

# REMOTE ONLINE NOTARIZATION

*Burt Bruton*

On Friday, June 7, 2019, Governor DeSantis signed CS/CS/HB 409 into law as Laws of Florida Chapter 2019-71, bringing Florida's notaries online effective January 1, 2019. Florida joins 22 other American states (as of mid-June 2019) in enabling notaries to perform online notarial acts remotely from the principal document signer through audio-video communication technology.

Most of the provisions of Chapter 2019-71 will become effective January 1, 2020. Exceptions are the provisions in Section 16 regarding the adoption of rules and standards by the Florida Department of State (which are effective immediately) and the primary provision in Section 33 authorizing electronic wills (which will become effective July 1, 2020).

I. **WHAT'S NEW IN CH. 2019-71**. This legislation adds a new Part II to Chapter 117 of the Florida Statutes, governing the remote notarization of electronic documents. In addition, the legislation conforms various other provisions of the Florida Statutes concerning transactional documents that are required to be notarized or witnessed. Finally, the bill includes provisions recognizing and regulating electronic wills and other estate planning documents, which is the subject of a separate presentation today.

Electronic documents are not new to Florida. Florida has recognized electronic documents since the adoption of UETA (Uniform Electronic Transaction Act) in FS §668.50 in 2000 and URPERA (Uniform Real Property Electronic Recording Act) in FS 695.27 in 2007. The innovation in Chapter 2019-71 is that the signer of the electronic document need not be in the same physical location as the notary or the witnesses. Chapter 2019-71 did not include a provision giving this legislation a short title, but for convenience today let's call it the "RON Act," since "RON" is the popular acronym for "Remote Online Notarization."

II. **KEY DEFINITIONS**. New Part II of Chapter 117 opens with Section 117.201, a glossary of definitions. Some of the defined terms ("electronic," "electronic record" and "electronic signature") are borrowed verbatim from UETA. Here are some other key terms:

A. **"Principal"** means an individual whose electronic signature is acknowledged, witnessed or attested to in an online notarization, or who takes an oath or affirmation administered by an online notary public. The term does not refer to the relationship between a principal and an agent (although a "principal" under Chapter 117 could sign an electronic power of attorney as a "principal" under Chapter 709).

B. **"Online notary public"** means a Florida notary public who registers with the Department of State to perform remote notarial acts under Part II is called an "online notary public." The term also includes a civil-law notary appointed under Chapter 118 or a commissioner of deeds appointed under Part IV of Chapter 721, in either case if registered as an online notary public with the Department.

C. **"Online notarization"** means the performance of a notarial act using electronic means in which the principal appears before the notary public by means of audio-video communication technology. The acronym "RON" (for "Remote Online Notarization") is not

defined in F.S. §117.201, but companies that offer the technology services necessary for remote online notarization are called “RON service providers.”

D. **“Audio-video communication technology”** means 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. Note that the phrase “in compliance with applicable law” is intended to encompass the law of any jurisdiction that recognizes such technology for remote online notarization.

E. **“Appear before,” “before” or “in the presence of”** mean either (i) in the physical presence of another person; or (ii) outside of the physical presence of another person, but able to see, hear, and communicate with the person by means of audio-video communication technology. Because these particular definitions generally apply only within Chapter 117, it was necessary to make this same conceptual change regarding physical presence in other parts of the Florida Statutes, including F.S. §92.50, §689.01 and §695.03 (see Topic IX below).

III. **HOW TO REGISTER AS A FLORIDA ONLINE NOTARY PUBLIC.** New Section 117.225 prescribes the requirements for registration as an online notary public in Florida. To become registered as an online notary public in Florida, one must:

A. Be authorized to act as a Florida notary public (Part I of Chapter 117), as a Florida civil-law notary (Chapter 118), or as a Florida commissioner of deeds (Part IV of Chapter 721).

B. Take a two-hour training course covering the duties, obligations and technology requirements for serving as an online notary public.

C. Pay the \$10.00 notary registration fee required under F.S. §113.01 (it is not entirely clear whether this is an additional fee after paying the \$10.00 fee required for a general notary commission—note the redundancy with requirement A above if this fee is *not* additional).

D. Submit a signed and sworn registration to the Florida Department of State, which is the agency charged with regulating Florida notaries.

E. Identify to the Department the notary’s intended RON service provider and confirm that its technology and processes satisfy the requirements of Chapter 117 and any rules adopted by the Department (note that the statute does not contemplate that the Department will register or evaluate RON service providers; rather, the online notary public is responsible for assuring the Department that her or his chosen RON service provider’s technology and processes meet the statutory and regulatory requirements).

F. Provide evidence satisfactory to the Department that the registrant has obtained a \$25,000 bond (such a bond also satisfies the general bonding requirement for notaries public under F.S. §117.01(7)).

G. Provide evidence satisfactory to the Department that the registrant is covered by errors and omissions insurance in the minimum amount of \$25,000.

IV. **REMOTE NOTARIAL ACTS.** New Section 117.209 prescribes the authority of a Florida online notary public to perform remote notarial acts.

