DRAFTING CONSIDERATIONS
Conveyances and Correction Instruments

by

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I. CONVEYANCE INSTRUMENTS

Conveyancing is the act of transferring an ownership interest in real property from one party to another. A conveyance is also a generic term for any written document which transfers (conveys) real property or real property interests from one party to another. The moment that a correctly prepared document is delivered from one owner to the next is the moment of actual conveyance. This paper focuses on statutorily directed steps that can be taken if the "instrument of conveyance" includes an error. See Tex. Prop. Code § 5.027-.031. For an in-depth review of the process and actions required to provide for the transfer of title to real property see "Cluttering the Deed" presented by Stephen A. Mitchell during the 18th Annual Advanced Real Estate Drafting Course in 2007. See also The Updated Annotated Deed of Trust, 38th Annual University of Texas Mortgage Lending Institute (2004) by Michael Alessio. This paper provides a brief update to some of the more key elements of conveyance instruments. The primary focus of this paper is reserved for the new legislation relating to correction instruments.

Deeds, of course, are the most common type of conveyance instruments. Some other types are leases, easements, and deeds of trust. A deed is to be distinguished from a promissory note (or real estate lien note) which is a promise to pay a sum of money, and from a deed of trust, which is a security pledge providing the lender with remedies (including foreclosure) if a borrower defaults on the note. A warranty deed, note, and deed of trust are the three principal documents in most Texas residential real estate transactions, and where most mistakes occur. This is largely due to the absence of attorney involvement as representatives of the parties and the significant role of out-of-state lenders. Also, many people touch and handle a residential real estate transaction before it closes. Accordingly, errors, when they exist, tend to occur in residential or smaller commercial transactions. It is to be emphasized that correction instruments are not an opportunity to "redo the deal."

A. Essential Elements:

For a conveyance to be legally operative, several essentials must exist including:

- An instrument of conveyance must be in writing. Tex. Prop. Code § 5.021
- An instrument of conveyance must be signed by the grantor or the grantor's authorized agent. See Smith v. Worth, 483 S.W.2d 834 (Tex. Civ.App. - Waco 1972, no writ).
- An instrument of conveyance must contain operative words of grant showing a present intent to convey. Harris v. Strawbridge, 330 S.W.2d 911 (Tex. Civ. App. - Houston 1959, writ ref'd n.r.e). This is also true for reservations. In Farm & Ranch Investors, Ltd. v. Titan Operating, L.L.C., 369 S.W.3rd 6791 (Tex. App. – Fort Worth 2012, pet. pending), recorded restrictions were not an instrument of conveyance and did not reserve minerals to the owner.
- An instrument of conveyance must provide an adequate legal description of the interest or estate conveyed. This may be done either by specific description within the document itself or by reference to another writing. Pick v. Artel, 659 S.W.2d 636 (Tex. 1983). The key factor is that the particular land conveyed may be identified with reasonable certainty. Broaddus v. Grant, 258 S.W.2d 308 (Tex. 1953)
- An instrument of conveyance must be delivered. Tex. Prop. Code § 5.021. Delivery requires both delivery to and acceptance by the grantee, along with the grantor's intention that it is to become presently operative as a conveyance. Smith v. Smith, 607 S.W.2d 617 (Tex. Civ. App. - Waco 1980, no writ).

B. Common Non-Essential Elements

Most deeds will contain more than minimum terms and provisions. Due care should be taken to ensure that additional terms and conditions are essential to the purposes of the deed and will support and advance the intent of the parties. Other provisions in conveyance instruments, not legally required, include:

- Consideration is not required for an instrument of conveyance to effectively and validly convey title
from one party to another. *Glenney v. Crane*, 352 S.W.2d 773 (Tex. Civ. App. - Houston 1961, writ ref'd n.r.e.). However, to rebut the implication that an instrument of conveyance was executed and delivered without valid consideration, most instruments of conveyance recite some form of consideration. *See Latham v. Dement*, 409 S.W.2d 429 (Tex. Civ. App. - Dallas 1966, writ ref'd n.r.e).


- An instrument of conveyance need not be acknowledged or recorded. An unrecorded and unacknowledged deed is effective as to, and binding on, each party to the instrument. *McCracken v. Sullivan*, 221 S.W. 336 (Tex. Civ. App. - San Antonio 1920, no writ). However, deeds (and certain other instruments such as deeds of trust) "must" be recorded in order for the interests conveyed to the grantee to prevail as against the claim of a subsequent lien creditor or bona fide purchaser for value. Tex. Prop. Code § 13.001. An acknowledgement or jurat is required for recording. Tex. Prop. Code § 12.001(a).

- An instrument of conveyance need not include recitals.

- An instrument of conveyance is effective with or without warranties. Tex. Prop. Code § 5.022(b).

- An instrument of conveyance need not contain reservations or exceptions. However, consideration should be given to provisions describing or giving notice of reservations and exceptions in order to avoid any breach of warranty or other similar claims which could arise. Keep in mind, the grantor of an estate cannot convey an estate greater than the one held by the grantor. Tex. Prop. Code § 5.003.

- An instrument of conveyance need not contain a vendor's lien. A vendor's lien is a lien that is reserved by a grantor in order to secure the unpaid portion of his purchase price. Although reserved by the grantor, it may be (and is typically required to be) assigned to a third-party lender advancing all or part of the funds for the purchase of the property. A vendor's lien must be enforced through a judicial process.

### C. Case Law Update – Interpretation of Conveyance Instruments

A number of decisions addressing conveyances have been published since Stephen Mitchell's paper in 2007. Some of the more significant are discussed below.

In *Hamilton, III v. Morse Resources Ltd*¹, the Court relied upon a fundamental rule of construction, the four-corners rule, to limit its analysis to the language within the deed. The Court sought to harmonize all parts of the deed and give intent and effect to the clause at issue.² As a result, the clause "one-fourth interest in and to all the oil, gas and other minerals in and under and that may be produced from the following described land . . ." was found to convey a full one-fourth interest, not just a one-fourth interest in any royalty payments pursuant to an existing lease. Moreover, this interpretation was not subject to quasi-estoppel arising from prior pooling agreements and division orders.³

The Texarkana Court of Appeals in *Corine, Inc. v. Harris, et al*⁴ noted the court's duty to determine whether or not a deed was ambiguous before permitting a fact question and testimony outside the deed. The court noted that an ambiguity does not arise simply because the parties advance conflicting interpretations, if the court could determine within reason that there was no ambiguity in a deed. In this case, a mineral reservation of "1/2 of the usual 1/8th royalty in all oil, gas, casing head gas and gasoline," was not susceptible to more than one reasonable interpretation.

However, in another deed construction case, *Cavazos*,⁵ the San Antonio Court of Appeals used a liberal construction to uphold a conveyance, allowing parole evidence to explain descriptive words and identify the land. In what was really a statute of frauds case, the court upheld the deed purporting to convey "all that certain interest in the estate . . . that she is now in possession of." Also of interest in this case, a quitclaim was sufficient to transfer a future interest in property, albeit a future interest which existed at the time of the quitclaim.

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² *Id.*
³ *Id.* at 346-47.
⁵ 246 S.W. 3d 175 (Tex. App. - San Antonio 2007).
In a similar case, *Fears v. Texas Bank*, the court opined that language such as "my property," "my land," or "owned by me" was sufficient to satisfy the statute of frauds, if extrinsic evidence showed that the party signing the contract of memorandum owned a single tract, and only one tract of land fit the description in the memorandum to which it referred. However, in this particular case, the description of land "off of the west end" was inadequate to describe the shape.

In *Eastin v. Dial, et al*, the danger of vacating a court decision as part of a settlement came home to roost. In this case, Eastin had obtained a successful judgment canceling a 1983 deed, but as part of a settlement, Eastin had vacated the judgment canceling the deed. On its face within the "four" corners, the 1983 deed conveyed all of the rights in the property including the grantor's interest in the mineral estate. As the court noted, a deed will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit, and only clear language showing an intention to grant a lesser estate is effective. Thus, the 1983 deed superseded any prior or different agreement, and a more limiting 1984 deed became rather meaningless.

