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# Simplification in Drafting - The Uniform Commercial Code Article 9 Experience

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## SIMPLIFICATION IN DRAFTING—THE UNIFORM COMMERCIAL CODE ARTICLE 9 EXPERIENCE

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## I. ACHIEVING USER-FRIENDLY AND READILY UNDERSTANDABLE TEXT—THE ROLE OF A SIMPLIFICATION TASK FORCE

New emphasis in the United States on the use of simplification and “plain English” techniques to produce readily understandable text has encouraged the revisers of the Uniform Commercial Code (“UCC”) to use these techniques. The Securities and Exchange Commission’s (“SEC’s”) Plain English Disclosures initiative<sup>1</sup> and the project of the Judicial Conference of the United States for simplification of the federal civil, criminal, appellate, and bankruptcy rules<sup>2</sup> are other examples of this emphasis. The SEC has prepared and made available *A Plain English Handbook* as well as a book of sample “plain English” SEC filings.<sup>3</sup> In addition, commercial publishers have collected materials from the SEC’s “plain English” pilot program and are selling those collections.<sup>4</sup> The Committee on Rules of Practice and Procedure of the Judicial Conference has prepared and made available a preliminary draft guideline for drafting court rules.<sup>5</sup> In addition, the United States Supreme Court on April 24, 1998, approved a set of rules for appellate courts recommended by this Committee’s Style Subcommittee.<sup>6</sup> A complete

1. See Plain English Disclosures, Exchange Act Release No. 39,593, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,003, at 80,125 (Jan. 28, 1998), available on-line (last modified Feb. 2, 1998) <<http://www.sec.gov/rules/final/33-7497.txt>> [hereinafter Plain English Disclosures]; see also BRYAN A. GARNER, SECURITIES DISCLOSURE IN PLAIN ENGLISH (1999) (explaining techniques for improving disclosure documents); Thomas M. Clyde, *Plain Language Turns the Corner: New SEC Rules for Prospectuses*, CLARITY, Sept. 1998, at 9; Andrew T. Serafin, Comment, *Kicking the Legalese Habit: The SEC’s “Plain English Disclosure” Proposal*, 29 LOY. U. CHI. L.J. 681 (1998) (discussing the history of the “plain English” movement and describing the details of the SEC’s “plain English” proposal).

2. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED REVISION OF THE FEDERAL RULES OF APPELLATE PROCEDURE USING GUIDELINES FOR DRAFTING AND EDITING COURT RULES AND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO APPELLATE RULES 27, 28, AND 32, at vii (Request for Comment Apr. 1996) [hereinafter PROPOSED REVISIONS OF APPELLATE PROCEDURE]; see also COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE (Request for Comment Aug. 1996); BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996).

3. See DIVISION OF CORPORATE FIN., U.S. SEC. & EXCH. COMM’N, PLAIN ENGLISH PILOT PROGRAM (1998); OFFICE OF INVESTOR EDUC. & ASSISTANCE, U.S. SEC. & EXCH. COMM’N, A PLAIN ENGLISH DISCLOSURE HANDBOOK (1998), available on-line (last modified Mar. 30, 1999) <<http://www.sec.gov/news/handbook.htm>>.

4. For example, Bowne & Co. is selling one of these collections. See DIVISION OF CORPORATE FIN., U.S. SEC. & EXCH. COMM’N, PLAIN ENGLISH PILOT PROGRAM (Bowne & Co. 1998).

5. See GARNER, *supra* note 2.

6. See Bryan A. Garner, *The Substance of Style in Federal Rules*, CLARITY, Sept. 1998, at

account of the work of the Style Subcommittee and an account of why and how it updated the style of the Appellate Rules is documented in Professors Wright, Miller, and Cooper's work on federal practice and procedure.<sup>7</sup>

Steven O. Weise's co-authors on this article believe that his earlier article, entitled "*Plain English*" Will Set the UCC Free,<sup>8</sup> should be required reading for all persons involved in drafting revisions to the UCC or other statutes. Weise recommends the use of the following simple techniques:

- Active voice
- Lists and bullets
- Short sentences
- Simple words
- One verb at a time
- Short paragraphs
- Captions
- Multiple columns
- Logical grouping
- Default rules
- Statutory language
- Functional statements
- Instructional language
- State the rule first and the exception last<sup>9</sup>

Our experience as a Simplification Task Force<sup>10</sup> working with drafts of Revised Article 9 demonstrates that application of simplified drafting techniques to proposed UCC revisions can be of great help to those who must evaluate those revisions. Consider the plight of members of drafting and consultative groups who must review and communicate with each other regarding lengthy drafts received a relatively short time before designated meetings. Consider also the plight of practitioners who do not deal with the statute regularly (and for that matter even specialists who do deal with it regularly) in retrieving relevant portions of a very lengthy and complicated statute.

15.

7. 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3946.1 (3d ed. 1999).

8. 28 LOY. L.A. L. REV. 371 (1994).

9. See *id.* at 371-72. The "State the rule first and the exception last" technique arose out of the efforts to simplify Article 9 and is added to Weise's original published list with his approval.

10. See *infra* note 19.

A text drafted in “plain English,” including appropriate captions, greatly facilitates their tasks.

Professor Amelia Boss, immediate past chair of the Uniform Commercial Code Committee of the Business Law Section of the American Bar Association, notes that Weise’s article on drafting UCC documents “could equally be viewed as a call for plain English in the drafting of statutes.”<sup>11</sup> The work of the Article 9 Simplification Task Force implements this idea.