A. **Online notaries can do almost anything.** Section 117.209(1) provides that a Florida online notary public may perform any of the functions of a notary public under Part I of Chapter 117, *except* conducting a marriage ceremony.

B. **Limitations on remote witnessing.** Other provisions of the RON Act impose limitations on the effectiveness of certain remote notarial acts, such as the remote witnessing of a power of attorney that grants certain “super powers” enumerated in §709.2202 or the remote witnessing of a will, power of attorney or certain other documents identified in §117.285(5) that are executed by a vulnerable adult (discussed below).

C. **General authorization for remote notarization.** Subject to those limitations, Section 117.215(1) provides that if any provision of Florida law requires a notarial act, then an online notarization in compliance with Part II of Chapter 117 (and any rules adopted by the Department) satisfies that requirement.

D. **“Appearing before” an online notary.** Section 117.209(2) provides that an online notary public may perform a notarial act if the principal appears before the online notary public either by physical presence or by means of audio-video communication technology. This same result is likely also achieved by the new definition of “appear before” in §117.201(1) to mean either physical presence or remote presence through technology.

E. **Location of notary.** Sections 117.209(3) and 117.265(1) both provide that a Florida online notary public must be physically located in Florida when performing the notarial act, regardless of where the principal or any witnesses are physically located (this limitation on the physical location of the online notary public does not apply to a Florida commissioner of deeds).

F. **Governing law.** Sections 117.209(4) and 117.265(1) both provide that the validity of a notarial act performed by a Florida online notary public is governed by Florida law. If the principal is located outside the State of Florida, F.S. § 117.265(3) requires the Florida online notary public to confirm, either verbally or in writing, that the principal desires that the notarial act be performed by a Florida notary public under the laws of this state.

G. **Part I applies to online notaries.** Section 117.235 provides that an online notary public is subject to all the general provisions of Part I of Chapter 117. ***Ethical note:*** existing F.S. §117.107(5) provides that a Florida notary public may not notarize a signature on a document if it appears that the signer is mentally incapable of understanding the nature and effect of the document at the time of notarization. New F.S. §117.285(5)(e) specifically calls out this existing provision in the context of notarizing an electronic will and certain other documents that are subject to special witnessing provisions under §117.285(5).

H. **Identifying an online notarial act.** Section 117.265(7) requires that the electronic notarial certification must identify an online notarial act as such (this requirement may be satisfied by including the words “online notary” in or adjacent to the online notary public’s seal). The RON Act also revises the non-exclusive statutory forms of oaths and acknowledgments found in F.S. §117.05(13) and revises the non-exclusive short forms of acknowledgment found in F.S. §695.25 to include a statement specifying whether the principal appeared by physical presence or by online notarization.

I. **Fees.** Section 117.275 imposes a \$25 limit on the fee that may be charged for performing an online notarization (fees for other services are not regulated by this section). In addition, §117.255(6) imposes a \$20 limit on the fee that an online notary public may charge for making and delivering an electronic copy of an electronic record; the notary cannot charge a copy fee to the parties to the electronic record and certain other specified persons.

V. **IDENTITY CONFIRMATION.** Because the RON Act substitutes technology instead of physical presence before the online notary public, the new law includes detailed requirements for confirming the identity of the principal and witnesses signing the electronic document. Although conceivably the technology platforms *could* enable an online notary public to perform these identity confirmation steps while connected online with the principal and witnesses in real time, the systems available today from most RON service providers perform the identity confirmation procedures through an online software process *before* the online notary public is connected in real time with the principal and any witnesses through audio-video communication technology. Although the identity confirmation process may be automated and performed before the real-time connection with the online notary public, the required audio-video recording of the online notarial act (see Topic VI below) must include confirmation of the identity of the principal and any witness.

A. **Definitions.** Here are some important new definitions pertaining to identity confirmation in an online notarization:

1. **“Government-issued identification credential”** means any approved credential for verifying identity under existing F.S. §117.05(5)(b)2, which lists various identification documents that are now acceptable by any Florida notary if the document is current or has been issued within the past 5 years and bears a serial or other identifying number.

2. **“Credential analysis”** means a process or service, in compliance with applicable law, in which a third party aids an online notary public in affirming the validity of a government-issued identification credential and data thereon through review of public or proprietary data sources. This third-party aid for credential analysis will be a key feature of the technology platform provided by the notary’s chosen RON service provider.

3. **“Remote presentation”** means transmission of an image of a government-issued identification credential that is of sufficient quality to enable the online notary public to identify the individual seeking the notary's services and to perform credential analysis through audio-video communication technology.

4. **“Identity proofing”** means a process or service in compliance with applicable law in which a third party affirms the identity of an individual through use of public or proprietary data sources, which may include by means of knowledge-based authentication or biometric verification. The online notary public will access these third party data sources through the technology platform of the chosen RON service provider. The RON Act does not contain any initial standards for biometric verification, which is expected to be addressed in the future through regulations adopted by the Department of State as the technology becomes available.

5. “**Knowledge-based authentication**” means a form of identity proofing based on a set of questions which pertain to an individual and are formulated from public or proprietary data sources.