In the Waco Court of Appeals case *Givings v. Ward*, the grantor sought reformation of a deed based on an underlying contract by which the mineral rights would have been reserved to the vendor. In response, the grantee raised the merger doctrine as a defense, along with a lack of mutual mistake. As the court noted, merger did not bar reformation to correct a mutual mistake made in preparing a written instrument to reflect the agreement of the parties. Moreover, the court recognizes that a unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

In *Watson v. Tipton*, yet another case on good practices, the Fort Worth Court of Appeals addressed delivery of a deed and its significance. In particular, the court found that recording created a presumption of delivery but that even unrecorded deed, if delivered, was binding on the parties to the deed. Likewise, contrary to an often misunderstood belief, the court noted that consideration is not necessary to support a deed and transfer of title. This case emphasizes the danger of "delivering" a deed to be held by another to secure a performance of some other act.

In a case arising in the sovereign immunity and takings environment, the Dallas Court of Appeals pointed out that restrictions in a deed requiring maintenance of unrestricted access to a state highway were unenforceable because of the State's sovereign immunity. Thus the landowner could not bring a suit for breach of covenant and to cause the State to maintain unfettered access. Sovereign immunity did not shield the State from an action for compensation under the takings clause. Also, of interest, the court found that a diminished access or impaired access was not compensable, while an encroachment due to some drainage improvements was a compensable encroachment.

The Amarillo Court of Appeals in *KCC Properties, Inc. v. Quality Vending, Inc.*, followed *Myrad* (discussed below) and affirmed a trial court reformation of a deed to convey only tract one instead of only the original tract one and two. Again, however, the *KCC Properties* case involved a dispute over transfer of property and a lawsuit between the grantor and grantee. Note that *Myrad* would appear to require even a grantor and grantee in agreement to file a lawsuit to reform an incorrect deed with a material error.

In *Lowell, et al v. Daniel*, a deed was void for its lack of a starting point and angles. Reference to extrinsic resources not referenced in the deed, was not permitted. "Location is a simple element to a deed delivery of a deed and its significance." In particular, the court found that recording created a presumption of delivery but that even unrecorded deed, if delivered, was binding on the parties to the deed. Likewise, contrary to an often misunderstood belief, the court noted that consideration is not necessary to support a deed and transfer of title. This case emphasizes the danger of "delivering" a deed to be held by another to secure a performance of some other act.

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8 *Id.* at 500.
10 *Id.* at 68.
11 *Id.* at 71.
13 *Id.* at 799.
14 *Id.* at 801.
16 *Id.* at 926.
which cannot be supplied by extrinsic evidence." However, in *Wiggins, et al v. Cade*, the court found that a reference in the deed to the name of the adjoining owner was sufficient, in that it allowed the individual to use parol evidence to locate the property. The deed indicated that the property began at the "Northwest corner of the tract of 45 acres of land formerly owned by Mrs. Kate Crook." By searching the grantor/grantee indices in the county deed records, one was able to identify the property survey name and abstract number. Then, with that information, the land described in the two royalty deeds could be described with reasonable certainty. The contesting party argued a subtle difference - that the deed must furnish within itself or by reference to another existing writing the means or data by which the land to be conveyed may be identified with reasonable certainty. The court permitted the use of parol evidence, in examination here, to connect data described in the instrument such as the name of the landowner to establish the sufficiency of the legal description.

Another drafting lesson arises in the context of *Masgas, et al v. Anderson, et al* in which the granting clause was broader than the warranty clause. The assignment, or deed, included an attached Exhibit A identifying seven oil and gas leases, fractional interests, and disputed interests. The assignment was intended, or so argued by the grantor, to only assign a fractional interest, noted on Exhibit A, and to retain title to the "disputed working interests." However, the granting clause indicated that the assignor "sells, transfers, assigns and conveys . . . all of the grantor's right, title and interest in . . . the oil and gas leases described in Exhibit A." There was no reference or limitation to just the fractional interests. The warranty did limit the warranty to the fractional interests, but the end result was that the grantor assigned all of its interest in the leases while only warranting the fractional interests.


II. CORRECTION INSTRUMENTS

A. Historical Use

Despite careful drafting, ambiguities and errors in recorded real property conveyance instruments seem inevitable. Rather than require that erroneous deeds or other real property instruments be reformed or rescinded by judicial proceedings, Texas courts have long allowed agreeable parties to use correction instruments in limited circumstances. *Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W.3d 859 (Tex. App. - Dallas 2005) (correction deed may be filed for sole purpose of correcting some facial imperfection in title). Over time, the practice of a Scrivener's Affidavit developed, and, in many cases, one party simply corrected the original document (in many fashions as one can imagine) and rerecorded the documents. The practices clearly needed refinement and guidelines as we entered a more technologically advanced era.

A correction deed is a supplementary filing that relates back in time to an original conveyance instrument which contained some error or mutual mistake. It corrects the mistake but leaves other terms of the conveyance intact. While these irregularities could be remedied by executing a second deed, quitclaim, or release, a correction deed may be preferable where the parties desire that the effective date of conveyance be the date of execution of the first deed. *See Borden v. Hall*, 255 S.W.2d 920 (Tex. Civ. App. - Beaumont 1951, writ refused n.r.e.). A correction deed should only be used to correct errors; if the parties intend to alter fundamental terms of the original conveyance then a new conveyance instrument should be used. Thus, no new consideration is required for a correction instrument, and if the correction is material, it should be signed by both grantor and grantee.

B. A 2009 Supreme Court of Texas Decision Spurs Challenges to Correction Instruments

The 2009 Texas Supreme Court case of *Myrad Properties, Inc. v. LaSalle Bank N.A.*, 300 S.W.3d 746
(Tex. 2009), provided guidelines for what would be considered "correctable," including errors in a metes and bounds description or an erroneous description of a party's capacity. According to the Court in dicta, other more substantive items (adding or deleting a parcel, for instance) could not be cured with a correction deed.

Myrad financed two separate apartment complexes located in Killeen, Texas. The apartment complexes were constructed on two, non-contiguous tracts of land located a mile apart. Myrad executed a promissory note in favor of the original lender secured by a deed of trust lien on both tracts of land.

The substitute trustee posted a sale notice. The sale notice referred both to the note and the recorded deed of trust. The property description in the sale notice referred to an "Exhibit A," the only exhibit to the sale notice, and that exhibit listed only one of the two tracts of land described in the deed of trust.

At the foreclosure sale the substitute trustee read only the legal description described on Exhibit A to the sale notice, but the substitute trustee did generally refer to the property described in the deed of trust. The bid amount was almost, but not quite, equal to the debt that Myrad owed LaSalle, and it was also near the combined values of the two real properties.

The substitute trustee's foreclosure deed conveyed the "Property" to LaSalle, defining the "Property" as "(T)he real property described in Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and personal property described in the Deed of Trust." Exhibit A to the deed only described the one tract of land that was described in Exhibit A to the sale notice.

LaSalle later recorded a correction deed that included a description of both tracts of land. Myrad then sought to quiet title, seeking a declaration that LaSalle owned only the one tract of land described in Exhibit A to the original substitute trustee's foreclosure deed, and that Myrad owned the second tract of land described in the deed of trust free from encumbrances. The trial court declared that the foreclosure sale had conveyed title to both tracts of land to LaSalle, and declared that the correction substitute trustee's foreclosure deed vested LaSalle with title to both tracts of land. The Court of Appeals affirmed the trial court's decision.

The Texas Supreme court reversed the lower court holdings that declared the correction substitute trustee's foreclosure deed had vested LaSalle with title to both tracts of land, holding that LaSalle's correction substitute trustee's foreclosure deed purporting to convey both properties was void as a matter of law. The Texas Supreme Court determined that a correction deed could not be used to correct a mistake omitting an entire second property. The Texas Supreme Court noted that correction deeds were appropriate to correct among agreeable parties:

- facial imperfections in title,21
- recitation of inaccurate metes and bounds,22
- a defective description of a grantor's capacity,23

The Supreme Court then took on the task to lay out the kinds of corrections that were allowed and the kinds that were not allowed.

**Allowed:**

- Correcting defects and imperfections,24
- Defective legal descriptions, such as errors in a metes and bounds description,25
- Incorrect acreage designation,26
- Defective description of a party's capacity,27
- Correcting from administrator to executor,28

**Not allowed:**

- Adding another parcel,29

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22 Id. (citing Doty v. Barnard, 92 Tex. 104, 47 S.W. 712, 713 (1898)).
23 Id. (citing Humble Oil & Refining Co. v. Mullican, 144 Tex. 609, 192 S.W.2d 770, 771–72 (1946)).
24 Id. (citing Doty, 47 S.W. at 712).
25 Id. (citing Doty, 47 S.W. at 712 (enforcing a deed correcting an improper acreage description)).
26 Id.
27 Id. (citing Humble Oil & Refining Co. v. Mullican, 144 Tex. 609, 192 S.W.2d 770, 771–72 (1946)).
28 Id.
29 Id. (citing Smith v. Liddell, 367 S.W.2d 662, 666 (Tex.1963) (refusing to enforce a correction deed
- Adding mineral interests,
- Changing a mineral interest,
- Changing the nature of a mineral interest.

