



Notarizations and Signatures: Ethical Considerations

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From the moment she steps on stage, it is evident that Christina Taylor is passionate about training real estate professionals on the topics of real estate law, title insurance and ethics. She is well known for her favorite method of teaching - storytelling - using it in every presentation to explain a range of subjects from complicated case law and claims, to the basics of title and closing. Another hallmark of Christina's speaking style is her ability to incorporate down-to-earth points of application, so that FNF Florida agents can easily put that knowledge to use in daily practice.

Christina is no stranger to the stage, having earned her undergraduate degrees in Music (vocal and piano performance) and Business Administration, from Palm Beach Atlantic University in West Palm Beach. Before earning her law degree from the University of Florida College of Law, she traveled the continental United States for 12 months in a high-top van seating 5 other band members, performing in hundreds of concerts to earn her \$25 weekly paycheck. Prior to her current role with FNF Florida Agency as an itinerant speaker, Christina served as Underwriting Counsel, commencing her employment in 2000. Before that, Christina practiced real estate law with a prominent law firm in Orlando, working on complex commercial and residential closings. She is currently a member of The Florida Bar and is certified as an instructor for numerous accrediting agencies in Florida.

When she's not traveling, you'll find her reading a book with her toes in the sand on one of Florida's beaches or tossing the ball for her energetic Goldendoodle. And she still enjoys singing as a member of the Lakeland Choral Society, a 90+ member chorus founded in 1967, which gives back to the community by annually awarding scholarships to promising music students. She is married to an attorney (still having robust "discussions" for more than 30 years) and will always be her two daughters' biggest fan.

Basic Role of the Notary Public

“The basic role of a notary public in our legal system and in the world of commerce is to prevent fraud. Notaries deter fraud when they perform their duties with diligence and obey the laws governing their duties.”¹

For real estate transactions in particular, notarization is the fraud-deterrent process that assures the parties to a transaction that a document is authentic and can be trusted. The central value of notarization lies in the notary’s impartial screening of a signer for identity, willingness and awareness. This screening detects and deters document fraud and helps protect the personal rights and property of private citizens from forgers, identity thieves and exploiters of the vulnerable.

In Florida, the process of notarization prevents countless forged, coerced and incompetent signings that would otherwise overwhelm our court system and dissolve the network of trust allowing our civil society to function. By acknowledging a signature on a real estate document, the notary public also acts to prevent real estate fraud. Irregularities and discrepancies in an acknowledgement could be evidence of a fraudulent transfer. Agents should be on the lookout for some of these methods fraudsters use to undermine the protections provided by a proper acknowledgement.

Chapter 117 of the Florida Statutes governs notaries public in Florida. Title agents should be familiar with these statutes. Notaries perform one of two notarial acts relating to real estate transactions:

1. Take an acknowledgement; or
2. Administer an oath.

An *acknowledgment* is defined as a “formal declaration made in the presence of an authorized officer, such as a notary public, by someone who signs a document and confirms the signature is authentic.”² With an acknowledgment, the person signing the document must personally appear before the notary and declare that he/she signed the document, or he/she must sign the document in front of the notary. Examples of documents that require an acknowledgment include deeds, mortgages and powers of attorney.

An *oath* is defined as a solemn declaration, accompanied by a swearing, that one’s statement is true.³ The person signing the document appears before the notary and swears that the information contained in the document is true. There should be a verbal exchange between the notary and person signing the document where the signer indicates that he/she is taking an oath, and this could be coupled with a ceremonial act. For example, the notary may request that the signer raise his or her right hand and the notary may ask, “Do you swear that the information contained in this document is true?”

Sworn statements are commonly used in affidavits and depositions. The clause at the end of the affidavit is referred to as a “jurat.” Jurats differ from acknowledgments because they evidence a sworn statement, not merely evidence the execution of an instrument. The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false. In other words, a person who makes a false oath is subject to criminal charges. In Florida, penalties exist for false swearing to an affidavit.