B. **Identity confirmation.** Section 117.265(4) requires the Florida online notary public to confirm the identity of each principal either by the notary’s personal knowledge of the principal (same standard now applicable to in-person notarizations under Part I) or by ALL of the following requirements (as such requirements may be modified by subsequent regulation):

1. Remote presentation by each principal of a government-issued identification credential; and
2. Credential analysis of each government-issued identification credential; and
3. Identity proofing of each principal in the form of knowledge-based authentication or another method of identity proofing that conforms to the standards of Chapter 117.

If the online notary public is unable to satisfy all three requirements above, or if the databases consulted for identity proofing do not contain sufficient information to permit authentication, then the online notary public is prohibited from performing the online notarization.

C. **Credential analysis standards.** Until the Department adopts standards that are equally or more protective, F.S. §117.295(3)(b) requires, at a minimum, that a Florida online notary must perform the credential analysis using one or more commercially available automated software or hardware processes that are consistent with sound commercial practices; that aid the notary public in verifying the authenticity of the credential by analyzing the integrity of visual, physical, or cryptographic security features to indicate that the credential is not fraudulent or inappropriately modified; and that use information held or published by the issuing source or authoritative source, as available, to confirm the validity of credential details. The output of the credential analysis process must be provided to the online notary public performing the notarial act.

D. **Identity proofing standards.** Until the Department adopts regulatory standards that are equally or more protective, F.S. §117.295(3)(a) requires identity proofing of each principal using knowledge-based authentication which must have, at a minimum, the following security characteristics:

1. The principal must be presented with five or more questions with a minimum of five possible answer choices per question.
2. Each question must be drawn from a third-party provider of public and proprietary data sources and be identifiable to the principal's social security number or other identification information, or the principal's identity and historical events records.
3. Responses to all questions must be made within a 2-minute time constraint.
4. The principal must answer a minimum of 80 percent of the questions correctly.

5. The principal may be offered one additional attempt in the event of a failed attempt.

6. During the second attempt, the principal may not be presented with more than three questions from the prior attempt.

VI. **AUDIO-VIDEO RECORDING.** Perhaps the most significant advance in security effectuated by the RON Act is the requirement that the online notary public must make an audio-video recording of the remote notarial act and that the recording must be retained and accessible.

A. **Recording requirement.** Subsection 117.265(2) requires a Florida online notary to record the two-way audio-video conference session between the notary public and the principal and any witnesses.

B. **Contents of audio-video recording.** Subsection 117.245(2) requires a Florida online notary to retain an uninterrupted and unedited copy of the recording of the audio-video communication in which an online notarization is performed. The recording must include all of the following:

1. Appearance by the principal and any witness before the online notary public;
2. Confirmation of the identity of the principal and any witness;
3. A general description or identification of the records to be signed;
4. At the commencement of the recording, recitation by the online notary public of information sufficient to identify the notarial act;
5. A declaration by the principal that his or her signature on the record is knowingly and voluntarily made; and
6. All of the actions and spoken words of the principal, notary public, and any required witness during the entire online notarization, including the signing of any records before the online notary public.

C. **Retention of audio-video recording.** Subsection 117.245(4) requires that the video recording must be retained for at least ten years after the date of the notarial act, although different requirements apply under amended Chapter 732 of the Florida Statutes to the retention by a qualified custodian of the recording of the online notarization of an electronic will.

D. **Access by others to audio-video recording.** Subsection 117.255(5) requires a Florida online notary public to provide access to the video recording of the notarial act to the following persons:

1. The parties to an electronic record notarized by the online notary public;

2. The qualified custodian of an electronic will notarized by the online notary public;
3. The title agent, settlement agent, or title insurer who insured the electronic record or engaged the online notary public with regard to a real estate transaction;
4. The online notary public's RON service provider whose services were used by the online notary public to notarize the electronic record;
5. Any person who is asked to accept a power of attorney that was notarized by the online notary public;
6. The Department of State pursuant to a notary misconduct investigation; and
7. To other persons pursuant to a subpoena, court order, law enforcement investigation, or other lawful inspection demand.

E. **Delegation of retention duties.** The online notary public, a guardian of an incapacitated online notary public, or the personal representative of a deceased online notary public may delegate the notary's retention duties to a secure repository, provided that the Department of State is notified of the delegation to the repository within 30 days thereafter, including the address and contact information for the repository. Any such retention delegation must be noted in the online notary public's electronic journal and reported to the Department.

F. **Consequences of errors.** Subsection 117.265(9) provides that a failure to record the online notarization or to comply with the other requirements of §117.265 does not impair the validity of the notarial act or the electronic record that was notarized, but the failure may be introduced to establish violations of Chapter 117 or as an indication of possible fraud, forgery, impersonation or other similar matters. However, subsection 117.245(5) provides that if the recording of the audio-video communication relating to the online notarization of the execution of an electronic will cannot be produced by the online notary public or the qualified custodian, then the electronic will shall be treated as a lost or destroyed will subject to F.S. §733.207.