According to the Court, allowing correction deeds to convey additional, separate properties not described in the original deed would "introduce unwarranted and unnecessary confusion, distrust and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice." Of course, the opposite argument may also be made, and Tex. Prop. Code § 13.002 and similar statutory provisions protecting bona fide purchasers, creditors, and involuntary lienholders, would seem to prevent this.

Note, however, the Texas Supreme Court concluded that Myrad would be unjustly enriched if the original substitute trustee’s foreclosure deed were enforced, holding in favor of LaSalle, and rendering judgment on LaSalle’s rescission claim. The entire matter was accordingly sent back to the trial court. Moreover, one should keep in mind that Myrad involved a foreclosure – a public auction affecting third parties, not just the lender and a business, and on its facts and in its context, the decision appears correct.

C. The Texas Legislature to the Rescue

The Texas Supreme Court's decision threatened over a century of recorded deed records, particularly including recorded correction instruments. The Texas Legislature, during its 82nd Regular Session (2011), reacting to the Myrad decision, passed, and Governor Rick Perry signed into law, S.B. No. 1496 ("S.B. 1496"), governing the scope and validity of corrections to instruments that convey real property or an interest in real property. S.B. 1496, effective on September 1, 2011, added Sections 5.027 through 5.031 to the Texas Property Code ("Code"). H.B. 2254 was the companion bill sponsored by Representative Anderson.

The bill analysis on S.B. 1496 prepared by the Senate Research Center included the following statements: It has been the practice in Texas that correction instruments may be filed in order to correct certain non substantive errors. The Texas Supreme Court in Myrad Properties, Inc. v. LaSalle Bank National Association, included language in the opinion which could suggest that certain correction instruments may be void. This is particularly so if additional property is included with the correction instrument. The Myrad decision thus created uncertainty within the real estate industry as to the validity of correction documents. S.B. 1496 amends current law relating to the scope and validity of correction instruments in the conveyance of real property.

First, this bill allowed a person with personal knowledge of facts relevant to the correction to prepare or execute a "correction instrument" to make a nonmaterial change to a legal description resulting from a clerical error or an inadvertent error (accidental omission). Second, this bill allowed a correction instrument to "replace" the original instrument, subject to the property interests of a creditor or a subsequent purchaser. Thus, the bill (i) protected bona fide purchasers and intervening creditors, (ii) provided for notice to parties, and (iii) defined material corrections. Material corrections required reexecution by all the parties to the original document. Finally, in the foreclosure context, a trustee’s deed could not be corrected unless the only error in the process was the preparation of the deed itself.

A correction instrument recorded before September 1, 2011, that substantially complies with the requirements of the Texas Property Code is also effective to the same extent as a correction instrument recorded after September 1, 2011, unless a court of competent jurisdiction renders a final judgment determining that the correction instrument does not substantially comply.

D. Statutory Inspiration from Wisconsin

Texas S.B. 1496 in 2011 was largely based on Wisconsin Stat. Section 706.085, adopted in May 2010 to address a Wisconsin court decision invalidating a recorded affidavit of correction because...
there was no statutory authority. However, the Texas bill was modified to recognize the case holding of *Myrad* in a foreclosure context and to conform to Texas' strong bona fide purchaser doctrine.

In Wisconsin, historically, affidavits of correction were commonly used to correct minor errors, but after the 2007 decision in *Smiljanic v. Niedermeyer*, the validity of those affidavits came into question. 737 N.W.2d 436. *Smiljanic* concerned a dispute over the effect of a recorded affidavit that averred the sellers had intended to convey an easement not reflected in the recorded deed. *Id.* at 438. Based on this affidavit, Smiljanic claimed he had the right to an easement not reflected in the recorded deed. *Id.* The circuit court concluded that the affidavit was not a valid means of conveying the easement or correcting the deed. *Id.* The circuit court therefore granted summary judgment against Smiljanic. *Id.* Smiljanic appealed, contending that the recorded affidavit was a valid method of correcting the deed and that it was not necessary to utilize the court procedure established in Wis. Stat. § 847.07 and its predecessor. *Id.*

The court of appeals upheld the circuit court and concluded there was no statutory authority for accomplishing a correction of the description of the property conveyed by the deed by simply recording an affidavit. *Smiljanic*, 737 N.W.2d at 445. The appellate court held that Wis. Stat. § 847.07 and its predecessor established the proper procedure for seeking a correction. *Id.*

The Wisconsin legislature responded by enacting Stat. § 706.085, which became effective in May of 2010. This statute authorized the correction of real estate documents by affidavit, and also provided for retroactive validation of previously recorded instruments which comply with its requirements. See Wis. Stat. § 706.085(4). A valid affidavit may correct a legal description or other information (such as a party's name, the tax parcel number, whether the property is homestead, and the like). Wisconsin study groups found the laws around the country to be varied and mostly archaic. As a result, Wisconsin developed a statutory process to deal directly with non-material and material errors. It became the model for Texas. The alternative would be to require a party to go to court, which is costly, lengthy, uncertain, and a waste of judge's time when there are more important things to ask them to decide.

### E. Other States That Have Correction Legislation

Many other states have statutory provisions with respect to the correction of various documents involving real property including deeds. Although commonly referred to as corrective or corrected deeds, they have also been referred to as “confirmatory deeds,” “correctional deeds,” and “supplemental deeds.” The extent of the statutorily enumerated requirements for correcting instruments differs substantially by state. Similar to Texas and Wisconsin, Virginia recently added legislation outlining the proper procedures to correct a recorded deed.

Virginia Code section 55-109.2, which became effective on July 1, 2014, permits the use of affidavits to correct “obvious description errors” in deeds, deeds of trust, and mortgages. “Obvious descriptive errors” are defined as:

- an error in a real property parcel description contained in a recorded deed, deed of trust, or mortgage where (i) such parcel is identified and shown as a separate parcel on a recorded subdivision plat; (ii) such error is apparent by reference to other information on the face of such deed, deed of trust, or mortgage or on an attachment to such deed, deed of trust, or mortgage or by reference to other instruments in the chain of title for the property conveyed thereby; and (iii) such deed, deed of trust, or mortgage recites elsewhere the parcel's correct address or tax map identification number.

The statute expressly lists the following as an "obvious description error":

- (a) an error transcribing courses and distances, including the omission of one or more lines of courses and distances or the omission of angles and compass directions;
- (b) an error incorporating an incorrect recorded plat or a deed reference;
- (c) an error in a lot number or designation; or

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34 D.C. Code § 42-1101(15).
36 *Id.* § 55-109.2A.
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(d) an omitted exhibit supplying the legal description of the real property thereby conveyed.\(^3\)

However, the statute explicitly notes that an "obvious description error" will not include "(1) missing or improper signatures or acknowledgments or (2) any designation of the type of tenancy by which the property is owned or whether or not a right of survivorship exists."\(^3\)

Notably the corrective affidavit in Virginia must be executed by the attorney seeking to correct the deed.\(^3\) Before the corrective affidavit can be recorded in the land records, the affiant must deliver a copy of the affidavit and notice of intent to record the affidavit, to all parties to the deed, deed of trust, or mortgage, including the current owner of the property and, if known, the title insurance company and preparing attorney.\(^4\) The notice of intent to record must also inform the parties of their right to object to the affidavit.\(^4\)

If no objection is received upon the expiration of thirty days of confirmed receipt or personal service to all relevant parties, the corrective affidavit may be recorded by the attorney.\(^4\) However, the affidavit must also contain: "(i) a statement that no objection was received from any party within the period and (ii) a copy of the notice sent to the parties."\(^4\) A form for the corrective affidavit is included in Virginia Code 55-109.2, which may be copied or used as a model.\(^4\)

The statute further requires the clerk to record the corrective affidavit in the deed book and index the affidavit in the names of the parties to the deed, deed of trust, and mortgage grantees/grantors.\(^4\) Once recorded, the correction will relate to the date the deed, deed of trust, and mortgage was originally recorded.\(^4\) If requested, the title insurance company is required to issue an endorsement to reflect the corrections made in the corrective affidavit, and deliver a copy of the endorsement to all parties to the policy.\(^4\)

While there are no provisions within the statute for handling objections to the correction affidavit, it appears that traditional options, like filing a reformation lawsuit, could be used to resolve the objection. Before Section 55-109.2 was enacted, anyone who wanted to have a deed correction relate back to the date of the original filing could only seek recourse through the courts.

