



## **The Reel Real Practice of Law**

By Cheryl M. Jones, Branch Manager and Title Counsel, Western District

We are all human and we all make mistakes. It's inevitable. After all, doesn't it make sense that's why it's referred to as the "*practice of law?*" And don't you think the person who coined that phrase was likely a very sage real property attorney?

The question is not "will" you come across a mistake in a recorded document, but "when?" And when that time comes, here are some "fixes" that I hope you will find useful.

### ***Minor and Typographical Errors in Recorded Instruments***

At one time, if a minor or typographical error was found in a recorded document then the face of the instrument was altered to show the correction. Many times an explanatory note was added and the document was re-recorded. At another time, a cover sheet was used to identify the error and provide the correct wording or spelling.

Fast forward to present day when if the face of a recorded document is altered or changed, the error can no longer be corrected through the re-recording of the flawed instrument. To *correct* the error in a recorded instrument, a corrective document must be obtained and placed on public record. Examples include but are not limited to a corrective deed, modification, substitution of collateral, or reaffirmation agreement.

In some limited instances, recording a new document that provides notice of the error and the correct information is sufficient. If the error in question is a minor or typographical error, then NCGS 47-36.1 may be appropriate to use. This document is typically referred to in practice as a "Scrivener's Affidavit" or a "Notice of Typographical or Minor Error."

NCGS 47-36.1(a) provides that one may record an affidavit with the register of deeds office providing "notice of a typographical or other minor error in a deed or other instrument." No specific form is required, but the statute does offer the following guidance: "[i]f an affidavit is conspicuously identified as a corrective or scrivener's affidavit in its title, the register of deeds shall index the name of the affiant, the names of the original parties in the instrument, the recording information of the instrument being corrected, and the original parties as they are named in the affidavit." A copy of the originally recorded document may be attached to the affidavit, but that step is not required.

While the affidavit for minor or typographical errors can be a very useful resource, it does have its limitations. Most importantly, it is imperative to note that this instrument does not actually *correct* the error in the instrument, but merely provides notice of its existence and the correct version. In

order to actually correct or change the face of the instrument, a proper corrective document must be executed by the original parties and placed on record.

There are many instances when the minor error affidavit is sufficient to obtain title insurance for a specific defect. It is always advisable however, to discuss these situations with your local Attorneys Title counsel to determine the best course of action. A sample form minor error affidavit is provided at the end of this article for your convenience.

### ***Notary Corrective Affidavit***

The corrective affidavit used to address mistakes made in the notary acknowledgment of a recorded instrument is typically referred to as an “Affidavit of Correction of Notarial Certificate” or a “Notary Corrective Affidavit.” This corrective affidavit is addressed in NCGS 47-36.1(c). Like the Scrivener's Affidavit, the applicable statute does not provide a specific format for the Notary Corrective Affidavit. A sample form is attached to this article for your convenience.

An important distinction between the Scrivener's Affidavit and the Notary Corrective Affidavit is that the notary form actually serves to *correct the error* in the flawed instrument upon its recording. Specifically, NCGS 47-36.1(c) states that “the notary public shall complete the corrective affidavit identifying the correction and may attach a new acknowledgment completed as of the date the original acknowledgment took place, *which shall be deemed attached to the original recording, and the instrument priority shall remain the date and time originally recorded* (emphasis added).”

One should note that in order to effectuate a correction, and not just provide notice of an error in a notary acknowledgment, the original notary must execute the Notary Corrective Affidavit. Like the Scrivener's Affidavit, the Notary Corrective Affidavit should include the names of the parties to the original instrument (for indexing purposes), the recording information of the previously recorded document, as well as a description of the error. The notary acknowledgment provided in the affidavit then serves to replace the actual error or omission found in the previously recorded document. This corrective affidavit can be used for previously recorded deeds, deeds of trust, modifications, agreements, and other similar instruments.

As with the Scrivener's Affidavit, attaching a copy of the previously recorded instrument to the Notary Corrective Affidavit is at the discretion of the drafting or recording party. It is not required in order for the Affidavit to be effective.

### ***Notary Corrective Statute***

Chapter 10B of the North Carolina General Statutes contains several curative provisions for certain notarial acts that may prove useful for many attorneys who discover errors in their back title chain. It is important to note that this statute is periodically reviewed and updated. The result is that one should pay particular attention to any applicable dates referenced in the statute so as to insure the curative provision is applicable to your situation.

Chapter 10B covers all acts of notaries and is extensive in its application and reach regarding the acts of those individuals. The following references are highlights of the curative subsections and are

applicable to real property practitioners:

1) Part 9. Validation of Notarial Acts (10B-65): As 10B-65(e) states, this section is currently only applicable to “notarial acts performed *on or before April 1, 2013* (emphasis added).” 10B-65(d) validates all notary acknowledgments with a notarial seal performed *before December 1, 2005*. 10B-65(c) provides validation for notary acknowledgments in deeds of trust where the notary is also named as the trustee. And 10B-65(a) and (b) outline several situations in which validation occurs without any further action. It is worth spending a few extra minutes familiarizing oneself with these subsections as they can be very useful if your fact pattern falls into one of the provided scenarios.