The historical lack of uniform guidelines in the drafting of federal civil, criminal, appellate, and bankruptcy rules led to inconsistencies and ambiguities. Changes in committee membership and in the identity of the reporters who produce initial drafts added to the unevenness in these rules.<sup>12</sup> Comparable problems exist in the UCC. All of the substantive UCC Articles (Articles 2 through 9) as well as Article 1 (general provisions) were and continue to be prepared by separate committees, each with its own consultants and drafters and its own stylistic preferences.

There are those who agree with Professor Boss’s proposition and yet argue that the application of simplified drafting techniques to uniform legislation is best left until the end of the project. This is undesirable for a number of reasons. First, this “end of the project” approach means that persons who have spent years considering draft language must adjust suddenly to a revised and “simplified” text, probably without opportunity to review those last minute changes that inadvertently may have an effect on substance. Second, if serious efforts to achieve “plain English” are postponed until late in the project, drafting committees understandably—and quite reasonably—will be reluctant to have their work product of many years of effort tampered with. In such circumstances, able and conscientious style committees face difficulties and tensions that are not as likely to emerge if “plain English” consultations occur from the beginning and on an ongoing basis as the project evolves.

Use of a committee on style, on an ongoing basis, to aid revision of UCC Articles, or any uniform law effort, is patently indispensable.

11. Amelia H. Boss, *Foreword: “Is the UCC Dead, or Alive and Well? An Introduction to the Practitioners’ Perspectives”*, 28 LOY. L.A. L. REV. 89, 100 (1994).

12. See Telephone Interview with James K. Logan, former United States Circuit Judge and Chair of the Judicial Conference of the United States Advisory Committee on the Federal Rules of Appellate Procedure (Feb. 22, 1999). Logan also notes that “[t]he rules often contained long narrative passages with few section dividers and headings to aid readers. There were inconsistencies in the general format of the rules.” *Id.*; see also PROPOSED REVISIONS OF APPELLATE PROCEDURE, *supra* note 2, at vii.

However, in fairness to all of the groups affected by the proposed revision, the work of a style committee ideally should be undertaken in a manner and at times that will allow adequate continuing review of the stylistic changes as the project evolves. Maximum understandability and minimization of any unintended substantive changes may thus be achieved. As noted elsewhere in this report, Revised Article 9 makes extensive use of drafting simplification techniques.<sup>13</sup>

In the pages that follow, we set forth a few examples<sup>14</sup> to illustrate how a number of the drafting techniques proposed by Weise could further facilitate understanding of certain provisions of the current revision of Article 9 and other UCC Articles.<sup>15</sup>

The UCC Article 9 Drafting Committee, consisting of eleven experienced commercial lawyers,<sup>16</sup> a Chair,<sup>17</sup> and two Reporters,<sup>18</sup> worked for five years on revisions to Article 9. The Drafting Committee sought to make Revised Article 9 understandable, particularly for practicing lawyers and others who do not regularly work with the Code. A Simplification Task Force<sup>19</sup> was appointed approximately two years after the project was under way to offer suggestions as to how to make the text of Article 9 as accessible as

13. See *infra* note 25 and accompanying text.

14. For an earlier discussion of this approach, see LOUIS F. DEL DUCA ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 72-74, 80-84, 430-31 (1992).

15. The Code drafters in recent years have consistently adopted a subsection, paragraph, subparagraph numbering system to be utilized uniformly throughout the Code. This numbering system has been utilized in the latest adopted Articles of the Code including Article 3 (Negotiable Instruments) (1990), Article 4 (Bank Deposits and Collections) (1990), Article 4A (Funds Transfers) (1998), and Article 8 (Investment Securities) (1994). Under this system, subsections are designated as (a), (b), etc. Consistency in the method of numbering subsections, paragraph, and subparagraphs obviously will facilitate ease of understanding and promote better communication.

With regard to captioning, although the Commissioners in the past have used captions only at the section level, at the request of the Article 9 Drafting Committee the Commissioners have recently authorized use of subsection captions in the Article 9 Revision. To facilitate understanding and readability in coping with the increasing complexity of the Code, it may be desirable in a specialized circumstance such as section 1-201(37) also to provide captions for paragraphs or subparagraphs. The language in the definition of "security interest" in section 1-201(37) is so complicated that renumbering and captioning through the subparagraph level is utilized in the Pennsylvania enactment of the UCC to facilitate understanding and readability. See 13 PA. CONS. STAT. § 1201(37) (1984 & Supp. 1998). The Simplified Version of section 1-201(37), see *infra* note 32 and accompanying chart, uses captions at the subparagraph level.

16. The members of the Committee are Marion W. Benfield, Jr., Neil B. Cohen, Dale G. Higer, William C. Hillman, Michael Houghton, Randal C. Picker, Donald J. Rapson, Harry C. Sigman, Bradley Y. Smith, Edwin E. Smith, and Sandra S. Stern.

17. The Chairman of the Committee is William M. Burke.

18. The Reporters are Steven L. Harris and Charles W. Mooney, Jr.

19. The members of the Simplification Task Force are Louis F. Del Duca, Vincent C. DeLiberato, Jr., David L. Hostetter, Kenneth C. Kettering, and Steven O. Weise.

possible. More effective coordination might be achievable in future efforts if a Simplification Committee is integrated into the drafting process from the beginning.