Failure of the Signer to Personally Appear before the Notary, aka Presence Requirement

Florida law requires that an acknowledgment or jurat contains certain elements, including the presence requirement. The presence requirement is the most basic requirement for performing a notarization. The person whose signature is being notarized, for either an oath or an acknowledgment, must be present at the time of

¹ Florida Governor’s Reference Manual for Notaries, November 1, 2001, version.

² *Black’s Law Dictionary*, 11th edition, 2019.

³ *Black’s Law Dictionary*, 11th edition, 2019.

notarization. In Florida, the acknowledgement or jurat must contain a statement that the signer personally appeared before the notary at the time of notarization by physical presence or audio-video communication technology.⁴ Stated another way, a notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the physical presence of the notary public at the time the signature is notarized.⁵

Many people misinterpret the presence requirement to require that a document be signed in the presence of the notary, in other words the notary *witnesses* the document signing, which is permissible but not required. In Florida, a notary *may* be a witness but is not *required* to be a witness. It is also important to understand that a notary may serve both as a witness and as the notary; however, when the notary is wearing both of those “hats,” the notary should specify each function being performed by way of separate signature lines. The difference lies in the distinction between the time of *notarization* and the time of *signing*.

Civil and Criminal Sanctions

Failure to adhere to these statutory requirements may result in criminal and civil sanctions for the notary, as well as disciplinary proceedings for an attorney who supervises the notary. If the notary public violates the presence requirement in the statute, the notary is guilty of a civil infraction, punishable by a penalty of up to \$5,000.⁶ Lack of intent to defraud is no defense. But if the notary has intent to defraud, the act constitutes a third-degree felony for fraudulently taking an acknowledgement or making a false notary certificate.⁷ There are no exceptions to the presence requirement.

Attorney Disciplinary Proceeding

In one attorney disciplinary proceeding before The Supreme Court of Florida, documents were returned to the representing attorney with signatures lacking the required notarization. The attorney requested a notary to notarize the documents. The clients did not appear before the notary at the time of notarization as required by Florida law. The Florida Bar charged the attorney with violations of The Rules Regulating The Florida Bar (alleging violations of The Rules of Discipline and The Rules of Professional Conduct).

The court held that “while the signee need not actually execute the document before the notary, the signee must *personally appear before the notary at the time the signee acknowledges that he or she executed the document.*”⁸ The court found that the notary’s actions were illegal and that the attorney solicited the improper and illegal conduct of the notary in violation of The Rules Regulating The Florida Bar. The court imposed public reprimand of the attorney and entered a fine of \$2,582.60 against the attorney.

Can an Attorney and Law Firm Employer Be Held Liable for Damages for Improper Notarization?

In this case before the Fifth District Court of Appeal, the plaintiff was seeking damages against a notary and the law firm⁹ which employed her, for injury sustained from an improper notarization. The notary was an employee of a law firm, who notarized documents for two persons who did not appear before her at the time of notarization. The court noted two problems with the documents: (1) the persons signing as agents of the insurance company were not in fact its agents and (2) the persons who signed the documents did not appear before the notary and swear to the content of the documents.

The majority opinion interpreted the statutory obligation of the notary as “quite simple:” to know or properly identify the persons appearing before the notary and to administer an oath. Since the notary failed in this obligation, the plaintiff was allowed to move forward with the case in an attempt to prove that the notary’s actions

⁴ § 117.05(4)(c), Fla. Stat. Effective January 1, 2020, the definition of presence was expanded to include not only physical presence, but also presence by means of audio-visual technology to authorize remote online notarization.

⁵ § 117.107(9), Fla. Stat.

⁶ § 117.107(9), Fla. Stat.

⁷ § 117.105, Fla. Stat.

⁸ *The Florida Bar v. Farinas*, 608 So.2d 222 (Fla. 1992).

