

Some Thoughts on the Success of the Revised Article 9 Enactment Effort

By William M. Burke
Chair, Drafting Committee for Revised Article 9

Adoption of the new Article 9 of the Uniform Commercial Code by all 50 states is an extraordinary achievement for the National Conference of Commissioners on Uniform State Laws, for the ALL, and for Bill Burke. Bill, a Commissioner from California and also a member of the ALI Council, has led this process from the beginning. Given the challenges of law reform ("not for the faint-hearted" is an ALI mantra) and the particular difficulties in recent years with aspects of the UCC modernization effort, Bill's account of what it took to succeed with the new Article 9 is an important statement. He, naturally, had to downplay one additional factor that was of the greatest importance: the key role of an engaged, expert, and trusted Chair. The entire story, including the crucial role played by Bill, is important for all of us who seek to improve law.

Michael Traynor
Lance Liebman

Revised Article 9 of the Uniform Commercial Code ("Revised Article 9" or "the Act") has been enacted into law in all 50 states and the District of Columbia. The Act became effective on July 1, 2001, except for the state of Connecticut, where it will become effective on October 1, 2001, and the states of Florida, Mississippi, and Alabama, where it will become effective on January 1, 2002.

The National Conference of Commissioners on Uniform State Laws (the "National Conference") and The American Law Institute (the "ALI") are the co-sponsors of the Uniform Commercial Code. Revised Article 9 was approved by the co-sponsors in 1998, and the legislative program for adoption of Revised Article 9 began in earnest in 1999.

The American Law Institute does not participate in the legislative activities that follow approval of UCC projects by the National Conference and the ALI. The National Conference therefore had sole organizational responsibility for the enactment of Revised Article 9. The goal of the National Conference was to complete the legislative process in just two and a half years because the Act had a uniform and delayed effective date of July 1, 2001. This delayed effective date was intended to give practitioners time to become familiar with the Act and to give the National Conference an opportunity to secure nationwide adoption of the Act so

that it could become effective in all jurisdictions at the same time.

Set forth below are some of the factors that contributed to the success of the legislative enactment effort with respect to Revised Article 9:

1. *Strong need for reform.* There was widespread consensus that Article 9 needed fixing. Article 9 was last revised in 1972. Advances in technology and changes in secured financing techniques left Article 9 ill-suited to meet the needs of debtors and secured creditors in accessing and providing much-needed capital. In addition, ambiguities in Article 9 led to litigation, which increased the cost of credit for all debtors. The Article 9 Drafting Committee was charged with responsibility for updating and modernizing Article 9 and resolving these ambiguities. This strong need for reform was a major factor in the success of the drafting and the enactment efforts since all participants were highly motivated to succeed.

2. *Long gestation period.* The work on Revised Article 9 began in 1990 as a Study Committee appointed by the Permanent Editorial Board for the UCC. The Study Committee met seven times over the next two years and enlisted the assistance of numerous advisers and advisory groups. At the end of 1992, the Study Committee produced a lengthy report recommending that a Drafting Committee be appointed and suggesting some of the areas of needed reform.

In 1993, the National Conference and the ALI appointed the Article 9 Drafting Committee. The Committee met 15 times over a five-year period, finishing its work in 1998 when the Act was approved by the co-sponsors. The Drafting Committee was given a significant head start with the excellent PEB report and had plenty of time to get it right.

3. *Strong project support by credible co-sponsors.* The revision project had strong support from the National Conference and the ALI, which are the nation's premier law reform organizations. Both organizations appointed Drafting Committee members and operated in a cooperative and supportive fashion throughout the project. The success of the drafting and enactment efforts is a testimony to how these two great law reform organizations can work together for the common good. The reputation of the National Conference and the ALI for independence and integrity and for the excellence of their work products was a significant factor in convincing the legislatures that the Act was worthy of adoption.

4. *Intellectually strong Drafting Committee.* The members of the Article 9 Drafting Committee appointed by the co-sponsors were recognized national experts on Article 9 and personal property secured financing. All members of the Drafting Committee were totally dedicated to

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the improvement of Article 9 in a manner that would advance the public interest.

5. *Excellent Co-Reporters.* Professors Charles Mooney and Steven Harris served as Co-Reporters for both the PEB Study Committee and the Article 9 Drafting Committee. The Co-Reporters came to the project with great energy, enthusiasm, and expertise and with no fixed preconceived notions as to the scope or content of the revision effort. They were solicitous and respectful of the views and votes of the Study Committee and the Drafting Committee. The Co-Reporters were also excellent draftsmen. This last factor is extremely important, since even the most necessary and worthwhile drafting project will fail if the statutory text is not solid and tight.