Revised Article 9 adapts secured transactions law to modern financing transactions. Thus, it necessarily contains many complex rules to accommodate sophisticated transactions and types of commercial interaction made possible by new technology and new methods of doing business.<sup>20</sup> Use of simplification techniques in drafting statutory language is therefore increasingly necessary to minimize loss of clarity.

Revised Article 9 has met with wide acceptance and approval to date. It was unanimously approved by its two sponsors, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”)<sup>21</sup> and the American Law Institute (“ALI”).<sup>22</sup> Article 9 has gone to the individual states for adoption with a proposed uniform effective date of July 1, 2001.<sup>23</sup> The goal is to have it come into effect in as many states as possible at one time to ease the effects of the transition rules.<sup>24</sup>

All fifty states adopted the previous version of the Uniform Commercial Code. If the same happens with Article 9, we will have converted a highly important statute—one that provides the framework for most of the commercial financing in the United States—into plain English.

The Article 9 Drafting Committee and its Simplification Task Force have also brought “plain English” drafting techniques to the attention of the UCC’s sponsors. We can accordingly expect—or at least hope—that these techniques will be used in other revisions to the UCC as well as other uniform laws and eventually seep into other legislation. Our Simplification Task Force will continue to cooperate with the sponsors of other laws in working toward achievement of these goals.

Revised Article 9 applies simplified drafting techniques to 122 out of its 126 sections. Laudably, it places captions on subsections as

20. The mandate of the Article 9 Simplification Task Force was to make suggestions as to simplification in language, style, and format. This assignment did not include authority to make substantive suggestions.

21. The NCCUSL Commissioners approved Revised Article 9 at its July 1998 annual meeting.

22. The ALI approved Revised Article 9 at its May 1998 annual meeting.

23. See R. § 9-701. In this article, references to sections of Revised Article 9 are denoted “R.”

24. See *id.* § 9-701 cmt.

well as sections. Time pressures prevented application of other simplification techniques to only four of the 126 sections of Revised Article 9 and to the pervasively important definition of “security interest.” We address most of these sections and the definition of “security interest” later in this article.<sup>25</sup>

Our earlier articles<sup>26</sup> suggest use of fourteen simplification techniques. To illustrate their application, we selectively address the following:

- Short sentences and paragraphs
- Tabulations (i.e., vertical lists and bullets)
- Captions on subsections as well as sections
- Logical grouping of related rules
- General rules before exceptions

## II. “TABULATIONS”—VERTICAL LISTINGS AND SHORT PARAGRAPHS

### A. “Accounts” and “Instrument” Definitions

The ease of understanding that can be achieved by use of “tabulations” (i.e., stating the component parts of a definition in a vertical, rather than a horizontal, format) is illustrated by the contrast between the actual definitions of “Account” and “Instrument” in Revised section 9-102 and the Simplified Version resulting from application of this drafting technique, as follows:<sup>27</sup>

25. The four sections are:

Section 9-301—Law Governing Perfection and Priority of Security Interests;

Section 9-305—Law Governing Perfection and Priority of Security Interests in Investment Property;

Section 9-328—Priority of Security Interests in Investment Property; and

Section 9-401—Alienability of Debtor’s Rights.

With the exception of section 9-401, each of these sections is discussed later in this article. See discussion *infra* Part III. The definition of “security interest” is also discussed. See discussion *infra* Part II.B.

26. See Louis F. Del Duca et al., *Applying Plain English Techniques in Revising the UCC*, 29 UCC L.J. 428, 428 (1997); Louis F. Del Duca et al., *Revisiting the Application of Plain English in Revising the UCC—Current Practice Among the Fifty States on Use of Captions in Legislation*, 30 UCC L.J. 167, 167-68 (1997).

27. Analogous simplification by use of the “tabulation” vertical listing technique is also suggested in our latest Simplified Version for the following definitions in section 9-102: “account debtor” (9-102(a)(3)), “chattel paper” (9-102(a)(11)), “general intangibles” (9-102(a)(42)), “goods” (9-102(a)(44)), “investment property” (9-102(a)(49)), “obligor” (9-102(a)(59)), and “promissory note” (9-102(a)(65)).



ACTUAL VERSION	SIMPLIFIED VERSION
<p><b>SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.</b></p> <p>(a) [Article 9 definitions.] In this article:</p> <ol style="list-style-type: none"> <li>(1) . . .</li> <li>(2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds</li> </ol>	<p><b>SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.</b></p> <p>(a) [Article 9 definitions.] In this article:</p> <ol style="list-style-type: none"> <li>(1) . . .</li> <li>(2) "Account," except as used in "account for,": <ol style="list-style-type: none"> <li>(A) means a right to payment of a monetary obligation, whether or not earned by performance: <ol style="list-style-type: none"> <li>(i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of,</li> <li>(ii) for services rendered or to be rendered,</li> <li>(iii) for a policy of insurance issued or to be issued,</li> <li>(iv) for a secondary obligation incurred or to be incurred,</li> <li>(v) for energy provided or to be provided,</li> <li>(vi) for the use or hire of a vessel under a charter or other contract,</li> <li>(vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or</li> <li>(viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate</li> </ol> </li> </ol> </li> </ol>