⁹ § 117.105(6), Fla. Stat. currently states “the employer of the notary shall be liable to persons involved for all damages proximately caused by the notary’s official misconduct, if the notary was acting within the scope of employment at the time.” The statute had slightly different language at the time of the case.

were the proximate cause of the plaintiff's damages. The dissenting opinion held that the notary's role was too tenuous to constitute proximate cause of the damages incurred by the plaintiff. Three years later, the court again dismissed the case in favor of the notary. Although there was no doubt that the notary breached the notary statute, her notarization was not the cause of the plaintiff's acceptance of the fraudulent document.¹⁰

Best Practices

If you are a notary public, you must know and adhere to all statutory requirements, including the statutory presence requirement. If you are a manager or attorney who supervises the actions of a notary public, you should remind the notary of the statutory presence requirement and authorize them to decline notarization if the requirement is not met.

Failure of the Notary to Confirm the Signer's Identity

Personally Knows or Satisfactory Evidence

Florida notaries may not notarize a signature on a document unless the notary *personally knows*, or has *satisfactory evidence*, that the person whose signature is to be notarized is the person who is described in and who is executing the document. The notary must certify the type of identification, either based upon personal knowledge or other form of identification as set forth under Florida law, which will be evidenced in the notarial certificate.

"Personally knows" means having an acquaintance, derived from association with the person, which establishes the signer's identity with at least a reasonable certainty.

"Satisfactory evidence" means the absence of any information, evidence or other circumstances that would lead a reasonable person to believe that the signer is not the person he or she claims to be. This can be proved by the sworn written statement of a credible witness, or by presentation of the forms of identification listed in the statute, if the identification is current or issued within the past five years and bears an identifying number.¹¹

Notary's Negligence in Failing to Confirm Signer's Identity

The Fourth District Court of Appeal recently held that a notary's negligence operated in combination with someone else's fraud to cause damages; and it was for a jury to determine if the notary's negligence was the proximate cause of the damages. The Appellate Court reinstated the jury's verdict from trial which awarded the plaintiff \$247,000 in damages.¹²

The plaintiff alleged that the notary failed to properly identify the person signing a deed, which was later claimed to be fraudulent. Third parties relied on that fraudulent deed to take title, thus depriving the signer's estate (which was opened after the signer's death) of the proceeds of the sale.

The originally recorded deed included an incorrect legal description¹³, which was later re-recorded with a different legal description, although not re-executed nor re-notarized. The court held that without the notarization and recording of the original deed (with the incorrect legal description), title would not pass to the fraudster and then the third-party purchasers. The notarization of the original deed allowed it to be recorded and then ultimately sold to the third-party purchasers. Thus, the court held that the notarization was the proximate cause of the plaintiff's injuries, directly contributing to the damages from the estate's loss of the property.

The court went further to state that *"the fact that the deed was void...does not relieve the notary of liability...for negligence. Even if the deed is of no effect and does not pass title, that does not mean that no damages have resulted from the fact that the forged deed was recorded, and the property sold."* The deed purported to convey title and

¹⁰ *Ameriseal of N.E. Fla., Inc. v. Leiffer, et al.*, 673 So.2d 68 (Fla. 5th DCA, May 7, 1996), 738 So.2d 993 (Fla. 5th DCA, July 16, 1999), reh'g den., August, 1999.

¹¹ § 117.05(5), Fla. Stat.

¹² *Scheible v. Brown, et al.*, 333 So.3d 726 (Fla. 4th DCA, February 9, 2022).

¹³ The trial court concluded the original deed had an incomplete legal description and was ineffective to pass title, but the Appellate Court found no evidence to support that contention. The notary claimed the county recorder rejected the original deed because of an improper legal description, which resulted in the corrective deed's recordation; however, both deeds were recorded and there was no evidence to support the notary's assertion.

the fraudster was able to sell the property to third party purchasers as a result of the recording of the corrective deed, causing the estate's damage.¹⁴ The court later went on to state "to hold that the notary is exempt from liability because the deed was forged excuses the notary from the performance of the very essence of duties for which the notary is required."