6. *Excellent ABA Adviser.* Steve Weise did an outstanding job as the American Bar Association Adviser to the Article 9 Drafting Committee. He prepared excellent pre-meeting summaries of Drafting Committee agendas and post-meeting minutes of the meetings. His summaries and minutes were widely circulated and publicized, and this helped the Drafting Committee get the word out to interested persons and garner support for the Act. The importance of public exposure of lengthy and complicated drafting projects cannot be overemphasized. It is inevitable that interested and affected persons and groups will not attend all Drafting Committee meetings, and some will not attend any meetings. Every effort must be made to give wide publicity to the work of the Drafting Committee and post the work product on publicly available websites.

7. *Broad and diverse Advisers and Observers.* In attracting Advisers and Observers to its work, the Drafting Committee reached out to all interested persons and organizations. Most of those who were invited to join the Drafting Committee accepted the invitation and actively participated in the work of the Committee.

As a result, the Committee membership was broadly representative and diverse and included individuals representing debtors, creditors, big firms, small firms, sole practitioners, industry specialists, academics, judges, consumer advocates, bar associations, trade organizations, and state and federal agencies. The Committee also sought and achieved broad geographical representation, recognizing the fact that secured financing needs and techniques vary significantly throughout the country. The broad and diverse composition of the Committee was mutually beneficial to the Drafting Committee and the participants. The Drafting Committee received valuable input as to the needs and issues of the participants and the participants were able to hear the views of others and, in many cases, modify their own views and reach compromises that were necessary to produce a work product that could be supported on a consensus basis in the legislatures.

8. *Attitude of openness, tolerance, and respect at Drafting Committee meetings.* At the Drafting Committee meetings, all points of view were considered and debated. No person was ever made to feel intimidated or reluctant to raise problems, issues, or objections. While the debates were, at times, spirited and robust, they were always conducted in an orderly, polite, and respectful manner. All participants were given a fair hearing, which helped build support for the final work product.

9. *Liberal use of task forces.* Many task forces were appointed to assist the Drafting Committee in specialized areas. For example, task forces were appointed on securitization, real estate, certificates of title, transition, international financing, bankruptcy, conflicts of law, simplification, deposit accounts, intellectual property, electronic contracting, filing, agricultural financing, and consumer law. Following approval of Revised Article 9 by the National Conference and the ALI, two more

task forces were established: a task force on changes in the statutory text and Official Comments and a Legislative Task Force (discussed at paragraph 20 below). Task force members met both between and at Drafting Committee meetings, reached out to specialists for input and help, completed legal and factual research, and prepared detailed reports with recommendations to the Drafting Committee. The task force members attended relevant meetings of the Drafting Committee, delivered their reports, and responded to questions from the Committee. Many of the recommendations of these task forces were accepted by the Drafting Committee and made their way into the Act.

10. *Proactive management of filing reform issues.* Reform of the personal property filing system in the United States was the centerpiece of the Article 9 revision effort. The PEB Study Committee knew that major revisions would be proposed to the filing provisions of Article 9, including (i) changes in the choice of law provisions related to filing, (ii) elimination of dual filing, (iii) imposition of filing officer performance standards, (iv) constriction of filing officer authority to reject filings, (v) elimination of the debtor signature requirement, and (vii) facilitation of electronic filing and searching. The Committee knew that these changes in the filing rules had the capacity to attract significant opposition from state and local filing officers, and that this opposition could doom the Article 9 revision project. For that reason, a filing systems task force was formed by the PEB Study Committee to aggressively and proactively manage these issues. This task force was continued by the Drafting Committee. Members of the task force met with state and local filing officers and their trade organizations, including the International Association of Corporate Administrators ("IACA"), in an effort to convince them of the need for filing reform

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and secure their commitment to support filing reform in Revised Article 9. Task force members regularly attended IACA meetings. These efforts paid huge dividends as the community of filing officers throughout the country ultimately came to support filing reform in Revised Article 9 and, indeed, took ownership of the filing reform project. Harry Sigman and Darrell Pierce deserve special recognition for their enormous contribution to the management of these filing reform issues.

11. *Willingness to compromise.* The Drafting Committee was able to forge compromises on controversial topics that generally won broad support from all competing interests. This ability to find acceptable compromises was crucial to the enactment effort since the tight July 1, 2001, deadline for uniform enactment of Revised Article 9 left no room for controversy and opposition in the legislatures. Much of the credit for the success in finding these compromises must be given to the Advisers and Observers who came to the meetings with open minds, firmly expressed their positions, listened to competing views, found a middle ground, and then sold the resulting compromise to their constituents.

