

Date of Hearing: April 26, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2834 (Kiley) – As Amended March 17, 2022

PROPOSED CONSENT (As Proposed to be Amended)

SUBJECT: NOTARIES PUBLIC: CERTIFICATE CORRECTIONS

KEY ISSUE: SHOULD COMMISSIONED NOTARIES PUBLIC BE PERMITTED TO CORRECT ERRORS IN NOTARIAL CERTIFICATES ATTACHED TO REAL ESTATE DOCUMENTS WHEN THOSE ERRORS PREVENT THE DOCUMENT FROM BEING FILED BY A COUNTY RECORDER AND THE COUNTY RECORDER REQUESTS THE CORRECTION?

SYNOPSIS

This bill would allow a currently commissioned notary public to correct an error in a notarial certificate attached to a grant deed, mortgage, deed of trust, quitclaim deed, security agreement, or other real estate document, if the error is one that prevents the document from being recorded by a county recorder. The bill is narrowly-tailored to target very specific harms that can befall consumers if a document memorializing a real estate transaction cannot be recorded due to notarial error. For example, a home buyer may forfeit the mortgage interest rate on their home loan, due to expiration of a rate lock. Or the purchaser may have given up their apartment, but be unable to move into their new home. Or the failure of a transaction to close may mean that the seller of a home lacks the funds to close on the purchase of their next home.

As a safeguard against fraud, the bill sets forth a number of other statutory requirements that must be satisfied before a correction can be validly made. For instance, the request for correction must be made in writing by a county recorder within five business days of when the document was originally notarized; the error must be in the notarial certificate, rather than in the document that was notarized; and the notary public must include with the corrected certificate an affidavit or declaration stating that all requirements were met, to which a copy of the erroneous certificate is attached. Further, nothing in the bill requires a notary public to make a requested correction.

The bill is sponsored by Notary Advocates of California. California League of Independent Notaries has taken a “support if amended” position on the bill. There is no opposition on file.

SUMMARY: Permits a notary public to correct an error in a certificate attached to a grant deed, mortgage, deed of trust, or other instrument affecting real property if the error prevents a county recorder from recording the instrument. Specifically, **this bill:**

- 1) Provides that a currently-commissioned notary public may correct an error on a certificate if all of the following are true:
 - a) The same notary public that originally completed the certificate is the one making the correction.

- b) The error is in a certificate attached to a grant deed, mortgage, deed of trust, quitclaim deed, security agreement, or other instrument affecting real property that is to be recorded with a county recorder.
 - c) The error was created by the notary public, and does not stem from an error within the drafted document, which must be one of the documents set forth in b).
 - d) The error is of a kind that prevents a county recorder from recording the document.
 - e) The request for correction is made in writing by the county recorder within five business days of the notarial act that is the subject of the certificate.
 - f) A clearly legible copy of the original record and notarial certificate are returned to the notary public by the county recorder with the recorder's request.
 - g) The notary public verifies the error by reference to the journal entry for the notarial act, the record itself, or other determinative evidence.
- 2) If a notary public makes a correction authorized under 1), then the notary must comply with all of the following requirements:
- a) Indicate the correction on the original entry for the certificate in the notary public's journal.
 - b) If the notary public updates the certificate, then initial and date the correction on the updated certificate; otherwise, if the notary public issues a new certificate, indicate on the new certificate that a new certificate was issued.
 - c) Attach to the updated or new certificate an affidavit or declaration that meets all of the following requirements:
 - i) It states that all of the requirements under 1) were satisfied.
 - ii) It has attached to it a clearly-legible copy of the county recorder's request for correction.
 - iii) It has attached to it a clearly-legible copy of the defective certificate.
- 3) Requires a notary public to make any correction under this bill within five business days of a request under 1) e).
- 4) Clarifies that nothing in this bill requires a notary public to make a requested correction, nor does it alter applicable law governing recording of documents.