<p>advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.</p>	<p>the game by a State or governmental unit of a State;</p> <p>(B) “Account” includes health-care-insurance receivables;</p> <p>(C) “Account” does not include:</p> <ul style="list-style-type: none"> <li>(i) rights to payment evidenced by chattel paper or an instrument,</li> <li>(ii) commercial tort claims,</li> <li>(iii) deposit accounts,</li> <li>(iv) investment property,</li> <li>(v) letter-of-credit rights or letters of credit, or</li> <li>(vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.</li> </ul>
<p>....</p> <p>(47) “Instrument” means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the</p>	<p>....</p> <p>(47) “<b>Instrument</b>”:</p> <ul style="list-style-type: none"> <li>(A) means a negotiable instrument, or</li> <li>(B) any other writing that:             <ul style="list-style-type: none"> <li>(i) evidences a right to the payment of a monetary obligation,</li> <li>(ii) is not itself a security agreement or lease, and</li> <li>(iii) is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.</li> </ul> </li> </ul>

card.	<p>(C) The term “instrument” does not include:</p> <ul style="list-style-type: none"> <li>(i) investment property,</li> <li>(ii) letters of credit, or</li> <li>(iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.</li> </ul>
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The component parts of the definitions of “Account” and “Instrument” are readily recognizable in the Simplified Version. The Simplified Version also facilitates citation. Suppose, for example, that in a brief or legal memorandum, the issue is whether “health-care-insurance receivables” are “accounts.” Under the Simplified Version,<sup>28</sup> instead of requiring the reader to find the pertinent language, a succinct statement can be made as follows: “A health-care-insurance receivable is an account within the meaning of section 9-102(a)(2)(B) of the Uniform Commercial Code.”

### B. “Security Interest” Definition

Use of the “tabulation” technique clarifies the murky definition of “security interest” set forth in section 1-201(37), which is retained with a few substantive modifications by Revised Article 9.<sup>29</sup> The current definition initially sets forth, in a lengthy single paragraph, five different aspects of the definition of “security interest,” followed by several further paragraphs dedicated solely to the “lease vs. security interest” issue.

The Simplified Version lists the various aspects of security interest in the initial paragraph vertically rather than horizontally,<sup>30</sup> and then spins off into a separate section the “lease vs. security interest” matter. In doing this, we propose essentially to adopt the solution already in place in the current draft of Revised Article 1,

28. See *supra* note 27 and accompanying chart (Simplified Version of R. § 9-102(a)(2)(B)).

29. See R. § 1-201(37).

30. In the Pennsylvania enactment of section 1-201(37), these subparagraphs are captioned. See 13 PA. CONS. STAT. § 1201(37) (1984 & Supp. 1998). The Simplified Version also captions these subparagraphs to achieve clarity and facilitate retrievability.

which likewise addresses the “lease vs. security interest” issue separately in a new section 1-203.<sup>31</sup>

ACTUAL VERSION <sup>32</sup>	SIMPLIFIED VERSION
<p><b>SECTION 1-201. GENERAL DEFINITIONS.</b></p> <p>....</p> <p>(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401 is not a “security interest,” but a buyer may also acquire a “security interest” by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest,” but a seller or lessor may also acquire a “security interest” by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a “security interest.”</p> <p>Whether a transaction creates a lease or security interest is determined</p>	<p><b>SECTION 1-201. GENERAL DEFINITIONS.</b></p> <p>....</p> <p>(37) “<b>Security interest</b>”:</p> <p>(A) <b>General definition.</b> “Security interest” means an interest in personal property or fixtures that secures payment or performance of an obligation.</p> <p>(B) <b>Consignor and buyers of accounts, chattel paper, or payment intangibles.</b> The term also includes any interest of a consignor and a buyer of accounts, chattel paper, or a payment intangible in a transaction that is subject to Article 9.</p> <p>(C) <b>Buyer’s interest in identified goods.</b> The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401 is not a “security interest,” but a buyer may also acquire a “security interest” by complying with Article 9.</p> <p>(D) <b>Right of seller or lessor to retain or acquire possession under Articles 2 or 2A.</b> Except as otherwise provided in Section 2-505, the right of a seller or lessor</p>

31. See U.C.C. § 1-203 (Proposed Revised Article 1, Sept. 1999), available at <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)>. Our Simplified Version suggests numbering this provision Section 1-203A during the interim period between enactment of Revised Article 9 and enactment of Revised Article 1.

32. R. § 1-201(37).

by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

- (a) the original term of the lease is equal to or greater than the remaining economic life of the goods,
- (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,
- (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or
- (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that

- (a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,
- (b) the lessee assumes risk of loss of

of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9.

**(E) Retention or reservation of title.**

The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest."

**SECTION 1-203A. LEASE  
DISTINGUISHED FROM SECURITY  
INTEREST.**

- (a) **Factual determinations.** Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.
- (b) **Factors which create a security interest.** A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:
  - (1) the original term of the lease is equal to or greater than the remaining economic life of the goods;
  - (2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
  - (3) the lessee has an option to renew the lease for the remaining economic life of the goods for no

<p>the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,</p> <p>(c) the lessee has an option to renew the lease or to become the owner of the goods,</p> <p>(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term or the renewal at the time the option is to be performed, or</p> <p>(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.</p> <p>For the purposes of this subsection (37):</p> <p>(x) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less</p>	<p>additional consideration or for nominal additional consideration upon compliance with the lease agreement; or</p> <p>(4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.</p> <p>(c) <b>Leases which are not a security interest.</b> A transaction in the form of a lease does not create a security interest merely because:</p> <p>(1) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;</p> <p>(2) the lessee assumes risk of loss of the goods;</p> <p>(3) the lessee agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;</p> <p>(4) the lessee has an option to renew the lease or to become the owner of the goods;</p> <p>(5) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or</p> <p>(6) the lessee has an option to become</p>
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than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.

