Notary Public, presence requirement

Number: INFORMAL

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Ms. Perla Sole Calas
15450 New Barn Road
Suite 302
Miami Lakes, Florida 33014

Dear Ms. Calas:

Thank you for contacting this office with questions about your duties as a notary public. You have asked for assistance in determining whether a live video teleconference will fulfill the "presence" requirement of section 117.107(9), Florida Statutes.

The duties and responsibilities of notaries are controlled by Chapter 117, Florida Statutes, which provides that notaries are appointed by the Governor[1] and that it is the Department of State which is responsible for administratively implementing the act.[2] Thus, questions relating to Chapter 117, Florida Statutes, should most appropriately be addressed to the notarial division of the Department of State as follows:

Department of State
Division of Corporations
Notary Commissions or Apostille Certification
Post Office Box 6800
Tallahassee, Florida 32314-6800

However, in an effort to assist you, I offer the following informal comments.

Section 117.05(4), Florida Statutes, requires that when notarizing a signature, a notary must complete a jurat or notarial certificate in substantially the form prescribed by the statute. The jurat or certificate of acknowledgment must contain a number of prescribed elements including one reflecting "[t]hat the signer *personally appeared* before the notary public at the time of the notarization."[3] (e.s.) In addition to this "presence" requirement, section 117.107(9), Florida Statutes, states that:

"A notary public may not notarize a signature on a document if the person whose signature is being notarized is not *in the presence* of the notary public at the time the signature is notarized. Any notary public who violates this subsection is guilty of a civil infraction, punishable by penalty not exceeding $5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this subsection that the notary public acted without intent to defraud. A notary public who violates this subsection with the intent to defraud is guilty of violating s. 117.105." (e.s.)

Chapter 117, Florida Statutes, does not define the word "presence" for purposes of the act.

However, it is a general rule of statutory construction that in the absence of a statutory definition, the plain and ordinary meaning of words can be ascertained if necessary by reference to a dictionary.[4]

The term "present," as an adjective, is defined as being "[i]n attendance; not elsewhere"[5] and "being here[;]" "existing or occurring in a place, thing, combination, or the like[;]" "being actually here or under consideration[.]"[6] From another source, the term "present" is defined as "[b]eing at hand[.]"[7] The word "presence" is generally defined to mean "the state or fact of being present, as with others or in a place[;]" "immediate vicinity; proximity[;]"[8] another dictionary defines "presence" as "[t]he condition or fact of being present[;]" and "[t]he area immediately surrounding someone."[9] Thus, it appears that the actual physical presence of a signatory before the notary is required by the statute for a valid acknowledgment. I would note that a number of cases relating to notarial misconduct make this same point.[10]

I trust that these informal comments will be helpful to you in performing your duties as a notary. You may wish to discuss your suggestions for "virtual presence" for purposes of Chapter 117, Florida Statutes, with the Department of State and with your local legislative delegation if you believe that statutory changes may be necessary.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] Section 117.01(1), Fla. Stat.

[2] *See* ss. 117.01(2) and 117.021, Fla. Stat.

[3] Section 117.05(4)(c), Fla. Stat.

[4] *See Green v. State*, 604 So. 2d 471, 473 (Fla. 1992); *Plante v. Department of Business and Professional Regulation*, 685 So. 2d 886 (Fla. 4th DCA 1996); *State v. Cohen*, 696 So. 2d 435 (Fla. 4th DCA 1997).

[5] Black's Law Dictionary p. 1221 (8th edition 2004).

[6] Webster's New Universal Unabridged Dictionary p. 1529 (2003).

[7] The American Heritage Dictionary p. 542 (office edition 1987).

[8] *Supra* n.6.

[9] *Supra* n.7.

[10] *See DeCamp v. Allen*, 156 So. 2d 661 (Fla. 1st DCA 1963), in which the court stated that "[i]t should no longer be necessary to remind those persons authorized to take acknowledgments that they are derelict in their duty if they notarize an acknowledgment without the signatories personally appearing before them." *And see Hitchinson v. Stone*, 84 So. 151 (Fla. 1920); *Robinson v. Bruner*, 114 So. 556 (Fla. 1927); *McDonald v. McDonald Holding Corp*., 165 So. 363 (Fla. 1935).