2) 10B-67: This section addresses situations in which the notary's commission expiration date is erroneously stated in a document. Specifically, the acknowledgment is validated and enforceable so long as the notary was “lawfully commissioned at the time of the notary act.” This section is applicable to notary acts “whenever performed.”

3) 10B-68: This section contains curative provisions when certain “technical defects” are present in a notary acknowledgment. Some examples of technical defects addressed in this section are the lack of the legible appearance of a notary's name in exact match to that on the commission; affixation of the notary's seal near the signing party's signature as opposed to near the notary's signature; and minor typographical errors and variations in certain instances dealing with the principal's name. This list is not exhaustive and the statute leaves room for interpretation when determining what other defects can be categorized as “technical.” Please consult with your local Attorneys Title counsel if you have any questions on whether your fact pattern is a candidate for cure under this statute.

Mistakes happen. And whether they are fresh or silently tucked away in your back chain of title, we hope that you will reach out to Attorneys Title when you discover such mistakes. Most mistakes can be corrected, and we look forward to working with you to cure these errors and allow you to more easily finalize your transactions.

**Suggested G.S. 47-36.1 Affidavit**

Prepared by and after recording hold for:  
(Insert attorney's name)

**STATE OF NORTH CAROLINA**  
**COUNTY OF \_\_\_\_\_**

**NOTICE OF TYPOGRAPHICAL OR OTHER MINOR ERROR IN PREVIOUSLY RECORDED INSTRUMENT**  
**(Pursuant to North Carolina General Statutes §47-36.1)**

Before me, the undersigned authority, personally appeared \_\_\_\_\_ Attorney at Law (the "Affiant"), who, after being by me first duly sworn, deposes and says as follows:

1. That a written instrument (the "Instrument"), prepared and recorded by Affiant, the instrument more particularly described below, has heretofore been recorded in the Office of the Register of Deeds of \_\_\_\_\_ County, North Carolina.

A. Description of Instrument:

B. Date of Instrument:

C. Parties to Instrument:

D. Recording Information of Instrument:

2. That the instrument contains the following described error (the "Error"):

3. That the following is the correct information to give notice of the Error:

4. This Affidavit is prepared, executed and recorded, pursuant to North Carolina General Statutes §47-36.1 (the "Statute"), for the purpose of giving notice of the error in the Instrument pursuant to the Statute.

This \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_, Attorney At Law, Affiant

STATE OF NORTH CAROLINA

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

I, the undersigned, a Notary Public in and for the County and State aforesaid, hereby certify that \_\_\_\_\_, Attorney at Law and Affiant ("Affiant"), personally known to me or known to me by said Affiant's presentation of said Affiant's North Carolina Driver's License, personally appeared before me this day and acknowledged the due and voluntary execution of the foregoing Affidavit.

Witness my hand and official stamp or seal, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

(STAMP OR SEAL)

My Commission expires: \_\_\_\_\_

**AFFIDAVIT OF CORRECTION OF NOTARIAL CERTIFICATE**

Prepared by: \_\_\_\_\_

The undersigned Affiant, being first duly sworn, hereby swears or affirms that the \_\_\_\_\_ (name or type of original instrument containing notarial certificate being corrected) recorded on \_\_\_\_\_ (date) in Book \_\_\_\_\_, Page \_\_\_\_\_, \_\_\_\_\_ County Registry, by and between Grantor, \_\_\_\_\_, Trustee, \_\_\_\_\_, and Grantee, \_\_\_\_\_,

The notarial certificate contained the following error:  
\_\_\_\_\_  
\_\_\_\_\_.

Affiant is the notary who performed the notarial act and completed the notarial certificate on the above-referenced original instrument and makes this Affidavit for the purpose of correcting the notarial certificate contained in the instrument. The corrected notarial certificate is attached.

A copy of the original instrument (in part or in whole) (\_\_\_) is / (\_\_\_) is not attached.

\_\_\_\_\_  
Signature of Affiant/Notary  
Print or Type Name: \_\_\_\_\_

State of North Carolina County of \_\_\_\_\_

Signed and sworn to (or affirmed) before me, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

My Commission Expires:

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

(Affix Official/Notarial Seal)

**CORRECTED NOTARIAL CERTIFICATE FOR ATTACHMENT TO:**

DOCUMENT: \_\_\_\_\_  
DATED: \_\_\_\_\_  
GRANTOR: \_\_\_\_\_  
TRUSTEE: \_\_\_\_\_  
GRANTEE: \_\_\_\_\_  
RECORDED ON \_\_\_\_\_  
IN BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, \_\_\_\_\_ COUNTY REGISTRY.

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State of \_\_\_\_\_  
County of \_\_\_\_\_

I certify that the following person(s) personally appeared before me on \_\_\_\_\_, 20\_\_\_\_, this day, each acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_ [insert name(s) of principal(s)].

Date: \_\_\_\_\_

\_\_\_\_\_  
Notary's Printed or Typed Name, Notary Public

(Official/Notarial Seal)

My commission expires: \_\_\_\_\_