- (y) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and
- (z) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

- (d) **Nominal consideration.** Additional consideration is nominal for the purpose of subsection (b) if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal for the purpose of subsection (b) if:
  - (1) when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or
  - (2) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.
- (e) **Relevance of facts and circumstances at the time transaction is entered into.** The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement for purposes of subsections (b), (c), and (d) must be determined with reference to the facts and circumstances at the time the transaction is entered into.
- (f) **"Present value."** "Present value" for

	<p>the purpose of subsection (c) means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.</p>
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The definition of “security interest” is pervasively relevant to Article 9 in its entirety. Clarity of this definition is therefore vital. The Simplified Version in the current Article 1 Revision and in our Simplified Version provides the requisite simplicity without changing any of the substance of the text of the Actual Version.

### III. USE OF SUBJECT MATTER CROSS REFERENCES AND CAPTIONED SUBSECTIONS

To achieve greater clarity and enhance retrievability, the Simplification Task Force has prepared a Simplified Version in which cross-references are systematically made on a subject matter as well as a section number basis throughout the text of Revised Article 9. This technique is indeed provided for by Rule 16(a) of the NCCUSL Procedural and Drafting Manual, which states as follows:

- (a) Do not make specific references to another article, part, or section by letter or number unless the nature of the provision is indicated by the context or descriptive language. Example: “Subject to Section 27(a)(1) (good faith purchasers).”<sup>33</sup>

Application of this rule may result in vastly more comprehensible text. For example, Revised section 9-301(a) begins with the general phrase “except as otherwise provided in Sections 9-303 through 9-306.” The “simplified” text enumerates each of these sections and adds an explanatory parenthetical following each one.

Time pressures precluded application of one simplification

33. NATIONAL CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, PROCEDURAL AND DRAFTING MANUAL 24 (1997) [hereinafter PROCEDURAL MANUAL].



technique to four sections in Revised Article 9: namely, restructuring these sections from paragraph and subparagraph format to subsection format. The actual text of section 9-301 (*Law Governing Perfection and Priority*) and the Simplified Version, both of which immediately follow, illustrate the advantage of using the captioned subsection format rather than the non-captioned, subdivided paragraph and subparagraph format. The captions facilitate retrievability of relevant rules by avoiding use of overly subdivided and fragmented text.<sup>34</sup>

Authorization by NCCUSL to use captions for subsections as well as sections motivates our suggestion to use this drafting technique. Use of a captioned subsection format makes it possible to state at the outset the general "location of the debtor" rule, which applies in determining which state's law governs perfection and priority of security interests, and then to identify separately and retrieve readily each of the exceptions to this general rule.

#### A. Section 9-301

ACTUAL VERSION	SIMPLIFIED VERSION
<p><b>SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS.</b> Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:</p> <p>(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a</p>	<p><b>SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS.</b></p> <p>(a) <b>General rule—location of debtor.</b> Except as otherwise provided in subsection (b) through (g), while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.</p> <p>(b) <b>Possessory security interests—location of collateral.</b> While collateral is located</p>

34. Consider the provision 11 U.S.C. § 524(g)(2)(B)(1)(III)(cc) in the 1994 Bankruptcy Code. In his article *A Section-by-Section Chart Summarizing the Recent Changes in the Federal Bankruptcy Code, Affixed to a Short Essay in Praise of the Sensibility of Judges and in Derogation of Small Roman Numerals, Jurisprudentially Significant Hyphens, and Title V of the Bankruptcy Reform Act of 1994*, 47 ARK. L. REV. 857, 861(1994), Robert Laurence states that the modern trend toward small Roman numerals is merely an outward expression of the piece-mealing of the law, which, in turn, is an attempt to define a statute so precisely that no judge could possibly be confused about what it means. The Bankruptcy Reform Act of 1994 takes this trend to heretofore unimagined depths; ponder with horror the following piece of work: 11 U.S.C. § 524(g)(2)(B)(1)(III)(cc).

<p>security interest in collateral.</p> <p>(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.</p> <p>(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:</p> <p>(A) perfection of a security interest in the goods by filing a fixture filing;</p> <p>(B) perfection of a security interest in timber to be cut; and</p> <p>(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.</p> <p>(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.</p>	<p>in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.</p> <p>(c) <b>Priority of non-possessory tangible property security interests.</b> Except as otherwise provided in subsections (d), (e), and (f), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs the effect of perfection or nonperfection and the priority of a nonpossessory security interest.</p> <p>(d) <b>Fixture filings—location of goods.</b> While goods are located in a jurisdiction, the local law of that jurisdiction governs perfection of a security interest in the goods by filing a fixture filing.</p> <p>(e) <b>Timber to be cut—location of the timber.</b> The local law of the jurisdiction in which timber to be cut is located governs perfection of a security interest in the timber.</p> <p>(f) <b>Collateral to be extracted—location of wellhead or minehead.</b> The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.</p> <p>(g) <b>Other exceptions.</b> Subsection (a) is subject to:</p> <p>(1) Section 9-303 (<i>Certificates of Title</i>),</p> <p>(2) Section 9-304 (<i>Deposit Accounts</i>),</p>
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	<p>(3) Section 9-305 (<i>Investment Property</i>), and</p> <p>(4) Section 9-306 (<i>Letter-of-Credit Rights</i>).</p>
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Location of the general and specialized rules for perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral are facilitated by restructuring the paragraphs of the section into captioned subsections. The basic “location of debtor” general rule is highlighted in subsection (a). The explicit listing of exceptions immediately follows in subsections (b) through (g).

