

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1255 Notaries Public

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Mawn	Jones

SUMMARY ANALYSIS

The law considers many documents to be of such importance that they must be signed in the presence of a notary public to prevent fraud. A notary public is a public officer appointed and commissioned by the Governor whose function is, in addition to taking acknowledgements, to administer oaths (or affirmations); to attest to the trueness of photocopies of certain documents; and to perform other duties as specified by Florida law.

A notary public may 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. A notary public must produce a notarial certificate for each notarial act performed, and must certify in the notarial certificate the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying to verify the principal's identity. In the case of an online notarization, the online notary public must also comply with the requirements set forth in part II of chapter 117, F.S.

A notary public who falsely or fraudulently takes an acknowledgment of an instrument as a notary public; who falsely or fraudulently makes a notarial certificate as a notary public; or who falsely takes or receives an acknowledgment of the signature on a written instrument commits a third-degree felony. A notary public is also prohibited from engaging in specified conduct, including notarizing a signature on a document if the person whose signature is being notarized does not appear before the notary public either in person or by means of audio-video communication technology at the time the signature is notarized. Any notary public who violates this prohibition commits a civil infraction, punishable by a fine of up to \$5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. Further, it is no defense to the civil infraction that the notary public acted without intent to defraud; however, a notary public who commits such infraction with the intent to defraud makes a false or fraudulent acknowledgement and commits a third-degree felony.

PCS for HB 1255:

- Increases the criminal penalties associated with a false or fraudulent acknowledgement by a notary public where the document notarized pertains to a real estate transaction or other real property transfer.
- Creates criminal penalties for the commission of a prohibited act by a notary public, which penalties are increased where the document notarized is committed with an intent to defraud or pertains to a real estate transaction or other real property transfer.
- Removes a provision providing a civil penalty for the commission of a specified prohibited act by a notary public.

The PCS may have an indeterminate fiscal impact on state and local governments. See Fiscal Comments.

The PCS provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Notary Public: General Provisions

The law considers many documents to be of such importance that they must be signed in the presence of a notary public to prevent fraud. A notary public is a public officer appointed and commissioned by the Governor whose function is, in addition to taking acknowledgements, to administer oaths (or affirmations); to attest to the trueness of photocopies of certain documents; and to perform other duties specified by Florida law.¹

Appointment

The Governor is authorized to appoint as many notaries public as he deems necessary; however, a person so appointed must be at least 18 years of age, a legal Florida resident, and have the ability to read, write, and understand English.² An application for appointment as a notary public must be signed and sworn to by the applicant and accompanied by specified fees.³

An applicant must also, before executing the duties of the office and throughout the term of office, give bond, payable to any individual harmed as a result of the notary's breach of duty while acting in his or her official capacity, in the amount of \$7,500, conditioned for the due discharge of the office.⁴ The bond must be approved and filed with the Department of State ("DOS") and executed by a surety company authorized to do business in Florida.⁵ Further, an applicant must take an oath that he or she will honestly, diligently, and faithfully discharge the duties of the notary public; as part of the oath, the applicant must also swear that he or she has read chapter 117, F.S., and knows the duties, responsibilities, limitations, and powers of a notary public.⁶

Once appointed, a notary may serve for four years, and no person may be automatically reappointed as a notary; instead, the application process must be completed regardless of whether an applicant has previously served as a notary.⁷ Further, the Governor may suspend a notary public on the grounds of any malfeasance, misfeasance, or neglect of duty, which grounds include, but are not limited to:⁸

- A material false statement on the application.
- A complaint found to have merit by the Governor.
- Failure to cooperate in or respond to an investigation regarding a complaint about a notary.
- Official misconduct.
- False or misleading advertising of notary public services.
- Unauthorized practice of law.
- Failure to timely report a change in business or home address or telephone number, or failure to timely submit documentation to request an amended commission after a lawful name change.
- Commission of fraud, misrepresentation, or any intentional violation of chapter 117, F.S.
- Charging fees in excess of the statutorily-authorized fees.
- Failure to maintain the required bond.

Duties of a Notary Public

¹ Executive Office of the Governor, *Governor's Reference Manual for Notaries Public*, https://www.flgov.com/wp-content/uploads/Notary_Reference_Manual_12.13.16.pdf (last visited Jan. 22, 2024).

² S. 117.01, F.S.