VII. **ELECTRONIC JOURNAL AND OTHER REQUIREMENTS.** In addition to the requirement to make and retain a recording of the remote notarial act, the RON Act also requires a Florida online notary public to keep one or more secure electronic journals of all remote online notarizations performed by the online notary public. Note that Florida notaries are not required to maintain a journal of notarial acts that are not performed online.

A. **Journal entries.** New F.S. 117.245(1) provides that for each online notarization, the electronic journal entry must contain all of the following items. Note that some of the required information will be obtained during the initial automated identity confirmation process, so subsection 117.295(3)(b) requires the online notary public's RON service provider to make the results of the credential analysis available to the online notary public for inclusion in the electronic journal. The required electronic journal items are:

1. The date and time of the notarization.
2. The type of notarial act.

3. The type, the title, or a description of the electronic record or proceeding.
4. The name and address of each principal involved in the transaction or proceeding.
5. Evidence of identity of each principal involved in the transaction or proceeding, either by a statement that the person is personally known to the online notary public, or by a notation of the type of government-issued identification credential provided to the online notary public.
6. An indication that the principal satisfactorily passed the identity proofing.
7. An indication that the government-issued identification credential satisfied the credential analysis.
8. The fee, if any, charged for the notarization.

B. **Journal duties.** New subsection 117.245(3) requires a Florida online notary public to take reasonable steps to:

1. Ensure the integrity, security and authenticity of online notarizations.
2. Maintain a backup record of the electronic journal.
3. Protect the electronic journal, the backup record, and any other records received by the online notary public from unauthorized access or use.

C. **Journal provisions that are the same as for audio-video recording.** The retention requirements for the audio-video recording of the online notarial act set forth in subsection 117.245(4) (including provisions regarding the delegation of retention duties to a secure repository) also apply to the online notary public's electronic journal. In addition, the accessibility requirements for the audio-video recording set forth in subsection 117.255(5) also require the online notary public to make and provide copies, upon request, of the pertinent entries in the electronic journal to the same list of persons authorized to access the audio-video recording. Subsection 117.245(5) provides that an omitted or incomplete entry in the electronic journal does not impair the validity of the notarial act or the electronic record that was notarized, but the failure may be introduced to establish violations of Chapter 117 or as an indication of possible fraud, forgery, impersonation or other similar matters.

D. **Other duties.** New §117.255 also imposes some additional duties on a Florida online notary public regarding the notary's electronic journal, signature and seal. A Florida online notary public must:

1. Take reasonable steps to ensure that any registered device used to create an electronic seal is current and has not been revoked or terminated by the issuing or registering authority of the device.
2. Keep the electronic journal and electronic seal secure and under his or her sole control, which includes access protection using passwords or codes under control of



the online notary public. The online notary public may not allow another person to use the online notary public's electronic journal, electronic signature, or electronic seal, other than a RON service provider or other authorized person providing services to an online notary public to facilitate performance of online notarizations.

3. Attach or logically associate the electronic signature and seal to the electronic notarial certificate of an electronic record in a manner that is capable of independent verification using tamper-evident technology that renders any subsequent change or modification to the electronic record evident.

4. Notify an appropriate law enforcement agency and the Department of State of any unauthorized use of or compromise to the security of the electronic journal, official electronic signature, or electronic seal within 7 days after discovery of such unauthorized use or compromise to security.

E. **Changing RON service providers.** New subsection 117.265(5) provides that a Florida online notary public may change his or her RON service provider(s) from time to time, but the notary must notify the Department of State of the change within thirty days thereafter.

VIII. **STATE REGULATION AND TECHNICAL STANDARDS.** Section 16 of the RON Act regarding administration and rulemaking by the Department of State became effective upon signature by Governor DeSantis, in advance of the January 1, 2020 effective date for other provisions of the new law, in order to give the Department adequate time to implement its provisions. As noted above, however, certain basic technical standards for remote online notarization are contained in this Section 16 and are effective as of June 7, 2019 without any requirement for rulemaking by the Department.

A. **Optional rulemaking.** The Department of State is authorized to adopt rules necessary to implement the requirements of Chapter 117 and to set standards for online notarization which include, but are not limited to:

1. Improvements in technology and methods of assuring the identity of principals and the security of an electronic record, including tamper-evident technologies in compliance with the standards adopted pursuant to F.S. §117.021 which apply to online notarizations.

2. Education requirements for online notaries public and the required terms of bonds and errors and omissions insurance, but not including the amounts of such bonds and insurance policies.

3. Identity proofing, credential analysis, unauthorized interception, remote presentation, audio-video communication technology, and retention of electronic journals and copies of audio-video communications recordings in a secure repository.

B. **Mandatory rulemaking.** The Department of State must adopt forms, processes, and interim or emergency rules necessary to accept applications from and register online notaries public pursuant to §117.225 by January 1, 2020 (the general effective date of most of the RON Act).

C. **Basic statutory requirements.** Subsection 117.295(3) provides certain basic requirements for remote online notarization that will apply until the Department adopts rules setting standards that are equally or more protective. The basic statutory requirements include:

1. **Identity confirmation.** Minimum standards for Identity proofing by knowledge-based authentication and credential analysis (discussed above under Topic V). Although the Department could adopt rules setting standards for biometric identity proofing, no standards are provided in the statute.