The “simplified” text of section 9-301 illustrates use of the following drafting techniques:

- State the rule first and the exceptions last;
- Use of tabulations;
- Use of headings for subsections as well as sections; and
- Use of section number and subject matter cross-references to other sections rather than only section number cross-references.

The advantages of restructuring paragraphs and subparagraphs into captioned subsection format are further illustrated by the actual text and Simplified Version of sections 9-305 and 9-328 which follow.

### *B. Section 9-305*

<b>ACTUAL VERSION</b>	<b>SIMPLIFIED VERSION</b>
<p><b>SECTION 9-305. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY.</b></p> <p>(a) [Governing law: general rules.] Except as otherwise provided in subsection (c), the following rules apply:</p> <p style="padding-left: 2em;">(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented</p>	<p><b>SECTION 9-305 LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY.</b></p> <p>(a) [Certificated Security.] Except as otherwise provided in subsection (f), the local law of the location of a security certificate governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.</p> <p>(b) <b>Uncertificated security.</b> Except as otherwise provided in subsection (f),</p>

thereby.

- (2) The local law of the issuer’s jurisdiction as specified in Section 8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.
- (3) The local law of the securities intermediary’s jurisdiction as specified in Section 8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.
- (4) The local law of the commodity intermediary’s jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

**(b) [Commodity intermediary’s jurisdiction.]**  
 The following rules determine a commodity intermediary’s jurisdiction for purposes of this part:

- (1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary’s jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the commodity intermediary’s jurisdiction.
- (2) If paragraph (1) does not apply

the local law of the location of the issuer’s jurisdiction as specified in Section 8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

- (c) **Securities entitlement or securities account.** Except as otherwise provided in subsection (f) (when perfection governed by law of jurisdiction where debtor located) the local law of the securities intermediary’s jurisdiction as specified in Section 8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.
- (d) **Commodity contract or commodity account.** Except as otherwise provided in subsection (f) (when perfection governed by law of jurisdiction where debtor located) the local law of the commodity intermediary’s jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.
- (e) **Determination of a commodity intermediary’s jurisdiction.** The following rules determine a commodity intermediary’s jurisdiction for purposes of this part:
  - (1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity

and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

- (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.
- (4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.
- (5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) **[When perfection governed by law of jurisdiction where debtor located.]** The local law of the jurisdiction in which the debtor is located governs:

- (1) perfection of a security interest in

intermediary's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the commodity intermediary's jurisdiction.

- (2) If paragraph (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that it is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.
- (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.
- (4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.
- (5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is

<p>investment property by filing;</p> <p>(2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and</p> <p>(3) automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.</p>	<p>located.</p> <p>(f) <b>[When perfection is governed by law of jurisdiction where debtor is located.]</b>                  The local law of the jurisdiction in which the debtor is located governs:</p> <p>(1) perfection of a security interest in investment property by filing;</p> <p>(2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and</p> <p>(3) automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.</p>
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Location of the special conflict of laws rules for each of the several types of investment property is facilitated by restructuring the paragraphs of subsection (a) into captioned subsections.

The restructured text of section 9-305 illustrates use of the following drafting technique:

- Captions on subsections as well as sections.

*C. Section 9-328*

<b>ACTUAL VERSION</b>	<b>SIMPLIFIED VERSION</b>
<p><b>SECTION 9-328. PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY.</b> The following rules govern priority among conflicting security interests in the same investment property:</p> <p>(1) A security interest held by a secured party having control of investment property under Section 9-106 has priority over a security interest held by a secured party that does not have control of the investment property.</p> <p>(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security</p>	<p><b>SECTION 9-328. PRIORITY OF SECURITY INTEREST IN INVESTMENT PROPERTY.</b></p> <p>(a) <b>General rule.</b> A security interest held by a secured party having control of investment property under Section 9-106 (<i>Control over Investment Property</i>) has priority over a security interest held by a secured party that does not have control over the investment property.</p> <p>(b) <b>Certificated security in registered form.</b> A security interest in a certificated security in registered form which is</p>

interests held by secured parties each of which has control under Section 9-106 rank according to priority in time of:

(A) if the collateral is a security, obtaining control;

(B) if the collateral is a security entitlement carried in a securities account and:

(i) if the secured party obtained control under Section 8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) if the secured party obtained control under Section 8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) if the secured party obtained control through another person under Section 8-106(d)(3), the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in Section 9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained

perfected by taking delivery under Section 9-313(a) (relating to perfection by possession or delivery) and not by control under Section 9-314 (*Perfection By Control*) has priority over a conflicting security interest perfected by a method other than control.