EXISTING LAW:

- 1) Authorizes the Secretary of State to appoint and commission notaries public and authorizes notaries public to act as such in any part of the state. (Government Code Section 8200.)
- 2) Requires every person appointed as a notary public to meet the following requirements:
 - a) Be a legal resident of the state (with specified exceptions);

- b) Be not less than 18 years of age;
 - c) After July 1, 2005, have completed a six-hour course of study approved by the Secretary of State; and
 - d) Have satisfactorily completed a written examination prescribed by the Secretary of State. (Government Code Section 8201.)
- 3) Requires the Secretary of State to determine if the applicant possesses the required honesty, credibility, truthfulness, and integrity to fulfill the responsibility of the position and requires the applicant to complete a criminal background check. (Government Code Section 8201.1.)
- 4) Establishes the duties of a notary public, which include taking the acknowledgment or proof of advance health care directives, powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of that proof or acknowledgment, endorsed on or attached to the instrument. (Government Code Section 8205.)
- 5) Requires a notary public to keep one active sequential journal at a time, of all official acts performed as a notary public, with specified information that must be included relating to the identity of the person signing, the fee charged, the document notarized and other information. (Government Code Section 8206.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill would allow a currently commissioned notary public to correct an error in a notarial certificate attached to a grant deed, mortgage, deed of trust, quitclaim deed, security agreement, or other real estate document, if the error is one that prevents the document from being recorded by a county recorder. Examples of the sorts of errors that might prevent filing are, e.g., omission of the date on which the signer appeared before the notary, or a minor mismatch (such as an omitted middle initial) between the notarial certificate and the real estate document sought to be filed. As a safeguard against fraud, the bill sets forth a number of other statutory requirements that must be satisfied before a correction can be made. For instance, the request for correction must be made in writing by a county recorder within five business days of when the document was originally notarized.

This measure is carefully tailored to address actual consumer harm. The sort of correction authorized by this bill is meant to prevent very real harms that can befall consumers if a document memorializing a real estate transaction cannot be recorded due to notarial error. For example, a home buyer may forfeit the mortgage interest rate on their home loan, due to expiration of a rate lock. Or the purchaser may have given up their apartment, but be unable to move into their new home. Or the failure of a transaction to close may mean that the seller of a home lacks the funds to close on the purchase of their next home.

As explained by the author:

Full-time notaries public may notarize as many as 100 documents per month, and each of these documents can be hundreds of pages. Many documents in need of notarization are time-sensitive, especially those that pertain to the buying and selling of property. In the unfortunate circumstance where a mistake is made by the notary, in order to correct the

mistake, the document must be re-notarized. While notaries public receive regular trainings, unfortunately, human error is inevitable, and AB 2834 is a way to protect homebuyers from these simple but unavoidable errors.

If this measure were merely intended to prevent inconvenience, whether for signers or notaries public, Committee members might have concerns about supporting it, given the anti-fraud and evidentiary importance of notarization. However, this bill is aimed at a more narrow and salutary goal: ensuring that notaries can correct minor errors in certificates so that these transactions can proceed in a timely fashion, without disrupting consumers' lives and settled expectations.

A general power of correction for notarial certificates would be inadvisable. As currently in print, this bill would provide notaries with a general power to correct errors in notarial certificates. While at least twelve states (Arizona, Arkansas, Colorado, Indiana, Kansas, Louisiana, Missouri, Montana, Oregon, Utah, Washington, and Wyoming) offer some version of a correction power, enactment of such a power in California would run strongly contrary to this Committee's recent pronouncements on the importance of notarization as a bulwark against fraud, and in support of the heightened reliability notarized documents are granted under the Evidence Code. (*See, generally*, Assembly Judiciary Committee analyses of AB 199 (Calderon, 2019) and AB 1093 (Jones-Sawyer, 2022).) In addition, while this bill has not been referred to the Assembly Business and Professions Committee, staff for that Committee expressed concerns that a broad power of correction might cause certain notaries to be less diligent in the performance of their duties—an undesirable outcome.

One of the most important safeguards in this bill is the requirement that the request for a correction to come from a county recorder, that is, an elected official accountable to the public for proper performance of their duties. To grant the power to request corrections to private, unaccountable actors, such as escrow agents, title companies, and the like would be to open the door to potentially fraudulent notarial “corrections” meant to sanitize questionable activities, as occurred with the creation of false documents to facilitate mass foreclosures during the Great Recession. (*See, generally*, Dayen, *Chain of Title* (The New Press 2016).) Note that removal of the requirement that recorders initiate the request, or loosening of other anti-fraud protections in this bill without consulting with Committee staff, may lead to this bill being called back into the Committee for re-hearing.