Other states, like Tennessee, expressly permit by statute the submission of corrective affidavits or "scrivener's affidavits" to correct the deed and other similar instruments that are recorded in the county records.\(^4\) However, states differ on who may execute these affidavits as well as the effect the affidavits will have with respect to notice. For example, North Carolina does not expressly limit who can submit a corrective or scrivener's affidavit.\(^4\) When the corrective affidavit is properly filed, "the register of deeds shall index 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."\(^4\) However, the affidavit is not required to be attached to the originally recorded instrument.\(^4\) Additionally, the corrective affidavit will not be given retroactive effect to the date of the original instrument.\(^4\)

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37 Id.
38 Id.
39 Id. § 55-109.2C (the attorney’s Virginia State Bar number must also be included in the affidavit).
40 Id.
41 Id.
42 Id. § 55-109.2D.
43 Id.
44 Id. § 55-109.2H (providing the form of an acceptable corrective affidavit).
45 Id. § 55-109.2F (“The clerk shall record the corrective affidavit in the deed book and, notwithstanding their designation in the deed, deed of trust, or mortgage needing correction, index the affidavit in the names of the parties to the deed, deed of trust, or mortgage as grantors and grantees as set forth in the affidavit.”). See infra Section III, for further discussion on indexing issues of corrective affidavits in Texas.
46 Id. § 55-109.2E.
47 Id.
48 A.C.A. § 18-12-108.
50 Id. § 47-36.1(a).
51 Id. § 47-36.1(b) (“Nothing in this section requires that an affidavit be attached to an original or certified copy of a previously recorded instrument that is unchanged but rerecorded. Nothing in this section requires that an affidavit be attached to a previously recorded instrument with a copy of a previously recorded instrument that includes identified corrections or an original execution by a party or parties of the corrected instrument after the original recording, with proof or acknowledgment of their execution of the correction of the instrument.”).
52 Id. § 47-36.1(a); but see id. § 47-36.1(c) (giving retroactive effect to the corrective affidavit if it is made solely to correct a notarial certificate).
In Mississippi, the Scrivener’s Affidavit can only be prepared by an attorney who was involved in the preparation of the chain of title. Like North Carolina, the affidavit will be properly indexed with notice considered effective upon the recordation date of the affidavit. Arkansas also provides statutory requirements for scrivener’s affidavits involving the conveyance of real property. In addition to attorneys, a preparer of the instrument being corrected, including a current employee of the title company involved in the transaction, may execute and record the affidavit. The clerk is required to record and properly index the affidavit in the land records.

Unlike North Carolina and Mississippi, the effective date of the affidavit can be retroactive. If the error identified in the affidavit is of “an obvious nature,” the affidavit will be effective at the time of the original instrument was recorded. All other corrections will be effective at the time the affidavit is recorded. Additionally, for purposes of court proceedings, the affidavit will receive the same evidentiary admissibility afforded other deeds or instruments that are properly recorded.

Judicial intervention is authorized to reform a deed in states including Alabama, Tennessee, and Pennsylvania. Although the statutes expressly authorize judicial reformation of deeds, there is no indication that judicial reformation is the only recognizable means to correct a deed or conveyance instrument. See City of Oneonta v. Sawyer, 244 Ala. 25, 26, 12 So.2d 82, 83 (1943) (“[Section 8-1-2 and § 35-4-153] enact into statutory law, in general terms, the law of reformation of instruments long existent.”); Tenn. Code Ann. § 66-5-107 (expressly noting that “the person liable to injury by such error or mistake may prefer a petition to the circuit court of the county in which the land is situated”) (emphasis added).

The majority of states do not have statutory provisions for the requirements or acceptance of corrective deeds. However, several of these states still have some legislation noting that a corrected deed is not subject to the taxes and fees typically charged when the deeds are filed and recorded. These would, at least implicitly, recognize the efficacy of a correction deed. As a practice, it is important to check whether a state has statutory conditions beyond common law requirements when it comes to correcting a deed or other instrument of conveyance. Below is a non-exhaustive list of states with some legislation on corrective deeds:

- Alabama (Code of Ala. §35-4-150; 35-4-153) - Judicial right to remedy
- Arizona (A.R.S § 11-1143) - Tax exemption status of correction deeds
- Arkansas (A.C.A. § 26-60-102; 18-12-108) - Tax exemption status of correction deeds and scrivener’s affidavit provisions
- California (Cal. Gov. Code § 27361.6; Cal. Civ. Code § 1202) - Formatting instructions of a modified record and judicial action to correct certificate
- Colorado (C.R.S § 39-13-104) - Tax exemption status of correction deeds
- District of Columbia (D.C. Code § 42-1101; 42-1102(6)) - Tax exemption status of correction deeds and “supplemental deed” defined
- Florida (Fla. Stat. § 694.08) - Time limitations on curative actions
- Georgia (O.C.G.A. § 44-2-13) - Rerecording instructions of a deed because of a county line change
- Hawaii (HRS § 247-3) - Tax exempted status of correction deeds
- Idaho (Idaho Code § 55-816) - Affidavit acceptable for instrument corrections
- Iowa (Iowa Code § 558.67 and § 558.66) - Correction of books and instruments and records by affidavit acceptable
- Kansas (K.S.A § 879-1437e) - Tax exempt status of correction deeds
- Kentucky (KRS § 382.297; 382.337) - Affidavits acceptable to changes to deeds and mortgages
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- **Louisiana (La R.S. § 35.2.1)**- Affidavits of correction acceptable
- **Maine (33 M.R.S. § 172)**- Tax exempt status of correction deeds
- **Maryland (Md. REAL PROPERTY Code Ann. §3-301)** Confirmatory Deed- Clerk not required to accept a corrected deed if it has not been properly executed
- **Minnesota (Minn. Stat. § 272.15)**- Deed to correct title
- **Mississippi (Miss. Code Ann. § 89-5-8)**- Scrivener’s affidavit is accepted
- **Nebraska (R.R.S. Neb. § 76-271; § 76-272)**- Affidavit acceptable
- **New Jersey (NJ SA § 46:15-10)**- Tax exempt status of correction deeds
- **New Mexico (N.M. Stat. Ann. § 7-38-12.1)**- Tax exempt status of correction deeds
- **New York (NY CLS Real P § 258, Form 35)**- Short form for corrective deed provided
- **North Carolina (N.C. Gen. Stat. § 47-36.1)**- Affidavit acceptable
- **Ohio (ORC Ann. § 2719.01)**- Judicial Authority to Correct a Deed
- **Oklahoma (68 Okl. St. § 3202)**- Tax exempt status of correction deeds
- **Oregon (ORS § 205.244)**- Rerecording of corrected instruments
- **Pennsylvania (61 Pa. Code § 91.151; 21 P.S. § 279)**- Tax exempt status of correction deeds and judicial remedy to correct certificate
- **South Dakota (S.D. Codified Laws § 43-4-22)**- Tax exempt status of correction deeds
- **Tennessee (Tenn. Code Ann. § 66-24-101; 66-26-114; 66-5-107)**- Scrivener’s affidavit acceptable for registration and judicial right to correct deed of conveyance
- **Virginia (Va. Code Ann. §55-109.2; 58.1-810)**- Corrective affidavit provisions and tax exempt status of correction deeds
- **West Virginia (W. Va. Code Ch. 37, Art. 11 Note)**- Curative time limits
- **Wisconsin (Wis. Stat. § 760.085)**- correction instruments

**F. The 83rd Legislature Revisits**

The 83rd Regular Session modified the provisions with a corrective bill S.B. 887. The bill analysis on S.B. 887 stated:

Property owners rely on clear and correct recorded documents. S.B. 1496, 82nd Legislature, Regular Session, 2011, established a uniform system for correcting recorded documents without initiating a court proceeding. This bill furthers the efficiencies provided for by that system by clarifying two issues that have come to light since the passage of S.B. 1496.