At trial, the notary had no memory of notarizing the deed and admitted she did not record the entire driver's license number of the signer, even though it was her usual practice to do so. She also admitted to differences between the signature and the name of the driver's license. A handwriting expert testified that the signature on the deed was not written by the true owner.

The Notary's Duty of Care for Identifying Document Signers

The Court in the *Scheible* case above relied heavily upon a law review article as a basis for its findings of the notary's negligence. The article sets forth the notary's responsibility to "act reasonably" in the performance of every notarial procedure; including the "responsibility to verify the identity of every person for whom he or she notarizes." Further, the notary is "liable to all persons who suffer injury as the proximate result of the notary's breach of his or her duty of care."¹⁵

The article also references the Notary Public Code of Professional Responsibility of 2020¹⁶, which requires that the notary exercise "a high degree of care in identifying each principal...using means allowed or prescribed by law in the state where the notary is commissioned." This identification can be through the notary's personal knowledge, only if the notary has had "substantial and meaningful interactions with the individual over an extended period of time sufficient to dispel and reasonable doubt" as to the individual's claim to that identity.

Failure of the Title Agent to Review the Acknowledgement/Jurat/Notarial Certificate

Under Florida's Recording Act, to entitle any instrument concerning real property to be recorded, the execution must be acknowledged by the party signing it; and certain officials, including a notary public, must authenticate it.¹⁷ The notary statute also requires that the acknowledgment or jurat contain certain elements, including:

- The venue stating the location of the notarization ("State of Florida, County of _____");
- Type of notarial act performed, an acknowledgment or oath, evidenced by the words "acknowledged" or "sworn;"
- Whether the signer personally appeared before the notary public at the time of notarization by physical presence or by means of audio-video communication technology;
- The exact date of the notarial act;
- The name of the signatory, absent specific notation it is presumed that notarization is to all signatures;
- The specific type of identification the notary is relying upon, either based on personal knowledge or satisfactory evidence;
- The notary's official signature;
- The notary's name, typed, printed or stamped below the signature; and
- The notary's official seal affixed below or to either side of the notary's signature. The seal must be a rubber stamp type seal and must include the words "Notary Public – State of Florida." The seal must also include the name of the notary public, the date of expiration of the commission and the commission number.¹⁸

¹⁴ *But see Wright v. Blocker*, 144 Fla. 428 (Fla.) holding that the mere recordation of a forged deed does not affect the title to land, as our recording statutes apply solely to genuine or lawful instruments. *See also Reed v. Fain*, 145 So.2d 858 (Fla.1962); *McCoy v. Love*, 382 So. 2d 647, 648 (Fla. 1979)

¹⁵ *The Notary's Duty of Care for Identifying Document Signers*, Van Alstyne, Peter J., 21 J. Marshall Law Review, 1999.

¹⁶ The first-ever comprehensive and detailed code of ethical and professional conduct for America's Notaries published by The National Notary Association, found online at <https://www.nationalnotary.org/file%20library/nna/reference-library/code-of-professional-responsibility-2020.pdf>

¹⁷ § 695.03, Fla. Stat.

¹⁸ § 117.05, Fla. Stat.

Based on the above statutory requirements, the title agent has a legal and ethical duty to review the notarial certificate in its entirety, including any supporting documentation, before relying upon it for an insured document.