2. **Communication technology.** Use of audio-video communication technology in completing online notarizations that must meet the following requirements:

(a) The signal transmission must be reasonably secure from interception, access, or viewing by anyone other than the participants communicating. New subsection 117.265(6) also provides that a Florida online notary public or his or her RON service provider shall take reasonable steps to ensure that the audio-video communication technology used in an online notarization is secure from unauthorized interception. An online notary public is not responsible for the security of the systems used by the principal or others to access the online notarization session.

(b) The technology must provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and any witness, and to confirm the identity of the principal and any witness, as required, using the identification methods described in s. 117.265.

3. **Tamper-evident technology.** A RON service provider is deemed to have satisfied tamper-evident technology requirements by use of technology that renders any subsequent change or modification to the electronic record evident.

4. **Insurance for RON service providers.** In addition to any coverage it elects to provide for individual online notaries public, a RON service provider must maintain errors and omissions insurance coverage in a total amount of at least \$250,000 in the annual aggregate with respect to potential errors or omissions in or relating to the technology or processes provided by the RON service provider.

5. **Training requirements.** Subsection 117.295(6) provides that the online notary public training requirement in subsection 117.225(2) may be satisfied by a 2-hour in-person or online course offered by the Florida Land Title Association, the Real Property, Probate and Trust Law Section of The Florida Bar, the Florida Legal Education Association, the Department of State, or a vendor approved by the Department of State. Each such training provider shall make the in-person or online course generally available to all applicants. Regardless of membership in the provider's organization, the provider shall charge each attendee the same cost for the course unless the course is provided in conjunction with a regularly scheduled meeting of the provider's membership.

D. **APA exemption.** The rulemaking required under Section 16 of the RON Act is exempted from F.S. §120.541(3), a provision of the Florida Administrative Procedure Act that

would otherwise require an estimate of regulatory costs and impact and could possibly require ratification by the Legislature before the rules could become effective.

IX. **REMOTE REAL ESTATE TRANSACTIONS.** Existing sections 92.51 and 695.03 of the Florida Statutes have previously provided for Florida recognition of notarial acts by notaries operating under the laws of other jurisdictions. Most American jurisdictions have similar foreign recognition laws, which are based on concepts of comity rather than the constitutional requirement of full faith and credit. Accordingly, a deed or other instrument conveying or encumbering Florida real property could be notarized in another state if certain minimal requirements were met and the instrument would be entitled to recordation in Florida public records.

A. **Physical presence amendments: “by or before”.** Until the RON Act, however, those two Florida statutes required that the principal must appear “before” the notary, i.e., that the principal must be in the physical presence of the notary. And since the new definitions of “appear before” in Chapter 117 apply only within that Chapter, it was necessary to make a series of amendments to statutory provisions outside of Chapter 117 in order to recognize remote online notarial acts performed by Florida online notaries public as well as by remote notaries in other states of the United States.

1. Section 19 of the act amends F.S. §92.51 by inserting the words “by or” in front of the word “before” in several places, so that the statute now uniformly provides that any required oath, affidavit or acknowledgment may be taken or administered *by or* before officers of this state or another state designated in the statute.

2. Similarly, Section 23 of the act amends F.S. §695.03(1) regarding documents affecting real property, to provide that an acknowledgment or a proof may be taken, administered, or made within this state *by or* before the same list of officials (including notaries) previously set forth in that statute. Similar amendments were made to F.S. §695.03(2) to authorize acknowledgments or proofs of real property documents taken, administered or made *by or* before designated officials (including notaries) of other states of the United States.

3. However, this “by or before” amendment was not made with respect to F.S. §695.03(3) regarding such actions before officers of foreign countries, with the result that Florida law does not permit recordation of real property documents remotely notarized by notaries or other officials of other countries. Principals located in a foreign country could have electronic documents remotely notarized by a Florida online notary public, since Florida imposes no territorial restriction on the physical location of the principal when a remote notarial act is performed by a Florida online notary.

B. **Validation and curative provisions.** Various existing sections of the Florida Statutes contain provisions validating recorded documents or curing technical defects in them, and the RON Act amends many of those provisions to recognize and validate remotely notarized or witnessed documents.

1. Section 695.03 of the Florida Statutes has long included a provision validating acknowledgments done in accordance with that section. This validation provision has been revised and moved to a new subsection 695.03(4), reading as follows:

(4) COMPLIANCE AND VALIDATION.—The affixing of the official seal or the electronic equivalent thereof under s. 117.021 or other applicable law, including part II of chapter 117, conclusively establishes that the acknowledgment or proof was taken, administered, or made in full compliance with the laws of this state or, as applicable, the laws of the other state, or of the foreign country governing notarial acts. All affidavits, oaths, acknowledgments, legalizations, authentications, or proofs taken, administered, or made in any manner as set forth in subsections (1), (2), and (3) are validated and upon recording may not be denied to have provided constructive notice based on any alleged failure to have strictly complied with this section, as currently or previously in effect, or the laws governing notarization of instruments. This subsection does not preclude a challenge to the validity or enforceability of an instrument or electronic record based upon fraud, forgery, impersonation, duress, incapacity, undue influence, minority, illegality, unconscionability, or any other basis not related to the notarial act or constructive notice provided by recording.