The amendment established/clarified the following:

- **When can a correction instrument be used?**
  - Only to correctly reflect the original intended transaction.
  - **Who can prepare a correction instrument?**
  - A person with personal knowledge of the facts relevant to the correction.
  - **What about omitted legal descriptions?**
  - Yes
    - if inadvertently omitted from the closing.
    - not a change to the deal.
  - **What about omitted calls?**
  - Yes
    - if it completes the legal description
    - not a new legal description.
  - **How does it work?**
  - Replaces and substituted?
    - Yes- clears the cloud created by the incorrect document.
  - **Rights of subsequent bona fide purchaser (BFP)?**
  - Subsequent BFP’s may rely.
  - **Intervening rights?**
  - These rights are protected.

**G. New Sections of the Property Code**

Texas Property Code Sections 5.027, 5.029 and 5.031 became effective September 1, 2011. Section 5.028 and 5.030, as amended, became effective September 1, 2013. As indicated, the code sections were largely modeled after the Wisconsin statute, but were modified to give effect to *Myrad*.

Section 5.027(a) states:

*A correction instrument that complies with § 5.028 or 5.029 may correct an ambiguity or error in a recorded original instrument of conveyance to*
transfer real property or an interest in real property, including an ambiguity or error that relates to the description of or extent of the interest conveyed.

In most cases, the settlement agent or the person who drafted the conveyance can sign the correction instrument- BUT NOT IF THE ERROR IS MATERIAL. Correction where the error is material requires participation and execution by all parties to the original instrument. Tex. Prop. Code § 5.029.

Also generally ineffective is the practice of making corrections to a certified copy of the original recorded document unless the corrections are initialed by the parties and a statement as to why the corrections are being made is signed by the parties. That said, it is important to remember that all corrections should be made as soon as they are discovered. Failure to promptly record a document as well as failure to make corrections can permit unintended encumbrances and cause large claims and losses. In particular, many documents are recorded without the referenced attached legal description. These need to be corrected immediately to preserve priority and provide notice.

Note that Section 5.027 utilizes the phrase "instrument of conveyance to transfer real property or an interest in real property." Thus, the statute primarily addresses real property deeds and deeds of trust, but could also include releases, leases, assignments, and other documents acting as a conveyance of a real property interest. However, as discussed below, Section 5.027(b) prohibits a correction instrument under a Chapter 51 power of sale "unless the conveyance otherwise complies with all requirements of Chapter 51."

Use of, and Limitations on, Correction Instruments

Correction instruments are authorized to remedy material and nonmaterial errors or ambiguities in recorded conveyance instruments that transfer real property or an interest in real property, including ambiguities or errors in the description or the extent of the interest conveyed. A correction instrument, however, may not be used to correct an ambiguity or error in a recorded non-judicial foreclosure deed involving the exercise of a power of sale under Chapter 51 of the Code unless the conveyance also complies with Chapter 51 of the Code. In other words, if the only thing wrong with the foreclosure is the preparation of the Trustee's Deed, that can be corrected. Myrad and S.B. 1496 implicitly recognized the ability to unilaterally rescind a foreclosure sale that has error. There are those, particularly the IRS or a third party purchaser, that will argue to the contrary. This is an open question.

Effect of a Correction Instrument

A correction instrument that complies with the statutory requirements is: (i) effective as of the effective date of the recorded original conveyance instrument; (ii) prima facie evidence of the facts stated in the correction instrument; (iii) presumed to be true, but subject to rebuttal; and (iv) notice to a subsequent buyer of the facts stated in the correction instrument. Tex. Prop. Code § 5.030(a). A bona fide purchaser of real property subject to a correction instrument may rely on the correction instrument against any person making an adverse or inconsistent claim, but a correction instrument is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the correction instrument has been acknowledged, sworn to, or proved and filed for record as required by law. Tex. Prop. Code § 5.030(b),(c). However, an unrecorded correction instrument is binding on the parties to the correction instrument, on the parties' heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the correction instrument.

Section 5.027(c) states a correction instrument is subject to § 13.001 (Validity of Unrecorded Instrument). That section states the instrument is not notice until it has been acknowledged, sworn to, or proved and filed for record as required by law, so a bona fide purchaser (BFP) could take without notice based on the incorrect instrument of record and not lose rights because of a later filed correction document that added the legal description that the BFP had acquired an interest in. This makes it very clear: one must be careful to have a correct legal description in every document you file, or a BFP or creditor could acquire an interest before a correction instrument is filed in the real property records.

H. When is a Correction Nonmaterial or Material?

Section 5.028- Correction Instruments: Nonmaterial Corrections (emphasis added):

(a) A person who has personal knowledge of facts relevant to the correction of a recorded original
instrument of conveyance may prepare or execute a correction instrument to make a nonmaterial change that results from a clerical error, including:

(1) Correction of an inaccurate or incorrect element in a legal description, such as a distance, angle, direction, bearing or chord, a reference to a plat or other plat information, a lot, block number, a unit, building designation, or section number, an appurtenant easement, a township name or number, a municipality, county, or state name, a range number or meridian, a certified survey number, or a subdivision or condominium name, or

(2) An addition, correction, or clarification of:

(A) A party's name, including the spelling of a name, a first or middle name or initial, a suffix, an alternate name by which a party is known, or a description of an entity as a corporation, company, or other type of organization;

(B) A party's marital status;

(C) The date on which the conveyance was executed;

(D) The recording data for an instrument referenced in the correction instrument, or,

(E) A fact relating to the acknowledgement, or authentication.

(a-1) A person who has personal knowledge of facts relevant to the correction of a recorded original instrument of conveyance may prepare or execute a correction instrument to make a nonmaterial change that results from an inadvertent error, including the addition, correction, or clarification of:

(1) a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instruments; or

(2) an omitted call in a metes and bounds legal description in the original instrument that completes the description of the property.

(b) A person who executes a correction instrument under this section may execute a correction instrument that provides an acknowledgment or authentication that is required and was not included in the recorded original instrument of conveyance.

(c) A person who executes a correction instrument under this section shall disclose in the instrument the basis for the person's personal knowledge of the facts relevant to the correction of the recorded original instrument of conveyance.

(d) A person who executes a correction instrument under this section shall:

- (1) record the instrument and evidence of notice as provided by Subdivision (2), if applicable, in each county in which the original instrument of conveyance being corrected is recorded; and

- (2) If the correction instrument is not signed by each party to the original instrument, send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the original instrument of conveyance, and, if applicable, to the party's heirs, successors, or assigns.

Note, in particular, there are provisions for typographical errors, minor additions, and completion of documents. An attorney is not required to prepare the correction. Notice must be sent to all parties.

Section 5.02 - Correction Instruments: Material Corrections

All of the parties, or the parties' heirs, successors, or assigns as applicable, may correct material mistakes by executing a correction document. Thus, the original signing parties are not necessarily required to execute the correction. Section 5.029 provides (emphasis added):

(a) In addition to nonmaterial corrections, including the corrections described by § 5.028, the parties to the original transaction or the party's heirs, successors, or assigns, as applicable may execute a correction instrument to make a material correction to the recorded original instrument of conveyance, including a correction to:

(1) add:

(A) a buyer's disclaimer of an interest in the real property that is the subject of the original instrument of conveyance;

(B) a mortgagee's consent or subordination to a recorded document executed by the mortgagee or an heir, successor, or assign of the mortgagee; or
(C) real property to a conveyance that correctly conveys other real property;

(2) remove land from a conveyance that correctly conveys other land; or

(3) accurately identify a lot or unit number or letter of property owned by the grantor that was inaccurately identified as another lot or unit number or letter of property owned by a grantor in the recorded original instrument of conveyance.

(b) A correction instrument under this section must be:

(1) executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party’s heirs, successors, or assigns; and

(2) recorded in each county in which the original instrument of conveyance that is being corrected is recorded.

Thus, correction instruments may be used to correct material errors, in spite of the suggestion otherwise in Myrad. However, as recently as April 2014, the Second District Court of Appeals in Ft. Worth suggested that Myrad has limited the use of correction deeds, and that a correction deed could not be used to eliminate the mistaken conveyance of a mineral estate. Cade v. Cosgrove, 430 S.W.3d 488 (Tex.App. - Ft. Worth 2014). The Court’s statement is unclear in view of its citation to cases which allowed correction deeds to add to a conveyance. See id. at 508. In addition, the requested relief is not clear, and there was a limitations issue that was the main point of the analysis. Thus while the Property Code was not raised in that case, it appears that the Court’s analysis is generally flawed on this point. To the extent the Court is stating an omitted mineral estate is a material error, it is correct.