12. *Early inclusion of consumer interests and the consumer compromise.* Consensus on consumer issues was key to the success of the drafting project. Representatives of consumer advocates and consumer creditors were invited into the project from the very beginning. The Consumer Task Force, ably led by Marion Benfield, worked hard to reach a compromise on consumer issues. The consumer compromise that was reached at the end of the project was instrumental in obtaining the unanimous support of the co-sponsors and avoiding opposition in the legislatures. Equally important, the National Conference kept its word by supporting the consumer compromise in the legislatures.

13. *Significant public exposure of the drafts before adoption.* The Revised Article 9 work product was well publicized in panels, programs, and articles before final approval by the co-sponsors. The Committee received valuable input from this public exposure.

14. *Unanimous approval by the co-sponsors.* Revised Article 9 was unanimously approved by the National Conference and the ALI. This unanimous approval was helpful in demonstrating strong support for the Act as well as the quality of the work product.

15. *Excellent work product.* The Act is well drafted. While there may be disagreements about the policy choices made by the Drafting Committee, those policy choices can be defended and are expressed well in the statutory text. In this respect, the Act sold itself in the state legislatures.

16. *Firm and realistic deadline.* The July 1, 2001, deadline for completion of the enactment effort was tight, but realistic. This deadline gave the Drafting Committee and the National Conference a firm goal, a strong motivation to achieve the goal, and a persuasive story to tell in the legislatures as to the urgent need for enactment of the legislation. As evidence of the importance and usefulness of the deadline, in the six-month period between January 1, 2001, and June 30, 2001, Revised Article 9 was approved by the legislatures of 23 states. In the week preceding July 1, Revised Article 9 was signed into law in six states.

17. *No organized opposition.* The Act is long and complex and not of any particular political appeal to a state legislator. In addition, in many states, the Act needed review and approval by bar committees and law revision commissions. This left little margin for error in the timing of introductions and enactments and absolutely no time to deal with any organized opposition. The lack of such opposition in the legislatures

was a key factor in finding bill sponsors, obtaining bar committee and law revision commission approvals, and securing prompt introductions and enactments.

18. *Significant public exposure of the Act after adoption.* Panels, programs, seminars, articles, and symposia all helped promote the work product after it was approved by the co-sponsors.

19. *Rapid response to post-approval problems.* When problems developed in the state legislatures, the Drafting Committee reacted quickly. For example, in 1999, certain lawyers representing bond financiers began to show up in the state legislatures expressing concern over certain provisions in Revised Article 9 that brought municipal financings within the scope of coverage of the Act. When these concerns surfaced in the state legislatures, the Chair of the Drafting Committee organized a series of telephone meetings between the representatives of the bond financiers and members of the Drafting Committee in an effort to find a compromise. A compromise was quickly reached that left states with the option to include or exclude municipal financings within the scope of coverage of the Act. This compromise removed the bond lawyers from the picture and allowed the bills to proceed smoothly through the legislatures.

20. *Organization of Legislative Task Force.* The American Bar Association Section of Business Law organized a Task Force on Revised Article 9 Enactment Process ("Legislative Task Force"), jointly sponsored by the Committee on Commercial Financial Services and the American College of Commercial Finance Lawyers. The mission of the Legislative Task Force was to assist the Drafting Committee and the National Conference in the Revised Article 9 enactment process. Commissioner Ed Smith and Carolan Berkley served as Co-Chairs of the Legislative Task Force. The

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Legislative Task Force appointed teams of lawyers in each state, as well as regional coordinators, to help in the state legislatures. The Legislative Task Force played a key role in the enactment process.

21. *Creation of website.* The Legislative Task Force established a Revised Article 9 website to promote the statute in the states (www.abanet.org/buslaw/cfs-ucc/ucc/article9/home.html). The website contains useful articles, a list of introductions and enactments, an Enactment Guide (discussed in paragraph 22 below), a state-by-state legislative survey, Revised Article 9 amendments, and other useful legislative information.

22. *Preparation of Enactment Guideline.* Revised Article 9 is a lengthy and complicated statute, requiring a great deal of integration into, and coordination with, other state laws. In many instances, the Act offers the legislatures choices among alternatives. The task of preparing the Revised Article 9 bill for introduction in the legislature was daunting. The Drafting Committee was hopeful that the legislatures could be given some guidelines for bill preparation that would enable uniform solutions to be applied to these issues of coordination. The Legislative Task Force therefore prepared a detailed Enactment Guideline to assist the state legislatures in preparing bills for introduction, and the Enactment Guideline was posted on the Legislative Task Force website. The Enactment Guideline is a user friendly, step-by-step instruction manual for the assembly of Revised Article 9. The Enactment Guideline carried great credibility with legislative staffers because it was prepared under the auspices of the Drafting Committee and was written by individuals who were directly involved in the preparation of complete and enactable bills.