2. This revised validation provision in §695.03(4) is intended to correct the practice of invalidating a deed or mortgage of Florida property as a voidable transfer in bankruptcy court on the grounds that the document was not entitled to be recorded because of some notarial foot-fault and therefore did not impart constructive notice under state law. Because subsection (4) applies to notarial acts by officials of other jurisdictions as well as Florida, it is also intended to validate recorded documents affecting Florida real property that may have been remotely notarized by a notary of another state before Florida law recognized remote notarization, or that may have not strictly complied with the remote notarial law of that other state. Since a notary public is an officer of her or his appointing jurisdiction, the officer's seal on the document is taken as a conclusive official statement that the notarization was performed in accordance with the applicable law of Florida or the other state.

3. Similarly, Section 26 of the act adds the following two paragraphs to the URPERA validation provision previously appearing in F.S. §695.28, which provides that an otherwise valid electronic document that is accepted for recording is deemed validly recorded and provides notice to all persons, notwithstanding:

(c) That the document was signed, witnessed, or notarized electronically, and that the document was notarized by an online notary public outside the physical presence of the signer through audio-video communication technology, as defined in s. 117.201, or that witnessing may have been done outside the physical presence of the notary public or principal through such audio-visual communication; or

(d) That the document recorded was a certified printout of a document to which one or more electronic signatures have been affixed.

4. Similar corrective tweaks appear in Section 20 of the RON Act (amending F.S. §95.231), Section 22 of the RON Act (amending F.S. §694.08), and Section 24 of the RON Act (amending F.S. §695.04).

C. **Remote witnessing of deeds and other real property transfers.** Section 21 of the RON Act amends F.S. §689.01 by adding new subsections (2) and (3) regarding the remote witnessing of real property conveyances.

1. New subsection 689.01(2) provides that any requirement that an instrument be signed in the presence of two subscribing witnesses may be satisfied by the witnesses being present and electronically signing by means of audio-video communication technology, as defined in F.S. §117.201. This definition of “audio-video communication technology” is not limited to the technology approved in Florida, but includes any such technology that complies with “applicable law.” This provision was intended to authorize the conveyance of Florida real property by instruments remotely witnessed under the laws of other states as well as Florida law.

2. Subsection 689.01(2) also repeats the description of the act of remote witnessing set forth in F.S. §117.285, meaning that the witness was in the physical or electronic presence of the principal at the time the principal affixed his or her electronic signature and the witness heard the principal make a statement acknowledging that the principal has signed the electronic record. This provision is also not limited to Florida and is intended to recognize the remote witnessing of Florida real property conveyances under the notarial laws of other states.

3. New subsection 689.01(3) validates all previous acts of remote witnessing of Florida real property conveyances and provides that they provide constructive notice upon recordation, similar to the provisions of revised F.S. §695.03(4) regarding remote acknowledgment of real property documents. A similar clause also preserves challenges based on fraud, forgery, impersonation and the like.

X. **SUPER-POWERED POWERS OF ATTORNEY.** The potential for abuse of powers of attorney was the concern most often expressed by members of the Legislature in the televised committee hearings regarding consideration of the RON Act. As a result, the RON Act includes a restrictive but complicated provision regarding the remote witnessing of powers of attorney that purport to grant so-called “super powers” to the attorney in fact.

A. **What are “super powers”?** Part II of Chapter 709 of the Florida Statutes is known as the “Florida Power of Attorney Act,” which governs powers of attorney granted by individual principals (with numerous important exceptions listed in §709.2103). It requires that a power of attorney must be signed by two subscribing witnesses and must be acknowledged by the signing principal before a notary public or other officer authorized under F.S. §695.03 (discussed above). Subsection 709.2202(1) requires that certain grants of important authority contained in a power of attorney must be separately signed or initialed by the principal in order to be valid. These are the so-called “super powers,” and they are the power of the agent to do the following:

1. Create an inter vivos trust;

2. With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor’s agent;

3. Make a gift, subject to subsection 709.2202(4) (limiting the agent’s power to make certain gifts unless expressly authorized);
4. Create or change rights of survivorship;
5. Create or change a beneficiary designation;
6. Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
7. Disclaim property and powers of appointment.

B. **Limitation on remotely witnessed powers of attorney.** The RON Act adds a new subsection (6) to §709.2202, which provides that a power of attorney, executed by a principal domiciled in Florida at the time of execution, that is witnessed remotely pursuant to F.S. §117.285 or other applicable law by a witness who is not in the physical presence of the principal is not effective to grant authority to an agent to take any of the actions enumerated in subsection (1) (i.e., to exercise any “super powers”). Note that an effective grant of super powers can be accomplished in a power of attorney that is remotely notarized if the subscribing witnesses are in the physical presence of the principal.