Proposal to set forth affidavit text in statute. California League of Independent Notaries has taken a “support if amended” position on the bill. The League writes, “We strongly recommend that a standardized affidavit of correction form be included in the bill.” This is a sensible suggestion. Several other Code provisions set forth form text for notaries to use. For example, Civil Code Section 1189 prescribes the form for a certificate of acknowledgment, and Government Code Section 8202 (d) provides the form for a jurat. Committee staff is available to work with the author, sponsors, and stakeholders to develop such a form. It may also make sense to specify in statute how a notary is to indicate on a newly issued certificate that it is a replacement for an erroneous, previously issued certificate; again, Committee staff is available to assist with crafting appropriate language.

Author's amendments. The following amendments effectuate the version of the bill set forth in the **SUMMARY** above:

Government Code 8205.1. (a) After completion of a certificate pursuant to Section 8205, a notary public who is currently commissioned may correct an error on the certificate pursuant to subdivision (b) ~~under the following circumstances~~ **if all of the following are true:**

(1) The notary public who makes the correction is the same notary public who originally completed the certificate.

(2) The error is in a certificate attached to a grant deed, mortgage, deed of trust, quitclaim deed, security agreement, or other instrument affecting real property that is to be recorded with a county recorder.

~~(3)~~ The error was created by the notary public and does not stem from errors within the drafted document, **which must be one of the types of documents set forth in paragraph (2).**

(4) The error is of a kind that prevents the county recorder from recording the document.

~~(5)~~ The request for correction is made in writing **by the county recorder within five business days of the notarial act that is the subject of the certificate.**

~~(6)~~ **A clearly legible copy of** ~~the~~ original record and notarial certificate are returned to the notary **by the county recorder with the recorder's request.**

~~(7)~~ The notary verifies the error by reference to the journal entry for the notarial act, the record itself, or other determinative evidence.

(b) If a notary public makes a correction authorized by subdivision (a), the notary public shall comply with all of the following:

(1) The notary public shall indicate the correction on the original entry for the certificate in the journal of notarial acts of the notary public.

(2) (A) If the notary public updated the certificate, the notary public shall initial and date the correction on the updated certificate.

(B) If the notary public issued a new certificate, the notary public shall indicate on the new certificate that a new certificate was issued.

(3) The notary public shall attach to any updated or new certificate under paragraph (2) an affidavit or declaration, pursuant to Section 2015.5 of the Code of Civil Procedure that meets all of the following requirements:

(A) It states that the conditions in subdivision (a) were satisfied.

(B) It has attached to it clearly-legible copies of both of the following:

(i) The request for correction from the county recorder.

(ii) The defective certificate.

(C) It states that the attached documents are true and correct copies of the originals.

(c) A notary public shall make any correction under subdivision (b) within five business days of receipt of a request made in writing by a county recorder under paragraph (5) of subdivision (a). Notwithstanding the foregoing, nothing in this section shall be construed as requiring a notary public to make a requested correction.

(d) Nothing in this section shall be deemed to alter applicable law governing the recording of documents by a county recorder.

ARGUMENTS IN SUPPORT: Notary Advocates of California explains the harms, for both consumers and notaries, that certificate errors can present in real estate transactions:

Should a notary make a mistake, the other attending parties including escrow offices, lenders, real estate agents and the county recorder's office require sending in a corrected certificate with an updated date in lieu of notarizing again. They expect we comply with their requirements, and not delay funding in any way that could cause a rate lock expiration, moving expenses, or any costs associated with a new loan not closing on time. If the notary does not comply, they are at risk of being sued by the signer, the lender, the escrow office, and the agents associated with the transaction. Conversely, if the notary does comply and send in a corrected certificate without a new notarization and date, they are now at risk of being fined or having their commission revoked via the Secretary of State.

REGISTERED SUPPORT / OPPOSITION:

Support

Notary Advocates of California (sponsor)
Across Town Notary Nationwide Signing Service
5 individuals

Support if Amended

California League of Independent Notaries

Opposition

None on file

Analysis Prepared by: Jith Meganathan / JUD. / (916) 319-2334