By statute, a material error may be corrected, but a “Correction Instrument” is not the proper process. A correction of a material error must be signed by all of the parties or their successors. The document to correct a recorded document must be recorded in the original county of recording. Both Sections 5.028 and 5.029 list errors as examples by the use of the term “including.” The lists are not exclusive. However, those errors listed will obviously be treated as nonmaterial or material according to the section of listing. Unlisted errors will require a judgment call. Consideration should be given to presume the error is material if not listed.

I. Correction Instrument: Effect

Section 5.030 gives presumptions of relating back to the effective date of the original instrument if it complies with 5.028 or 5.029. Also Section 5.031, titled “Correction Instruments Recorded Before September 1, 2011” states that if a correction instrument is filed before the law is effective but complies with § 5.028 or 5.029, it is effective to the same extent provided by § 5.030, unless a court renders a final judgment determining that the correction instrument does not substantially comply with § 5.028 or 5.029.

J. The "Practice of Law" Includes the Preparation of Instruments Affecting Title

The "practice of law" is defined to include “the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.” See Tex. Gov’t Code § 81.101 (emphasis added). The preparation of all types of legal instruments constitutes the practice of law. Courts generally include as "legal instruments" any and all documents and instruments affecting title to real estate. Legal instruments include deeds, deeds of trust, mechanic's liens, lien affidavits, releases of liens and contracts for sale relating to such property.

More recently in 2008, the Texas Supreme Court decided Unauthorized Practice of Law Committee v. American Home Assurance Co., Inc., which laid out three factors to consider when determining whether a corporation has engaged in the practice of law when its staff employees provided legal services to someone other than the corporation. 261 S.W.3d 24, 27 (Tex. 2008). These three factors are: (i) whether the company's interest being served by the rendition of legal services is existing, or prospective only; (ii) whether the company has a direct, substantial interest in the matter for which it provides legal services; and (iii) whether the company's interest is aligned with the interest of the person to whom the company is providing legal services. Id.

The Court evaluated its earlier decision in Hexter Title & Abstract Co. v. Grievance Committee. 142 Tex. 506, 179 S.W.2d 946, 948 (Tex. 1944). Hexter Title & Abstract Co. was a title insurance agent that had its
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employee-attorneys prepare title opinions on the title being insured and draft corrective instruments to cure any defects found. *Id.* The service was rendered at no cost in order to attract business and so title defects could be cured before insurance was purchased. *Id.*

Hexter also held that the title insurance agent's interest was prospective because the curative work was done for the purpose of placing good title in the grantee. *Id.* The Court reasoned that Hexter Title's interest in providing legal services was to attract business, an interest distinct from that of its customers. *Id.* The company's interest is aligned with that of the third party to whom it is providing legal services. *Id.* Only the parties, or their attorneys, can make material changes. *Id.*

The take away is that Texas case law holds a corporation cannot employ attorneys to represent third party interests. A corporation does not engage in the practice of law when its in-house attorneys provide legal advice regarding the corporation's own affairs or represent others with identical interests. It would probably be seen as representing the parties to the underlying transaction rather than the company.

This, of course, raised questions as to who can prepare a "correction instrument." The 2013 amendments made it clear that "a person who has personal knowledge of facts relevant to the correction of a recorded original instrument of conveyance may prepare or execute a correction instrument to make a nonmaterial change that results from a clerical error." Tex. Prop. Code § 5.028(a). There is no language in the new statute that suggests a correction instrument that corrects a material error can be prepared by anyone but an attorney. Tex. Prop. Code § 5.029. The statute in that instance only addresses who may "execute" the instruments. *Id.*

K. How Do You Prepare Correction Instruments?

Guidelines for Correcting or Amending an Original Executed Document Prior to Recording.

- A document containing a typographical mistake that is corrected at the time of execution or prior to recording is an example of an allowable correction and/or amendment. However, the documents must be initialed by all parties to the document, prior to recording.

- A correction and/or amendment to any lender document at the time of execution or prior to recording must be approved in writing by the lender funding the transaction and initialed by all parties signing the document.

- A correction and/or amendment to an original document at the time of execution or prior to recording CANNOT change the terms of the document i.e., a mineral reservation cannot be added to the document, an additional grantee cannot be added to the document, etc. If a correction or amendment would change the terms of the original document, then a correction instrument is required and must be executed by all parties to the document.

Guidelines for Recording a Certified Copy of a Document: There are instances where a certified copy can simply be filed of record. Note this still can be done under the right circumstances.

- Original document(s) recorded in the wrong county can be recorded by obtaining a certified copy of said document and recording "as is" in the correct county.

- A court certified document such as a divorce decree or probate filed in any Texas county that references the subject property can be filed for record.

- A certified copy of a divorce decree or probate filed in another state that references the subject property can be filed for record.

Guidelines for Correcting a Recorded Document- The Correction Instrument.

- Determine who may sign the correction instrument.

- Identify the basis for a person's personal knowledge.

"I have reviewed prior conveyances of this parcel. The prior conveyances are consistent in stating that the initial call number is for 15 feet whereas the deed that I drafted states the initial call number is 14 feet, and therefore, I have deduced that the document I drafted contains an error."

- Clearly define the Error.
"The lot number was incorrect on the above stated warranty deed. The lot being conveyed should have been Lot 14 instead of Lot 15."

- State the Complete Legal Description.
- Notify the parties to the original agreement.

Compliance with the notice requirements should be included with the correction instrument for recording. (Remember Texas allows e-mail.) Tex. Prop. Code § 5.028(d)(2) states in relevant part: "if the correction instrument is not signed by each party to the recorded original instrument, send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the original instrument of conveyance and, if applicable, a party's heirs, successors, or assigns."

- Use plain language.

III. ISSUES FOR RECORDING CLERKS

The Local Government Code provides confusing advice for recording if read literally.

Tex. Local Gov’t Code § 193.003 – Index to Real Property Records

(a) The county clerk shall maintain a well-bound alphabetical index to all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property. The index must state the specific location in the records at which the instruments are recorded.

(b) The index must be a cross-index that contains the names of the grantors and grantees in alphabetical order. If a deed is made by a sheriff, the index entry must contain the name of the sheriff and the defendant in execution. If a deed is made by an executor, administrator, or guardian, the index entry must contain the name of that person and the name of the person's testator, intestate, or ward. If a deed is made by an attorney, the index entry must contain the name of the attorney and the attorney's constituents. If a deed is made by a commissioner or trustee, the index entry must contain the name of the commissioner or trustee and the name of the person whose estate is conveyed.

Tex. Local Gov’t Code § 193.005 – Indexes to Other Records

(a) In a manner similar to that by which the index to real property records is maintained, the county clerk shall maintain an alphabetical index to all recorded instruments relating to goods, chattels, and other personal property, marriage contracts, and other instruments authorized or permitted to be recorded in the clerk's office.

Affidavits are typically indexed as other instruments by the name of the affiant. Many clerks have recorded Correction Instruments as affidavits. While a title company may pick up the document and post it to a geographical plant, a search of the grantor/grantee index may miss it. Is the Correction Instrument outside the chain of title? The proposed form for a Correction Instrument attempts to address this. See Exhibit 2. Currently, the Texas Land Title Association and a representative group of Texas County Clerks are studying and addressing this concern. The most current proposal is attached as Exhibit 5, and seeks to minimize the changes to the Local Government Code while giving the county clerks specific guidance.

Legislative direction in the Local Government Code may also be needed. For additional guidance, the Texas Legislature may want to consider the statutory provisions for the indexing of corrective affidavits by other states. In Virginia, for example, “[t]he clerk shall record the corrective affidavit in the deed book and, notwithstanding their designation in the deed, deed of trust, or mortgage needing correction, index the affidavit in the names of the parties to the deed, deed of trust, or mortgage as grantors and grantees as set forth in the affidavit.”64 North Carolina also requires the clerk to record the corrective affidavit in the register of deeds, and “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.”65

Also, many county clerks have voiced concerns regarding the current statutory language in Tex. Prop. Code § 5.030(b), which states in relevant part: "a correction instrument replaces and is a substitute for the original instrument." Obviously, the drafters did not intend the county clerks to replace the original instrument with the correction instrument. In fact, the original version of the bill used the term "supersedes" instead of "replace" and "substitute," but the language

64 See Va. Code Ann. § 55-109.2F.
was changed by legislative counsel during the final revisions. Given that a correction instrument is only intended to clarify and correct errors and ambiguities while leaving the majority of the original instrument intact, arguably neither "substitute" nor "replace" seems to convey the proper meaning. This may also warrant a legislative fix.