(c) **Priority of secured parties where both have control.** Except as otherwise provided in subsections (d) and (e), conflicting security interests held by secured parties each of which has control under Section 9-106 (*Control of Investment Property*) rank according to priority in time of:

(1) if the collateral is a security, obtaining control;

(2) if the collateral is a security entitlement carried in a securities account:

(A) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under Section 8-106(d)(1);

(B) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under Section 8-106(d)(2); or

(C) if the secured party obtained control through another person under Section 8-106(d)(3), the time on

with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under Section 9-313(a) and not by control under Section 9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under Section 9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by Sections 9-322 and 9-323.

which priority would be based under this paragraph if the other person were the secured party; or

(3) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in Section 9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(d) **Security interest held by a securities intermediary.** A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(e) **Security interest held by a commodity intermediary.** A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(f) **Perfection without control.** Conflicting security interests granted by a broker, securities intermediary, or commodity intermediary which are perfected without control under Section 9-106 (*Control of Investment Property*) rank equally.

(g) **Security interests in investment property-other cases.** In all other cases, priority among conflicting security interests in investment property is governed by Sections 9-322 (*Priorities*



	<p><i>Among Conflicting Security Interests in and Agricultural Liens on Same Collateral) and 9-323 (Future Advances).</i></p>
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Location of the priority rules applicable to particular types of transactions involving investment property is facilitated by restructuring the paragraphs of subsection (2) into captioned subsections.

The restructured text of section 9-328 illustrates use of the following drafting technique:

- Use of section number and subject matter cross-references rather than only section number cross-references.

#### IV. PROPOSED ADJUSTMENTS TO NCCUSL DRAFTING AND STYLE RULES 13 AND 15

Our Article 9 Simplification Task Force continues to use the NCCUSL drafting and style rules supplemented by the simplification techniques previously discussed. Experience in simplifying a series of Article 9 drafts over a period of more than two years suggests a few adjustments that can constructively be made to the NCCUSL drafting and style rules to incorporate explicitly particular simplification techniques. We suggest the following minor adjustments to incorporate “Rule First, Exception Last” in Rule 13 and “Use of Captions for Subsections” in Rule 15:<sup>35</sup>

##### RULE 13. LIMITATIONS, EXCEPTIONS, AND CONDITIONS.

(a) A single limitation, condition, ~~or~~ qualification, or exception to the applicability of a provision of a Uniform Act should be placed at the beginning of the subordinated provision, so that it will be readily noticed. The subordinated provision should reference the dominant provision. Examples: “Except as otherwise provided in Section 201(a), insert description as required by Rule 16(a).” or “Subject to Section 210(a), insert description as required by Rule 16(a).” If the subordinated provision cannot be placed in the subordinated section, it may be necessary to use a “notwithstanding”

35. See PROCEDURAL MANUAL, *supra* note 33, at 21-22, 23-24. Our suggested deletions are indicated with a strikethrough and our insertions with an underline.

phrase at the beginning of the dominant provision. Example: “Notwithstanding Section 101(a), insert description as required by Rule 16(a).” Use “Except as otherwise provided” to indicate that the dominant provision referred to, at least in some situations, limits or qualifies the rule stated in the subordinated provision. Use “Subject to” to indicate that the dominant provision, though not inconsistent with the subordinated provision, provides other criteria that should be considered in construing the subordinated provision.

Existence of more than one limitation, condition, qualification, or exception to the applicability of a provision of a Uniform Act should be cross-referenced at the beginning of the subordinated provision, so that it will be readily noticed. Example: “(a) Except as provided in subsection (b).”

The multiple limitations, conditions, qualifications, or exceptions should then be listed in the reference with descriptions as provided by Rule 16 (a). Example: “(b) Subsection (a) is subject to:

- (1) Section 4-210, insert description as provided by Rule 16(a).
- (2) Section 5-118, insert description as provided by Rule 16(a), and
- (3) Section 9-206, insert description as provided by Rule 16(a).”

~~(b) If a provision is limited in its application or is subject to an exception or condition, it generally promotes clarity to begin the provision with a statement of the limitation, exception, or condition or with a notice of its existence. Example: “(a) Except as otherwise provided in subsection (b), . . . .”~~

Avoid using “notwithstanding” to express a limitation of a general provision of the same Act. Example: “(b) Notwithstanding subsection (a), insert description as provided by Rule 16(a), . . . .”

~~(e)(b)~~ If the application of a provision of an Act is limited by the occurrence of a condition that may never occur, use “if” to introduce the condition in the subjunctive mood, not “when” or “where.” If the condition is certain to occur, use “when,” not “if,” “where,” or “whenever.” Example: “*When* this section takes effect, the court shall dismiss all pending proceedings.” If the condition may occur more than once with respect to the object to which it applies, use “whenever,” not “if,” “when,” or “where.” Example: “*Whenever* an officer receives a call, the officer shall note the time in the log.” Use “when” to indicate a particular time. Use “where” to indicate a

particular place or set of circumstances.

(d)(c) Do not use “provided that” or “provided however that,” or a similar proviso. Use “but” instead of “except that.”

(e)(d) Negate only unintended and reasonably inferable implications of a provision of an Act. Example: “*Person* means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity. The term *does not include* a government, governmental subdivision, agency, or instrumentality, or a public corporation.” Without the negating sentence in the example, one could reasonably infer that a governmental body is within the scope of the definition as “any other legal or commercial entity.”

#### Comment

It is important to cross-reference multiple limitations, conditions, qualifications, or exceptions to a separate provision at the beginning of the subordinated provision to be certain that they are clearly brought to the reader’s attention. It is equally important that the general rule not be obfuscated by a litany of exceptions. The general rule should be concisely stated at the outset to assure that it will be readily understood by the reader. The proposed technique achieves both goals.