Best Practices in Evaluating the Notarial Certificate

- If a notarization is in question, independently confirm the notary's commission, address and contact information.
 - For Florida notarizations, you can find this information through the Florida Department of State's website at <http://notaries.dos.state.fl.us/not001.html>. Here you will find the notary identification number, commission number, expiration date (even those that have already expired) and bonding agency. Florida notaries are required to notify the state of any name changes and contact information changes.
 - For out-of-state notarizations, you can find an Index of State Notary Officials at the Florida Governor's website, https://www.flgov.com/wp-content/uploads/pdfs/index_of_notary_officials.pdf.
 - In the alternative for out-of-state notarizations, you can search by state at the American Society of Notaries website at <https://www.asnnotary.org/?form=stateinfo>. This website also provides a brief synopsis of the notary laws for that state, although you should confirm the information directly with the notary authority for that state, as it is subject to change.
- You may also ask the notary to provide their journal entry for your transaction. In Florida, a journal is not required, but a notary may opt to keep a journal as a protective measure to provide a permanent record of notarial acts.
- If you are acting as a notary, never let your guard down, even when performing a notarial service in a personal capacity.
- Remember that your underwriter cannot override Florida's notary laws. If any laws are violated, for example, proper identification is not provided, then you may not accept it and you may not notarize the document.

Signatures

"I don't think I've ever seen your handwriting before. It's an oddly personal thing, isn't it?"¹⁹

With our industry moving at a record pace, it is easy for day-to-day activities to become rushed and frantic, with certain details becoming mundane, ordinary and seemingly trivial. The recurring nature of the particulars of our business, such as signing documents, may lead to an agent overlooking details that may indicate a questionable transaction or a potential fraud. Signatures are one aspect in document preparation, execution and review that may go easily unnoticed. Beware, this is exactly what the fraudsters are counting on.

Failure of the Title Agent to Review Signatures

Signature Comparisons

As stated in the quote above, a person's signature is an oddly personal thing. Although not a part of your everyday operations, you should consider comparing signatures when other red flags for fraud are revealed in your transaction. Underwriters do not expect you to become a forensic expert on signature analysis, but many times the inconsistencies are obvious if you take a few minutes to compare them. Many agents have avoided a potential forgery by simply reviewing and comparing signatures of the parties and the notaries.

¹⁹ Ann Aguirre, American author of science fiction series *Sirantha Jax*, taken from fifth book in that series, *Aftermath* (2011).

If you determine a signature is questionable, contact the party directly and independently to verify their signature. If you believe the signatory may be the party attempting a fraud, contact an independent party to confirm the transaction, for example, the seller or a realtor. Do not rely on a third party's verification of the signature and do not utilize contact information provided to you by an involved party. Conduct your own independent research to find contact information and speak to that person directly.

Misspellings

Another way title agents can prevent potential fraud is by closely evaluating signatures for misspellings. As part of your closing process, you should verify correct spellings for the parties to the transaction and for the notary. For example, examine the identification provided by the grantor to confirm it matches his or her signature. Inspect the inscribed signatures on your documents to confirm they match the spelling on the documents and the spelling on the signature lines. Confirm the spelling of the notary's signature matches the spelling on the notary stamp or seal. Even a misspelling in a seemingly inconsequential piece of information, such as the seller's address, may be an indication of fraud. If you find a misspelling, you must make further inquiries to determine if the misspelling is a mistake or if it indicates a potential fraud.

Fraud on Vacant Land

Although not a definite sign that the transaction is fraudulent, the unimproved or vacant nature of a property, along with other indicators such as an absentee owner, should give rise to heightened scrutiny or even the decision to decline the transaction altogether. These properties are easy targets for fraudsters. Often, the fraudster impersonates the true owner of the property, attempts to sell the property and receive the proceeds.

When dealing with a property having a risk of fraud, we suggest taking two or more of the actions set forth in FNF Florida Agency **Underwriting Bulletin 2021-09** Fraud Prevention Guidelines (a copy can be found at the end of these materials) to ensure the legitimacy of the transaction. The closing file should be documented to reflect the actions taken. Additional information on the latest fraud schemes can also be found in these Bulletins which can be found online at fnfflorida.com:

- **Underwriting Bulletin 2022-01** United States Secret Service's Foreign National Real Estate Fraud Bulletin, and
- **Underwriting Bulletin 2022-11** Fraud Prevention: Transaction Confirmation Letters.