IV. CONCLUSION

Ambiguities and errors in recorded real property conveyance instruments continue, often the result of improving technology and a compilation from various sources. Correction Instruments have always existed, but Myrad highlighted questions of their usage. The newly adopted statutory provisions create uniformity, prompt notice, efficiency, and attempt to avoid clogging the courts. Some provisions were also added to help prevent fraud.

Importantly, a correction instrument that complies with Section 5.028 or 5.029 of the Texas Property Code may correct an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property, including an ambiguity or error that relates to the description of or extent of the interest conveyed. A correction instrument replaces and is a substitute for the original instrument. It relates back. Except as provided by Section 5.030(c), a bona fide purchaser of property that is subject to a correction instrument may rely on the instrument against any person making an adverse or inconsistent claim.

The opportunity for fraud is not enhanced, but it does continue. There are protections for intervening parties and for subsequent bona fide purchasers. Perhaps most important, the requirement of re-execution by all parties continues for material corrections, and notice to all is required for non-material corrections. A Correction Instrument really only comes into play when the documents mistakenly memorialize or effectuate known terms to the deal, and is not ever to be a tool to redo or restructure the original transaction.

V. SUGGESTED FORMS

A. Notice of Correction (See Exhibit 1)

B. Correction Instrument Template (See Exhibit 2)

C. Correction Instrument for a Material Error (See Exhibit 3)

D. State Bar of Texas Language – Material Corrections (can also be used for any correction deed). See attached Exhibit 4.
Exhibit 1

[Insert date]

(Address of each party to the transaction should be inserted)

Re:  (insert file number)

This letter serves as notice that at the time of the recording of the (insert name of original document with nonmaterial error), a nonmaterial error as defined in Section 5.028 of the Texas Property Code was made. Pursuant to the requirements contained therein, the attached Correction Instrument will be filed for record to correct that error.
Exhibit 2

Please Index As Follows:

Grantor:

Grantee:

Document Type:

CORRECTION INSTRUMENT

State of Texas §
County of _____________ §
"Original Instrument"

    Document Type:
    Recording Date:
    Recording Information:
    Grantor:
    Grantee:

Description of error in Original Instrument:

1. This is a Correction Instrument pursuant to the provisions of Section 5.028 of the Texas Property Code, regarding the following non-material change resulting from a clerical or inadvertent error in the Original Instrument:
   (Detailed description of the error for which correction is needed)

2. The Original Instrument should correctly read as follows:
   (Specific description of the correct text)
Person with knowledge of facts relevant to the correction (hereinafter, "Correction Party"): 

Before me, the undersigned authority, personally appeared Correction Party who on oath swears that the following statement are true and correct and are within the personal knowledge of Correction Party:

1. My name is ___________________, and I am over the age of 18 years and duly qualified to execute this Correction Instrument.

2. {choose one as applicable- do not attach copies of documents or sources "relied upon"} 
   - I am employed as __________________ of ____________________, (name of title agent) and in said capacity was responsible for oversight of the closing of the transaction relating to the Original Instrument and have personal knowledge of the facts relevant to the correct of the Original Instrument, having reviewed the following documents: (describe documents or sources relied upon)
   - I am employed as an Escrow Officer of __________________ (name of title agent). I oversaw the closing of the transaction relating to the Original Instrument, and have reviewed the following documents: (described documents or sources relied upon)
   - I am employed as the custodian of the document for ______________________________ (name of title agent). I have personal knowledge of the facts relevant to the correction of the Original Instrument, having reviewed the following documents: (described documents or sources relied upon)
   - I am employed or acting on behalf of _____________________ in the capacity of ____________________ (give authority or capacity) and have examined the closing file and the following documents: (described documents or sources relied upon)
3. I hereby certify that I have given notice of this Correction Instrument, a correction of the Original Instrument by sending a copy of this Correction Instrument by ____________________ (describe method of delivery) to each party to the Original Instrument in accordance with provisions of Section 5.028(d)(2) of the Texas Property Code.

(Name of Correction Party), Correction Party

State of Texas §
County of _____________ §

SWORN TO, SUBSCRIBED AND ACKNOWLEDGED before me on this
________________ day of ______________, 20__, by _______________________________.

Notary Public, State of Texas

RETURN TO:

________________________
________________________

TO THE RECORDING OFFICER
PLEASE INDEX AS FOLLOWS:
GRANTOR: __________________________
GRANTEE: __________________________
CORRECTION SPECIAL WARRANTY DEED WITH VENDOR'S LIEN
(Vendor's Lien Reserved and Assigned to Third Party Lender)

THE STATE OF TEXAS §
COUNTY OF _______________ §

KNOW ALL MEN BY THESE PRESENTS:

THIS CORRECTION SPECIAL WARRANTY DEED WITH VENDOR'S LIEN is made to be effective as of ____________, by ____________________ ("Grantor") and ________________ ("Grantee").

RECITALS:

1. Grantor conveyed the Property (defined below) to Grantee by that certain Special Warranty Deed with Vendor's Lien dated ____________, ("Original Deed"), which Original Deed was filed on ______________ as Document No. _____________, of the Official Public Records of _________________ County, Texas.

2. Due to a scrivener's error, ____________________________ (reason for correction)

3. Grantor and Grantee desire to make and execute this Correction Special Warranty Deed with Vendor's Lien (the "Correction Deed") in order to correct______________________(reason for correction), all as referenced in the Original Deed, which Correction Deed supersedes and replaces the Original Deed in its entirety.

NOW, THEREFORE, ____________________________, hereinafter referred to as "Grantor," whether one or more, for and in consideration of the sum of TEN DOLLARS ($10.00) and other valuable consideration to the undersigned in hand paid by the Grantee herein named, the receipt of which is hereby acknowledged, and the further consideration of the execution and delivery by the Grantee of that one certain promissory note of even date herewith in the principal sum of $______________, payable to the order of ________________________ ("Lender"), as therein specified, providing for acceleration of maturity and for attorneys' fees, the payment of which note is secured by the vendor's lien herein retained, and is additionally secured by a deed of trust of even date herewith to ________________, TRUSTEE, has GRANTED, SOLD AND CONVEYED, and by these presents does GRANT, SELL AND CONVEY unto ________________, hereinafter referred to as the "Grantee", whether one or more, having a mailing
address of _______________________________, the real property including any improvements described as:

LEGAL DESCRIPTION

This conveyance, however, is made and accepted subject to:

Any and all restrictions, encumbrances, easements, covenants, conditions, outstanding mineral interests held by third parties, and reservations, if any, relating to the hereinabove described property as the same are filed for record in the County Clerk's Office of Montgomery County, Texas.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns forever; and Grantor does hereby bind Grantor, Grantor's heirs, executors, administrators, successors and/or assigns to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns, against every person whomsoever claiming or to claim the same or any part thereof, by, through, or under Grantor, but not otherwise.

But it is expressly agreed that the Vendor's Lien, as well as superior title in and to the above described premises, is retained against the above described property, premises and improvements until the above described note and all interest thereon are fully paid according to the face, tenor, effect and reading thereof, when this Deed shall become absolute. Lender at the instance and request of the Grantee herein, having advanced and paid in cash to the Grantor herein that portion of the purchase price of the herein described property as is evidenced by the hereinabove described Note, the Vendor's Lien, together with the superior title to said property, is retained herein for the benefit of said Lender and the same are hereby TRANSFERRED AND ASSIGNED to said Lender, its successors and assigns.

Current ad valorem taxes on the property having been prorated, the payment thereof is assumed by Grantee.

This Correction Deed supersedes and replaces the Original Deed in its entirety and is made to correct the above-described error. The Correction Deed will be effective as of the date of the Original Deed.

EXECUTED on the dates set forth in the acknowledgements below, to be EFFECTIVE July 12, 2013.
Grantor

THE STATE OF TEXAS §
COUNTY OF _________________ §

The foregoing instrument was acknowledged before me on this the _____ day of ________________, 2013, by ________________________________________.

________________________________
NOTARY PUBLIC, STATE OF TEXAS

PRINTED NAME OF NOTARY

MY COMMISSION EXPIRES:

________________________

AGREED AND ACCEPTED:

Grantee

THE STATE OF TEXAS §
COUNTY OF _________________ §

The foregoing instrument was acknowledged before me on the _____ day of ________________, 2013, by ____________________________.