³ S. 117.01, F.S.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Florida law specifies the duties of a notary public. Specifically, a notary public may:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriages;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.⁹

However, a notary public may not charge a fee of more than \$10 for any one notarial act.¹⁰

Notarial Certificates

When notarizing a signature, a notary public must complete a notarial certificate.¹¹ Such certificate must identify:

- 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;
- The name of the person whose signature is being notarized;
- The type of identification the notary public relied upon;
- The notary's official signature;
- The notary's name, which must be typed, printed, or stamped below the signature; and
- The notary's official seal¹² affixed below or to either side of the notary's signature.¹³

A notary public may 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.¹⁴ A notary public must certify in the notarial certificate the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying to verify the signatory's identity, and, in the case of an online notarization, the online notary public must comply with the requirements set forth in part II of chapter 117, F.S.¹⁵

Electronic Notarizations

Any document requiring notarization may be notarized electronically.¹⁶ 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.¹⁷

When a signature must be accompanied by a notary public's seal, the seal requirement is satisfied when the electronic signature of the notary public contains the minimum information required.¹⁸ An electronic signature may be any letters, characters, or symbols, manifested by electronic means,

⁹ Executive Office of the Governor, *supra* note 1; ch. 117, F.S.

¹⁰ S. 117.05(2), F.S.

¹¹ S. 117.05(4), F.S.

¹² The notary seal must be a rubber stamp that includes 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 notary's commission number. S. 117.05(3), F.S.

¹³ S. 117.05(12), F.S.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ S. 117.021, F.S.

¹⁷ *Id.*

¹⁸ *Id.*

executed or adopted by a party with an intent to authenticate a writing; and a writing is electronically signed if an electronic signature is logically associated with such writing.¹⁹

However, in performing electronic notarizations, a notary must reasonably ensure the security, reliability, and uniformity of such notarizations.²⁰ 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.²¹

False or Fraudulent Acknowledgements

A notary public who falsely or fraudulently takes an acknowledgment of an instrument as a notary public; who falsely or fraudulently makes a certificate as a notary public; or who falsely takes or receives an acknowledgment of the signature on a written instrument commits a third-degree felony.²²

Prohibited Acts

Florida law prohibits a notary public from:²³

- Using a name or initial in signing certificates other than that by which the notary public is commissioned.
- Signing notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to DOS with an exemplar of the facsimile signature stamp.
- Affixing his or her signature to a blank form of affidavit or certificate of acknowledgment and delivering that form to another person with the intent that it be used as an affidavit or acknowledgment.
- Taking the acknowledgment of or administering an oath to a person whom the notary public actually knows to have been adjudicated mentally incapacitated by a court of competent jurisdiction, where the acknowledgment or oath necessitates the exercise of a right that has been removed pursuant to s. 744.3215(2) or (3), F.S., pertaining to the rights of persons deemed incapacitated, and where the person has not been restored to capacity as a matter of record.
- Notarizing 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.
- Taking the acknowledgment of a person who does not speak or understand the English language, unless the nature and effect of the instrument to be notarized is translated into a language which the person does understand.
- Changing anything in a written instrument after it has been signed by anyone.
- Amending a notarial certificate after the notarization is complete.
- Notarizing a signature on a document if the document is incomplete or blank.
- Notarizing a signature on a document if the person whose signature is to be notarized is the spouse, son, daughter, mother, or father of the notary public.
- Notarizing a signature on a document if the notary public has a financial interest in or is a party to the underlying transaction.

Further, Florida law prohibits a notary from notarizing a signature on a document if the person whose signature is being notarized does not appear before the notary public either in person or by means of audio-video communication technology at the time the signature is notarized.²⁴ Any notary public who violates this prohibition commits a civil infraction, punishable by penalty not exceeding \$5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties.²⁵ Further, it is

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² A third-degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.; S. 117.105, F.S.

²³ S. 117.107, F.S.

²⁴ *Id.*

²⁵ *Id.*

no defense to the civil infraction that the notary public acted without intent to defraud.²⁶ However, a notary public who violates this prohibition with the intent to defraud makes a false or fraudulent acknowledgement and commits a third-degree felony.²⁷

Online Notarization

Registration

A notary public may register as an online notary public with DOS if he or she:

- Holds a current commission as a notary public;
- Submits a copy of such commission with the registration;
- Certifies that the notary public 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;²⁸
- Identifies the Remote Online Notary (“RON”) service provider²⁹ 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.³⁰

Once registered, 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 and the online notary public complies with both the general notarization and electronic notarization requirements provided in law.³¹ Further, an online notary public may perform any function as an online notarization authorized under chapter 117, F.S., with the exception of solemnizing matrimony rites,³² and if a notarization requires a principal³³ to appear before the online notary public, the principal may appear by means of audio-video communication technology.³⁴

Technology Standards for Online Notarization

Florida law establishes minimum requirements for online notarization technology standards, as follows:

- *Identity proofing.*³⁵ 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.³⁶

²⁶ *Id.*

²⁷ *Id.*; s. 117.105, F.S.