Limitations or exceptions to an Act should be placed where they are noticed. Consistent placement in the first part of an Act or provision serves to avoid surprises.

An unnecessary disclaimer in one provision of an Act may create a negative pregnant suggesting a contrary construction of the meaning of a similar provision in which a disclaimer is not made.

#### RULE 15. SECTIONS.

(a) Number sections by Arabic numerals consecutively or progressively throughout an Act.

(b) “Section” and the section number and heading should be printed boldface, using capitals for “section” and the words in the heading, but excluding pronouns and indefinite articles. Example: “**SECTION 10. MANNER OF DESIGNATING SECTIONS.**” The heading should not be relied upon either to convey or ascertain the legislative purpose or sense of a section; it is merely a signpost.

(c) Use short sections. Use a separate section for each separate topic.

(d) Divide into subsections and paragraphs, as necessary, a section that covers a number of contingencies, alternatives, requirements, or conditions. A paragraph may be divided into subparagraphs, but avoid their use. Divide a section into several sections as an alternative to subparagraphs.

(e) Designate each subsection, paragraph, subparagraph, or subsubparagraph by a letter or number, as follows:

- (1) Designate subsections by lower case letters in parentheses and headings, which should be printed boldface using capitals for the first letter of the first word. Example: **“(a) Manner of designating subsections.”**
- (2) Designate paragraphs by Arabic numerals in parentheses,
- (3) Designate subparagraphs by upper case letters in parentheses, and
- (4) Designate subsubparagraphs by lower case Roman numerals in parentheses. Example: “Section 101(a)(1)(A)(i).”

(f) Use lower case Roman numerals for internally numbered clauses (where each clause is run in and not a separate paragraph or subparagraph) only if this makes the meaning substantially clearer.

#### Comment

See Sample Outline of Acts, *infra*. Portions of a section or subsection that are not identified by a letter or number often cause confusion and lead to problems with computer systems. Section and subsection headings are ~~no longer~~ not bracketed. However, section and subsection headings should not be considered indicative of the intent of the drafters.

### V. TOWARD A MODEL SIMPLIFICATION DRAFTING MANUAL FOR GENERAL LEGISLATIVE AND DRAFTING USE—COORDINATION WITH OTHER GROUPS

Several other groups share the belief that simplified drafting techniques will have a beneficial impact on the drafting process. This is demonstrated by the SEC’s initiative previously addressed in this

article<sup>36</sup> and the work of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.<sup>37</sup> The former Chair of the Committee, Judge Robert E. Keeton, created a Style Subcommittee in 1991.<sup>38</sup> Judge Keeton appointed Professor Charles Alan Wright, the current President of the ALI and one of the country's foremost experts on legal procedure, as the Subcommittee's first Chair.<sup>39</sup> Judge Keeton and Professor Wright obtained the aid of Bryan A. Garner, an accomplished legal writing scholar, to lead the project under the auspices of the Style Subcommittee.<sup>40</sup> Professor Wright in his capacity as President of the ALI reports that a Committee of the ALI Council is already considering "the feasibility and desirability of a style manual for the American Law Institute."<sup>41</sup> Michael Greenwald, a Deputy Director of ALI, is Reporter for the work.<sup>42</sup>

Use of simplified drafting techniques not only makes the final product easier to use, it also may assist the drafting process. Use of these techniques may make it easier to identify substantive issues within the drafts. A clear draft will present issues more precisely and permit readers to grasp the content more readily. Furthermore, drafting committee members and advisers will be able to communicate more precisely and efficiently when discussing lengthy drafts.

Our modest proposals to adjust the NCCUSL drafting and style rules to incorporate these simplification techniques suggest the desirability of cooperatively producing a Model Simplification Drafting Manual or Statement of Drafting Principles that could be used in legislative drafting by local, state, and federal agencies and legislatures and for other drafting purposes. Cooperative efforts by the NCCUSL and ALI could be initiated to bring together

36. See Plain English Disclosures, *supra* note 1.

37. See PROPOSED REVISIONS OF APPELLATE PROCEDURE, *supra* note 2.

38. See *id.* at vii.

39. See *id.*

40. See *id.* The current Chair of the Committee is Honorable Judge Anthony J. Scirica, U.S. Court of Appeals for the Third Circuit. The current members of the Subcommittee on Style are Honorable Judge James A. Parker, Chair; Honorable William R. Wilson, Jr.; Professor Geoffrey C. Hazard, Jr.; Bryan A. Garner, Esquire, Consultant; and Joseph F. Spaniol, Jr., Esquire, Consultant.

41. Charles Alan Wright, *The President's Letter*, A.L.I. REP., Winter 1999, available on-line (last modified May 30, 1999) <[http://www.ali.org/ali/Rptr\\_Presltr.htm](http://www.ali.org/ali/Rptr_Presltr.htm)> (quoting the Institute's unanimous resolution to create a special committee to explore the possibility of creating a style manual for the ALI).

42. See *id.*

representatives from interested groups (such as the SEC's simplification initiative and the previously noted Keeton-Wright-Garner Project for simplification of the federal civil, criminal, appellate, and bankruptcy rules, as well as our own Simplification Task Force) to participate in producing such a Model Manual or Statement of Drafting Principles. The combined experiences of these groups would serve as a rich source of expertise in producing a high quality and widely accepted Model Manual or Statement of Drafting Principles that would facilitate production of user-friendly, readily understandable legal text.