________________________________
NOTARY PUBLIC, STATE OF TEXAS

PRINTED NAME OF NOTARY

MY COMMISSION EXPIRES:

________________________
CORRECTION SPECIAL WARRANTY DEED WITH VENDOR'S LIEN  
(Vendor's Lien Reserved and Assigned to Third Party Lender)  

THE STATE OF TEXAS §  KNOW ALL MEN BY THESE PRESENTS:  
COUNTY OF DENTON §  

THIS CORRECTION SPECIAL WARRANTY DEED WITH VENDOR'S LIEN is made to be effective as of __________, 20__, by _______________, a Texas limited partnership ("Grantor"), and ___________________ and wife, _______________ (collectively referred to herein as "Grantee").  

RECITALS:  

1. Grantor conveyed the Property (defined below) to Grantee by that certain Special Warranty Deed with Vendor's Lien dated _____ ___, 20__, ("Original Deed"), which Original Deed was filed on _________________, 20__, in Volume ____, Page ____, in the Official Public Records of Real Property of Denton County, Texas.  

2. The Original Deed erroneously conveyed Grantor's entire interest in the mineral estate of the Property to the Grantee, when in fact, the Grantee had purchased one-half (½) of Grantor's interest in the mineral estate of the Property along with the surface estate of the Property.  

3. Grantor and Grantee desire to make and execute this Correction Special Warranty Deed with Vendor's Lien (the "Correction Deed") to correctly describe the Property being conveyed thereby, all as referenced in the Original Deed, which Correction Deed supersedes and replaces the Original Deed in its entirety.  

NOW, THEREFORE, THAT THE UNDERSIGNED, SIX OAKS, LTD., A TEXAS LIMITED PARTNERSHIP, ACTING HEREIN BY AND THROUGH ITS DULY AUTHORIZED PARTNER, hereinafter called "Grantor," whether one or more for and in consideration of the sum of TEN DOLLARS ($10.00) and other valuable consideration to the undersigned in hand paid by the Grantee herein named, the receipt of which is hereby
acknowledged, and the further consideration of the execution and delivery by the Grantee of that one certain promissory note of even date herewith in the principal sum of

($____________), payable to the order of WORTH NATIONAL BANK, as therein specified, providing for acceleration of maturity and for attorney's fees, the payment of which note is secured by the vendor's lien herein retained, and is additionally secured by a deed of trust of even date herewith to____________________, Trustee, has GRANTED, SOLD AND CONVEYED, and by these presents does GRANT, SELL AND CONVEY unto __________________AND __________________, herein referred to as the "Grantee," whether one or more, all of Grantor's right, title and interest in and to the real property described as follows, to-wit:

Being Lot ______________________________________________________

_____________________________________________________________

PROVIDED, that Grantor hereby reserves unto itself, its heirs, executors, administrators, successors and assigns forever, an undivided one-half (½) interest in Grantor's interest in the oil, gas and other minerals in and under and that may be produced from the Property, if any. If the mineral estate is subject to existing production or an existing lease, this reservation includes one-half (½) of the Grantor's interest in the production, the lease, and all benefits from it.

This conveyance, however, is made and accepted subject to any and all restrictions, encumbrances, easements, covenants and conditions, if any, relating to the herein above described property as the same are filed for record in the County Clerk's Office of DENTON County, Texas.

TO HAVE AND TO HOLD the above described premises, subject to Grantor's reservation of one-half of all oil, gas and other minerals in and under the Property, if any, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Grantee, Grantee's heirs, executors, administrators, successors and assigns forever and Grantor does hereby bind Grantor's heirs, executors, administrators, successors and/or assigns to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns against every person whomsoever claiming or to claim by, through or under Grantor but not otherwise the same or any part thereof.

But it is expressly agreed that the Vendor's Lien, as well as Superior Title in and to the above described premises, is retained against the above described property, premises and improvements until the above described note and all interest thereon are fully paid according to the face, tenor, effect and reading thereof, when this Deed shall become absolute. THAT _________________ ("Lender"), at the instance and request of the Grantee herein, having advanced and paid in cash to the Grantor herein that portion of the purchase price of the herein described property as is evidenced by the hereinabove described Note, the Vendor's Lien, together with the Superior Title to said property, is retained herein for the benefit of said Lender and the same are hereby TRANSFERRED AND ASSIGNED to said Lender, its successors and assigns.
Current ad valorem taxes on the property having been prorated, the payment thereof is assumed by Grantee.

This Correction Deed supersedes and replaces the Original Deed in its entirety and is made to correct the above-described errors. The Correction Deed will be effective as of the date of the Original Deed.

EXECUTED on the dates set forth in the acknowledgements below, to be EFFECTIVE as of ________________, 20__.  

GRANTOR:

__________________________, a Texas Limited Partnership

By: ____________________________

By: ____________________________

Name: __________________________

Title: __________________________

THE STATE OF TEXAS §

COUNTY OF _________________ §

The foregoing instrument was acknowledged before me on this the ____ day of ________________, 20__, by ______________, Manager, on behalf of ______________, a limited liability company, on behalf of said limited liability company, and the limited liability company executed this instrument as General Partner on behalf of ________________, a Texas Limited Partnership.

NOTARY PUBLIC, STATE OF TEXAS

PRINTED NAME OF NOTARY
AGREED AND ACCEPTED:

GRANTEE:

_________________________________________

_________________________________________

_________________________________________

THE STATE OF TEXAS §

COUNTY OF _____________ §

The foregoing instrument was acknowledged before me on the _____ day of
________________, 20__, by _________________________.

_________________________________________

NOTARY PUBLIC, STATE OF TEXAS

PRINTED NAME OF NOTARY

MY COMMISSION EXPIRES:

_________________________________________

THE STATE OF TEXAS §

COUNTY OF _____________ §

The foregoing instrument was acknowledged before me on the _____ day of
________________, 20__, by _________________________.

_________________________________________

NOTARY PUBLIC, STATE OF TEXAS

PRINTED NAME OF NOTARY

MY COMMISSION EXPIRES:
Exhibit 4

The suggested wording from Clause 12-9-4 and Clause 12-9-5, Volume 1 of the Texas Real Estate Forms Manual, Second Addition (Real Estate Forms Committee of the State Bar of Texas, Austin 2011) represent examples of wording that may be used in correction instruments if the correction is either placed on the original instrument, and re-recorded, or placed in a new instrument signed by the original parties to the conveyance or, by a party's heirs, successors, or assigns. These would particularly apply to correction instruments for material corrections, but obviously can be used for non-material corrections.

Clause 12-9-4

NOTE CONCERNING CORRECTION: This deed is being filed again for record as a correction deed to correct certain incorrect information and to substitute for the deed as originally recorded. The following incorrect information is being corrected: [state the incorrect information and the correction[s], e.g., when this deed was first recorded, the legal description incorrectly stated the acreage as "32 acres," when it should have stated the acreage as "23 acres"] Other than the stated correction, no changes were made in the deed as originally recorded, and the effective date of this correction deed relates back to the effective date of the deed being corrected.

Clause 12-9-5

This deed is made as a correction deed in substitution of the deed titled "[title of original deed]" ("Corrected Deed") dated [date] and recorded in [recording data] of the real property records of [county] County, Texas, to correct the following incorrect information: [state the incorrect information and the correction[s], e.g., the legal description incorrectly stated the acreage as "32 acres," when it should have stated the acreage as "23 acres"]). Other than the stated correction, this deed is intended to restate in all respects the Corrected Deed, and the effective date of this correction deed relates back to the effective date of the Corrected Deed.
Exhibit 5

Sec. 193.003. INDEX TO REAL PROPERTY RECORDS. (a) The county clerk shall maintain a well-bound alphabetical index to all recorded deeds, powers of attorney, mortgages, correction instruments pursuant to Texas Property Code Sections 5.027 et. seq., and other instruments relating to real property. The index must state the specific location in the records at which the instruments are recorded.

(b) The index must be a cross-index that contains the names of the grantors and grantees in alphabetical order. If a deed is made by a sheriff, the index entry must contain the name of the sheriff and the defendant in execution. If a deed is made by an executor, administrator, or guardian, the index entry must contain the name of that person and the name of the person's testator, intestate, or ward. If a deed is made by an attorney, the index entry must contain the name of the attorney and the attorney's constituents. If a deed is made by a commissioner or trustee, the index entry must contain the name of the commissioner or trustee and the name of the person whose estate is conveyed. The index entry for a correction instrument pursuant to Texas Property Code Sections 5.027 et. seq. should contain the names of the grantors and grantees in the original instrument, as reflected in the correction instrument.

(c) This section does not apply to records classified and indexed in the manner required for records on microfilm by Sections 193.008 and 193.009.