C. **Other edits pertaining to remotely notarized powers of attorney.** The RON Act also made a number of minor edits to §709.2119 and §709.2120 of the Florida Power of Attorney Act, generally for the purpose of providing access to the records of the online notary public by persons that are asked to rely on a power of attorney that was remotely notarized.

D. **Procedural limitations; savings provision.** In addition to this absolute limitation on the effectiveness of any grant of “super powers” enumerated in §709.2202(1) in a remotely witnessed power of attorney, new §117.285(5) imposes certain procedural requirements on the remote witnessing of powers of attorney that grant authority with respect to “banking transactions” or “investment transactions” under F.S. §709.2208 (along with electronic wills and other electronic documents specified in that subsection (5), discussed below in Topic XI). However, an express savings clause provides that nothing in subsection 117.285(5) precludes a remotely witnessed power of attorney from granting the agent effective authority to act in connection with any real property, commercial or consumer transaction or loan.

XI. **WITNESSING ELECTRONIC DOCUMENTS.** Section 117.285 provides that an online notary public may supervise the witnessing of electronic records by the same audio-video communication technology used for online notarization.

A. **Electronic witnessing defined.** The act of witnessing an electronic signature means that the witness is either in the physical presence of the principal or present through audio-video communication technology at the time the principal affixes the electronic signature, and the witness hears the principal make a statement to the effect that the principal has signed the electronic record.

B. **Witness identity confirmation.** If the witness is remote from the principal, then the witness's identity must be verified in accordance with the procedures for identifying a principal under F.S. §117.265(4) as described in Topic V above. If the witness is in the physical presence

of the principal, then the witness must confirm his or her identity by stating his or her name and current address on the audio-video recording as part of the act of witnessing.

C. **Remote witnesses in U.S. only.** A witness who is remote from the principal and appearing through audio-video communication technology must verbally confirm that he or she is a resident of and is physically located within the United States or a territory of the United States at the time of witnessing.

D. **Electronic witnessing authorized generally.** Except for certain powers of attorney as set forth in F.S. §709.2202 (Topic X above), an act of witnessing performed pursuant to F.S. §117.285 satisfies any requirement that the witness be a subscribing or attesting witness or be in the presence of the principal at the time of signing.

E. **Florida law and jurisdiction.** Florida law governs the validity of the act of witnessing an electronic document that is supervised by a Florida online notary public pursuant to F.S. §117.285, regardless of the physical location of the witness at the time of witnessing. State courts and federal courts of Florida have subject matter jurisdiction over any dispute arising out of an act of witnessing pursuant to §117.285, and they may issue subpoenas for records or appearance in relation thereto in accordance with applicable law.

F. **Access to certain information.** Subsection 117.285(6) provides that an online notary public or RON service provider shall provide the following information pursuant to subpoena, court order, an authorized law enforcement inquiry, or other lawful request:

1. The last known address of each witness who witnessed the signing of an electronic record using audio-video communication technology under §117.285;
2. A principal's responses to the questions required under subsection 117.285(5) for certain remotely witnessed documents listed in that subsection (Topic XII below) (note that there is a typo in this cross-reference to the paragraphs containing those questions); and
3. An uninterrupted and unedited copy of the recording of the audio-video communication in which an online notarization is performed.

G. **Real property transactions.** As described in Topic IX above, section 21 of the RON Act amends Section 689.01 of the Florida Statutes by adding a subsection (2) that authorizes the remote electronic witnessing of any instruments requiring witnesses under Chapter 689. Subsection (2) includes cross-references to definitions in §117.201, in particular the definition of "audio-video communication technology," which is not limited to Florida law. One objective of this additional subsection was to allow the remote witnessing of deeds under the supervision of online notaries in other states. Additional subsection 689.01(3) automatically validates all acts of witnessing upon public recordation of the witnessed instrument, notwithstanding any alleged failure of strict compliance with the statute; this validation provision does not override challenges based on fraud, forgery, impersonation or other similar grounds.

XII. **ELECTRONIC WILLS AND CERTAIN OTHER DOCUMENTS.** Subsection 117.285(5) provides special rules for electronically signing and witnessing an electronic record that is a will under chapter 732, a trust with testamentary aspects under chapter 736, an advance health care directive, a

waiver of spousal rights under F.S. §732.701 or F.S. §732.702, or a power of attorney authorizing any of the banking transactions or investment transactions enumerated in F.S. §709.2208.

A. **Vulnerable adults require in-person witnesses.** For any of the foregoing electronic records affected by subsection 117.285(5), paragraph (g) of that subsection provides that the presence of a witness with the principal at the time of signing by means of audio visual communication is *not effective* for witnessing the signature of a principal who is then a “vulnerable adult” as defined in F.S. §415.102. The contestant of an electronic record has the burden of proving that the principal was a vulnerable adult at the time of executing the electronic record.

B. **Vulnerable adult questionnaire.** Prior to facilitating the remote witnessing of an instrument listed in subsection (5), a RON service provider must require the principal to answer three questions designed to help determine whether the principal is a “vulnerable adult.” If any of the required questions is answered in the affirmative, then the principal's signature on the instrument may be validly witnessed only by witnesses who are physically present with the principal at the time of signing. The three questions must be asked in substantially the following form:

1. Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?
2. Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?
3. Do you require assistance with daily care?

C. **Vulnerable adult warning.** Subsequent to submission of the answers to the foregoing three questions, the RON service provider must give the principal written notice in substantially the following form:

NOTICE: If you are a vulnerable adult as defined in s. 415.102 of the Florida Statutes, the documents you are about to sign are not valid if witnessed by means of audio video technology. If you suspect you may be a vulnerable adult, you should have witnesses physically present with you before signing.

D. **More questions for the video record.** The remote witnessing of a signature on an electronic record listed in subsection 117.285(5) is valid only if, during the audio-video communication, the principal provides verbal answers to all of the following questions, which are designed to create a video record of the principal’s capacity or possible undue influence on the principal when signing an electronic will or other subsection (5) document. The online notary public must ask the questions in substantially the following form:

1. Are you currently married? If so, name your spouse.
2. Please state the names of anyone who assisted you in accessing this video conference today.



3. Please state the names of anyone who assisted you in preparing the documents you are signing today.

4. Where are you currently located?

5. Who is in the room with you?

E. **Effect of responses. Ethical note:** Paragraph 117.285(5)(e) specifically directs the online notary public to consider the principal's responses to the foregoing five questions in carrying out the notary public's duties under existing F.S. §117.107(5), which provides that a Florida notary public may not notarize a signature on a document if it appears that the signer is mentally incapable of understanding the nature and effect of the document at the time of notarization. A principal's responses to the eight questions required under subsection 117.285(5) may be offered as evidence regarding the validity of the instrument, but an incorrect answer may not serve as the sole basis to invalidate an instrument.

F. **Identifying remotely witnessed documents.** Because many of the special rules in subsection 117.285(5) turn on whether the witnesses were physically present or remote from the principal, paragraph (i) of that subsection requires that an electronic record containing a subsection (5) document that was signed by remote witnesses must contain a perceptible indication of their presence by audio-video communication technology. This information is expected to be built into the electronic record by the software from the online notary public's RON service provider, but it might not be immediately evident on a print-out of the electronic document.

G. **Savings provision for certain powers of attorney.** Although a power of attorney that includes banking or investment powers enumerated in F.S. §709.2208 is a document that is subject to subsection (5) if remotely witnessed, paragraph (h) of that subsection expressly provides that nothing in subsection (5) precludes such a power of attorney from being effective with respect to any other authority granted therein or with respect to the agent's authority, in connection with a real property, commercial or consumer transaction or loan, to exercise any power specified therein or to execute and deliver instruments obligating the principal or to draw upon the proceeds of that transaction or loan. This savings provision prevents subsection (5) from interfering with those transactions, but it does not override the F.S. §709.2202(6) invalidation of grants of "super powers" in a remotely witnessed power of attorney under §709.2202(1) (see Topic X above).

H. **Good faith reliance by third parties.** Paragraph (j) of subsection 117.285(5) expressly provides that the subsection does not affect the provisions of F.S. §709.2119, which protects third parties who rely in good faith on a power of attorney.

## Forms of Acknowledgment

### For an individual acting in his or her own right:

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name of person acknowledging)  , who is personally known to me or who has produced   (type of identification)   as identification.

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped

My Commission Expires: \_\_\_\_\_

### For a corporation:

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name of officer or agent, title of officer or agent)   of   (name of corporation acknowledging)  , a   (state or place of incorporation)   corporation, on behalf of the corporation. He/she is personally known to me or has produced   (type of identification)   as identification.

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped

My Commission Expires: \_\_\_\_\_

### For a limited liability company:

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name of member, manager, officer or agent, title of member, manager, officer or agent)  , of   (name of company acknowledging)  , a   (state or place of formation)   limited liability company, on behalf of the company, who is personally known to me or has produced   (type of identification)   as identification.

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped  
My Commission Expires: \_\_\_\_\_

**For a partnership:**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name of acknowledging partner or agent)  , partner (or agent) on behalf of   (name of partnership)  , a partnership. He/she is personally known to me or has produced   (type of identification)   as identification.

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped  
My Commission Expires: \_\_\_\_\_

**For an individual acting as principal by an attorney in fact:**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name of attorney in fact)   as attorney in fact, who is personally known to me or who has produced   (type of identification)   as identification on behalf of   (name of principal)  .

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped  
My Commission Expires: \_\_\_\_\_

**By any public officer, trustee, or personal representative:**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this   (date)   by   (name and title of position)  , who is personally known to me or who has produced   (type of identification)   as identification.

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped  
My Commission Expires: \_\_\_\_\_

**Jurat for an oath or affirmation:**

STATE OF FLORIDA

COUNTY OF \_\_\_\_\_

Sworn to (or affirmed) and subscribed before me by means of  physical presence or  online notarization,  
this    (day) day of    (month)   ,    (year)   , by    (name of person making statement)   .

[Notary Seal]

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name typed, printed or stamped

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_ Personally Known OR \_\_\_\_\_ Produced Identification

Type of Identification Produced \_\_\_\_\_