission, Acts, *Electronic Transactions Act*, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UETA> (last visited Jan. 29, 2018) (“The **Uniform Electronic Transactions Act (UETA)** allows the use of electronic records and electronic signatures in any transaction, except transactions subject to the Uniform Commercial Code. The fundamental purpose of this act is to remove perceived barriers to electronic commerce. The UETA is a procedural statute. It does not mandate either electronic signatures or records, but provides a means to effectuate transactions when they are used. The primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures.”

³² Section 668.50, F.S.

Group (C): Sections 18 through 27 of the bill make conforming or necessary collateral changes to several provisions outside of chapter 117, F.S., most of which apply to the recording of real estate conveyances under of chapter 695, F.S. Significantly, the bill amends s. 28.222, F.S., to permit the clerk of a circuit court to record documents “originally created and executed using an electronic signature” citing to Florida’s Uniform Real Property Electronic Recording Act,³³ that are “certified to be true and correct paper printout[s] by a notary public[.]”

Section 28: The bill has an effective date of July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Notaries who wish to provide online services must pay an additional \$25 registration fee.

B. Private Sector Impact:

The availability of online notarial services may be more convenient for those who need the services.

C. Government Sector Impact:

The bill will likely add to the regulatory and record-keeping responsibilities of the Department of State and the Office of the Governor.

VI. Technical Deficiencies:

The signature and seal information at the bottom of the new form certificate added as s. 117.05(12)(c) is not consistent with the other form certificates contained in s. 117.05, F.S.

VII. Related Issues:

None.

³³ Section 695.27, F.S.

VIII. Statutes Affected:

This bill substantially amends sections 117.01, 117.021, 117.05, 117.107, 28.222, 92.50, 95.231, 689.01, 694.08, 695.03, 695.04, 695.05, 695.09, and 695.28, Florida Statutes.

This bill creates sections 117.201, 117.209, 117.215, 117.225, 117.235, 117.245, 117.255, 117.265, 117.275, 117.285, 117.295, 117.305, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