²⁸ S. 113.01, F.S.

²⁹ 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.

³⁰ S. 117.225, F.S.

³¹ S. 117.209, F.S.

³² S. 117.209, F.S.

³³ 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.

³⁴

³⁵ 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.

³⁶ S. 117.295, F.S.

- *Credential analysis*.³⁷ 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.³⁸
- *Audio-video communication technology*.³⁹ The technology must:
 - Be secure from interception or access by anyone other than the participants communicating; and
 - Provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and to confirm the identity of the principal.⁴⁰

With respect to online notarization, a notary must protect an electronic signature through the use of passwords or codes under the notary's control.⁴¹ The notary may not allow another person to use the notary's electronic journal, seal, or signature, and notaries must also reasonably ensure that any device used to create their electronic signature is current and secure.⁴²

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 through the use of audio-video communication technology.⁴³ The notary must record the entire audio-video conference session between the notary public and the principal and any subscribing witnesses, and a principal may not serve as a witness for an online notarization.⁴⁴

In performing an online notarization for a principal not located in Florida, an online notary public 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.⁴⁵

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.⁴⁶ However, such failure may be introduced as evidence to establish violations of chapter 117, F.S., or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes.⁴⁷

Electronic Journal and Electronic Records

An online notary public must keep a secure electronic journal of electronic records he or she has notarized.⁴⁸ For each online notarization, the electronic journal entry must contain the:

- Date and time of the notarization;

³⁷ 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.

³⁸ S. 117.295, F.S.

³⁹ 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.

⁴⁰ S. 117.295, F.S.

⁴¹ S. 117.021, F.S.

⁴² *Id.*; s. 117.225, F.S.

⁴³ S. 117.265, F.S.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ S. 117.245, F.S.

- 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.⁴⁹

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.⁵⁰

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

- Appearances 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.⁵¹

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.⁵² The electronic journal and a backup record thereof must be maintained for at least ten years after the date of the notarial act, and a notary must immediately notify an appropriate law enforcement agency and DOS of the electronic journal's, electronic signature's, or electronic seal's unauthorized use.⁵³

Effect of Proposed Changes

False or Fraudulent Acknowledgements

PCS for HB 1255 amends s. 117.105, F.S., to make any false or fraudulent acknowledgement under this section a second-degree felony⁵⁴ where the document notarized pertains to a real estate transaction or any other real property transfer.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² S. 117.255, F.S.

⁵³ *Id.*

⁵⁴ A second-degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

Prohibited Acts

The PCS amends s. 117.07, F.S., to provide that a notary public who knowingly and willfully commits a prohibited act under this section commits a first-degree misdemeanor;⁵⁵ or, if the act is committed knowingly and willfully and with an intent to defraud, a third-degree felony. However, if the act is committed knowingly and willfully and with an intent to defraud, and pertains to a real estate transaction or any other real property transfer, the PCS provides that the notary public commits a second-degree felony.

The PCS also removes language providing a civil penalty for one of the prohibited acts, which under the PCS is now at least a misdemeanor.

Effective Date

The PCS provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 117.105, F.S., relating to false or fraudulent acknowledgement; penalty.

Section 2: Amends s. 117.07, F.S., relating to prohibited acts.

Section 3: Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The PCS may have an indeterminate fiscal impact on the state court system to the extent that it increases criminal prosecutions for notarial misconduct as specified in the PCS and thereby reduces the availability of prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The PCS may have an indeterminate fiscal impact on local governments to the extent that it increases criminal prosecutions for notarial misconduct as specified in the PCS and thereby reduces the availability of county jail beds.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCS may have a positive economic impact on the private sector to the extent that it reduces fraudulent real estate transactions or other fraudulent real estate transfers. However, the PCS may have a negative economic impact on the private sector to the extent that it subjects to criminal prosecution notaries who would previously have faced only civil penalties for certain actions, or increases the criminal penalties associated with certain other notarial actions.

⁵⁵ A first-degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The PCS does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES