

Supplement to Executive Council Agenda

1. **General Standing Division:**

a. Action Item #1:

Submission of White Paper Pertaining to Remote Notarization Proposal -
p. 1-15

b. Information Items:

Addition of Written Report of the Model and Uniform Acts Committee - p.
16

2. **Probate and Trust Law Division:**

Action Item #1:

The motion is revised to read as follows:

Motion to (A) adopt as a Section legislative position support for amendment to Florida Statutes, including Florida Statutes § 744.331, amending the current statutory procedure for dismissal of a petition to determine incapacity to require a unanimous finding by the examining committee that a person is not incapacitated; (B) adopt as a Section legislative position support for amendment to Florida Statutes, including Florida Statutes § 744.331, creating a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the event that there is a unanimous finding of the examining committee that a person is not incapacitated; (C) find that such legislative position is within the purview of the RPPTL Section; and (D) expend Section funds in support of the proposed legislative position.

Updated versions of the Legislative Position Request Form, white paper and proposed legislation are also attached (p. 17-29).

WHITE PAPER
ONLINE NOTARIZATION¹

I. SUMMARY

During the 2017 Legislative session, CS/CS/HB 277 creating the “Florida Electronic Wills Act” was passed. Among other things this bill allowed for the remote notarization and remote witnessing of wills using electronic communication technology.

On June 26, 2017, Governor Scott vetoed the bill indicating that “[w]hile the concept of remote notarization is meant to provide increased access to legal services like estate planning, the remote notarization provisions in the bill do not adequately ensure authentication of the identity of the parties to the transaction and are not cohesive with the notary provisions set forth in Chapter 117, Florida Statutes.” Governor Scott then encouraged the Legislature to continue to work on these questions during the next legislative session.

During the 2018 Legislative session, companion online notarization bills were filed (SB 1042 and HB 771). As filed and as they progressed through their committees of reference, both bills addressed the mechanics of remote online notarization and methods for authenticating the identity of parties. Neither bill included authorization for remote execution of electronic wills. As a floor amendment, the Senate bill added authorization for electronic wills, which triggered substantial opposition. Although the amended Senate version passed, it was not taken up for vote in the House.

The 2019 Online Notarization Bill again separates those issues. It sets up the mechanics of and expressly authorizes the use of remote online notarization and remote witnessing for most purposes under Florida law, but expressly limits their use for wills, codicils, revocable trusts, advance directives and similar testamentary dispositions. The online notarization bill was drafted to support possible future legislative authorization of electronic wills without the need for major revisions to Chapter 117.

The mechanics of remote online notarization and remote witnessing are so fundamentally different from the concerns surrounding electronic wills, that the RPPTL section drafters strongly recommend that each topic be addressed in an entirely separate, comprehensive bills.

The 2019 Online Notarization Bill 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 will be governed by the traditional provisions set forth in chapter 117, F.S.

The 2019 Online Notarization Bill authorizes a Florida notary to conduct remote electronic notarizations and sets the operating and licensing parameters. It creates standards, safeguards and record keeping requirements for validating the identity of the party whose signature is being notarized. The bill also makes conforming changes and includes curative measures in an attempt to eliminate potential ambiguities and uncertainties regarding the recognition and validity of remotely notarized documents.

In evaluating any online notary model, one of the key issues is whether it provides adequate certainty of the identity of the party being notarized. The bill contemplates the following process:

- Parties must be able to hear and see each other using audio-video communication technology. Lines [489-492, 947-950]

¹ Line number references correspond to “Draft Bill Clean 6-26-18”

- The person being notarized is asked at least 5 questions drawn from credit and other information services. Which of these addresses haven't you lived at? What was your first car? And the party is given a limited time to answer. (defined term "identity proofing") [lines 507-511, 913-931]
- The person presents ID by holding it up to the camera – front and back (defined term "remote presentation"). Pictures of the ID are recorded.
- The notary software analyzes the ID – is layout correct for a Florida Driver license? Are holograms in the right place? does the bar code contain the right name? can they read the microprinting on the back? (defined term "credential analysis" Lines 493-497, 932-936)
- The entire execution is video recorded. [lines 688-695, 782-784]
- The party E-signs the document, the witnesses (physically with the signer or remote from them) e-sign.
- The notary completes the acknowledgement or jurat, e-signs and e-seals in accord with current Florida law regarding E-Notarization in person.
- The entire e-document is "tamper sealed" in a way that identifies if there have been any alterations after notarization. [lines 740-744]

The bill sets initial standards to assure online security, but also gives rule-making authority to the Department of State, in collaboration with the Agency for State Technology, to refine the types of "identity proofing" and other technologies notaries public are required to use to verify a person's identity remotely and in connection with online notarizations.

The bill takes effect on October 1, 2019.

II. CURRENT SITUATION

Terminology in this area can introduce confusion. For this discussion E-signatures are referring to signing an electronic document by affixing, attaching or logically associating an electronic sound, symbol, or process adopted by a person with the intent to sign the electronic document.

E-Notarization or electronic notarization is used to refer to a situation in which the party whose signature or act is being notarized or authenticated actually appears in person before a notary public – the difference from "normal" notarization is that the signatures and the notary seal are electronically affixed to an e-document rather than a wet ink signature. But the remaining rules and practices are the same.

Florida law has approved E-Signing of most types of contracts and other documents since 2000. F.S. 668.50. Since 2007, Florida has authorized notaries to electronically sign and seal as part of their notarizations F.S. 117.021, and approved the electronic recording of documents in the land records. F.S. 695.27 & .28.

Remote online notarization (described as an "online notarization" in the bill) is used to refer to a notarization in which the person whose signature or act is being notarized appears virtually before the notary using audio video technology.

Approving online notarization and remote witnessing, in which the party "appears" before the notary or the signatory through electronic means allowing both to hear and see the other, to meet legal

requirements for various documents is a natural progression toward fully integrated electronic closings and transactions.

Under existing law, a Florida notary public is expressly prohibited from notarizing a signature on a document unless the person whose signature is being notarized is in the presence of the notary public at the time the signature is notarized. F.S. 117.107(9).²

In 2012, Virginia law was modified to allow its notaries to remotely notarize signatures over the internet without regard to the physical location of the signatory at the time of the notarial act. Subsequently laws authorizing remote notarization have been adopted in a number of other states including Montana, Texas, Nevada, Ohio, Indiana, Minnesota, Tennessee and Vermont. During the 2018 session, remote online notarization bills were introduced in 16 states and the District of Columbia.

In order to be recorded in the Florida land records, an instrument affecting real property must be acknowledged, legalized or authenticated. Like all other states, Florida recognizes the acts of an out-of-state notary public (among others) for purposes of authenticating its real estate records. F.S. 695.03. In fact, recognition of other states' notarial acts was one of the first uniform laws.³

Florida's law, like the laws in other states, was drafted well before technology made online notarization a possibility. Given the phrasing of those acts, and the time in which these statutes governing recording and out-of-state notary recognition were adopted, there is room to challenge whether an online notarization performed by an out-of-state notary is entitled to be recorded in Florida. Virginia notarizations are already turning up in recorded instruments. After recording it is difficult, if not impossible, to determine if the instrument was notarized in person or remotely.

This ambiguity subjects otherwise valid deeds, mortgages and other instruments affecting Florida real property, executed by the proper persons, to challenges questioning whether an out-of-state online notarization is entitled to be recorded.

III. EFFECT OF PROPOSED CHANGES

Section 1 divides ch. 117, F.S. into two parts: Part I entitled "General Provisions," and Part II entitled "Online Notarizations." With the exception of the effective date, the remaining sections of the bill can be grouped as follows: Sections 2 through 5 – amending existing notary provisions; Sections 6 through

² There is a limited exception to this allowing law enforcement and correctional officers to take sworn statements using electronic means. F.S. 117.10. This was presumably one of the inconsistencies between HB 277 and the laws governing notaries cited by Governor Scott in his veto letter. 2016's HB 277 purported to allow notarization using audio-video technology in a manner that is expressly prohibited by the applicable notary laws. That bill did not make any modification to chapter 117.

³ The first uniform law applicable to acknowledgment was adopted in 1892. (adopted by Iowa, Louisiana, Massachusetts, Michigan and Tennessee), See Rumph v. Lester Land Co., 205 Ark. 1147, 172 S.W.2d 916, (Ark. 1943) at 1150. This was followed by the **Uniform Acknowledgments Act** (1939, last amended in 1960) (adopted by: Arizona, Arkansas, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, New Hampshire, North Dakota, Pennsylvania, South Dakota, and by Wyoming); **Uniform Recognition of Acknowledgments Act** (1968) (adopted in Alaska, Arizona, Colorado, Connecticut, Illinois, Kentucky, Maine, Michigan, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, Virgin Islands, Virginia, West Virginia); **Uniform Law on Notarial Acts** (1982) (Delaware, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, Oklahoma, Oregon, Wisconsin); the **Revised Uniform Law On Notarial Acts 2010** (adopted in Washington, Oregon, Idaho, Minnesota, Montana, Colorado, North Dakota, Iowa, Pennsylvania, Rhode Island, Vermont, and West Virginia).

17 – authorizing online notarizations; and Sections 18 through 26 – conforming changes to other statutes.

Amendments to General Provisions

Sections 2 through 5 amend current provisions of ch. 117, F.S., which will now be Part I, that contains the general provisions governing how to become a notary public and the duties and responsibilities of a notary public.

Section 3 amends existing F.S. 117.021, regarding in-person electronic notarizations, to require that a notary public must use a password or code protected electronic signature, and that the online notary public cannot be required to use technology the online notary public has not selected. The bill also requires the Department of State, in collaboration with the Agency for State Technology, to adopt rules establishing standards for tamper-evident technologies that will indicate any alteration to an electronic record after completion of an electronic notarial act and to publish a list of technologies that satisfy those standards. All electronic notarizations performed on or after January 1, 2020 must comply with the adopted standards and use an approved technology.

Section 4, amends various portions of F.S. 117.05 to reflect operational changes which will be brought about with online notarization. Chief among these are changes to the suggested acknowledgement and jurat forms to reflect whether a notarial act was accomplished in person or by use of audio-video technology, as such is a requirement for an online notarization under F.S. 117.265(6) [lines 813-815]

Subsection 117.05(12)(a) [lines 272-279] expands the new authority for a Florida notary public. Under current law, a notary may supervise the making of a photocopy of a document and certify the trueness of the copy. The amendment expands the authority to allow a notary to supervise the making of a copy or printout of an electronic record and attesting to the trueness of the copy or printout. It is anticipated that the expanded authority of the notary will be used in connection with amendments to F.S. 28.222 [lines 984-989] which allow the clerk to record certified printouts if the county recorder is not then prepared to accept electronic documents for recording. This process is sometimes referred to as “papering out” a transaction.

Section 5 makes conforming changes to F.S. 117.107 to clarify that the current prohibition of use of a facsimile signature by a notary does not apply to the use of an approved electronic signature, and clarifies that the current prohibition on notarization without a personal appearance, permits an appearance by means of audio-video communication technology.

New Part II – Online Notarizations

Section 6, Proposed F.S. 117.201 contains various definitions applicable to online notarization.

“Appear before,” “before,” “appear personally before,” or “in the presence of”, for purposes only of chapter 117 F.S. to include a remote presence through audio-video communication technology. It should be noted that this definition does not apply to other chapters of Florida Statutes, thus triggering a need for various conforming changes where existing language might introduce uncertainties.

“Audio-video communication technology” is defined as being technology which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another.

“Credential analysis” means a process or service through which a third party confirms the validity of a government-issued identity credential or data thereon through review of public and proprietary data sources;

“Error and omissions insurance” means a type of insurance that provides coverage for potential errors or omissions in or relating to the notarial act;

“Government-issued identity credential” means any of the forms of I.D. approved for use by Florida notaries under current F.S. 117.05(5)(b)2;

“Identity proofing” means a process or service through 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;

“Knowledge-based authentication” means a form of identity proofing based on a set of questions formulated from public and proprietary data sources;

“Online notarization” means the performance of an electronic notarization by means of audio-video communication technology and which meets standards provided in this chapter;

“Online notary public” means a notary public who has registered to perform online notarizations under this part, a civil-law notary appointed under chapter 118, F.S., or a commissioner of deeds appointed under part IV of ch. 721, F.S.;

“Physical presence” means being in the same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person.

“Principal” means an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who gives an oath or affirmation to the online notary public.

“Remote presentation” is defined to mean transmission of an image of a government-issued identification credential through audio-video communication technology 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.

Unless the context requires otherwise, F.S. 117.201 adopts the defined terms from the Uniform Electronic Transaction Act, F.S. 668.50.

Section 7, creates Section 117.209 authorizing an online notary to perform any notary functions authorized by part I of chapter 117, other than solemnizing a marriage online or performing a notarial act in connection with wills and codicils, revocable trusts, advance directives, contracts, agreements or waivers subject to s. 732.701-.702. [542-554].

Each of these carve-outs is qualified “except as otherwise provided in” the pertinent chapter of Florida Statutes. The intent of the carve-out and the phrasing of the exception language is to allow the Legislature, at some point in the future, to adopt a comprehensive act dealing with E-wills without the need for substantial conforming changes to chapter 117.

Subsection 117.209(2) [lines 555-557] a cross-reference to a limit on effectiveness of remotely notarized and remotely witnessed powers of attorney for the exercise of certain powers. These limitations are set forth at F.S. 709.2202(7).

Subsection 117.209(4) confirms that a Florida Online Notary Public must be located inside the state of Florida when exercising notarial powers, but that, consistent with current law, a civil-law notary or Florida commissioner of deeds may perform notarial acts while located outside of the state. Any of them may remotely notarize a principal or supervise remote witnessing without regard to the location of the principal or witnesses. This concept also appears in F.S. 117.265 [lines 766-776] spelling out the online notarization procedures.

Subsection 117.209(5) provides that the validity of an online notarization performed by a Florida notary public is to be determined under Florida law.

Section 8. creates new section 117.215. While efforts were made to make conforming changes to other statutory provisions to expressly recognize remote online notarization, Section 117.215 sets the general rule for all portions of Florida statutes. The section provides that if a notarial act or witnesses are required by some other provision of law, the requirement may be satisfied by compliance with the remote online notarial provisions of Part II.

As with F.S. 117.209, in contemplation of possible future approval of a comprehensive E-Will bill, this section expressly excludes any application to wills and codicils, revocable trusts, and similar testamentary dispositions “except as otherwise provided in” the pertinent chapters. It also cross-references the limitations on remotely witnessed and online notarized powers of attorney contained in F.S. 702.2202(7).

Section 9 creates new F.S. 117.225, which sets forth the qualifications and registration process for registering as a Florida Online Notary Public. This includes certification of completion of training requirements; payment of a fee of \$10; submitting a sworn registration to the Office of the Governor, Department of State; confirming the use of qualifying technologies; maintenance of a bond of at least \$25,000 (which will also satisfy the general notary bond requirement); and maintaining a minimum \$100,000 of errors and omission coverage.

Section 10 creates new F.S. 117.235, expressly stating that an online notary public is subject to the general provisions of Part I of the chapter and may perform in person notarial acts. [lines 651-659]

Section 11 creates new F.S. 117.245 requiring an online notary public to keep records of each online notarization in a secure electronic journal, which must include all of the following

- The date and time of the notarization;
- The type of notarial act;
- The type, the title, or a description of the electronic record or proceeding;
- The printed name and address of each principal involved in the transaction or proceeding;
- Evidence of identity of each principal involved in the transaction or proceeding in the form of:
 - A statement that the person is personally known to the online notary public;
 - A notation of the type of identification document provided to the online notary public;
 - A copy of the government-issued identity credential provided; and
 - A copy of any other identity credential or information provided;
- An indication that the principal satisfactorily passed the identity proofing;
- An indication that the government-issued identity credential satisfied the credential analysis; and
- The fee, if any, charged for the notarization.

The online notary is also required to retain a recording of the audio-video communication that includes the principal and any witnesses who appeared before the notary public; confirmation of the identity of each; the signing of electronic records by the principal and any witnesses; and the performance of the notarial act(s).

The online notary public must take reasonable steps to ensure the integrity, security, and authenticity of online notarizations; maintain a backup record of the electronic journal; and protect the electronic journal, the backup record, and any other records received by the online notary public from unauthorized access or use.

The electronic journal must be maintained by the online notary public or a custodian acting on his or her behalf, for at least 10 years after the date of the notarial act. The notary, or their personal representative, may contract with a secure repository to maintain custody of the electronic journal and recordings. [lines 705-718]

This provision includes a savings clause, providing that an omitted or incomplete entry in the electronic journal does not impair the validity of the notarial act or of the electronic record notarized, but may be introduced as evidence to establish violations of this chapter; as an indication of possible fraud, forgery, or impersonation; or for other evidentiary purposes. F.S. 117.245(5) [lines 719-725]

Section 12 creates new F.S. 117.255, placing duties on the online notary public to

- Ensure that any registered device used to create an electronic signature is current and has not been revoked or terminated by the issuing or registering authority of the device.
- Keep the electronic journal, electronic signature, and electronic seal secure and under his or her sole control, including access protection using passwords or codes. The notary may not allow another person to use their electronic journal, electronic signature, or electronic seal.
- Apply the electronic signature and seal 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.
- Notify law enforcement and the Department of State of any unauthorized use of or compromise to the security of the electronic journal, electronic signature, or electronic seal within 7 days after discovery.
- Make electronic copies, upon request, of the pertinent entries in the electronic journal and provide access to the related audio-video communication recordings to the parties to the electronic records notarized, and to the title agent, settlement agent, or title insurer who engaged the online notary with regard to a real estate transaction, and sets a maximum charge of \$20 for copies, except if requested by the Department of State or Office of the Governor. F.S. 117.255(5) [lines 750-763]

Section 13 creates new F.S. 117.265 which sets forth the procedures for online notarization.

F.S. 117.265(1) provides that the online notary public must be physically located within the state at the time of performing a notarial act, while a civil law notary or commissioner of deeds may be located outside the state. Any of them may act without regard to the physical location of the principal(s) or any witnesses, and the notarial act is deemed to have been performed within the State of Florida and is governed by Florida law.

F.S. 117.265(2) requires the online notary to confirm the identity of the principal and of any witnesses using audio-video communication technology and processes that meet the requirements of this part and to record the two-way audio-video conference session. [lines 777-785]

F.S. 117.265(3) requires that a principal not located in the state confirm their desire for the notarial act to be performed by a Florida notary and under Florida law. [lines 786-790]

F.S. 117.265(4) requires the online notary to confirm the identity of the principal and any witnesses by: [lines 791-807]

- Personal knowledge of the notary as to each individual; or
- All of:
 - Remote presentation of a government issued identification credential.
 - Credential analysis of each government-issued identification credential; and
 - Identity proofing of each individual in the form of knowledge-based authentication or another method of identity proofing that conforms to the standards of this chapter.

If the online notary public is unable to satisfy these requirements or if the databases consulted for identity proofing do not contain sufficient information to permit authentication, the online notary public may not perform the online notarization. [lines 804-807]

F.S. 117.265(5) requires the online notary public and the company providing online notarization services or technologies to take reasonable steps to ensure that the audio-video communication technology is secure from unauthorized interception. [lines 808-812]

F.S. 117.265(6) requires the the electronic notarial certificate for an online notarization to state that the notarization is an online notarization. [lines 813-815]

Since this section is establishing technical requirements, F.S. 117.265(8) provides that failure to comply with these procedures does not impair the validity of the notarial act or the electronic record that was notarized.

However, the non-compliance may be introduced as evidence to establish violations of the notary act or as evidence of possible fraud, forgery, impersonation, duress, incapacity, undue influence, minority, illegality, unconscionability or for other evidentiary purposes. It further states that the savings clause is not be be construed to alter the duty of an online notary public to comply with this chapter and any rules adopted thereunder.

Section 14 creates new F.S. 117.275 capping fees for performing an online notarization at \$25.

Section 15 creates new F.S. 117.285 regarding remote witnessing. [lines 839-866]

Florida is one of five states (Florida, Connecticut, Georgia, Louisiana, South Carolina) which still requires witnesses on deeds and/or mortgages. Many states, including Florida, require witnesses on specific documents, often including wills, testamentary trusts, and powers of attorney.

The concept of what it means to “witness” the signing of a document is not well defined in Florida, or in most states – because historically, there was only one way to do it. You watched

the other person pick up the pen and sign the document. When a document is e-signed, there is not the same physical act to be observed, you might see a finger move on a mouse or a tablet, or the party typing something. If the witnessing is to be accomplished remotely, the camera is likely to remain focused on the signer's face (as it probably should) and the mouse, keyboard or pad will remain entirely out of view.

The lack of a definition of what it means to "witness" an electronic signature (or for that matter any signature) creates an unnecessary and societally undesirable basis for challenging the validity of legal documents. Section 15 addresses this by establishing both the standards for a remote witnessing, and clarifying definition in statute of what it means to "witness" an electronic signature.

First, remote witnessing requires the identity of the witness to be verified in the same manner as the identity of the principal signer – using credential analysis, knowledge based authentication and video recordings. As no identity check at all is required of a "paper" witness this is a marked improvement in security. The bill contemplates the witness either being physically present or using the same audio video connection being used by the online notary.

F.S. 117.285(3) then defines "the act of witnessing an electronic signature means 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 hears the principal make a statement to the effect that the principal has signed the electronic record." [lines 848-853]

As with F.S. 117.209, and F.S. 117.215, in contemplation of possible future approval of a comprehensive E-Will bill, the provisions regarding remote witnessing are expressly made not application to wills and codicils, revocable trusts, and similar testamentary dispositions "except as otherwise provided in" the pertinent chapters. F.S. 117.285(4) [lines 854-863] F.S. 117.285(5) reiterates that a power of attorney witnessed remotely may not be used to exercise certain powers. [lines 864-866]

Section 16 creates new F.S. 117.295.

The drafting intent was to make online notarizations and remote witnessing available immediately after the effective date of the act, and for the statutes to include enough specificity to avoid a need for immediate rulemaking as to technical aspects. It also recognizes that technology generally and the methods of assuring the identity of principals and security of electronic records will continue to evolve and improve. Accordingly it delegates rulemaking authority to the Department of State to adopt rules, more protective, but perhaps at variance with the initial statutory standards, based on future improvements in technology and methodology. [lines 871-878]

F.S. 117.295(1) authorizes the Department of State to approve companies meeting the minimum standards; to publish lists of technologies approved for use in online notarizations; and to periodically review approved companies to assure ongoing compliance. It specifically authorizes rulemaking to implement the requirements of the chapter regarding:

- education requirements
- required terms of bonds and errors and omissions insurance, but not including the amounts of such bonds or policies.
- identity proofing

- credential analysis
- unauthorized interception
- remote presentation
- tamper-evident technology
- audio-video communication technology
- retention of the electronic journal and copies of audio video communications recordings in a secure repository;

each of which provide levels of integrity, security and reliability for online notarizations not lower than the initial standards set forth F.S. 117.295(2). [lines 879 -908]

When adopting rules, the Department of State is required to make and publish a finding of the manner(s) in which the rules protect or enhance the integrity, security and reliability of online notarizations.

The Department of State is directed to adopt forms, processes and interim or emergency rules necessary to accept applications from and register online notaries public no later than October 1, 2019.

F.S. 117.295(2) sets forth the initial standards to govern until the Department of State has adopted rules that are “equally or more protective.” The initial standards include:

- That identity proofing by knowledge-based authentication which must have the following security characteristics:
 - The principal must be presented 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 and be identifiable to the principal’s social security number or other identification information, or the principal’s identity and historical events records.
 - Responses to all questions must be made within a 2 minute time constraint.
 - The principal must answer a minimum of 80 percent of the questions correctly.
 - The principal may be offered one additional attempt in the event of a failed attempt.
 - During the second attempt, the principal may not be presented with more than three questions from the prior attempt. [lines 913-931]
- Credential analysis must confirm that the credential matches the signer’s claimed identity, contains data, format and security elements consistent with a credential of the type presented, and appears to be genuine. [lines 932-936]
- Tamper-evident technology requirements must render any subsequent change or modification to the electronic record evident. [lines 937-940]
- The audio-video communication technology used for online notarizations must

- be reasonably secure from interception, access, or viewing by anyone other than the participants communicating.
- provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and to confirm the identity of the principal using identification methods described in F.S. 117.265. [lines 941-950]
- A company which provides software services for performance of online notarial acts is required to maintain errors and omissions insurance coverage providing no less than \$100,000 coverage per claim. 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. [lines 951-960]
- Until required curricula and other providers have been approved by the Department of State, a two hour classroom or online course covering the duties, obligations, and technology requirements for serving as an online notary public offered by the Florida Land Title Association or the Real Property, Probate and Trust Law Section of the Florida Bar shall be deemed to satisfy the education requirements of s. 117.225(2). [lines 961-968]

Section 17 creates new F.S. 117.305, which is required to avoid pre-emption by the Electronic Signatures in Global and National Commerce Act.

Changes to Other Provisions of Florida Law

Section 18 amends F.S. 28.222 to allow the county recorder to record a certified printout of an electronic document, if the recorder is not then prepared to accept an electronic document. [lines 984-989]

Section 19 amends F.S. 92.50, governing the acceptance of oaths, affidavits and acknowledgements. Current language requires such to be taken “before” an enumerated list of officials, including notaries public. The language is changed to “by or before” to eliminate any uncertainty as to the acceptability of a remote online notarization under this section.

Section 20 amends F.S. 95.231 and **Section 22** amends F.S. 694.08 to provide that the existing curative acts apply not just to a defect in acknowledgment, but also a “failure of or absence of” the acknowledgment.

Section 21 amends F.S. 689.01 to expressly recognize remote witnessing conducted in accord with chapter 117, F.S. 689.01(2)(a); or a similar practice conducted by other parties or in another state, F.S. 689.01(2)(b). [lines 1082-1093]

F.S. 689.01(3) is a savings clause validating remote notarizations previously or hereafter made and providing that, upon recording, they shall provide constructive notice. The provision expressly allows 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 act of witnessing. [lines 1094-1104]

Section 23 amends F.S. 695.03, Current language in subsections (1), (2) and (3) requires acknowledgements, legalizations and proofs to be taken “before” an enumerated list of officials, including notaries public. The language is changed to “by or before” to eliminate any uncertainty as to the acceptability of a remote online notarization under this section.

F.S. 695.03(1), relating to an acknowledgment or proof taken in Florida expressly states that a remote online notarization conducted by a Florida notary or civil law notary in accord with chapter 117 is sufficient to meet the requirements for recordation in the land records.

F.S. 695.03(2) and (3) expressly provide that a remote online notarization by a person other than a Florida notary, Florida civil law notary, or Florida commissioner of deeds IS NOT entitled to recordation in the land records. [lines 1187-1194, 1223-1230]

The bill sets high and often highly technical standards for the online notarization process, as do the laws of other states. In drafting, there was a prevailing view that a party should not be able to escape liability under an instrument actually and validly signed by them based on some technical error or defect in the online notarization process. This is addressed in three ways in F.S. 695.03(4). [lines 1231-1249]

First it provides conclusive evidentiary presumption that affixing of a notary's official seal or the conclusively establishes that the acknowledgment or proof was 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.

Second, it provides that affidavits, oaths, acknowledgments, legalizations, authentications, or proofs taken or administered in any manner set forth in F.S. 695.03 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.

Third, it expressly preserves 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.

Section 24 amends F.S. 695.04 to include a cross-reference to F.S. 117.05.

Section 25 amends F.S. 695.28, which is a "savings clause" originally adopted to provide that a recorded instrument is validly recorded and provides constructive notice notwithstanding technical challenges to electronically recorded instruments in a bankruptcy court. That savings clause was required because clerks began accepting e-recordings before the Secretary of State had adopted required rules. We have a similar situation in which instruments electronically signed, witnessed, notarized and remotely notarized have been recorded without benefit of the changes proposed in this bill.

The bill expands the protections to provide constructive notice notwithstanding an "inability to demonstrate strict compliance with any statute, rule or procedure relating to electronic signatures, electronic witnesses, electronic notarization, or online notarization, or for submitting or recording an electronic document..."

The bill adds F.S. 695.28(c) and (d) precluding recording and constructive notice challenges based on the document having been signed, witnessed, notarized electronically, remotely notarized or witnessed, or that a certified copy of an electronic document was recorded.

As with other savings clauses, this one is qualified so as to not preclude a challenge based on fraud, forgery, impersonation, duress, incapacity, undue influence, minority, illegality, unconscionability, or any other basis not in the nature of those matters described.

Section 26 creates new F.S. 709.2202(7). Current F.S. 709.2202 provides that certain powers may be exercised under a power of attorney ONLY IF the principal signed or initialed next to the specific

enumeration of the authority. Among other things, this requires express approval of powers to create or modify a trust, make certain gifts, create or change rights of survivorship or beneficiary designations and the like. (the “enumerated powers”)

F.S. 709.2202(7) provides that none of the enumerated powers nor banking transactions nor investment transactions (as defined in F.S. 709.2208)⁴ may be exercised under a power of attorney which was remotely notarized or witnessed by a person not in the physical presence of the principal.

The limitation is qualified to provide that a remotely witnessed or remotely notarized power of attorney is effective to authorize an agent to execute and deliver a promissory note, loan agreement, line of credit agreement, mortgage, security agreement, guaranty, indemnity, or other loan document obligating the principal.

Section 27 sets an effective date of October 1, 2017.

⁴ F.S. 709.2208 reads:

(1) A power of attorney that includes the statement that the agent has “authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes” grants general authority to the agent to engage in the following transactions with financial institutions without additional specific enumeration in the power of attorney:

- (a) Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution.
- (b) Contract for services available from a financial institution, including renting a safe-deposit box or space in a vault.
- (c) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution.
- (d) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them.
- (e) Purchase cashier’s checks, official checks, counter checks, bank drafts, money orders, and similar instruments.
- (f) Endorse and negotiate checks, cashier’s checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal’s order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due.
- (g) Apply for, receive, and use debit cards, electronic transaction authorizations, and traveler’s checks from a financial institution.
- (h) Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution.
- (i) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

(2) A power of attorney that specifically includes the statement that the agent has “authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes” grants general authority to the agent with respect to securities held by financial institutions or broker-dealers to take the following actions without additional specific enumeration in the power of attorney:

- (a) Buy, sell, and exchange investment instruments.
- (b) Establish, continue, modify, or terminate an account with respect to investment instruments.
- (c) Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal.
- (d) Receive certificates and other evidences of ownership with respect to investment instruments.
- (e) Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.
- (f) Sell commodity futures contracts and call and put options on stocks and stock indexes.

For purposes of this subsection, the term “investment instruments” means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Federal.

Constitutional questions are raised by the provisions in F.S. 695.03 allowing recordability of an instrument which was online notarized by a Florida notary, a Florida civil law notary or a Florida commissioner of deeds, but denying such an instrument's recordability if acknowledged by a non-Florida notary under potentially identical laws.

This provision is subject to potential challenge under the full faith and credit clause, under an equal protection analysis, and as an impairment of contract.

There is no case law expressly addressing these questions in the context of a remote online notarization.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill may have an indeterminate positive impact to state revenues from the \$25 application fee to become an online notary.

2. Expenditures: The bill allows, but does not require the Department of State (DOS) and the Agency for State Technology (AST) to publish lists of technologies that satisfy the standards and are approved for use in online notarization. DOS has not provided an estimated fiscal impact or agency bill analysis as requested therefore it is assumed that any impacts can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

D. FISCAL COMMENTS: None.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The bill allows the act of notarization to be performed remotely, as opposed to in person. In some instances, this new method will allow businesses and professions that must use notary publics in their day-to-day work to do so without all of the parties coming together in one location. As such, these businesses and professions may see a reduction in expenditures.

VII. OTHER INTERESTED PARTIES

Real Property, Probate, & Trust Law Section of the Florida Bar

Florida Bankers Association

Florida Association of Realtors

Florida Notary Association

National Notary Association

Florida Land Title Association

American Land Title Association

Vendors of Online notarization Services such as Notarize and Notary Cam

Report of the **Model and Uniform Acts** General Standing Committee-
Bruce M. Stone and Richard W. Taylor, Co-Chairs
Prepared for the Executive Council Meeting, July 26-28, 2018

1. The Uniform Law Commission (ULC) is also known as the National Conference of Commissioners on Uniform State Laws. The website is <http://www.uniformlaws.org>. Information on each of its Model Acts is found on the website and for many of the Acts there is an enactment kit which can be downloaded to provide additional information.

2. There has been no new reported activity by the ULC since the May 2018 report.

3. Apple users may be interested in an Estate and Trust App through the App Store as shown at <http://www.uniformlaws.org>.

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LEGISLATIVE POSITION GOVERNMENTAL AFFAIRS OFFICE
REQUEST FORM

Date Form Received _____

GENERAL INFORMATION

Submitted By Nicklaus Curley, Chairman, Guardianship, Power of Attorney, and Advanced Directives Committee of the Real Property Probate & Trust Law Section
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Appearances Before Legislators (SAME)

(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:
Support amendment to Florida Statutes, including Florida Statutes § 744.331, amending the current statutory procedure for dismissal of a petition to determine incapacity to require a unanimous finding by the examining committee that a person is not incapacitated and creating a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the event that there is a unanimous finding of the examining committee that a person is not incapacitated.

Reasons For Proposed Advocacy:
Under current law, the Court is left without any discretion to hear evidence when a majority of the examining committee makes a finding that a person is not incapacitated. When such unanimity is found, the Court must dismiss the petition in its entirety. It is believed that the status of the current law violates the separation of powers by forcing the judiciary to dismiss petitions due to the wording of the statute

WHITE PAPER

PROPOSED AMENDMENT OF F.S. SECTION 744.331(4) IN LIGHT OF *ROTHMAN v. ROTHMAN*

A. SUMMARY

This proposal seeks the creation of a process which would allow the Court to hear extrinsic evidence relating to capacity after a unanimous finding by the Court appointed examining committee that the alleged incapacitated person (“AIP”) is not incapacitated. The guardianship process depends on the examination of the AIP by three court appointed committee members, who each receive a nominal fee and prepare a report to be presented to the court, pursuant to subsection 744.331(3), Florida Statutes. Subsection 744.331(4), Florida Statutes (2015), currently states “If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition.”

In *Rothman v. Rothman*, 93 So 3d 1052 (4th DCA 2012), the lower Court failed to dismiss a Petition to Determine Incapacity even though there was a majority of the examining committee reports which found the AIP to have capacity. A motion to dismiss was filed by the AIP in accordance with Florida Statutes Section 744.331(4). This Motion was denied on the basis that the statute was unconstitutional. Stating that the dismissal of the Petition under these facts was “ministerial,” the 4th DCA overturned the lower court. The holding was especially troubling in this case, because the AIP had already been found incapacitated in another jurisdiction, had a long history of mental illness, and had been fleeced for millions of dollars. Despite such knowledge by the trial court, the holding of *Rothman* took away any discretion that could have been used to allow for extrinsic evidence about the AIP’s condition.

The rights of an AIP to a speedy trial and exit from the guardianship system must be balanced against the public policy of protecting vulnerable adults from exploitation. Under the current system, the pendulum has swung completely in favor of a swift exit from the system by taking away any discretion that the Court has to hear from long time medical professionals, friends, colleagues, or others who can give a more holistic picture of a person’s mental condition and vulnerability. As a result, interested persons can be left without a remedy to protect those who need assistance.

Rothman’s holding supports the legislature’s imposition of its authority on the judiciary by taking away any discretion. Courts generally need to have appropriate discretion to determine whether the particular facts and circumstances of a case should support dismissal of an action. The current law does not allow for that. The infringement by the legislature also creates a conflict between other portions of Chapter 744. On one hand, subsection 744.331(3)(f) states that “the comprehensive examination report shall be an essential element, ***but not necessarily the only element***, used in making a capacity and guardianship decision.” *Rothman* ignored this portion of the statute and made the examining committee reports the ONLY dispositive evidence if a majority concluded that the AIP is not incapacitated.

In order to address these issues, there should be a procedure in place that allows AIP's to quickly exit the system when improperly placed into it, but that also allows interested persons to bring forward extrinsic evidence in cases where the examining reports are believed to be incorrect. Allowing for a quick dismissal but providing the Court with discretion to deviate from this process in the event that there is compelling evidence to do so better tracks public policy and the other portions of Chapter 744. The proposed solution will reduce undue burden on the persons finding themselves in inappropriate guardianship proceedings, while preserving a party's ability to bring forward evidence when a timely motion not to dismiss is filed.

The Guardianship, Power of Attorney and Advance Directives Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has studied this issue, believes *Rothman* was correctly decided, but that the applicable statute should be changed. The Committee further recommend that certain amendments to subsection 744.331 be made to allow for interested persons to bring forth evidence of incapacity, while providing AIP's with the ability to quickly end proceedings. This proposal adopts changes to subsection 744.331 to i) change the standard for dismissal from a "majority" standard to "unanimous," ii) institute a new procedure that will allow an interested person to file a verified motion challenging the examining committee's conclusion no later than 10 days after service of the last examining committee report in the event of unanimous reports finding that a person is not incapacitated, and iii) clarifies and amends the existing legislation for the process of dealing with dismissal of a Petition to Determine Incapacity.

B. CURRENT SITUATION: *ROTHMAN V. ROTHMAN*

The holding in *Rothman* is problematic in that it does not allow the Court any discretion even when there is extrinsic evidence that the examining committee reports are inaccurate. In cases, like *Rothman*, where there are clear indications that the AIP is incapacitated despite the examining committee reports, the Court should have discretion to consider extrinsic evidence. Unfortunately, the current form of 744.331(4) has no procedure to allow this to happen. The appellate court interpreted the statute such that the word "shall" requires dismissal without the ability of the lower tribunal to consider:

- a. The opinion of the third examining committee member;
- b. The opinion(s) of long term treating medical or mental health professionals;
- c. The opinion(s) of informed family members;
- d. The interview of the Alleged Incapacitated Person—who may have made seemingly plausible statements that contained untruths or delusions that were not able to be verified or refuted;
- e. That the Alleged Incapacitated Person was properly medicated at the time of the examining committee's examination, but is currently and usually medication non-compliant;
- f. The fact that there may be inexperienced or untrained members of the examining committee; and
- g. The effects of denying the Petitioner's right to examine or cross-examine the examining committee members as to the contents of the examining committee reports that may contain discrepancies.

C. EFFECT OF PROPOSED CHANGES

Under this proposal, a procedure is created which allows the Court to dismiss a Petition to Determine Incapacity if there is a unanimous finding by the Court appointed examining committee that the AIP is not incapacitated. There are new provisions that provide the Court with discretion to hear extrinsic evidence regarding incapacity if a timely motion challenging the examining committee's conclusion is filed by an interested person.

The proposed process respects the rights of those who may find themselves involved in an incapacity case improperly, while also providing support for the public policy of protecting vulnerable adults. The proposed changes provide a dismissal process to those who are being subjected to an unnecessary determination of incapacity, while protecting against erroneous reports. Since there is a requirement under 744.331(3)(a) that "at least one member be psychiatrist or other physician," the use of a unanimity of the examining committee reports, as opposed to "majority," would further protect against the practical concerns of members who obtain bad information or lack the necessary training for a difficult case. The proposed changes also provide clear direction for the Court to determine if the request for further study of a AIP's level of capacity is warranted. This is accomplished through the use of a "good faith" standard, coupled with the requirement of a proffer of "a reasonable showing."

Accordingly, the changes being made to Florida Statute § 744.331 are as follows:

§ 744.331(4) is revised to change the standard for dismissal of a Petition to Determine Incapacity from a "majority" of the examining committee to a "unanimous" finding that a person is not incapacitated. In addition, the proposed change allows for the timely filing of a motion challenging the examining committee's conclusion and a possible hearing by the Court to consider whether extrinsic evidence should be presented before summary dismissal of the Petition to Determine Incapacity occurs.

The effective date of this act is upon becoming law.

D. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal may increase the costs because it decreases the likelihood for automatic dismissal of the Petition to Determine incapacity. However, such increased costs should be limited since it is rare that examining committee reports make findings of capacity and/or that there is a dispute regarding such findings.

E. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will could increase the fees incurred by persons involved in incapacity proceedings because the proposed change raises the standard for dismissal of a Petition to Determine Incapacity. At the same time, individuals who could otherwise be taken advantage of if they are found to not be incapacitated as a result of improper reports are likely to be protected

by these changes. Such protections will have the likely result of saving assets of vulnerable adults.

F. CONSTITUTIONAL ISSUES

The holding of *Rothman* is viewed by some as an unconstitutional infringement of the legislature's power on the judiciary by removing any discretion from the Court. The proposed change remedies this situation by giving the Court greater discretion depending on the facts and circumstances.

G. OTHER INTERESTED PARTIES

None are known at this time.

1 A bill to be entitled

2 An act relating to guardianships; amending s. 744.331(4), F.S. addressing
3 certain holdings in *Rothman v. Rothman*, 93 So 3d, 1052 (4th DCA 2012);
4 clarifying the purposes and applicability of s. 744.331(4), F.S.; providing
5 applicability; providing an effective date.

6
7 Be It Enacted by the Legislature of the State of Florida:

8
9 Section 1. Subsection 744.331, Florida Statutes is amended to read:

10 744.331 Procedures to determine incapacity.—

11 (1) Notice of petition to determine incapacity.- Notice of the filing of a petition to
12 determine incapacity and a petition for the appointment of a guardian if any and copies of the
13 petitions must be served on and read to the alleged incapacitated person. The notice and copies
14 of the petitions must also be given to the attorney for the alleged incapacitated person, and
15 served upon all next of kin identified in the petition. The notice must state the time and place of
16 the hearing to inquire into the capacity of the alleged incapacitated person and that an attorney
17 has been appointed to represent the person and that, if she or he is determined to be incapable of
18 exercising certain rights, a guardian will be appointed to exercise those rights on her or his
19 behalf.

20 (2) Attorney for the alleged incapacitated person.--

21 (a) When a court appoints an attorney for an alleged incapacitated person, the court must
22 appoint the office of criminal conflict and civil regional counsel or a private attorney as
23 prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney
24 registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a
25 rotating basis, taking into consideration conflicts arising under this chapter.

26 (b) The court shall appoint an attorney for each person alleged to be incapacitated in all
27 cases involving a petition for adjudication of incapacity. The alleged incapacitated person may
28 substitute her or his own attorney for the attorney appointed by the court.

29 (c) Any attorney representing an alleged incapacitated person may not serve as guardian

30 of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated
31 person or the petitioner.

32 (d) Effective January 1, 2007, an attorney seeking to be appointed by a court for
33 incapacity and guardianship proceedings must have completed a minimum of 8 hours of
34 education in guardianship. A court may waive the initial training requirement for an attorney
35 who has served as a court-appointed attorney in incapacity proceedings or as an attorney of
36 record for guardians for not less than 3 years. The education requirement of this paragraph does
37 not apply to the office of criminal conflict and civil regional counsel until July 1, 2008.

38 (3) Examining committee.--

39 (a) Within 5 days after a petition for determination of incapacity has been filed, the court
40 shall appoint an examining committee consisting of three members. One member must be a
41 psychiatrist or other physician. The remaining members must be either a psychologist,
42 gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner,
43 licensed social worker, a person with an advanced degree in gerontology from an accredited
44 institution of higher education, or other person who by knowledge, skill, experience, training, or
45 education may, in the court's discretion, advise the court in the form of an expert opinion. One of
46 three members of the committee must have knowledge of the type of incapacity alleged in the
47 petition. Unless good cause is shown, the attending or family physician may not be appointed to
48 the committee. If the attending or family physician is available for consultation, the committee
49 must consult with the physician. Members of the examining committee may not be related to or
50 associated with one another, with the petitioner, with counsel for the petitioner or the proposed
51 guardian, or with the person alleged to be totally or partially incapacitated. A member may not
52 be employed by any private or governmental agency that has custody of, or furnishes, services or
53 subsidies, directly or indirectly, to the person or the family of the person alleged to be
54 incapacitated or for whom a guardianship is sought. A petitioner may not serve as a member of
55 the examining committee. Members of the examining committee must be able to communicate,
56 either directly or through an interpreter, in the language that the alleged incapacitated person
57 speaks or to communicate in a medium understandable to the alleged incapacitated person if she
58 or he is able to communicate. The clerk of the court shall send notice of the appointment to each
59 person appointed no later than 3 days after the court's appointment.

60 (b) A person who has been appointed to serve as a member of an examining committee to
61 examine an alleged incapacitated person may not thereafter be appointed as a guardian for the
62 person who was the subject of the examination.

63 (c) Each person appointed to an examining committee must file an affidavit with the
64 court stating that he or she has completed the required courses or will do so no later than 4
65 months after his or her initial appointment. Each year, the chief judge of the circuit must prepare
66 a list of persons qualified to be members of an examining committee.

67 (d) A member of an examining committee must complete a minimum of 4 hours of initial
68 training. The person must complete 2 hours of continuing education during each 2-year period
69 after the initial training. The initial training and continuing education program must be developed
70 under the supervision of the Office of Public and Professional Guardians, in consultation with
71 the Florida Conference of Circuit Court Judges; the Elder Law and the Real Property, Probate
72 and Trust Law sections of The Florida Bar; and the Florida State Guardianship Association. The
73 court may waive the initial training requirement for a person who has served for not less than 5
74 years on examining committees. If a person wishes to obtain his or her continuing education on
75 the Internet or by watching a video course, the person must first obtain the approval of the chief
76 judge before taking an Internet or video course.

77 (e) Each member of the examining committee shall examine the person. Each examining
78 committee member must determine the alleged incapacitated person's ability to exercise those
79 rights specified in s. 744.3215. In addition to the examination, each examining committee
80 member must have access to, and may consider, previous examinations of the person, including,
81 but not limited to, habilitation plans, school records, and psychological and psychosocial reports
82 voluntarily offered for use by the alleged incapacitated person. Each member of the examining
83 committee must file his or her report with the clerk of the court within 15 days after appointment.

84 (f) The examination of the alleged incapacitated person must include a comprehensive
85 examination, a report of which shall be filed by each examining committee member as part of his
86 or her written report. The comprehensive examination report should be an essential element, but
87 not necessarily the only element, used in making a capacity and guardianship decision. The
88 comprehensive examination must include, if indicated:

89 1. A physical examination;

90 2. A mental health examination; and

91 3. A functional assessment.

92 If any of these three aspects of the examination is not indicated or cannot be accomplished for
93 any reason, the written report must explain the reasons for its omission.

94 (g) Each committee member's written report must include:

95 1. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.

96 2. An evaluation of the alleged incapacitated person's ability to retain her or his rights,
97 including, without limitation, the rights to marry; vote; contract; manage or dispose of property;
98 have a driver license; determine her or his residence; consent to medical treatment; and make
99 decisions affecting her or his social environment.

100 3. The results of the comprehensive examination and the committee member's assessment
101 of information provided by the attending or family physician, if any.

102 4. A description of any matters with respect to which the person lacks the capacity to
103 exercise rights, the extent of that incapacity, and the factual basis for the determination that the
104 person lacks that capacity.

105 5. The names of all persons present during the time the committee member conducted his
106 or her examination. If a person other than the person who is the subject of the examination
107 supplies answers posed to the alleged incapacitated person, the report must include the response
108 and the name of the person supplying the answer.

109 6. The signature of the committee member and the date and time the member conducted
110 his or her examination.

111 (h) Within 3 days after receipt of each examining committee member's report, the clerk
112 shall serve the report on the petitioner and the attorney for the alleged incapacitated person by
113 electronic mail delivery or United States mail, and, upon service, shall file a certificate of service
114 in the incapacity proceeding. The petitioner and the attorney for the alleged incapacitated person
115 must be served with all reports at least 10 days before the hearing on the petition, unless the
116 reports are not complete, in which case the petitioner and attorney for the alleged incapacitated
117 person may waive the 10 day requirement and consent to the consideration of the report by the
118 court at the adjudicatory hearing. If such service is not timely effectuated, the petitioner or the
119 alleged incapacitated person may move for a continuance of the hearing.

120 (i) The petitioner and the alleged incapacitated person may object to the introduction into
121 evidence of all or any portion of the examining committee members' reports by filing and serving
122 a written objection on the other party no later than 5 days before the adjudicatory hearing. The
123 objection must state the basis upon which the challenge to admissibility is made. If an objection
124 is timely filed and served, the court shall apply the rules of evidence in determining the reports'
125 admissibility. For good cause shown, the court may extend the time to file and serve the written
126 objection.

127 (4) DISMISSAL OF PETITION.— If all three examining committee members conclude that
128 the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the
129 petition unless a verified motion challenging the examining committee's conclusion is filed no
130 later than 10 days after service of the last examining committee report. The verified motion must
131 make a reasonable showing, by evidence in the record or proffered, that a hearing on the Petition
132 is necessary. The court shall rule on the verified motion as soon as is practicable. If the court
133 finds that the verified motion is filed in bad faith, the court may impose sanctions under s.
134 744.331(7)(c)(2). ~~If a majority of the examining committee members conclude that the alleged~~
135 ~~incapacitated person is not incapacitated in any respect, the court shall dismiss the petition.~~

136 (5) Adjudicatory hearing.--

137 (a) Upon appointment of the examining committee, the court shall set the date upon which the
138 petition will be heard. The adjudicatory hearing must be conducted at least 10 days, which time
139 period may be waived, but no more than 30 days, after the filing of the last filed report of the
140 examining committee members, unless good cause is shown. The adjudicatory hearing must be
141 conducted at the time and place specified in the notice of hearing and in a manner consistent with
142 due process.

143 (b) The alleged incapacitated person must be present at the adjudicatory hearing, unless
144 waived by the alleged incapacitated person or the person's attorney or unless good cause can be
145 shown for her or his absence. Determination of good cause rests in the sound discretion of the
146 court.

147 (c) In the adjudicatory hearing on a petition alleging incapacity, the partial or total incapacity
148 of the person must be established by clear and convincing evidence.

149 (6) Order determining incapacity.--If, after making findings of fact on the basis of clear and
150 convincing evidence, the court finds that a person is incapacitated with respect to the exercise of
151 a particular right, or all rights, the court shall enter a written order determining such incapacity.
152 In determining incapacity, the court shall consider the person's unique needs and abilities and
153 may only remove those rights that the court finds the person does not have the capacity to
154 exercise. A person is determined to be incapacitated only with respect to those rights specified in
155 the order.

156 (a) The court shall make the following findings:

- 157 1. The exact nature and scope of the person's incapacities;
- 158 2. The exact areas in which the person lacks capacity to make informed decisions about care
159 and treatment services or to meet the essential requirements for her or his physical or mental
160 health or safety;
- 161 3. The specific legal disabilities to which the person is subject; and
- 162 4. The specific rights that the person is incapable of exercising.

163 (b) When an order determines that a person is incapable of exercising delegable rights, the
164 court must consider and find whether there is an alternative to guardianship that will sufficiently
165 address the problems of the incapacitated person. A guardian may not be appointed if the court
166 finds there is an alternative to guardianship which will sufficiently address the problems of the
167 incapacitated person. If the court finds there is not an alternative to guardianship that sufficiently
168 addresses the problems of the incapacitated person, a guardian must be appointed to exercise the
169 incapacitated person's delegable rights.

170 (c) In determining that a person is totally incapacitated, the order must contain findings of fact
171 demonstrating that the individual is totally without capacity to care for herself or himself or her
172 or his property.

173 (d) An order adjudicating a person to be incapacitated constitutes proof of such incapacity
174 until further order of the court.

175 (e) After the order determining that the person is incapacitated has been filed with the clerk, it
176 must be served on the incapacitated person. The person is deemed incapacitated only to the

177 extent of the findings of the court. The filing of the order is notice of the incapacity. An
178 incapacitated person retains all rights not specifically removed by the court.

179 (f) Upon the filing of a verified statement by an interested person stating:

180 1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust
181 amendment, or durable power of attorney is invalid; and

182 2. A reasonable factual basis for that belief, the trust, trust amendment, or durable power of
183 attorney shall not be deemed to be an alternative to the appointment of a guardian. The
184 appointment of a guardian does not limit the court's power to determine that certain authority
185 granted by a durable power of attorney is to remain exercisable by the agent.

186 (7) Fees.--

187 (a) The examining committee and any attorney appointed under subsection (2) are entitled to
188 reasonable fees to be determined by the court.

189 (b) The fees awarded under paragraph (a) shall be paid by the guardian from the property of
190 the ward or, if the ward is indigent, by the state. The state shall have a creditor's claim against the
191 guardianship property for any amounts paid under this section. The state may file its claim within
192 90 days after the entry of an order awarding attorney ad litem fees. If the state does not file its
193 claim within the 90-day period, the state is thereafter barred from asserting the claim. Upon
194 petition by the state for payment of the claim, the court shall enter an order authorizing
195 immediate payment out of the property of the ward. The state shall keep a record of the
196 payments.

197 (c) If the petition is dismissed or denied:

198 1. The fees of the examining committee shall be paid upon court order as expert witness fees
199 under s. 29.004(6).

200 2. Costs and attorney fees of the proceeding may be assessed against the petitioner if the court
201 finds the petition to have been filed in bad faith. The petitioner shall also reimburse the state
202 courts system for any amounts paid under subparagraph 1. upon such a finding.

203 Section 2. This act shall take effect upon becoming law and shall apply to all proceedings
204 pending before such date and all proceedings commenced on or after the effective date.