23. *Effective assistance from the National Conference Legislative Director and his staff.* John McCabe, the

Legislative Director for the National Conference, and his extremely capable staff in Chicago did an excellent job in organizing support from the Commissioners in each state, securing bill introductions, testifying in the state legislatures, responding to questions and problems, tracking bills, and reporting to the leadership of the National Conference, the Legislative Task Force, and the Legislative Status Report Group (described in paragraph 28 below).

24. *Dedicated Commissioners in the states.* The Commissioners responded to the call and did a marvelous job in securing bill introductions and obtaining passage of the Act in each state and the District of Columbia. Without this 100 percent level of dedication by the Commissioners, the Drafting Committee and the National Conference would have fallen far short of the goal.

25. *Effective volunteers in key states.* The Drafting Committee and the National Conference were greatly assisted by key individuals who came forward and helped obtain bill introductions, respond to problems, and shepherd the bills through the legislative process. In many cases, these individuals had no involvement in the project before it was approved by the co-sponsors.

26. *Priority treatment by bill sponsors.* The sponsors of the bill in the state legislatures played a major role in the success of the Revised Article 9 enactment project by giving the Act priority treatment in the legislature. In many states, because of the need to obtain bar committee and law revision commission approvals, the bill sponsors did not even receive a finished bill ready for introduction until shortly before the July 1 deadline. In New York, for example, the final agreed-upon version of the Revised Article 9 bill was not ready until four business days before the Senate adjourned, and Revised Article 9 was just one of hundreds of bills then competing for the time and attention of legislators. The Drafting

Committee and the National Conference owe a huge debt of gratitude to the bill sponsors, committee counsel, and legislative staff members for their full cooperation and support in meeting the July 1, 2001, deadline.

27. *Good communication regarding problems, issues, and solutions.* As the enactment effort proceeded and issues and problems were raised and solved in the legislatures, the Drafting Committee and the National Conference developed a level of experience and a database of information that were extremely helpful. Good communication was maintained among the states to be sure the Drafting Committee and the National Conference took full advantage of this valuable experience and database.

28. *Core leadership group tracking introduction and enactment status and tackling problems.* Early in the legislative process, a Legislative Status Report Group was created to quarterback the legislative effort. The Legislative Status Report Group consisted of Carolan Berkley, Michael Houghton, John McCabe, Fred Miller, Harry Sigman, Ed Smith, Steve Weise, and William Burke. The Legislative Status Report Group was charged with coordinating the national legislative effort, including tracking bill introductions and enactments, responding to problems and issues, testifying, attending meetings, preparing reports and memoranda, reviewing proposed legislative language, begging, pleading, and cajoling, and keeping Commissioners in the states motivated and advised.

29. *Biweekly Legislative Status Report Group meetings during the stretch run.* During the months leading up to the July 1, 2001, deadline, the Legislative Status Report Group met by telephone on a biweekly basis to review progress and plan legislative strategy. In advance of the telephone meetings, John McCabe prepared and circulated a state-by-state sum-

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mary of the status of the bills in the legislatures. The Legislative Status Report Group discussed every state in the report in which bills were pending in an effort to keep the bills on track and deal with problems. In many instances, Commissioners in the states participated in the telephone calls to offer their insights and solicit advice or help from the Legislative Status Report Group.

Concluding Observations

The success of the Revised Article 9 enactment effort was the result of a confluence of many factors, each contributing in its own way, large or small, to the end result. In some cases this came from planning and hard work; in others it came from just plain good timing and good luck.

Every drafting project of the National Conference and the ALI is different, each with its own set of needs and challenges. Many of the techniques and approaches set forth in this article have been used to varying degrees in other drafting projects. What may have made the Revised Article 9 effort unique was the sheer size of the project, which enabled all of these methods to be deployed in unison to a common and useful end.

The purpose of this article is not to herald the planning, hard work, and good fortune of the Article 9 Drafting Committee, but rather to offer suggestions that may be helpful to other drafting projects of the National Conference and the ALI.

On a personal note, I want to express my sincere appreciation to the National Conference, The American Law Institute, the Co-Reporters, the Article 9 Drafting Committee, and the many volunteers who were part of this project for allowing me the privilege to serve as the Chair of the PEB Study Committee and the Article 9 Drafting Committee. ☺